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IN THE SUPREME COURT OF FLORIDA

CASE NO.: 77358

FIRST DCA CASE NO.: 90-03387

KENNETH R. MCGURN, as Trustee
of the SIMONTON RANCH TRUST,

Petitioner,

v.

STEPHEN A. SCOTT,

Respondent.

PETITIONER'S REPLY BRIEF ON THE MERITS

PROCEEDINGS ON DISCRETIONARY REVIEW FROM
THE DISTRICT COURT OF APPEAL, FIRST DISTRICT

DANA G. BRADFORD, II
Florida Bar No.: 167542
LEE S. HARAMIS
Florida Bar No.: 398070
BAUMER, BRADFORD, WALTERS
& LILES, P.A.
Suite 2000, 225 Water Street
One Enterprise Center
Post Office Box 4788
Jacksonville, Florida 32201
(904) 358-2222

Attorneys for Petitioner

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**ARGUMENT IN RESPONSE AND REBUTTAL TO
RESPONDENT'S ANSWER BRIEF**

A. A RULING THAT AN ORDER WHICH RESERVES JURISDICTION TO CONSIDER AWARDING PREJUDGMENT INTEREST IS A FINAL ORDER FOR PURPOSES OF APPEAL WOULD NOT OVERBURDEN THE COURTS WITH MULTIPLE APPEALS.

Respondent, Stephen A. Scott (hereinafter "Scott"), correctly observes in his answer brief that this Court has held that prejudgment interest is merely another element of pecuniary damages. Argonaut Insurance Company v. May Plumbing Company, 474 So.2d 212 (Fla. 1985). However, this observation overlooks the fact that consequently Scott was required to prove his entitlement to interest at trial. Petitioner contends that because this element of damages was not proven at trial, Scott waived any claim to such damages. Moreover, Scott is unable to draw any meaningful distinction between a costs award and an award of prejudgment interest on a liquidated damages claim in the context of the issues presented on this appeal, (i.e. whether reserving jurisdiction to award prejudgment interest renders a judgment not final and appealable.)

In his basic argument, Respondent suggests that if this Court rules that a judgment which appears final in all respects, but includes a reservation of jurisdiction to award prejudgment interest, is a final order for purposes of appeal, this would flood Florida's intermediate appellate courts with unnecessary multiple

appeals. This argument ignores the practical realities of the situation regarding a trial court's award of prejudgment interest.

As noted in the Petitioner's Initial Brief, prejudgment interest awarded on liquidated damage claims typically involves only a ministerial (if not even more simplistic) calculation to be performed by the trial court similar to an order awarding costs. In the usual scenario, upon a jury verdict, the trial court will immediately assess prejudgment interest and include such an award in the final judgment. Likewise, and typically even more expeditiously, in most cases tried before the court, the trial court will include an award of prejudgment interest in its final judgment. In the case at bar the unusual situation exists where the trial court, having conducted the trial several months earlier then entered its judgment, but at the same time reserved jurisdiction to award prejudgment interest. Such a scenario is clearly far from the typical situation and is an unusual circumstance to which there should not be an exception from the general rule that should be announced by this Court.

In a case where a trial court fails to award attorneys' fees or costs at the same time it renders its judgment, where the judgment is appealed, a subsequent and related appeal must necessarily follow in order for the appealing party to preserve its claim that the prevailing party is not entitled to such an award in the first instance, (should the appellant prevail on the merits of the appeal), or in order to contest the amount. Consequently,

placing prejudgment interest awards to be made pursuant to a reservation of jurisdiction in the same posture as awards of costs and attorneys' fees, absent unusual circumstances, would not create additional appeals and overburden the intermediate appellate courts. Also, as has been noted previously, such appeals are usually consolidated with the appeal on the merits and are essentially treated as one appeal.

Scott correctly observes that had the First District not dismissed Petitioner's appeal, it would have been faced with a subsequent appeal challenging any award of prejudgment interest or costs. What Scott fails to recognize is that such an appeal would necessarily follow from a trial court's award of costs or attorneys' fees as well, during the pendency of the appeal on the merits, in order for the appellant to preserve the argument that any award of interest or costs made by the trial court was incorrect, should the appealing party ultimately prevail on its appeal on the merits. As Petitioner has argued previously, the question of prejudgment interest is so intertwined with the question of the method and calculation of damages awarded on the merits in this action, judicial economy would best have been served by having the First District considering these issues on the appeal on the merits taken from the Final Judgment rendered in this case. The fact that the Respondent failed to prove prejudgment interest (an element of his damages) at trial has to a great degree led to the procedural quagmire in this case, requiring resolution by this Court.

Likewise, Scott's claim that he is entitled to interest for the period of time between the trial (i.e., January 31, 1990) and the time the judgment was entered (i.e., in August of 1991) is again an atypical situation for the consideration of determining whether prejudgment interest awards are ancillary to the judgment. As Respondent notes, damages are liquidated if the verdict establishes the amount of damages due at a date certain. Respondent then suggests (with no authority) that the damages were liquidated as of the last day of the trial, despite the fact that the order imposing liability against the Petitioner did not come forth until some eight (8) months later. Petitioner contends that at no time have damages due at a date certain been established in this case, and further damages were clearly not liquidated if at all until entry of final judgment. Petitioner, contrary to Respondent's statements does not concede that the Respondent is entitled to "post-trial" interest, but merely points out that an award of interest for that time period would not have interfered with the appellate court's jurisdiction to the same degree as having the trial court go back and attempt to calculate interest on each date the trust in question purportedly earned profits.

B. THE ISSUE OF RESPONDENT'S ENTITLEMENT TO INTEREST MAY BE PROPERLY RESOLVED BY THIS COURT.

This Court has repeatedly held that where its jurisdiction is based upon a conflict in the districts, the Court may in its discretion consider other issues properly raised and argued before

the Supreme Court. See, Savoie v. State, 422 So.2d 308, 310 (Fla. 1982). Moreover, this Court has recognized that once it has jurisdiction, it may at its discretion consider any issue affecting the case. Cantor v. Davis, 489 So.2d 18, 20 (Fla. 1986), citing: Trushin v. State, 425 So.2d 1126 (Fla. 1982), Savoie, supra, and Negron v. State, 306 So.2d 104 (Fla. 1974). Undoubtedly, the question of the Respondent's entitlement to interest in this case is substantially, if not inextricably, related to the question presented in this appeal regarding the finality of the trial court's order. Thus, it is appropriate for this Court to resolve the question of entitlement to interest in the first instance, at this stage of the proceedings.

As Petitioner noted in the Initial Brief On The Merits, Respondent's claim for a share of profits was essentially a claim for unliquidated damages. Prejudgment interest cannot be recovered on unliquidated claims or demands. Moreover, in light of the nature of the Respondent's claim, where interest would have to be calculated for each day, as the alleged profit was earned over a five (5) year time span, prejudgment interest on such damages was an element of the alleged damages required to be proven at the time of trial. This was not done, and accordingly the claim for interest was waived. There is nothing in the record, or otherwise, to suggest that the Respondent is necessarily entitled to interest for the time between when the trial ended and the judgment was issued or rendered by the trial court. Such an argument is analogous to claiming that a litigant is entitled to prejudgment

interest on a jury award for the time between when the jury begins deliberating its verdict and finally renders its verdict. In other words, the time lag between the trial and the trial court's issuance of a judgment in this case was time that court required to deliberate over the case, and the Petitioner should not be responsible for interest during that period of time, where it would not be responsible for prejudgment interest at all because the claim on damages was unliquidated. The fact that a substantial period of time elapsed between the close of the evidence and the court's decision does not magically convert the Respondent's claim into one for liquidated damages and therefore entitle him to prejudgment interest.

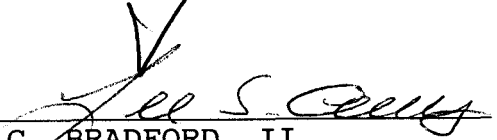
CONCLUSION

Accordingly, this Court should hold the Final Judgment rendered by the Circuit Court in the instant case was final and therefore an appealable order and reinstate Petitioner's appeal. This Court should also decide the question of Respondent's entitlement to prejudgment interest, and hold either that such interest is not available, because the claim was for unliquidated damages, or that to the extent Respondent was entitled to interest, because it was not proven at trial, the claim was waived. In the event this Court does not decide the question of Respondent's entitlement to interest, it should, nevertheless, reinstate the appeal and hold that the appellate court alone shall consider the claim for interest as part of the plenary appeal on the merits. In the alternative, this Court at a minimum should nevertheless

reinstate Petitioner's appeal, and permit the trial court to decide entitlement to prejudgment interest while the plenary appeal proceeds.

Respectfully Submitted,

BAUMER, BRADFORD, WALTERS
& LILES, P.A.



DANA G. BRADFORD, II
Florida Bar No.: 167542
LEE S. HARAMIS
Florida Bar No.: 398070
225 Water Street, Suite 2000
One Enterprise Center
Jacksonville, Florida 32202
(904) 358-2000

Attorneys for Petitioners

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Jack M. Ross, Esquire, Post Office Box 1168, Gainesville, Florida 32601, by United States Mail, this 18 day of July, 1991.



Attorney