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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 BRIEF ON THE MERITS

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

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INTRODUCTION

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STATEMENT OF THE CASE AND FACTS

A. PROCEEDINGS IN THE CIRCUIT COURT.

Respondent, Plaintiff/Appellee below, Stephen A. Scott (hereinafter referred to as "Scott") commenced suit against Petitioner, Appellant/Defendant below, Kenneth R. McGurn, as Trustee of The Simonton Ranch Trust (hereinafter referred to as "McGurn" or "Petitioner"), in 1989. Scott's claim, as set forth in his Amended Complaint, dated April 27, 1989 (A-40), was a claim for a three percent (3%) share of the profits earned by the Simonton Ranch Trust, for the period subsequent to April 9, 1985, through the time of the filing of the Amended Complaint. In the Amended Complaint Scott alleged that the trust had earned profits subsequent to April 9, 1985, continuously through the date of the Amended Complaint, and that the Trustee, McGurn, had failed or refused to pay Scott his three percent share of such profits, which were Scott's damages (A-41). The Amended Complaint also demanded prejudgment interest, costs and attorneys' fees (A-41). McGurn also filed a counterclaim against Scott (SA-3).

In accordance with the circuit court's Order setting non-jury trial in the matter, both parties filed notices of compliance with the court's pre-trial order (SA-5 and SA-9). The parties did not at any time in the proceedings stipulate to the trial court's reservation of jurisdiction following trial to consider any issues, including awarding prejudgment interest, costs or attorneys' fees, nor were the proceedings bifurcated. Trial was held on the Amended

Complaint filed by Scott, and the Counterclaim asserted by McGurn on January 30 and 31, 1990, before the Honorable Stephan P. Mickle.

On August 27, 1990, the circuit court entered its Final Judgment For Plaintiff, Scott (A-1).[1] The final judgment was regular in form, appearing in all respects to in fact be the final order resolving both the Plaintiff's claims and McGurn's counterclaim. The judgment provided for a specific award of monetary damages to the Plaintiff, and the issuance of execution process thereon. However, in the third paragraph of the final judgment, the trial court provided as follows:

> 3. The Court reserves jurisdiction to award appropriate costs, prejudgment interest and attorneys' fees, upon proper motion by the parties.

On September 10, 1990, McGurn filed a timely motion for rehearing (A-3). On October 16, 1990, the trial court denied McGurn's motion for rehearing, thus rendering the judgment (A-20). Thereafter on November 14, 1990, Petitioner filed a timely notice of appeal of the final judgment, which instituted the proceedings below before the First District Court of Appeal (A-22).

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[1] The Final Judgment for Plaintiff was drafted by Scott's attorney pursuant to the trial court's direction.

B. PROCEEDINGS IN THE FIRST DISTRICT COURT OF APPEAL.

On November 29, 1990, Scott served a motion to permit the lower tribunal to consider Plaintiff's Motion For Award Of Interest And Verified Plaintiff's Motion For Costs (A-23), requesting that the district court relinquish jurisdiction to the circuit court for a ruling upon Scott's motion for prejudgment interest and costs.[2] McGurn served a response to the motion in the district court on December 7, 1990 (A-26).[3]

On December 26, 1990, the First District Court of Appeal *sua sponte*, issued an Order directing McGurn to show cause why the appeal should not be dismissed, and deferring disposition of Scott's motion (A-31). The district court's Order referred the parties to the earlier decision of the First District in Chipola Nurseries, Inc. v. Division of Administration, 335 So.2d 617 (Fla. 1st DCA 1976), suggesting that the holding in that case required dismissal of the appeal.

McGurn served a response to the district court's order to show cause as required on January 4, 1991 (A-32). In the response McGurn pointed out *inter alia*, that the Chipola Nurseries decision, although indicating that an order reserving jurisdiction to award prejudgment interest might not have been appealable when entered,

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[2] Scott did not file a motion seeking an award of attorneys' fees.

[3] McGurn did not take issue with the propriety of such a procedure with respect to the taxing of costs only (A-26).

nevertheless did not decide that issue. McGurn's response also pointed out that if Chipola Nurseries stood for the proposition that a final judgment reserving jurisdiction to consider prejudgment interest at a later time was not a final, appealable order, that case would be in conflict with the decision of the Third District in City of Miami v. Bailey & Dawes, 453 So.2d 187 (Fla. 3d DCA 1984).

On January 23, 1991, the First District rendered its *per curiam* opinion below, dismissing McGurn's appeal upon the authority of the Chipola Nurseries case, but acknowledging that its ruling was in direct conflict with the Third District's opinion in City of Miami. On February 1, 1991, McGurn filed a notice to invoke this Court's discretionary jurisdiction to review the First District's opinion, and on April 19, 1991 this Court entered its Order accepting jurisdiction to review the First District's opinion in the case, which dismissed the appeal.

SUMMARY OF THE ARGUMENT

The general question presented by this appeal is whether or not a trial court's order or judgment, which purports to be final in all respects, save a reservation of jurisdiction to consider awarding prejudgment interest, is a final appealable order pursuant to Rules 9.030(b)(1)(A) and 9.110(a)(1), Fla. R. App. P. The First District Court of Appeal in the case at bar, McGurn v. Scott, 573

So.2d 414 (Fla. 1st DCA 1991), held that an order or judgment reserving jurisdiction for the purpose of considering awarding prejudgment interest is non-final, and hence an insufficient act from which to invoke the district court's appellate jurisdiction. The First District acknowledged that its holding is in direct conflict with the Third District's holding in City of Miami, and accordingly this Court exercised its discretion to review the general question presented and resolve the conflict, as well as to decide the question as it applies to the case at bar.

Petitioner submits that under ordinary circumstances, an order or a judgment rendered by a circuit court, which reserves jurisdiction to consider awarding prejudgment interest, is a final order for purposes of appeal, and that accordingly, the First District erred when it dismissed the instant appeal. Petitioner also submits that under the particular situation presented by this case (that of a claim for essentially unliquidated damages having been tried by the circuit court), prejudgment interest is not available, and even if available, was an element of damages which needed to be proved at trial. Because Scott did not present evidence or argument in support of an award of interest at the trial, the claim for interest has been waived because the proceedings were not bifurcated, pursuant to a stipulation of the parties or otherwise. Further, because the district court became vested with jurisdiction over the case, it would be improper for the trial court to be allowed to consider the issue of interest, because in this case an interest award necessarily implicates the

propriety of the method of calculating damages, which shall be the focus of McGurn's plenary appeal.

The Petitioner submits that the approach taken by the Third District as spelled out in City of Miami is correct in typical situations where an order is issued which contains all the indicia associated with finality. Accordingly, Petitioner contends that typically (although not necessarily in this case), where a notice of appeal has been filed from an underlying judgment, the trial court may consider the issue of prejudgment interest while the appeal is pending, and that despite the unresolved claim for interest, the appellate court's jurisdiction has properly been invoked by the notice of appeal from the underlying judgment. Petitioner, however, contends that in this case, since interest was an element of damages not proven at trial, it would be inappropriate for the district court of appeal to relinquish jurisdiction to the circuit court to consider the issue of prejudgment interest, as such would invade the appellate court's jurisdiction.

ARGUMENT

A. AN ORDER WHICH APPEARS "FINAL", IN ALL RESPECTS, SAVE A RESERVATION OF JURISDICTION TO CONSIDER AWARDING PREJUDGMENT INTEREST, IS A FINAL ORDER FOR PURPOSES OF APPEAL AND, ACCORDINGLY, PETITIONER'S APPEAL SHOULD BE REINSTATED.

Florida courts have on many occasions struggled with the question of the finality of judgments or orders, which is of course

a prerequisite to such an order or judgment being appealable under Rules 9.030(b)(1)(A) and 9.110(a)(1), Fla. R. App. P. The well settled test for determination of whether a judgment or order is final, and therefore appealable by the losing party, under these operative Rules of Appellate Procedure, is to ascertain whether the order adjudicates the merits of the case, and disposes of the pending action between the parties, leaving no judicial labor to be done but the execution of the judgment. Gore v. Hanson, 59 So.2d 538 (Fla. 1952). If the answer to this question is affirmative the order is final, and hence appealable, if the answer is negative the order is non-final.

Florida Courts have uniformly held that trial courts, upon issuing a judgment, may reserve jurisdiction in order to award costs and attorneys' fees, without affecting the finality of the underlying judgment for purposes of appeal. See, e.g., CBT Realty Corp. v. St. Andrews Co. 1 Condominium Ass., Inc., 508 So.2d 409 (Fla. 2d DCA 1987); Intercoastal Marina Towers, Inc. v. Suburban Bank, 506 So.2d 1177 (Fla. 4th DCA 1987), rev. denied, 518 So.2d 1275 (Fla. 1987); Casavan v. Land O'Lakes Realty Inc. of Leesburg, 526 So.2d 215 (Fla. 5th DCA 1988); and Finst Development Inc. v. Bemaor, 449 So.2d 290 (Fla. 3rd DCA 1983). The rationale behind such a rule is that the act of taxing attorneys' fees and costs does not affect or interfere with the subject matter of the appeal, because such relate to matters which are ancillary to the underlying judgment.

The Florida courts have not considered the act of determining attorney fees or costs as being the type of judicial labor as yet undone, so as to render the underlying judgment non-final, and therefore not yet appealable. While it may be arguable that some awards of prejudgment interest are not necessarily ancillary to the underlying judgment, Petitioner submits that in ordinary cases, such an award is in fact ancillary to the underlying judgment, and simply involves a ministerial calculation to be performed by the trial court, particularly in cases involving liquidated damages claims in which the due date of the damages is easily determined, i.e., from the pleadings. But see, Alarm Systems of Florida, Inc. v. Singer, 380 So.2d 1162 (Fla. 3d DCA 1980) (trial court is without authority to disturb a final judgment, which was then on appeal, by granting a motion to amend, strike or award prejudgment interest).

The Third District, in City of Miami v. Bailey & Dawes, 453 So.2d 187, has held that it was proper for a trial court to consider an award of prejudgment interest despite there being a pending appeal of the underlying judgment. The Third District stated:

> We likewise find that the lower court's order assessing prejudgment interest, entered pursuant to a stipulated reservation of jurisdiction for that purpose, after the city had taken this appeal from the final judgment, was both procedurally and substantively correct. (citations omitted.)

Id. The Third District never questioned its jurisdiction to hear the appeal in City of Miami because of the reservation by the trial court.[4]

It would appear that the Third District's approach to the issue presented in City of Miami is the one which makes the most sense to be the common rule of practice in the Florida courts. Under this approach, the trial court would be permitted to consider awarding prejudgment interest ancillary to an underlying judgment which is on appeal, and the judgment would not be considered non-final, and hence leaving the appellate court without jurisdiction. In order to preserve the question of the propriety of the award of interest in the first instance, or to contest its amount, the appealing party would simply file a subsequent appeal of the ancillary order, which would then be consolidated with the appeal of the judgment on the merits.

The First District's view of the situation as announced in McGurn v. Scott, 573 So.2d 414 (Fla. 1st DCA 1991) is less desirable as a procedural matter than the Third District's approach

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[4] One is unable to determine from reading City of Miami whether or not the fact that the parties had stipulated to the trial court's reservation of jurisdiction was a crucial factor in the Third District's never considering the question of its own jurisdiction. It is not likely that this would be significant in the typical situation, because parties are unable to vest jurisdiction in a court by stipulation. However, in the instant case, because Scott's claim for interest, if available at all, was an element of damages which needed to be proved at trial, the fact that the parties did not stipulate to a reservation or "bifurcated" proceedings weighs against allowing the trial court to consider awarding interest, because such would affect the judgment and invade the appellate court's jurisdiction. See, Alarm Systems of Florida, Inc. v. Singer, supra.

in most instances. Under the First District's approach, a litigant may not appeal a judgment on the merits until such time as any prejudgment interest question is resolved. Such could result in circumstances wherein execution on the underlying judgment is had, due to a long delay in awarding prejudgment interest, and the losing party being unable to quickly exercise its right to a plenary appeal.

Further, the First District's rationale is on somewhat unsure intellectual footing, especially in light of the Florida courts' uniform rule that awarding costs or attorneys' fees is not unperformed judicial labor making the underlying judgment non-final. There is little to support an argument that prejudgment interest is not ancillary to the underlying judgment, in the face of decisions which hold that taxing a prevailing party's costs or attorneys' fee award are. Awards of interest, like costs and attorneys' fees, can only be made where a party has prevailed on the merits of the claim. Therefore, there is no meaningful distinction between interest and costs or attorneys' fees in this context.

To the extent the First District predicated its ruling in the instant case by relying on the holding in Chipola Nurseries Inc., its ruling dismissing the appeal is not supported by this precedent. The holding in the Chipola Nurseries Inc. case is not directly on point with the question presented by this appeal. In Chipola Nurseries Inc., the final judgment rendered had been stipulated to by the parties, and specifically provided that the

award entered by the court covered damages of any nature "except for interest as provided by law, which interest will be further set by this court." One cannot determine from the Chipola Nurseries Inc. opinion whether the judgment in that case provided that execution would issue on the relief ordered, or contained other language usually associated with a final judgment, as does the judgment at issue in this case. The contention in Chipola Nurseries Inc. was that the trial court was required to award interest "within a reasonable time" of its rendition of its original order (similar to a costs' award), and that failure to do so would result in the trial court losing jurisdiction to award interest because its order was final. The First District in Chipola Nurseries Inc. never considered the issue of whether the underlying judgment was appealable.

Further, to the extent that the First District's holding in McGurn v. Scott was predicated on its view that the necessary judicial labor had not yet come to an end, and thus, the judgment was not final for purposes of appeal, such a rationale escapes notice that under ordinary circumstances an award of prejudgment interest is simply a ministerial task to be performed by the court, similar to calculating a costs award.

Thus, it is the Petitioner's position that the appeal herein was improperly dismissed. Petitioner contends that the general rule, which should be announced by this Court in resolving the conflict between the districts, is that in the typical situation a trial court may consider awarding prejudgment interest

pursuant to a reservation of jurisdiction, despite the pendency of an appeal, and that such does not render the underlying order non-final. As will be discussed below, in the instant case, this rule, while supporting the Petitioner's claim that the appeal was improperly dismissed, would not operate to allow Scott to seek prejudgment interest at this stage of the proceedings, because prejudgment interest in this case was not available, or was an element of damages which was required to be proven at trial, and which was not.

B. SCOTT IS NOT ENTITLED TO AN AWARD OF PREJUDGMENT INTEREST BECAUSE NONE IS AVAILABLE WHERE THE UNDERLYING CLAIM IS FOR UNLIQUIDATED DAMAGES AND ALSO BECAUSE SCOTT WAIVED HIS CLAIM FOR INTEREST.

It is important at the outset to consider the claim of Scott asserted in the trial court. Scott claimed, pursuant to a written instrument, that he was entitled to a three percent (3%) share of any profits earned by The Simonton Ranch Trust. Scott claimed that The Simonton Ranch Trust had earned profits in an unspecified amount, subsequent to April 9, 1985 up through the date of the claim. In view of this allegation, Scott's claim for a share of the profits was essentially a claim for unliquidated damages, as the determination of what, if any profits were earned by the trust during the period of time in question was to be decided at the trial on the merits, and which issue involved testimony regarding the calculation of such profits. Prejudgment

interest cannot be recovered on unliquidated claims or demands, as the person liable cannot be in default for not paying where he does not know what sum he owes. See, e.g., Whatley Equipment Co. v. Duster, 433 So.2d 539 (Fla. 3d DCA 1983); and Vacation Prizes, Inc. v. City Nat. Bank of Miami Beach, 227 So.2d 352 (Fla. 2d DCA 1969). Petitioner respectfully submits that because Scott's claim was tantamount to one for unliquidated damages, no award of prejudgment interest would be proper in the circumstances of this case.

Furthermore, in light of the nature of Scott's claim, whereby interest would have to be calculated from each day as the alleged profit was earned, over an approximately five year time span, McGurn also submits that prejudgment interest on such damages was an element of the alleged damages, required to be proven at the time of trial by Scott. This was not done, as is borne out by the final judgment's language which acknowledges that interest was not being awarded.[5] [See McGurn's motion for rehearing (A-10), in which it can be seen why interest on Scott's claim for a share of profits would have to be a part of his damages and, also, why the damages claimed were unliquidated.]

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[5] Petitioner would point out, as was made known to the First District during the proceedings therein, that Scott's counsel later represented that he intended to seek prejudgment interest only for the time period from the date the trial ended, which was January 31, 1990 until the date final judgment was rendered, October 16, 1990. In light of this representation, Petitioner believes that should it be determined in this proceeding that Scott did not fail to properly raise or preserve his claim for interest, it may be appropriate to allow the trial court to consider the question of interest for the limited time period while the appeal on the merits remains pending.

Since the case is in the posture of being before this Court for a resolution of the issue of the propriety of the dismissal of McGurn's appeal, which dismissal relates to the question of prejudgment interest, it would be appropriate for this Court to rule as well on the issues of Scott's entitlement to interest.

In view of the foregoing, McGurn took the position in the appellate court proceedings below, that the district court should not relinquish jurisdiction to the trial court for a consideration of the motion for prejudgment interest, because such interest was not available as a matter of law and because Scott had failed to properly raise the issue at trial which adjudicated the entire merits of the controversy between the parties. [See (A-26-30).]

In the present circumstances McGurn contends that Scott both failed to prove prejudgment interest at trial and has thus waived his claim, and that interest cannot be awarded in any event because his damages were unliquidated. This, however, does not lend credence to an argument that therefore judicial labor remained to be performed, and thus the final judgment issued was in fact not final, because, since the parties never stipulated to the trial court determining entitlement to interest at a later time, nor was a bifurcated proceeding on damages or interest ever requested or granted, the judicial labor ended with the trial's conclusion.

Accordingly, McGurn's appeal should be reinstated in the First District, and should this Court not determine the issue of Scott's entitlement to interest, the First District alone should

determine all issues relating to prejudgment interest in this case, as they are at this stage intertwined with the question of damages. [See McGurn's motion for rehearing (A-3), for a detailed explanation of why the methods of calculating Scott's damages would necessarily effect any award of interest.] Such an outcome would not conflict with this Court's adopting the Third District's position in City of Miami v. Bailey & Dawes.

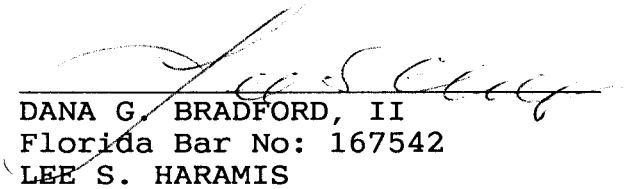
CONCLUSION

This Court should hold that the final judgment rendered by the circuit court in the instant case was final and, therefore, an appealable order, and reinstate the Petitioner's appeal of the underlying judgment in the First District Court of Appeal. This Court should also hold that Respondent is not entitled to prejudgment interest because his claim was for unliquidated damages, and further hold that to the extent Respondent was entitled to prejudgment interest, he waived any such claim by not proving it at trial. In the event this Court does not decide Scott's entitlement to interest, it should nevertheless reinstate the appeal in the First District, and hold that the First District alone shall consider Scott's claim for interest as part of the plenary appeal on the merits of the judgment. In the absence of such a ruling, this Court should nevertheless reinstate

Petitioner's appeal and permit the trial court to decide entitlement to (or the amount of) prejudgment interest.

Respectfully Submitted,

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



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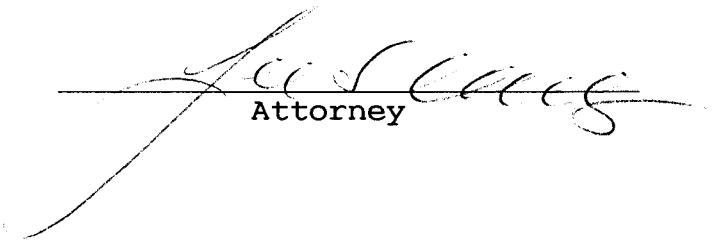
CERTIFICATE OF SERVICE

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 13th day of June, 1991.



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