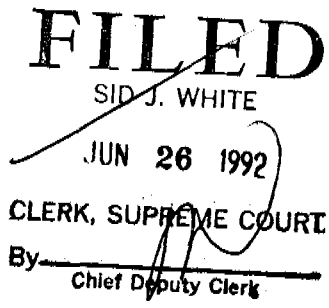
IN THE SUPREME COURT OF FLORIDA

CASE NO. 79,600



ARTHUR GREEN,

Petitioner,

v.

DENIS RETY

Respondent.

PETITIONER'S REPLY BRIEF

HICKS, ANDERSON & **BLUM,** P.A.
Suite 2402, New World Tower
100 N. **Biscayne** Boulevard
Miami, FL 33132
(305) 374-8171

BY: RALPH O. ANDERSON
Fla. Bar No. 503207

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REPLY BRIEF OF PETITIONER

The first and only judgment in this cause was entered after Rety elected to accept the remittitur which the Third District ordered in Rety v. Green, 546 So.2d 410 (Fla. 3d DCA), rev. denied, 554 So.2d 1165 (Fla. 1989) ("Rety I"). Until Rety made this election, Green did not owe Rety either the $20,000,000 assessed by the jury or the $2,550,000 awarded by the trial court in the remittitur or new trial order. Green owed either the $5,000,000 conditionally set by the Third District or some undetermined amount to be assessed by a second jury. Rety's claim to interest from the date of the verdict under these circumstances is unavailing.

1. Rule 9.340 does not apply.

Rule 9.340(c), Fla. R. App. P., applies only where the appellate court (1) enters a "judgment of reversal" which (2) requires "entry of a money judgment on a verdict." Neither prerequisite has been met here.

Green acknowledges that the Third District in Rety I overturned the trial court's order granting a new trial on all issues. The fact remains, however, that the appellate court also affirmed the trial court's remittitur or new trial order except for the amount of punitive damages as to Green:

> In sum, then, we affirm the remittitur or new trial order under review, save for the amount of the remittitur ordered as to the punitive damages awarded against the defendant Green.

Rety I, 546 So.2d 421. Because the Third District disagreed with

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the amount of punitive damages assessed by both the jury and the trial court, the Third District's decision in Rety I does not constitute a "judgment of reversal" under Rule 9.340.

Likewise without merit is Rety's contention that the Third District's decision required the "entry of a money judgment on the verdict." Rety I did not require the trial court to enter any judgment at all. The Third District instead ruled that:

> The cause is remanded to the trial court with directions to enter a remittitur of $7,500,000 as to this award so that the remitted punitive damage award against Green is $2,500,000.

Id. at 421. That Rety had the choice of accepting the remitted amount or retrying his damages does not magically convert Rety I into a direction to the trial court to enter judgment.

Moreover, Rety I, required Rety to choose between a new trial or a remittitur $17,000,000 less than the jury's award. Had Rety elected the new trial route, his damages would have been retried. Consequently, Rety I did not "require" the trial court to enter a "money judgment on the verdict" within the meaning of Rule 9.340.

2. Mabrey and Calder do not support Rety's position.

Rety argues that Mabrey v. Carnival Cruise Lines, Inc., 438 So.2d 937 (Fla. 3d DCA 1983), and Calder Race Course, Inc. v. Illinois Union Ins. Co., 714 F.Supp. 1183 (S.D. Fla. 1989) are the "most analogous cases" and favor his position. Rety's reliance on these decisions is totally misplaced.

In Mabrey, the trial court directed a verdict for the defendant after the jury had returned a verdict in favor of the plaintiff for $80,000. On appeal, the Third District reversed on the

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ground that sufficient evidence was presented to support the jury's liability finding. The case was remanded with directions to enter a final judgment nunc pro tunc to the date of the jury verdict. Id at 939. n.2.

Mabrey, of course, is a perfect example of a case where Rule 9.340(c) applies. The Third District reversed the trial court's nullification of the jury's award, reinstated the full amount of the verdict, and remanded the case with instructions to enter judgment on the verdict, Mabrey thus clearly involved a "judgment of reversal" which "require[d] the entry of a money judgment on the verdict" under the rule.

The same holds true for Calder. In that case, the jury awarded the plaintiff $10,000,000. The trial court subsequently entered an order for new trial or remittitur. This Court ultimately reversed the trial court's ruling and expressly directed the trial court on remand to "reinstate the jury verdict and enter judgment.'' Id. at 1189. The trial court subsequently entered judgment on the verdict plus interest from the date of the verdict. In the federal court suit brought by the defendant against its insurer to compel payment of interest, the district court observed that "when a verdict is reinstated on appeal, a plaintiff is entitled to post-judgment interest from the date of the verdict." Id. at 1190. Relying on Rule 9.340, the district court held that interest ran from the date of the verdict because this Court had reinstated the verdict and directed entry of judgment. Id. at 1190.

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SUITE 2402 NEW WORLD TOWER, 100 NORTH BISCAYNE BOULEVARD. MIAMI, FL 33132-2513• TEL. (305) 3748171

Both Mabrey and Calder stand for the proposition that interest runs from the date of the verdict where an appellate court reverses a trial court ruling which nullified the verdict, and directs that judgment be entered for the full amount of the verdict. This rule regarding reinstatement of verdicts does not apply here. Rety I did not reinstate the jury's verdict. Indeed, the conditional remittitur ordered in Rety I was $17,000,000 less than the amount awarded by the jury because the Third District agreed with Green and the trial court that the verdict was wildly excessive. In further contrast to Mabrey and Calder, the Third District in Rety I did not require the entry of judgment.

In sum, neither Rule 9.340 nor its application in cases where jury awards are reinstated on appeal support Rety's claim to interest from the date of the verdict. Rety I was not a "judgment of reversal," Rety I did not require the "entry of a money judgment," and Rety I did not direct the trial court to "reinstate" the verdict.

3. Watkins and similar cases are not applicable.

Rety argues that the Third District's majority opinion in the present case properly relied on Atlantic Coast Line R.R. Co. v. Watkins, 99 Fla. 395, 126 So. 489 (1930) in ruling that interest runs from the date of the verdict. This argument also is without merit. As Green pointed out in his brief on the merits (and as Judge Baskin correctly noted in her dissent), Watkins does not apply here because, unlike the present case, in Watkins a judg-

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ment on the verdict had been entered by the trial court which was later modified on appeal. Thus, a pre-appeal predicate for the commencement of interest existed. This Court said in Watkins:

> [I]f the plaintiff will remit such designated excess portion of the original judgment, as of the date of its rendition, said judgment as thus voluntarily reduced, will stand affirmed as of the date of its original rendition. The matter of interest is taken care of the statute, which provides that all judgments shall bear interest ... from the date of their rendition.

126 So.2d at 490.

Rety's other cases on this point also are unpersuasive. In Smith v. Goodpasture, 189 So.2d 265 (Fla. 4th DCA 1966), the Fourth District applied Watkins and held that where a plaintiff accepts an appellate court ordered remittitur of a portion of a judgment, the unremitted portion of the original judgment bears interest from the time of its original entry. The court reasoned: "[W]hen a judgment holder suffers a remittitur there is no reason to deny interest from the date of the original judgment on the reduced amount." Id. at 267.

In Gorman v. Largo Hospital Owners, Ltd., 435 So.2d 872 (Fla. 2d DCA 1983), rev. denied, 446 So.2d 99 (Fla. 1984), the Second District likewise applied Watkins and held that where a money judgment has been modified on appeal, interest runs from the date of the original judgment.

The court came to the same conclusion in Gilmore v. Morrison, 341 So.2d 779 (Fla. 4th DCA 1977). The Fourth District there held that where an original judgment was modified on appeal so as

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SUITE 2402 NEW WORLD TOWER, 100 NORTH BISCAYNE BOULEVARD, MIAMI, FL 33132-2513 • TEL. (305) 374-8171

to increase the amount awarded, interest runs from the date of the original judgment.

Like Watkins, the other decisions which Rety cites are but specific applications of the general rule that the event which triggers the accrual of interest under section 55.03, Fla. Stat., is the entry of judgment.[1/] As Judge Baskin aptly observed in her dissent, the pre-appeal judgment provides a logical starting point for interest and the modification of that judgment following remand can be deemed to relate back to it. This is not an exception to the rule that post-judgment interest only runs on judgments. It clarifies that the judgment contemplated by section 55.03 is the judgment entered prior to the appeal and not the modified judgment entered on remand. However, in this case no judgment was entered prior to Rety I. Rety's cases simply do not support his contention that the general rule on post-judgment interest should be discarded in favor of a rule allowing interest from the time an outrageous (and later reduced) verdict is returned by the jury.

Furthermore, it has been held that:

> [I]n order for interest to run from the date of the original judgment, the money judgment of the trial court must be merely modified on appeal, rather than reversed, and the only action necessary by the trial court is compliance with the mandate. In other words, no further judicial labor is required and the act

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[1/] It is worth noting that in Gilmore the appellate court had ordered reinstatement of the verdict in the first appeal. It appears that no issue was raised as to whether interest should have been calculated from the date of the verdict,

HICKS, ANDERSON & BLUM, P.A.
SUITE 2402 NEW WORLD TOWER, 100 NORTH BISCAYNE BOULEVARD, MIAMI, FL 33132-2513 • TEL. (305) 374-8171

mandated is purely ministerial.

Guy v. Kight, 431 So.2d 653, 656 (Fla. 5th DCA), rev. denied, 440 So.2d 352 (Fla. 1983) (where on prior appeal the appellate court remanded for a new trial on settlement issue, but did not disturb amount of damages found by the jury, interest accrued from entry of post-mandate judgment and not from entry of original judgment because the mandate "required further judicial labor at the trial level before any of the damages previously found could be determined due and payable.").

The Third District's remand in Rety I unquestionably required more from the trial court than simple ministerial compliance with the appellate court's mandate. Rather, Rety I directed the trial court to modify the order of remittitur and further instructed the court to give Rety the option of accepting the remittitur "or be subject to a new trial on damages." Rety I, 546 So.2d at 422. Rety had a choice at that point, and had he elected a new trial instead of accepting the remittitur, a money judgment (in any amount) would have been premature until after the trial was concluded. No money was owed before Rety made his election, nor had it ever been.

Herberholt v. DePaul Community Health Center, 648 S.W.2d 160 (Mo. Ct. App. 1983) is a case on point and, Green submits, its reasoning is compelling. In that decision, the trial court entered judgment for the plaintiff pursuant to a verdict for $15,000 actual and $100,000 punitive damages. The trial court thereafter set aside the verdict and entered judgment for the

defendant. The court also ruled that in the event its j.n.o.v. were reversed on appeal and if plaintiff would remit $11,825 actual damages and $50,000 punitive damages, the defendant's motion for new trial would be denied; otherwise the motion would be granted as to damages only.

On appeal, the Missouri Supreme Court reversed the j.n.o.v. and modified the trial court's conditional order to provide for $1.00 actual damages and $50,000 punitive damages. The Supreme Court's opinion "affirmed the trial court judgment **as** modified and remanded the cause 'for entry of judgment accordingly.'" Id. at 161. The plaintiff subsequently accepted the modified remittitur and requested interest on the remitted amount from the date of the original judgment which was entered on the verdict. The trial court agreed with the plaintiff on the interest issue, and entered judgment for $50,001.00 plus interest from the date of the original judgment.

The Missouri Court of Appeals reversed the trial court's ruling, and squarely rejected the identical argument which Rety presses here:

> Contrary to plaintiff's contention, the Supreme Court's opinion and mandate did not reinstate the jury verdict and original judgment, which totalled $115,000. The opinion established plaintiff's right to recover ... but the amount of damages was not certain at the time of the Court's mandate.
>
> The Supreme Court approved, with modification, the trial court's conditional order granting a new trial on damages unless plaintiff agreed to a remittitur. Plaintiff could accept or refuse $1.00 actual and $50,000 punitive damages. If he refused, a new trial would deter-

> mine the amount of damages.
>
> Rendering of judgment thus required more than the trial court's mere entry of an order following the Supreme Court opinion and mandate: it required an election by plaintiff.
>
> * * *
>
> The sum for which defendant was liable was not $115,000 as set by the jury or $53,175 as conditionally set by the trial court. Defendant owed either $50,001 as conditionally set by the Supreme Court or some unknown figure to be determined by a jury in a new trial.
>
> The sum was not ascertainable until plaintiff notified the court ... of his election to accept $50,001 and to forego a new trial.

Id. at 162.

Although certainly not binding on this Court, Green submits that Herberholt was correctly decided, and its reasoning should be adopted here.[2/] Until such time as Rety elected to accept the remittitur as modified in Rety I, Green did not owe either the sum awarded by the jury or the sum conditionally set by the trial court in order of remittitur or new trial. Instead, Green owed either the $5,000,000 conditionally set by the Third District in Rety I or some amount to be determined by a second jury. Accordingly, Rety I, just like the Missouri Supreme Court's decision in Herberholt, did not reinstate the jury's verdict, and required considerably more on remand than "the trial court's mere entry of an order following the ... opinion and mandate." Id.

[2/] In fact, in Herberholt, there was at least an original judgment for the plaintiff that the "modified" judgment on appeal arguably could relate back to. Here, the only judgment in this case was entered after this Court's remand from Retv I.

HICKS. ANDERSON & BLUM, P.A.
SUITE 2402 NEW WORLD TOWER, 100 NORTH BISCAYNE BOULEVARD, MIAMI, FL 33132-2513 • TEL. (305) 374-8171

The rule regarding interest on judgments which have been modified on appeal accordingly does not support Rety's position or the holding by the majority of the Third District in this case.

4. Prejudgment interest cases are off point.

Rety's contention that interest should be calculated from the date of the verdict, and not from the entry of the first and only judgment in this case, because prejudgment interest may be awarded under certain circumstances is unavailing. As Rety points out repeatedly in his brief, this is a defamation action and he was awarded punitive damages and damages for injury to his reputation. The law is settled that prejudgment interest is not "recoverable on awards for personal injury." Argonaut Insurance Co. v. May Plumbing Co., 474 So.2d 212, 214 n.1 (Fla. 1985). Consequently, the analogy drawn by Rety between this case and prejudgment interest cases which apply the "loss theory" is totally inapt.

5. Rety is entitled to interest as of the date the final judgment was entered.

Post-judgment "interest only runs from the time payment is due, that is from the time the award is finally adjudicated." Novack v. Novack, 210 So.2d 215, 217 (Fla. 1968). Moreover, post-judgment interest commences only upon the filing of a judgment, even where entry of judgment is delayed through no fault of the plaintiff. Merchant v. Merchant, 433 So.2d 633 (Fla. 1st DCA 1983).

The only judgment ever entered in this lawsuit was the one entered on December 15, 1989, after the remand from Rety I. Rety

HICKS, ANDERSON & BLUM, P.A.
SUITE 2402 NEW WORLD TOWER, 100 NORTH BISCAYNE BOULEVARD, MIAMI, FL 33132-2513 • TEL. (305) 374-8171

has shown no basis for not applying the general rule that interest runs from the entry of judgment, and not before, and the majority of the Third District erred in concluding otherwise.

CONCLUSION

Based on the facts and authorities set forth above and in Green's brief on the merits, Green submits that this Court should (1) accept jurisdiction in this case; (2) answer the question certified by the Third District in the negative; and (3) require that the final judgment be modified to provide interest from the date of its rendition.

Respectfully submitted,

HICKS, **ANDERSON** & BLUM, P.A.
Suite 2402, New World Tower
100 North Biscayne Boulevard
Miami, FL 33132
(305) **374-8171**

By _____
RALPH O. ANDERSON

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief was mailed this 25th day of June, 1992 to:

Hugo L. Black, Jr., Esq.
Kelly Black Black Byrne
1400 Alfred I. DuPont Building
169 East Flagler Street
Miami, Florida 33131
(305) 358-5700
Attorneys for Denis Rety

Milton P. Shafran, Esq.
Shafran & Martin
2300 E. Las Olas Blvd.
Suite 400
Ft. Lauderdale, Florida 33301
(305) 522-5101
Attorneys for Plaintiff Denis Rety

Neil Chonin, Esq.
Chonin & Sher, P.A.
304 Palermo Avenue
Coral Gables, Florida 33134
(305) 443-5125
Attorneys for Plaintiff Denis Rety

Lisa Bennett, Esq.
304 Palermo Avenue
Coral Gables, Florida 33134
(305) 443-5125
Attorney for Plaintiff Denis Rety

Kimbrell & Hamann, P.A.
Suite 900 Brickell Centre
799 Brickell Plaza
Miami, Florida 33131-8181
(305) 358-8181
Attorneys for Arthur Green

Robert Parks, Esq.
Anderson Moss Parks
New World Tower, 25th Floor
100 North Biscayne Boulevard
Miami, Florida 33132
(305) 358-5171
Attorneys for Green and So, Commodity

Charles George, Esq.
George Hartz & Lundeen, P.A.
4800 LeJeune Road
Coral Gables, Florida 33146
(305) 662-4800
Attorneys for So. Commodity

Lauri Waldman Ross, Esq.
Maland & Ross
Two Datran Center, Suite 1209
9130 S. Dadeland Boulevard
Miami, FL 33156
(305) 666-4400
Co-Counsel for Respondent Denis Rety

Ralph Anderson