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IN THE SUPREME COURT OF
THE STATE OF FLORIDA

CASE NO.: 79,635

DISTRICT COURT OF APPEAL
4TH DISTRICT NO.: 91-0270

Florida Bar No.: 364411

DENISE ALVARADO,

Petitioner,

vs.

MARTIN M. RICE and
RUTH RICE,

Respondents.

AMENDED RESPONDENTS' BRIEF ON THE MERITS

THOMAS L. HOWARD, ESQUIRE
LAW OFFICES OF DeCESARE & SALERNO
Attorneys for Respondents
110 Tower, Suite 1700
110 S. E. 6th Street
Fort Lauderdale, Florida 33301
(305) 764-5020

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INTRODUCTION

This Brief rebuts Petitioner's contention that she should be awarded pre-judgment interest related to medical bills incurred prior *to* obtaining her Plaintiff's personal injury jury verdict at trial. Respondent argues that there is no basis at law for this request and that it is excluded by case law.

STATEMENT OF THE CASE AND TEE FACTS

Petitioner, DENISE ALVARADO, the Plaintiff in the underlying case, sued Respondent RUTH RICE for negligence and personal injuries she suffered in a motor vehicle accident. After a jury trial, the jury returned a verdict on December 4, 1990 for the Plaintiff finding RUTH RICE 70% negligent and DENISE ALVARADO 30% negligent. The verdict form awarded total damages in the amount of SIXTY FIVE THOUSAND NINE HUNDRED EIGHTY-SEVEN DOLLARS AND 63/100 ($65,987.63) to DENISE ALVARADO, which included TEN THOUSAND NINE HUNDRED EIGHTY-SEVEN DOLLARS AND 63/100 ($10,987.63) for medical expenses in the past, TWENTY FIVE THOUSAND DOLLARS AND NO/100 ($25,000.00) for future medical expenses and THIRTY THOUSAND DOLLARS AND NO/100 ($30,000.00) in compensatory damages.

The trial court reduced the verdict by 30% comparative negligence and entered a Final Judgment on December 27, 1990. This Judgment was satisfied in full and the Satisfaction was executed the previous day by DENISE ALVARADO, on December 26, 1990, discharging and cancelling the Final Judgment.

DENISE ALVARADO subsequently requested that the Trial Court award pre-judgment interest for the TEN THOUSAND NINE HUNDRED EIGHTY-SEVEN DOLLARS AND 63/100 ($10,987.63) for past medical expenses which comprised part of the total jury award. The Trial Court denied this request.

The 4th District Court of Appeal entertained the subsequent Appeal and on March 11, 1992 entered on Opinion affirming the Order of the Trial Court and certifying the question:

> Is a Claimant in a Personal Injury Action entitled to interest on past medical expenses?

SUMMARY OF THE ARGUMENT

Pre-judgment interest has been held allowable only in cases involving loss to property. This Honorable Court has long held that pre-judgment interest is not allowed in actions for personal injuries. Nevertheless, the Petitioner is requesting that this Court now allow pre-judgment interest on medical bills incurred prior to the return of a jury verdict in a personal injury action.

Medical bills do not become out-of-pocket expenses until paid. As argued in this brief, the actual amount paid is often different from the initial bill presented by a doctor. Therefore, the actual amount of the out-of-pocket expense attributable to a compensable accident is often not determined until after the return of a verdict.

In any event, pre-judgment interest should be requested in the pleadings as part of the prayer for relief. If so requested, the verdict form should literally fix pre-judgment interest as an element of damages as of a prior date.

ARGUMENT

There is no known precedent under Florida case law to entitle a claimant in a personal injury action to interest on past medical expenses. The only known cases dealing with pre-judgment interest relate in some fashion to property losses. The Petitioner cites language from the holding rendered by this Honorable Court in Arqonaut Insurance Company v. May Plumbing Company, 474 So. 2d 212 (Fla. 1985), to support the arguments contained in Petitioner's Brief on the Merits. Arqonaut is a subrogation action against a plumbing company to recover money paid for a fire loss. This court has over the years taken the position stated in Parker v. Brinson Construction Company, 78 So. 2d 873 (Fla. 1955), that it has been the consistent rule of the court's decisions to deny interest in personal injury cases until entry of judgment. See also, Smith v. Goodpasture, App., 189 So. 2d 265 (1966), and Zorn v. Britton, 120 Fla. 304, 162 So. 879 (1935), wherein this Honorable Court stated that:

> "...in personal injury cases we have consistently declined to approve interest before entry of Judgment."

See also Farrelly v. Heuacker, 118 Fla. 340, 159 So. 24 (1935).

More recently, the Fourth District Court of Appeal has applied the language from Arqonaut in once again reaffirming the denial of prejudgment interest in Personal Injury cases in United Services Automobile Association v. Strasser, 530 So. 2d 1026

(Fla. App. 4 Dist. 1988). In Aetna Casualty & Surety Company v. Lange, 587 So. 2d 1370 (Fla. App. 4 Dist. 1991), the court cited Cooper v. Aetna Casualty & Surety Co., 485 So. 2d 1367 (Fla. App. 2 Dist. 1986), agreeing that "prejudgment interest was not recoverable...because prejudgment interest is not allowed in actions for personal injuries."

Cases recognizing a right to pre-judgment interest have all involved loss of vested property rights. Pre-judgment interest awards have been limited to cases involving fire damage to property, Argonaut Insurance Company v. May Plumbing Company, 474 So. 2d 212 (Fla. 1985); lien foreclosures, International Community Corporation v. Overstreet Paving Company, 493 So. 2d 25 (Fla. D.C.A. 1986); unpaid commissions due to a salesman, Barnes Surgical Specialties, Inc. v. Bradshaw, 549 So. 2d 1189 (Fla. 2nd D.C.A. 1989); unpaid back wages, E.E.O.C. v. Carolina Freight Carriers Corp., 723 F. Supp. 734 (S.D. Fla. 1989); property destroyed by fire, Jacksonville, Tampa and Key West Railway v. Peninsular Land Transportation and Manufacturing Company, 27 Fla. 1, 9 So. 661 (1891); actions ex contractu, Sullivan v. McMillan, 37 Fla. 134, 19 So. 340 (1896); and conversion actions, Gillette v. Stapleton, 336 So. 2d 1226. In all of the above cases, the court's rulings have been consistent with the language in legal treatises which reflects the present state of the law on this issue:

> "...in personal injury actions, because the amount of damages is largely discretionary with a jury and cannot ordinarily be measured by fixed standards of value, pre-judgment interest may not be recovered as part of the damages." (9 A Fla. Jur. 87, 88.)

Petitioner suggests that this Honorable Court should depart from centuries old precedent denying pre-judgment interest in personal injury cases. In Argonaut, this Honorable Court recognized and rejected the alternative but traditional rationale in property loss matters that pre-judgment interest was a penalty for a Defendant's wrongful act of disputing a claim, linking this "penalty theory" to medieval times, while noting that this view is still held in some jurisdictions. The court stated that "to punish a Defendant for failure to pay a sum which was not yet certain or which he disputed would be manifest injustice."

This court propounded in Argonaut the "loss theory," which was defined as a wrongful deprivation by the Defendant of the Plaintiff's property. The wrongful deprivation of property concept is consistent with the long line of cases recognizing pre-judgment interest in those matters which have wrongfully deprived a Claimant of a vested property interest. They are not consistent with Petitioner's attempt to recover interest for "expenses". Expenses are not synonymous with property loss and deprivation of property.

Petitioner's have attempted to equate "out of pocket expenses" to "wrongful deprivation of property." This argument fails because expenses are not property losses. Even if by a certain logic one might argue that expenses are a loss of money, medical bills are not necessarily out of pocket expenses.

In personal injury actions when a Plaintiff incurs medical bills, serious questions are raised with regard to the

definition of "out of pocket expenses" when the bills have not, in fact, been paid. First, Defendants often raise the defense that Plaintiffs have failed to mitigate medical expenses, showing at trial that many medical expenses were superfluous, unreasonable, unnecessary and duplicative. Second, many medical bills are not due when incurred, as evidenced by the standard medical practice of obtaining a letter of protection and foregoing collection of the bill. Third, most medical practitioners do not charge interest on medical bills. As in the instant case, unless the Plaintiff makes a showing on the record that interest is being charged, pre-judgment interest should not be allowable because the Plaintiff does not incur an actual expense until the bill is paid at some time in the future. Fourth, medical bills are most often negotiable and are usually negotiated by the Plaintiff's attorney subsequent to obtaining a verdict or settlement. The amount of the bill does not become an actual expense until it is paid and the amount thereof becomes final. Fifth, collateral source payments offset the medical bills claimed, thus significantly diminishing or eliminating any actual out of pocket expense. Sixth, comparative negligence reductions further cloud the determination and valuation of out of pocket expenses. The record in the instant matter does not contain any evidence of the "actual amount" of the ultimate out of pocket expenses for which a claim to pre-judgment interest has been asserted. For all of the above reasons, it is difficult, if not impossible, to determine the out of pocket expenses. In all

probability, the ultimate out of pocket expense in the instant case did not equate to the amount awarded by the jury for past medical expenses.

In any event, Argonaut holds that Florida leaves the duty of awarding pre-judgment interest to the jury. Pre-judgment interest for property damages might properly accrue if property damages are separate and distinct from the personal injury claim. The verdict form should separate the property damage from the personal injury claim. In the instant matter, the verdict form does not. It sets forth an amount for past medical expenses, which is not the same as property damage, Argonaut has been interpreted by the U. S. District Court for the Middle District of Florida in Neva Inc. v. Christian Duplications Intern, Inc., 743 F. Supp. 1533 (M.D. Fla. 1990), to require that the verdict itself literally fix damages as of a prior date. The language in Argonaut is unclear with regard to the requirements which a verdict form must satisfy to find pre-judgment interest as an element of damages literally.

Respondent argues that unless pre-judgment interest is requested in the pleadings as part of the prayer for relief, it should not be awarded as an element of damages. This position has been upheld by the Second District Court of Appeal in Harry E. Robbins Associates v. Sudbury, 467 So. 2d 343 (Fla. 2d DCA 1985). The Court therein held that when the Plaintiff made no request for pre-judgment interest as part of the Plaintiff's pleadings, it was not error for the Trial Court *to* fail to

include pre-judgment interest as part of the final judgment. See also Caden v. Safeco Title Insurance Company, 475 So. 2d 275 (Fla. 2nd DCA 1985); Palilla v. St. Paul Fire and Marine Insurance Company, 322 So 2d 46 (Fla. 1st DCA 1975) and Otis Elevator Co. v. Scott, 551 So. 2d 489 (Fla. App. 4 Dist. 1989).

Finally, Petitioners have argued that the most reasonable definition of "out of pocket" expenses is to define them as the damages awarded on the date of trial, regardless of the date of payment. This argument fails because if the date of trial is the measuring date, a claim for pre-judgment interest is moot. Petitioner states that the Trial Court did not find that there were any out of pocket expenses paid before trial and therefore no pre-judgment interest was awarded, If, as Petitioner argues, the most reasonable definition of out of pocket expenses is the award at trial for past medical expenses, regardless of payment, then the trial date becomes the measuring time for the award of interest.

Respondent argues that out of pocket expenses can only be defined after all af the qualifying factors set forth above have been applied to determine the ultimate obligation. Only after the ultimate obligation ("actual amount") has been determined, can it next be determined if an out of pocket expense occurred prior to trial. If so, then logic might dictate that pre-judgment interest could be awarded. Even so, however, there is no present entitlement at law to pre-judgment interest in personal injury cases. If there were, it should not be awardable

in the instant matter because it was not included as a request in the pleadings. If it had been, Respondent argues that pre-judgment interest is not awardable in the instant matter because the jury in this case did not literally award pre-judgment interest as an element of damages and the verdict itself did not literally fix damages as of a prior date.

CONCLUBION

Petitioner's argument that the Trial Court committed reversable error when it denied the claim for pre-judgment interest must fail because the present state of the law in Florida does not allow pre-judgment interest to be awarded in personal injury matters.

Petitioner's claim for pre-judgment interest must fail because the record does not contain adequate evidence to establish the actual out of pocket expenses for medical bills or the date certain from which to calculate pre-judgment interest, even if the present state of the law permitted such award.

The Petitioner's claim for pre-judgment interest must fail because the record does not establish that pre-judgment interest was requested in the pleadings, that the jury intended to award pre-judgment interest as a separate element of damages and because the verdict form does not contain the "literal" prerequisites of amount of damages and date certain from which to calculate pre-judgment interest, even if the jury had intended to make such an award.

LAW OFFICES OF DeCESARE & SALERNO
Attorneys for Respondents
110 S. E. 6th Street
110 Tower, Suite 1700
Fort Lauderdale, FL 33301
Telephone: (305) 764-5020

By _____
THOMAS L. HOWARD, ESQUIRE

TLH:nmw
a:Alvbrf

CERTIBICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. Mail to MARK R. McCOLLEN, ESQUIRE, Chidness & McCollem, P. A., Attorneys for Appellant, 201 S. E. 12th Street, Fort Lauderdale, Florida 33316, on this 29th day of May, 1992.

LAW OFFICES OF DeCESARE & SALERNO
Attorneys for Respondents
110 S. E. 6th Street
110 Tower, Suite 1700
Fort Lauderdale, FL 33301
Telephone: (305) 764-5020

By _____
THOMAS L. HOWARD, ESQUIRE

TLH:nmw
a:Alvbrf