SUPREME COURT OF FLORIDA

CASE NO.: SC09-1277

L.C. CASE NO: 4D-07-3383

MARC E. BOSEM, M.D.,
MARC E. BOSEM, M.D., P.A.
d/b/a CORRECT VISION
LASER INSTITUTE, a
Florida corporation,

Petitioners,
v.

MUSA HOLDINGS, INC.
d/b/a EYEGLASS WORLD,
a Florida corporation, THE
LASER VISION INSTITUTE,
L.L.C., and MARCO MUSA,
individually,

Respondents.
_____/

INITIAL BRIEF OF PETITIONERS

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I.
STATEMENT OF THE CASE AND FACTS

A. The Course of Proceedings. This is an action for trade-name infringement and invasion of privacy. The Appeal of Plaintiffs Marc E. Bosem, M.D. and his P.A. (hereinafter, collectively, "Dr. Bosem") challenged the significant limitations on the damages awarded to Dr. Bosem by the trial court, sitting as factfinder, after Dr. Bosem had secured a Summary Judgment on the issues of liability. A predecessor judge had found on Summary Judgment that Defendants Musa Holdings, Inc., d/b/a Eyeglass World ("Musa Holdings"), which owned Defendant Laser Vision Institute, LLC ("LVI"), and Defendant Marco Musa individually, had violated both the Lanham Act, 15 U.S.C. §§1114, 1117, 1125, and §540.08, Fla. Stat. (proscribing unauthorized publication of a name or likeness).[1] They did so by utilizing Dr. Bosem's name, photograph and credentials in LVI's advertising without authorization, while competing with Dr. Bosem in the same market. The case was tried on the issue of damages by the Circuit Court, sitting as factfinder. The Defendants did not cross-appeal the Order of Summary Judgment.

As the Defendants said in one of their unauthorized advertisements, Dr.

[1]The Order of Summary Judgment is not listed in the Index to the Record. The Plaintiffs attached a copy at the end of their initial Brief in the District Court.

Bosem is "[o]ne of the LASIK [laser surgery] pioneers and among the first to perform LASIK vision correction in the United States"--"one of the nation's leading refractive surgeons," who had "lectured," "been published," and "performed thousands of vision correction procedures," and was certified by numerous organizations (P.X. 7). The trial court's Order of Summary Judgment found that the Defendants were competitors of Dr. Bosem in Broward County and throughout Florida; published without authorization several pamphlets and newspaper advertisements containing Dr. Bosem's name, likeness and biography; continued to do so even after Dr. Bosem had filed suit, and even after assuring the Circuit Court that they would cease doing so; and therefore violated both Florida and federal law.

Dr. Bosem's evidence in the damage trial, relevant to the issue of the Defendants' scienter, was that he was solicited by LVI to work there; was in negotiations with Marco Musa to work there one or two days a week; insisted that he would allow the use of his name and likeness only internally--that is, only in LVI's offices--and in all events that he would have prior approval of any use; that after LVI's first draft of the contract omitted these requirements, and Dr. Bosem made clear that they were non-negotiable, all subsequent drafts contained them; that such drafts, however, also contained some unrelated "deal-breaking"

requirements (Tr. 6 at 718); that these deal-breakers were never eliminated; that negotiations broke down and no contract was ever signed; that Marco Musa was the negotiator, and knew that there was no contract; that even if there had been a contract, the draft still required prior approval of any advertisement; but that after Dr. Bosem had left on a vacation, LVI, without prior approval, nevertheless widely advertised Dr. Bosem's name, resume and picture, misrepresenting that Dr. Bosem worked for LVI (*see* Tr. 2 at 3, 132-33, 135-39, 142-48, 158-65; Tr. 3 at 313, 320-21; Tr. 5 at 607-09, 612-14, 636-37, 645; Tr. 6 at 706-07, 709-13, 718; Tr. 12 at 1554; P.X. 1, 2, 3, 4, 6, 7, 8, 21, 22, 24, 27, 28). Thus, there was no contract; the Defendants had no contractual authorization to do anything; and even if they had, they violated the most important provision of the (non-existent) contract, by advertising without permission.

The Defendants did not deny any of the above-stated facts, but instead contended that this was all a big mistake. They said that despite Marco Musa's intimate involvement in every detail of the negotiations, and despite the total breakdown of negotiations, his assistant had misinformed him that a deal had been made, and that the advertisements and brochures had been authorized, and that he had approved the advertisements and brochures only for that reason. And Musa's assistant, after acknowledging that there was no contract, then fell on her sword

and took the blame for telling her boss something that she admittedly knew was not true. *See* Tr. 5 at 618-20, 629, 638-40, 649-50, 697-99; Tr. 8 at 985-86, 992, 996-97. Mr. Musa and his assistant also testified that after learning of this error, they did everything possible to pull the advertisements. *See* Tr. 2 at 213, 215; Tr. 5 at 624-25, 652; Tr. 8 at 988, 991; Tr. 13 at 1612.

We will not summarize the Plaintiffs' rebuttal of this defense, because the trial court believed the Defendants' incredible story. In the damage trial, in determining the elements and scope (geographic and temporal) of the damages to be awarded, the trial court found that Mr. Musa had not negotiated with Dr. Bosem in bad faith, had published the ads and brochures mistakenly, and had exercised due diligence in attempting to pull the ads and retrieve the brochures (Tr. 12 at 1515-17). Notwithstanding the numerous categories of damages available under the federal and state statutes, the trial court denied Dr. Bosem royalties for the expropriation of his identity; disgorgement of LVI's profits; non-economic damages based on the uncontradicted evidence of the significant emotional toll, and the harm to reputation, caused by this invasion; pre-judgment interest on the federal claim; attorneys' fees; and punitive damages (Tr. 12 at 1517, 1522-25; Tr. 28 at 7-15). The court awarded Dr. Bosem $93,306.00 in lost profits (of $300,000 to $400,000 sought), and $35,000 in pre-judgment interest on

the state-law claim (of $135,000 sought), resulting in a Final Judgment for $178,872.44 (R. 16 at 2946). The effect of this ruling was that Dr. Bosem was only partially compensated for his lost income, and awarded nothing for the Defendants' unlawful expropriation and use of his name and reputation, or the profits they made as a result. He was not even awarded a royalty for the unlawful use of his name and reputation.

In addition to defending the pre-judgment interest awarded by the trial court on the state-law claim--the issue presented in the Petition for Discretionary Review--we will also address two other elements of damages.[2]

B. Florida Statutory Damages. First, the trial court held that notwithstanding the Summary Judgment finding that the Defendants had violated §540.08, Fla. Stat., proscribing unauthorized publication of a name or likeness, it had discretion to deny Dr. Bosem all damages under that Statute, including a royalty, for the expropriation of his name, likeness and reputation. Dr. Bosem will argue, as he did in the District Court, that a violation of §540.08 requires an award of damages.

C. Lost Profits. Second, even the minimal damages awarded by the trial

[2]When the Court accepts jurisdiction on one issue, it has discretion to consider any other issues raised by the Petitioner. *See Jenkins v. State*, 978 So. 2d. 116 (Fla. 2008); *Allstate Ins. Co. v. Rudnick*, 761 So. 2d 289, 291 (Fla. 2000).

court for lost profits were erroneously calculated. Dr. Bosem's theory of lost income, accepted by the trial court, was that LVI's entrance into the market as a bargain operation was legitimized and significantly enhanced by its unlawful association of Dr. Bosem's high-end prestigious practice, which ironically required Dr. Bosem to compete against himself (*see* Tr. 12 at 1567). He testified without contradiction that he had to reduce his own prices solely because of the false association with LVI's lower prices (*id*. at 1558; *see* Tr. 6 at 745-48, 787-88; Tr. 10 at 1331). He had to change his practice to a tiered pricing system in order to compete with the lower numbers advertised by LVI. He also was forced to attempt to increase his volume as a result, but doing so did not make up for the differences in price (*see* Tr. 2 at 184-88, 211; Tr. 12 at 1540-46, 1560-82; P.X. 10, 11).

The trial court "accept[ed] the price erosion theory of recovery espoused by the Plaintiff," and agreed that although Dr. Bosem's "gross revenue" had "increased over the period at issue," "the revenues that he did earn would have increased had he charged the original rates, not modifying his rates to the tiered rate system" (R. 16 at 2935-36). The trial court therefore applied Dr. Bosem's price-erosion measure of lost income per eye, based upon his price reductions between July 1, 2000 and December 1, 2001--the period of infringement (R.

16-2936, ¶16). In doing so, the court attached to its Order the uncontradicted damage calculations offered by Dr. Bosem (P.X. 10, 11), showing the difference in the prices that Dr. Bosem had charged per eye before the infringement, and the price reductions he was forced to make after the infringement. However, the court limited the damages to the period of infringement--July of 2000 to December of 2001--excluding the following year, during which the court itself had found that Dr. Bosem's prices remained deflated. *See* R. 16 at 2935, ¶¶ 13, 16. Moreover, it unilaterally altered the baseline pre-infringement prices shown by Dr. Bosem in the uncontradicted damage Exhibits the court had purported to adopt.

Exhibits 10 and 11 show, without contradiction, that Dr. Bosem's average price per eye between January and June of 2000 was $1,643. Comparing that to the post-infringement price reductions accepted by the trial court, the lost income was $161,946. Nevertheless, for unexplained reasons, the trial court altered Dr. Bosem's uncontradicted average "per-eye price before the illicit advertising [to] $1,500 per eye"; then chose "July 2000 through November 2001 as the operative period" of the infringement; "accepted the raw data in Plaintiffs' Trial Exhibits 10 and 11 as to the number of eyes treated in the operative period"; "calculated the loss as the difference between $1,500 baseline price and the prices actually charged"; and "arrived at the total of $93,305 as the damages by multiplying the

price differences by the number of eyes operated on" (R. 2936). The court actually attached Plaintiff's Exhibit 11 as Exhibit B of its Order, showing its handwritten additions of the monthly numbers (for the restricted time period allowed), using the court's unilaterally-altered $1,500 base number.

There were two problems with this calculation. First, the baseline pre-infringement price of $1,500 per eye is not supported by any evidence of Record. The uncontradicted evidence--evidence the court said it was accepting--was that the baseline pre-infringement price was $1,643. The total should have been $161,946, or $68,640 more than was awarded.

Second, the trial court's limitation of post-infringement damages to the period between July of 2000 and December of 2001 contradicted its own acceptance of Dr. Bosem's proof that the period of infringement lasted for a year beyond the cessation of publication (*see* R. 16 at 2935, ¶¶13, 16). Therefore the lost profits should have been awarded through the end of 2003. There was no evidence to the contrary.

In their Answer Brief in the District Court, the Defendants did not address these two specific points. Their only argument on the issue of lost profits was advanced on cross-appeal, contending that Dr. Bosem was not entitled to any award of lost profits (*see* Answer Brief/Brief on Cross-Appeal at 14-17, 60-72).

The Defendants did not attempt to defend the trial court's two errors in calculating lost profits. Thus, this argument was uncontradicted.

D. The District Court's Decision. On Appeal, the District Court rejected without discussion all of the arguments for reversal raised by Dr. Bosem, including the two discussed above. It chose to address only the Defendants' cross-appeal, contending that the trial court had erred in awarding pre-judgment interest on the economic damages allowed. *See Bosem v. Musa Holdings, Inc.*, 8 So. 3d 1185 (Fla. 4th DCA 2009). The District Court described the trial court's finding that "Musa's unauthorized use of his image resulted in lost profits because he was forced to reduce the price of his LASIK eye surgery procedure in order to retain patients who had seen Musa's advertisements in which Musa claimed Bosem would perform the same surgery for less at its centers." *Id*. at 1186. The District Court noted that the trial court, as factfinder, had liquidated the damages lost during the period specified at $93,306, awarding pre-judgment interest on that amount (*id*.). However, the District Court then noted that Dr. Bosem had claimed lost profits of between $300,000 and $400,000, while the trial court had awarded only $93,306 during the specified period, and thus that "the amount of damages was never certain until the trial court calculated Bosem's lost profits" (*id*.). The District Court held (*id*.): "Florida case law suggests that on a claim for lost profits

or pre-erosion damages, pre-judgment interest is not warranted because the amount of damages is generally unknown." Therefore, notwithstanding that the trial court had liquidated the amount of lost profits over a specific period of time, the District Court reversed the award of pre-judgment interest.

II.
ISSUES ON REVIEW

A. WHETHER THE DISTRICT COURT ERRED IN ITS HOLDING THAT PRE-JUDGMENT INTEREST WAS NOT AVAILABLE TO DR. BOSEM.

B. WHETHER THE DISTRICT COURT ERRED IN AFFIRMING THE TRIAL COURT'S DENIAL OF ROYALTIES UNDER STATE LAW.

C. WHETHER THE DISTRICT COURT ERRED IN AFFIRMING THE TRIAL COURT'S CALCULATION OF LOST PROFITS.

III.
STANDARD OF REVIEW

The District Court's legal ruling that pre-judgment interest was impermissible under Florida law, because the amount of lost profits was uncertain until liquidated by the trial court, is reviewable *de novo*. *See Holland v. Gross*, 89 So. 2d 255, 258 (Fla. 1956) ("A finding of fact by the trial court in a non-jury case will not be set aside on review unless there is no substantial evidence to

sustain it, unless it is clearly against the weight of the evidence, or unless it was induced by an erroneous view of the law"). *Accord*, *Hilton v. State*, 961 So. 2d 284, 299 (Fla. 2007). The trial court's interpretation of the Florida Statute is reviewable *de novo* *See Bell South Communications, Inc. v. Meeks*, 863 So. 2d 287, 289 (Fla. 2003); *State v. Glatzmayer*, 789 So. 2d 297, 301 n.7 (Fla. 2001). The trial court's calculation of the lost profits is reviewable for substantial competent evidence. *Holland v. Gross*.

IV.
SUMMARY OF ARGUMENT

The District Court erred as a matter of law in holding that pre-judgment interest is unavailable on past economic damages over a specified time period if they were in dispute until the factfinder's verdict. So long as the damages represent out-of-pocket losses, including lost profits, during a specified period, pre-judgment interest is appropriate.

The District Court also erred in affirming the trial court's ruling, after finding an unauthorized usage of Dr. Bosem's name and likeness in violation of §540.08, Fla. Stat., that it had discretion to award no damages under the Statute. A violation of the Statute is inherently harmful, and at least a royalty for the value of the name and likeness expropriated is required, although the court can

determine the amount.

The District Court also erred in affirming the amount of lost profits calculated by the trial court, which ignored uncontradicted evidence of Dr. Bosem's baseline pre-infringement price structure, and its own finding of the period during which the Defendants' wrongdoing deflated his profits.

V.
ARGUMENT

A. THE DISTRICT COURT ERRED IN HOLDING THAT PRE-JUDGMENT INTEREST WAS UNAVAILABLE BECAUSE DR. BOSEM'S ECONOMIC DAMAGES WERE UNCERTAIN UNTIL LIQUIDATED BY THE FINDER OF FACT.

In *Argonaut Ins. Co. v. May Plumbing Co.*, 474 So. 2d 212, 215 (Fla. 1985), this Court adopted the "loss theory" of pre-judgment interest, under which "neither the merit of the defense *nor the certainty of the amount of loss* affects the amount of pre-judgment interest. Rather, the loss itself is a wrongful deprivation by the defendant of the plaintiff's property. Plaintiff is to be made whole from the date of the loss *once a finder of fact has determined the amount of damages* and the defendant's liability therefor" (emphasis added). Thus, the Court held: "Once a verdict has liquidated the damages as of a date certain, computation of pre-judgment interest is merely a mathematical computation." *Id.* at 215. It held: "When a verdict liquidates damages on a plaintiff's out-of-pocket, pecuniary losses, plaintiff is entitled, as a matter of law, to pre-judgment interest at the

statutory rate from the date of that loss." *Id*. These statements alone demonstrate the error of the District Court's ruling--that liquidation of damages by the factfinder comes too late. Moreover, numerous other decisions underscore that error.

This Court said in *Alvarado v. Rice*, 614 So. 2d 498, 499 (Fla. 1993): "It is well settled that a plaintiff is entitled to pre-judgment interest when it is determined that the plaintiff has suffered an actual, out-of-pocket loss at some date prior to the entry of judgment." For example, pre-judgment interest on attorneys' fees accrues "the date the entitlement to attorney fees is fixed through agreement, arbitration award, or court determination." *Quality Engineered Installation, Inc. v. Higley South Inc.*, 670 So. 2d 929, 930-31 (Fla. 1996), *quoted in Butler v. Yusem*, 3 So. 3d 1185 (Fla. 2009). As the court put it in *Celotex Corp. v. Buildex, Inc*., 476 So. 2d 294, 295 (Fla. 3d DCA 1985), *review denied*, 486 So. 2d 595 (Fla. 1986): "[W]here a disputed contractual claim becomes liquidated by a jury verdict as to the amounts recoverable, interest should be awarded from the date the payment was due." The same rule applies in tort actions. *See Sostchin v. Doll Enterprises, Inc.*, 847 So. 2d 1123, 1229 n.7 (Fla. 3d DCA), *review denied*, 860 So. 2d 977 (Fla. 2003).[3]

[3]*Accord, Kissimmee Utility Authority v. Better Plastics, Inc.*, 526 So. 2d 46, 47

All of these decisions demonstrate the error of the District Court's holding that pre-judgment interest is available only if the amount of the plaintiff's loss is uncontested. And this rule is no different when the economic damages are lost profits. As the court put it in the *Sostchin* case cited above: "[I]f lost profits prior to the date of the judgment are appropriately proven, pre-judgment interest on such amounts is recoverable."[4] *Sotchin* was a tort case, but whether decided in contract or tort cases, all of these decisions apply to lost profits, which are proved

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(Fla. 1988) ("[O]nce damages are liquidated, pre-judgment interest is considered an element of those damages as a matter of law, and the plaintiff is to be made whole from the date of the loss"); *RDR Computer Consulting Corp. v. Eurodirect, Inc.*, 884 So. 2d 1053, 1505 (Fla. 2d DCA 2004); *Fidelity and Guaranty Ins. Underwriters, Inc. v. Federated Department Stores, Inc.*, 845 So. 2d 896, 902-03 (Fla. 3d DCA), *review denied*, 859 So. 2d 514 (Fla. 2003); *Glover Distributing Co., Inc. v. F.T.D.K., Inc.*, 816 So. 2d 1207, 1213 (Fla. 5th DCA 2002) (even if specific date of loss was not calculable, interest was awardable from the latest possible date the damage could have been suffered); *Perdue Farms, Inc. v. Hook*, 777 So. 2d 1047, 1053-54 (Fla. 2d DCA 2001); *Underhill Fancy Veal, Inc. v. Padot*, 677 So. 2d 1378, 1380 (Fla. 1st DCA), *review denied*, 686 So. 2d 583 (Fla. 1996); *H & S Corp. v. U.S. Fidelity Guaranty Co.*, 667 So. 2d 393, 399-400 (Fla. 1st DCA 1995) (interest awarded from the dates that various out-of-pocket expenses were necessitated by the defendant's default).

[4]*Accord, Montage Group, Ltd. v. Athle-Tech Computer Systems, Inc.*, 889 So. 2d 180, 199 (Fla. 2d DCA 2004); *Glover Distributing Co., Inc. v. F.T.D.K., Inc.*, 816 So. 2d 1207, 1213 (Fla. 5th DCA 2002); *Indian River Colony Club, Inc. v. Schopke Construction & Engineering, Inc.*, 619 So. 2d 6, 8 (Fla. 5th DCA 1993); *Pilkington PLC v. Metro Corp.*, 562 So. 2d 709, 710 (Fla. 3d DCA 1990), *review denied*, 576 So. 2d 289, 290 (Fla. 1991); *Developers of America, Corp. v. ABC Promotions Unlimited, Inc.*, 549 So. 2d 1042, 1043 (Fla. 3d DCA 1989); *Bergen Brunswig Corp. v. Department of Health and Rehabilitative Services*, 415 So. 2d 765, 767 (Fla. 1st DCA 1982), *review denied*, 426 So. 2d 25 (Fla. 1983).

the same way in either type of case.

Moreover, the decisions relied upon by the District Court do not support its sweeping holding. In *Jones v. Sterile Products Corp.*, 572 So. 2d 519, 520 (Fla. 5th DCA 1990), *review denied*, 583 So. 1037 (Fla. 1991), the decision does not reveal whether the lost profits awarded were for future anticipated profits, or rather for past lost profits; and if the latter, whether the plaintiff proved specific dates during which the loss was suffered. In *Scheible v. Joseph L. Morse Geriatric Center, Inc.*, 988 So. 2d 1130, 1134 (Fla. 4th DCA 2008), the damages were "unliquidated personal injury damages," which the court held did not constitute a vested property right warranting pre-judgment interest. In *Air Ambulance Professionals, Inc. v. Thin Air*, 809 So. 2d 28, 31-32 (Fla. 4th DCA 2002), *review denied*, 832 So. 2d 103 (Fla. 2002), the lost profits were on "future charters," and the court properly held that they were not "fixed," nor constituted "an amount certain." These holdings are consistent with the law cited above, but are not applicable to this case. They do not support the District Court's holding.

Since *Argonaut*, it has been settled in Florida that when the plaintiff and then the factfinder liquidate an economic loss, including lost profits, suffered in the past during an identified period of time, whether the amount was earlier fixed or contested, the plaintiff is entitled to pre-judgment interest on that loss. The

District Court's decision was foreclosed by *Argonaut* and the many subsequent decisions that enforce its holding.

B. THE DISTRICT COURT ERRED IN AFFIRMING THE TRIAL COURT'S DENIAL OF DAMAGES FOR MISAPPROPRIATION OF DR. BOSEM'S NAME AND REPUTATION, UNDER §540.08, FLA. STAT.

In its Order granting Summary Judgment on the issue of liability (attached to the initial Brief in the District Court), the prior judge in this case said that "in my considered opinion, [Dr. Bosem would] be entitled to royalty payments, if nothing else, for such use." Section 540.08 is entitled "Unauthorized publication of name or likeness." It forbids anyone to "publish, print, display or otherwise publicly use for purposes of trade or for any commercial advertising purpose the name, portrait, photograph or other likeness of any natural person without express written or oral consent . . . ." §540.08(1). It says that the victim of such expropriation "may bring an action to enjoin such unauthorized publication, printing, display or other public use, and to recover damages for any loss or injury sustained by reason thereof, including an amount which would have been a reasonable royalty, and punitive or exemplary damages." §540.08.(2).

As the Defendants acknowledged below (*see* Tr. 8 at 1696-97), the scope and purpose of the Florida Statute is different from that of the Lanham Act. The

Lanham Act has a specialized purpose, proscribing the unauthorized commercial use of a name only as a means of unfair competition or as a trademark--that is, as the identifier of particular goods, services, or celebrity. In contrast, the Florida Statute embraces a proprietary interest--indeed, a property interest (*see infra*)--in a person's identity alone, attaching a value by virtue of the plaintiff's exclusive domain over such "property." Thus, §540.08(1) forbids a defendant even to "print" a publication unlawfully using the plaintiff's name, whether it is ever distributed or not. *See Weinstein Design Group, Inc. v. Fielder*, 884 So. 2d 990, 998 (Fla. 4th DCA 2004), *review dismissed*, 923 So. 2d 1162 (Fla. 2006). *See generally* McCarthy, *The Human Persona as Commercial Property: The Right to Publicity*, 19 Colum.-VLA J.L. & Arts 129 (Spring/Summer 1995) (noting that rights of privacy and publicity are creatures of state law). Moreover, the Statute provides that the rights it protects can be assigned or inherited, *see* §540.08(1)(b)--both attributes of a property right.

The Statute therefore codifies the recognized common-law principle that a "plaintiff is entitled to compensation for the deprivation of his right to control the use of commercially valuable asset, his name." *Zim v. Western Publishing Co.*, 573 F.2d 1318, 1327 n.19 (5th Cir. 1978) (Fla. law). *Zim* said that the common-law rule protected an "asset" whose appropriation "entitled [the plaintiff]

to compensation." *See also Doe v. TCI Cablevision*, 110 S.W. 3d 363, 372 (Mo. 2003) (right to publicity is a property right); *Restatement (Second) of Torts*, §652C, comment a (the use or benefit of a name or likeness "is in the nature of a property right, for the exercise of which an exclusive license may be given to a third person," who may "maintain an action to protect it").

The clear intent of the Florida Statute is to prevent and redress precisely what happened in this case--the use of someone's name without his permission to promote another's business. If that is not compensable in and of itself, then the Statute does not serve its purpose. It can be violated without consequence, requiring only that the unlawful practice stop when the wrongdoer is caught. In essence, the wrongdoer has nothing to lose.

Instead, §540.08(2) says that the unauthorized publication of a name or likeness supports an action (the plaintiff "may" bring an action) to "recover damages for any loss or injury sustained by reason thereof, including an amount which would have been a reasonable royalty, and punitive or exemplary damages." Given that the polestar of statutory interpretation is a statute's underlying purpose,[5] this Statute must provide redress for the injury inherent in its violation--the expropriation of a name or likeness without paying for it. In

[5]*See Bautista v. State*, 863 So. 2d 1180, 1185 (Fla. 2003); *B.C. v. Florida*

contrast, the Statute generally allows recovery for "damages sustained," which requires proof that any such damages were "sustained." But the unlawful use of a name or likeness *by definition* deprives the plaintiff of a royalty for its use.[6]

Thus in *Loft v. Fuller*, 408 So. 2d 619, 622-23 (Fla. 4th DCA 1981), *review denied*, 419 So. 2d 1198 (Fla. 1982), admittedly addressing a different issue (the propriety of the trial court's dismissal of the plaintiff's complaint with prejudice), the court said this about the damages awardable under the Statute (emphasis added):

> In our view, Section 540.08 . . . is designed to prevent the unauthorized use of a name to directly promote the product or service of the publisher. Thus, the publication is *harmful* not simply because it is included in a publication that is sold for a profit, but rather because of the way it associates the individual's name or his personality with something else.

See also Weinstein Design Group, Inc. v. Fielder, 884 so. 2d at 998 (*quoting Loft*).

The court in *Loft* did not simply state that the use of another's name is unlawful, but rather that it "is harmful . . .", because "it associates the individual's

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Department of Children and Families, 887 So. 2d 1046, 1051 (Fla. 2004).

[6]The Statute also allows punitive damages, but under Florida law, even if a plaintiff establishes an entitlement to punitive damages by proving wanton or willful conduct, because punitive damages are not compensation, the finder of fact retains discretion to decline to award them. *See Wackenhut Corp. v. Canty*, 359 So. 2d 430, 435-36 (Fla. 1978).

name or his personality with something else." In other words, it is inherent in the Statute that a plaintiff has suffered harm by virtue of the expropriation alone. And that particular harm is not redressed by an award of lost profits under the federal Statute, which may compensate a plaintiff for his out-of-pocket losses, but provides no compensation for a defendant's unauthorized expropriation of his name, likeness and reputation--the value protected by the Statute. The court said in *Loft* that the *harm* recognized by the Statute is unauthorized association, *not* because it gives the defendant a profit, but because of the way it "associates the individual's name or his personality with something else." Thus, although the court can consider the extent and amount of that harm, based on the plaintiff's evidence, in valuing the royalty appropriate to such usage, it cannot deny the fact that some harm was suffered.

Admittedly, the Statute could have said this more explicitly. For example, 38 U.S.C. §284 prescribes damages for infringement and "in no event less than a reasonable royalty . . . ." However, given the narrower purpose and reach of the federal Statute, such explicit language may have been necessary. In contrast, the Florida Statute makes actionable the mere unlawful expropriation of a person's name or likeness, and therefore could not achieve its objective without awarding at least a reasonable royalty for the value of the asset taken. As opposed to the

federal Statute, the only way to achieve the Florida Statute's purpose, and to give effect to its language, is at least to award a reasonable royalty for its violation.

There is nothing in the language of the Statute inconsistent with that construction. The Statute provides that the person victimized may bring an action to recover damages for loss or injury "sustained," and "sustained," typically means "suffered" or "incurred" (our quotations). Under this Statute, as the court recognized in *Loft v. Fuller*, the commercial expropriation of an individual's name by definition *is* an injury "sustained," because the Statute recognizes that a name and likeness have an intrinsic value. The Statute also says that the plaintiff "may bring an action . . . to recover damages for any loss or injury sustained," but that says that the plaintiff "may" bring *the action*--not that the factfinder "may" or may not award such damages. Moreover, even if the word "may" extended to the damages, it should be read to mean that the plaintiff is entitled to recover such damages, based on the proof he offers as to the amount. Just as the word "shall" in a statute can sometimes be permissive, *see Palm Springs General Hospital, Inc. of Hialeah v. State Farm Mutual Automobile Ins. Co.*, 218 So. 2d 793, 798 (Fla. 3d DCA 1969), *aff'd*, 232 So. 2d 737 (Fla. 1970), the word "may" can sometimes be mandatory. *See, e.g., Minor v. Mechanic's Bank of Alexandria*, 26 U.S. (1 Pet.) 46, 7 L Ed. 47 (1828); *Atlantic Life v. Hopps*, 183 So. 15 (Fla. 1938) (stipulation

that a party "may" file by a given date means that he must file by that date); *Weston v. Jones*, 41 Fla. 188, 194-95, 25 So. 888, 890 (1899)(statute providing that court "may" require formal pleadings upon application of either party required that it do so). In such circumstances, the word "may" creates an entitlement. Thus, the second definition of "may" in *Merriam-Webster's Third New International Dictionary, Unabridged* (CD ed.) is "have permission to" (the fourth definition is "shall" or "must"). *See also American Heritage Dictionary of the English Language* (3d ed.); *Black's Law Dictionary* (7th ed.); *Oxford English Dictionary* (Compact ed.).

In the instant case, given the underlying purpose of the Statute, its prescription that a plaintiff "may" recover royalties means that he has a right to recover royalties, along with any other damages that he can prove were sustained. But if the right to at least a royalty is not provided, then under a Statute that accords a person's name and likeness intrinsic value, a defendant can use the plaintiff's name, likeness and reputation for free, and a plaintiff like Dr. Bosem recovers nothing for their expropriation.

C. THE DISTRICT COURT ERRED IN AFFIRMING THE AMOUNT OF THE TRIAL COURT'S AWARD FOR LOST PROFITS, WHICH IS NOT SUPPORTED BY SUBSTANTIAL COMPETENT EVIDENCE.

As noted, the trial court "accept[ed] the price erosion theory of recovery espoused by the Plaintiff" (R. 16 at 2935, ¶16)--that is, the difference between the prices that Dr. Bosem charged pre-infringement, and the lower prices that he was required to charge post-infringement, until they reached their pre-infringement levels. It also limited this recovery to the period of actual infringement. Respectfully, the trial court erred in that calculation, by ignoring the uncontradicted evidence on this element of damages. As noted, the Defendants did not address the two specific defects in the court's calculations.

First, there is no record evidence to support the trial court's baseline pre-infringement measure of $1,500 per eye. *See supra* pp. 6-7. It is unclear where the trial court got this figure. But the uncontradicted evidence, based on the very Exhibits adopted by the court (Ex. 10, 11), is that the average pre-infringement price per eye was $1,643. The trial court erred in failing to apply that baseline price, which was uncontradicted.

Second, although the trial court adopted a measure of damages that would compensate Dr. Bosem for the entire post-infringement period during which his prices were deflated, and itself acknowledged (R. 16 at 2935, ¶13) that this period extended a year beyond the cessation of publication (*see supra* pp. 6, 8), the court then limited its lost profits award to the period of publication. R. 16 at 2935, ¶16.

Given the measure of damages that the court adopted, based on the uncontradicted evidence, it required that the scope of damages extend through 2003. The court's award did not comport with its own measure of damages, and there is no evidence of Record to support that award. For this reason as well, the District Court erred in affirming the trial court's calculation of lost profits.

VI.
CONCLUSION

It is respectfully submitted that the holding of the District Court on the issue of pre-judgment interest should be disapproved, with instructions to reinstate the trial court's award of pre-judgment interest. It also is respectfully submitted that the District Court's approval of the trial court's rulings under the Florida Statute, and its award of damages for lost profits, should be disapproved, and the cause remanded with instructions that the trial court should award royalties under the Florida Statute, and amend its award for lost profits in accordance with the uncontradicted evidence.

Respectfully submitted,

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By:_____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via U.S. mail upon Paul O. Lopez, Esq., and Alexander D. Brown, Esq., Tripp Scott, P.A., 110 Southeast Sixth Street, Fifteenth Floor, Fort Lauderdale, FL 33301 and Jeffrey A. Norkin, Esq., 2901 NW 126th Avenue, Suite 2-209, Sunrise, FL 33324 on this 24th day of November, 2009.

By:_____
Joel S. Perwin
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CERTIFICATE OF COMPLIANCE

We hereby certify that this response complies with the font requirements of Fla. R. App. P. 9.210(a)(2).

By:_____
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