

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 EYEGLOSS WORLD,  
a Florida corporation, THE  
LASER VISION INSTITUTE,  
L.L.C., and MARCO MUSA,  
individually,

Respondents.

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**PETITIONERS' BRIEF ON JURISDICTION**

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I.

STATEMENT OF THE CASE AND FACTS

This Petition contends that the District Court created conflict in reversing an award of pre-judgment interest on an award of lost profits liquidated by the trial court, sitting as factfinder, over a specific period of time. The relevant facts are stated in the District Court's Opinion. The Plaintiffs' Complaint charged the Defendants with the unauthorized use of Plaintiff Marc Bosem's name and likeness, under both federal and Florida law. As the District Court noted (C.A. 1), "Bosem argued below, in part, 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." The District Court continued (A. 1-2): "The trial court found that Bosem sustained lost profits in the amount of \$93,306 and awarded Bosem pre-judgment interest on that amount."

Noting that Bosem had claimed lost profits of \$300,000 to \$400,000, while the trial court had awarded only \$93,306 during the specific period of infringement that it found--July, 2000 to December, 2001--the District Court said that "the amount of damages was never certain until the trial court calculated Bosem's lost profits" (A. 2). For that reason, it held (*id.*): "Florida case law suggests that on a claim for lost profits or pre-erosion damages, prejudgment interest is not warranted

because the amount of damages is generally unknown.” Therefore, notwithstanding that the court in its ruling had liquidated the amount of lost profits over a specific period of time, the District Court reversed the award of pre-judgment interest.

## **II. ISSUE ON APPEAL**

**WHETHER THE DISTRICT COURT’S DECISION-  
-THAT AN ECONOMIC LOSS DURING A  
SPECIFIC PERIOD OF TIME DOES NOT  
WARRANT AN AWARD OF PRE-JUDGMENT  
INTEREST IF THE AMOUNT OF THAT LOSS IS  
UNCERTAIN UNTIL LIQUIDATED BY THE  
FACTFINDER--CONFLICTS WITH DECISIONS  
OF THIS COURT OR OTHER DISTRICT COURTS  
OF APPEAL.**

## **III. SUMMARY OF THE ARGUMENT**

Numerous cases hold that pre-judgment interest is not limited to economic losses in amounts that are uncontested, but rather is available whenever the plaintiff proves an economic loss suffered in the past, during a specified period of time, whose amount is liquidated by the factfinder.

## **IV. ARGUMENT**

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 create conflict with the District Court's decision, and numerous additional decisions have repeated that formulation.

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." 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).<sup>1</sup> All of these decisions directly conflict with 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 in cases like this one, involving 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.”<sup>2</sup> *Sotchin* was a tort case, but whether decided in contract

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<sup>1</sup>*Accord, Kissimmee Utility Authority v. Better Plastics, Inc.*, 526 So. 2d 46, 47 (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 & 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).

<sup>2</sup>*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 Brunswick Corp. v. Department of Health and Rehabilitative Services*, 415 So. 2d 765, 767



or tort cases, all of these decisions apply to lost profits, which are proved the same way in either type of case.

The decisions relied upon by the District Court do not forestall this conclusion (and even if they did, they would not erase the conflict created by all the cases cited above). 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.” That is perfectly consistent with the law cited above, and wholly inapplicable to this case. These decisions do not support the District Court’s holding.

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(Fla. 1st DCA 1982), *review denied*, 426 So. 2d 25 (Fla. 1983).

Since *Argonaut*, it has been settled in Florida that when the plaintiff liquidates an economic loss, including lost profits, suffered in the past during an identified period of time, whether the amount was fixed or contested, the plaintiff is entitled to pre-judgment interest on that loss. The District Court's decision conflicts with *Argonaut* and the many subsequent decisions that enforce its holding.

V.

### CONCLUSION

It is respectfully submitted that the District Court's decision directly and expressly conflicts with decisions of this Court and other District Courts of Appeal, and that the Court should accept jurisdiction to review its decision.

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 on this \_\_\_\_ day of July, 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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