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.

________________________________/

REPLY BRIEF OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

I.
STATEMENT OF FACTS

Although the underlying facts of the case are relevant only as background, and therefore we will not join issue with the Defendants' 14-page restatement (Answer Brief at 2-15), a few incomplete or erroneous factual statements need to be corrected for the record.

The Defendants' statement (Brief at 3)--that the proposed contracts did not expressly prohibit the use of Dr. Bosem's name and likeness in their advertising--omits the fact that all drafts after the first draft required Dr. Bosem's pre-approval of *any* advertising. Thus the last draft of the contract, which the Defendants say they mistakenly thought was agreed to, prohibited all of their advertising--internal and external--without prior approval from Dr. Bosem. They published without approval anyway The numerous citations for this requirement are in the Brief of Petitioners at 3.

The Defendants say twice (Brief at 4, 5) that Marco Musa's assistant, Elizabeth Bolivar, "thought [that Dr. Bosem had] indicated that he had executed the final iteration of the proposed contract, and placed the same in the mail for delivery to LVI" (Brief at 4). The Defendants have provided no citation to the Record for either of these statements. They are incorrect. As we noted, providing substantial citations (Brief at

3), Ms. Bolivar in fact acknowledged that she knew there was no contract, but then took the blame for telling her boss something that she admittedly knew was not true.

The Defendants emphasize in bold letters (Brief at 7) that some of their brochures contained the names of other physicians in addition to Dr. Bosem's. Given that the Defendants admittedly exploited Dr. Bosem's name, resume and likeness, the purpose of this observation is unclear. Whether the advertising included another nine or another hundred names, it unlawfully used Dr. Bosem's--and he was the best in the field.

The Defendants charge (Brief at 12) that other than the Revenue Chart, Dr. Bosem "failed to present any corroborating proof of the harm allegedly sustained." One sentence later, however, the Defendants admit that after the trial court had denied the damages sought by Dr. Bosem--for example damages for "disgorgement of profits"--"such testimony was irrelevant and inadmissible once the court found that BOSEM was not 'entitled' to such a remedy." After the court's ruling on entitlement, the amount of any prohibited element of damages was irrelevant, and there was no reason to permit or present any evidence concerning any such element. On the specific question of royalties under the Florida Statute, we will review the sequence of events in detail in the Argument. Dr. Bosem can hardly be faulted for failing to prove damages that the trial court had already disallowed.

The Defendants engage in a long discussion--in both their Statement of Facts (Brief at 12-14) and their Argument (Brief at 36-44)--of Dr. Bosem's proof of price erosion, and of the Defendants' counter-evidence on that issue. But after all of this, the Defendants then acknowledge that "[t]he trial court considered [their expert's] testimony, but did not accept it in its entirety. Rather, the court apparently factored [his] testimony into the final calculation of damages" (Brief at 14). *See also* Brief of Respondents at 36 (Defendants "concede that the district court acted well within its discretion in approving the trial court's generous award" of lost profits). Given this concession, it is unclear why the Defendants have devoted their entire response on this subject to a review of both sides' arguments on a ruling they no longer challenge. The District Court rejected their cross-appeal on this issue. The District Court also rejected Dr. Bosem's challenge of the trial court's calculation of the lost profits, which the Defendants did not address in the District Court. Dr. Bosem has reasserted his challenge to the trial court's calculation before this Court. Again, the Defendants say nothing. They again address only the issue of entitlement, which they now concede was within the trial court's discretion, and which is irrelevant to the only arguments presented.

II.

ARGUMENT

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

In the Initial Brief (pp. 11-15), we addressed the single argument made by the Defendants below and accepted by the District Court--that pre-judgment interest is unavailable on economic damages, including lost profits, that are contested, and are liquidated by the factfinder only after trial. The District Court agreed with the Defendants' argument that pre-judgment interest was unavailable because "the amount of damages was never certain until the trial court calculated Bosem's lost profits." *Bosem v. Musa Holdings, Inc.*, 8 So. 3d 1185, 1186 (Fla. 4th DCA 2009). That was the only basis for the District Court's ruling on this issue, and the only point that we discussed in our Brief.

The Defendants barely address that point in their discussion of this issue (Brief at 18-26). They do so only in their "important aside" concerning the cases in which interest is available between the time of a verdict and the time judgment is entered (*see* Answer Brief at 24-25). We will address that "aside" in a moment. On the central issue--whether the economic damages have to be fixed and unchallenged in order to warrant pre-judgment interest--the Defendants say nothing. They have cited back to us all of the cases that we cited, but only for their holdings that pre-judgment interest is permissible only on liquidated economic damages, while ignoring their holdings that such damages may be liquidated, even when contested, by the factfinder. These cases recognize that pre-judgment interest is unavailable only on damages for *future losses*, or damages whose amounts or periods of loss are *never liquidated*.

Forsaking the District Court's holding (Brief at 21-22), the Defendants construct a strawman, in purporting to distinguish these cases on the ground that the damages awarded in all of them were capable of liquidation, while ignoring the fact that in every one of them, those damages *were contested*, and were liquidated only *by the factfinder's verdict*.

The Defendants have also ignored the import of the controlling decision on this issue (*see* Brief of Petitioners at 11-12)--*Argonaut Ins. Co. v. May Plumbing Co.*, 475 So. 2d 212, 215 (Fla. 1985). The Defendants mention *Argonaut* in a single paragraph (Brief at 19), quoting only its adoption of the loss theory recognizing that pre-judgment interest is an element of pecuniary damages, and holding that pre-judgment interest is only available in cases liquidating damages as of a date certain. Incredibly, the Defendants never mention the passages from *Argonaut* that rebut the District Court's holding, by repeatedly stating that this standard is satisfied even if the amount of damages is contested before the verdict, and only liquidated by the verdict. They ignore this Court's holding that "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 was a wrongful deprivation by the defendant of the plaintiff's property. The 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." *Id.* (emphasis added). They ignore this Court's statement in *Argonaut* that "*[o]nce a verdict* has liquidated the damages as of a date certain, computation of pre-judgment interest is merely a mathematical computation." *Id.* (emphasis added). The Defendants also ignore this Court's statement that "[w]hen *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.* (emphasis added). It is significant that the Defendants would attempt to defend the District Court's ruling without acknowledging these controlling statements from *Argonaut.*

Argonaut has been repeatedly enforced. As this Court recently reaffirmed on the issue of pre-judgment interest on attorneys' fees, the right accrues "'the date the entitlement to attorney fees is fixed through agreement, arbitration award, or court determination.'" *Butler v. Yusem*, 30 So. 2d 1185 (Fla. 2009), *quoting Quality Engineered Installation, Inc. v. Higley South Inc.*, 670 So. 2d 929, 930-31 (Fla. 1996). The court said 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." And the same is true 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). The same is true in the additional cases that we cited (Brief at 13 n.3) and the Defendants have re-cited.[1] And as we also noted, through substantial authority, the same is also true of lost profits: "[I]f lost profits prior to the date of the judgment are appropriately proven, pre-judgment interest on such accounts is recoverable." *Sostchin v. Doll Enterprises, Inc.*, 847 So. 2d at 1229. *See* cases cited Brief at 14 n.4.

[1] In addition to the many cases cited, *see Erp v. Erp*, 976 So. 2d 1234, 1240 (Fla. 2d DCA 2008) ("The wife's interest in the marital estate was liquidated as of the date of the final judgment").

As we also noted, the cases that deny pre-judgment interest are those in which the lost profits were never liquidated; or they were never liquidated as of a date certain; or they were future damages. To the extent that any decision supports the District Court's holding, it is inconsistent with *Argonaut* and numerous other decisions that follow *Argonaut*. Virtually the entirety of the Defendants' Argument does not even address that issue.[2]

The Defendants have made no argument, and have cited no decision, that undermines the overwhelming Florida authority prescribing pre-judgment interest on past economic damages that are liquidated by the factfinder as of a specific date.

[2]The Defendants touch on the issue when they argue (Brief at 24-26) that their position is bolstered by the decisions holding that pre-judgment interest on economic damages is available between the time of a verdict and the time the judgment is entered. In contrast, this Court has held that post-verdict/pre-judgment interest is not available on non-economic damages in a tort case. *See Amerace Corp. v. Stallings*, 823 So. 2d 110 (Fla. 2002). Contrary to the Defendants' suggestion, this distinction strongly undermines their position. The cases allowing post-verdict/pre-judgment interest on economic damages, but not on non-economic damages, do so on exactly the basis argued here--that the economic damages have been liquidated by the factfinder. As the court put in *KMS Restaurant Corp. v. Wendy's Internat'l, Inc.*, 194 Fed. Appx. 591, 595-96 (11th Cir. 2006) (Fla. law): "We conclude that the district court properly awarded post-verdict, prejudgment interest to [the plaintiff]. Under Florida law, prejudgment interest is appropriate only from the date of the jury's verdict when damages are not liquidated *until the jury renders its verdict*" (emphasis added). The propriety of an award of pre-judgment interest on economic damages after the verdict liquidates them, but before a judgment is entered, derives from the same policy that motivated this Court's decision in *Argonaut* and the decisions following it.

Respectfully, the District Court erred in holding otherwise.

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

The trial court awarded Dr. Bosem damages for part of his lost profits, but it did not award him anything for the value of his name, likeness and reputation that the Defendants misappropriated. Our contention (Brief at 15-21) is that given the purpose and reach of the Florida Statute, an award of this type of damage (if it can be sufficiently liquidated), is inherent in the Statute's violation. Therefore, the trial court should have authorized an award of the value of a royalty to Dr. Bosem for his name and likeness, if he could adequately prove the value of such a royalty. Instead, the trial court denied him the entitlement, and thus the opportunity to present such proof.

As we argued (Brief at 18), "the Statute generally allows recovery for 'damages sustained,'" and "the unlawful use of a name or likeness *by definition* deprives the plaintiff of a royalty for its use." The Defendants' entire response ignores the argument (Brief at 30-35), focusing instead upon the methods of *calculating* a reasonable royalty, and the proof required to do so. And they justify the trial court's refusal to award royalty damages solely because of the absence of such proof.[3]

[3]The Defendants say that "the theory espoused by BOSEM . . . is that the

damage provision of Section 540.08 is automatic, *requiring no proof of harm sustained*" (Brief at 27) (emphasis in original). The Defendants say (Brief at 28) "The plain meaning of the damage provision of Section 540.08 unmistakably indicates that recovery is available only for those damages a plaintiff is able to prove were sustained." The Defendants say that "BOSEM absolutely failed (at trial and on appeal) to address any of the requisite [evidentiary] factors used to assess whether a royalty award should have been awarded" (Brief at 34) (emphasis deleted). The Defendants say (Brief at 34 n.4) that "BOSEM never asked the trial court to award a specific amount."

This contention concedes for purposes of argument our position that §540.08 requires a reasonable royalty for its violation, *if* the plaintiff offers sufficient proof of the amount. The Defendants contend that Dr. Bosem offered insufficient evidence to permit the trial court to liquidate the amount. The decisions cited and discussed by the Defendants are decisions concerning the proper measurement of a royalty, and the evidence necessary. We acknowledge the factors prescribed. Dr. Bosem would have offered evidence on those factors if the trial court's pre-emptive ruling had not precluded him from doing so. In the instant case, however, as noted, Dr. Bosem was *forbidden* to provide such evidence, in light of the trial court's *prior* ruling that he was not entitled to a royalty. It is circular for the Defendants to concede *arguendo* that Dr. Bosem was entitled to a royalty under the Statute if he could offer evidence to support one, but argue that he failed to offer such evidence, where the trial court forbid him to do so in ruling that he was not entitled to a royalty.

As the Defendants said at the start of the trial, when Dr. Bosem proposed to "start with liability and then move on to damages," "we agree that, that plaintiff will present all factual witnesses and/or exhibits that relate to that particular issue, so on the issue of liability--in other words, I want plaintiff to present everything they've got, rest, and then we'll decide whether we're going to present anything further other than just simply cross-examining and dealing with the issues as they've raised in the plaintiff's case" (Tr. 1 at 11). Dr. Bosem answered: "So we have a bifurcated trial" (*id*. at 12). Thus, on the issue of lost profits, the Defendants insisted that offering evidence on damages would be inappropriate--"really is putting the cart before the horse. We don't get to figuring out what the numbers are. We have to figure out whether an accounting is appropriate. So we certainly oppose, we certainly disagree with . . . to deal with forensic experts, to deal with whether costs are appropriately deducted or what financial statements are being relied upon." He continued (*id*. at 21): "So we disagree vehemently that we need to deal with any sort of cost deduction arguments until the Court, you, as the trier of fact, Your Honor, decides whether we even go there."

The trial proceeded on that basis. In accordance with the Defendants' insistence, Dr. Bosem addressed the extent of the Defendants' wrongdoing, which would in part determine his entitlement to various categories of damages. As both parties had agreed, he did not put on the evidence that would quantify such damages. Then at the end of the first phase of the trial, the court announced its finding concerning the categories of damages that it would allow (Tr. 12 at 1492): "As I indicated in a phone call with counsel earlier this morning, I had advised them that were we were not going to proceed with the quote, unquote, phase two as we had discussed it. So it's really apparent that the Court is going to deny Dr. Bosem the relief that he was seeking regarding accounting for profits. I will explain in my ruling why. But that's the ruling on that particular issue." The trial court then announced additional rulings on other elements of damage, denying Dr. Bosem royalties, disgorgement of profits and attorney's fees under the Lanham Act (*id*. at 1523-25). Subsequently, both parties pointed out that the court had not addressed the issue of royalties under the Florida Statute (*id*. at 1696-97). The court asked the parties to submit memoranda on the Florida Statute (*id*. at 1713-17). After they had done so, the court denied royalties under §540.08, Fla. Stat., for the same reason it had denied royalties under the Lanham Act, and with no further explanation: "In the totality of the analysis I find that there is no supportable basis for an award of royalties" (*id*. at 12).

This ruling, which followed the procedural sequence agreed to by the Plaintiff and demanded by the Defendants, made any question of measuring an appropriate royalty moot. In this context, it is disingenuous for the Defendants to base their argument on Dr. Bosem's failure to prove the value of the royalties that were denied him. And the Defendants have not even addressed the argument that the Florida Statute requires an award of lost profits *if* the plaintiff offers adequate proof of the amount. We refer the Court to the unrebutted arguments advanced in the initial Brief.

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.

The Defendants have addressed an argument we did not make, and have not addressed the argument we did make. We contend that the trial court, after deciding to award Dr. Bosem damages for his lost profits, miscalculated those lost profits in two ways. The court ignored uncontradicted evidence concerning the baseline pre-infringement measure of Dr. Bosem's price per eye, and it also adopted a measure of damages that did not compensate Dr. Bosem for the damages caused by the infringement during the post-infringement period of price deflation that the court itself acknowledged.

As we said, the Defendants have never addressed those two specific arguments, and they do not do so in their Answer Brief in this Court. Instead, the Defendants have offered nine pages of discussion (Brief at 35-44) of the evidence offered by both sides on the question of whether Dr. Bosem was entitled to damages for lost profits, with the Defendants contending that Dr. Bosem's proof was too speculative. But notwithstanding that lengthy discussion, the Defendants "concede that the district court acted well within its discretion in affirming the trial court's generous award. The discussion herein sets forth the legal parameters, and record facts, that necessarily guided the trial and district courts to render their harmonious decisions" (Respondents' Answer Brief at 36). For no apparent reason, the Defendants then proceed to discuss the evidence introduced by both sides on the entitlement to lost profits. They do not address the two mathematical errors that the trial court made in its *calculation* of lost profits, notwithstanding the uncontradicted evidence and its own ruling.

First, the uncontradicted evidence was that Dr. Bosem's baseline pre-infringement price was $1,643--not $1,500 per eye. The Defendants say nothing about this point.

Second, despite its own ruling that the period of infringement extended a year after the cessation of publication (*see* initial Brief of Petitioners at 6, 8), the trial court nevertheless cut off the damages when the infringement stopped, awarding no damages for the following year, in which the court itself had found that Dr. Bosem's price structure remained deflated because of the infringement. The evidence on that point was uncontradicted. Here too, the Defendants say nothing about the error. Notwithstanding any clash of evidence on the general question of entitlement to lost profits, which the Defendants admit the trial court was entitled to award, its calculation was erroneous in two respects, never addressed by the Defendants.

III.

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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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 ____ day of January, 2010.

By:________________________
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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).

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