IN THE SUPREME COURT FOR THE STATE OF FLORIDA

CASE NO: SC09-1881
LOWER TRIBUNAL NO: 3D09-264

WESTGATE MIAMI BEACH, LTD,
A Florida Limited Partnership

Petitioner,

v.

NEWPORT OPERATING CORP.,
a Florida Corporation

Respondent.

RESPONDENT'S ANSWER BRIEF

Respectfully submitted,
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PREFACE

Westgate Miami Beach, Ltd. ("Westgate") is the Petitioner and the plaintiff in the trial court proceedings. Newport Operating Corp. ("Newport") is the Respondent and the defendant in the trial court proceedings.

Record references are to either the Petitioner's Appendix that was filed with Petitioner's Initial Brief, or to the Record that was forwarded by the Third District Court of Appeal to the Supreme Court of Florida on January 29, 2010. Citations to the Petitioner's Appendix are self explanatory. References to the Record are as follows: "R" followed by the volume number, then dash followed by the page number. For example, a Record citation may read "R3-475." Whenever the Petitioner's Appendix is used to cite to an unofficial hearing transcript, the page number that is used in the citation is the page number appearing at the bottom of each transcript page, and not the "floating" page numbers that appear within the body of the transcript. Finally, references to the Petitioner's Initial Brief appear as abbreviations "IB," followed by the page number.

SUMMARY OF THE ARGUMENT[1]

In this appeal, the Florida Supreme Court is asked to revisit *McGurn*[2] and to either overrule or modify *McGurn*, or create an exception to the bright line rule of *McGurn* wherever it causes an injustice – namely, the inadvertent waiver of a litigant's prejudgment interest. There is nothing confusing or "unjust" about the application of *McGurn* and its "progeny" to warrant Supreme Court jurisdiction. In fact, every court called upon to apply *McGurn* has done so reliably and consistently, resulting in *not one* conflict within the District Courts of Appeal in the past eighteen years. It is simple and straightforward and works as follows:

- Provide for Pre-Judgment Interest in the Final Judgment. This bright line rule which has now been in existence for eighteen years is easy to understand and to follow. A corollary to this bright line rule is not to insist that pre-judgment interest be excluded from the Final Judgment in favor of a "separate order" as Westgate repeatedly insisted.
- File a Motion Pursuant to Rule 1.530. If the amount of pre-judgment interest is not liquidated in the Final Judgment, the affected party is required to simply file a timely Motion under Rule 1.530 to correct

[1] In this somewhat unusual case, the Respondent respectfully suggests that its summary of the argument will make the following response to the Petitioner's statement of the case and of the facts more readily understandable, and for this reason the Respondent has moved its summary of the argument to the front of its Answer Brief.

[2] *McGurn v. Scott*, 596 So.2d 1042 (Fla. 1992).

the error just the same way as used to correct any other error in a Final Judgment.[3] A corollary to this is that if such a Motion is filed, it should actually identify the error and seek its correction rather than repeatedly insist that pre-judgment interest nonetheless be calculated by way of a "separate order" as Westgate insisted.

- Do Not Abandon The Motion Pursuant to Rule 1.530. Assuming that an affected party filed an appropriate Rule 1.530 Motion seeking to correct the error (as Westgate claims that it did on "no less than two (2) distinct occasions"), it is also advisable that the affected party NOT abandon its own Motion by rushing to the Appellate Court and initiating an Appeal before the Trial Court rules on the Rule 1.530 Motion like Westgate did.
- Use The Safety Feature. Assuming that the affected party failed to correct the error by filing a timely 1.530 Motion, (or did file such a timely Motion and then chose to abandon it like Westgate did), the affected party may still invoke the discretion of the Appellate Court to relinquish jurisdiction back to the Trial Court anytime up to the issuance of the Mandate.

[3] Westgate claims in its Initial Brief that it filed such a Motion "on no less than two (2) distinct occasions." IB at page 7. If true, than we can not perceive what the Appellate Issue is. *McGurn* works.

Thus, the only way that an affected party can be "caught" by *McGurn* and its progeny is if the affected party, such as Westgate, missed every opportunity to protect itself. Importantly, an affected party being unaware of the status of the law ***18 years*** after this Supreme Court issued its 1992 Opinion in *McGurn*, does not make *McGurn* unfair *per se*, nor difficult to understand, nor does it create ambiguities. In fact, the absence of a single conflict amongst the District Courts of Appeal in applying *McGurn* attests to the very fact that *McGurn* is easily understood and simply applied. In short, revisiting *McGurn* should not be deemed a question of "great public importance" in order to seek to remedy the one affected party at issue - Westgate - which not only didn't follow the clear and unambiguous law, but repeatedly insisted that pre-judgment interest be calculated by way of a "separate order."

Indeed, as we will show, Counsel for Westgate claims that at the July 31, 2008 hearing to assess prejudgment interest, Mr. Frankel actually knew about *McGurn* at the time prior to the Appeal ("Your Honor, that's why I filed my [purported Rule 1.530] Motion within the ten days. It had to be done"[4]). But if Counsel's statement to the Court were true about knowing of *McGurn,* then Counsel inexplicably chose to abandon the [purported Rule 1.530] Motion *by filing a Notice of Appeal before the Trial Court could even rule on the Motion*. Because

[4] See, July 31, 2008 hearing, p. 18, Petitioner's Appendix, Tab "K."

the mere act of filing a timely Motion perfects an affected party's ability to seek to correct such an error, the Judge's vacation plans and any delay associated with her vacation plans had ***absolutely nothing*** to do with Westgate's subsequent choice to then abandon its Motion before the Judge could rule. *Howell v. Jackson*, 810 So.2d 1081, 1082 (Fla. 4th DCA 2002) (party who files a notice of appeal is deemed to have abandoned its own pending post-trial motions; notice of appeal filed by another party does not have that effect). Further, notably absent from Westgate's Initial Brief is Westgate's Counsel's insistence to the Trial Court, before the Final Judgment was entered, that "***absolutely you can***"[5] exclude pre-judgment interest from the Final Judgment. Indeed, the very unusual form of the Final Judgment which provided for a "separate order" for pre-judgment interest was prepared by Counsel for Westgate. The fact that, as the District Court noted in its majority opinion, counsel for Newport and even the Trial Court followed Westgate's misguided suggestion that the calculation of the amount of pre-judgment interest could await resolution of the Appeal does not, and should not, operate to change the rule of *McGurn*.

Finally, we point out, as we must, the absence of a pending case or controversy since the Parties executed and delivered broad mutual general releases in July 2009 thereby releasing each other of any and all claims then existing,

[5] See, June 8, 2007 hearing, p. 105, Petitioner's Appendix, Tab "C."

whether known or unknown or even suspected to exist. Although this Court may nonetheless have jurisdiction to resolve this Appeal if this Court deems this issue a question of great public importance, Westgate's initiation of this Appeal and its continued prosecution in the face of a clear and unambiguous general release is highly questionable in our view. Contemporaneous with this Answer Brief, Respondent has file a Suggestion of Mootness with this Court more fully addressing this issue.

RESPONSE TO STATEMENT OF THE CASE AND FACTS

In its Initial Brief, Westgate took significant liberties with its bold characterizations of the facts weaved in between selected excerpts and lack of record cites on certain critical points.

If one were to only read Westgate's Brief, one could have the mistaken impression that Westgate had no responsibility for waiving its pre-judgment interest. Certainly the Trial Court understood from inception that it was Westgate's responsibility to know the law when Judge Cohen rebuked Westgate's Counsel ("you could have and should have and would have" known to "make sure that you were going to get your prejudgment interest"). [Petitioner's Appendix, Tab "T" at p. 24].

A. Westgate's Own Responsibility For Not Including Pre-Judgment Interest In The Final Judgment.

Westgate fails to mention that it created the purported error itself. The unusual concept that prejudgment interest could be awarded by way of a "separate order," rather than the far-more traditional inclusion in the Final Judgment itself, was Westgate's own idea which Westgate itself proposed to the Lower Court in Westgate's form of proposed Final Judgment submitted to the Lower Court. [*See*, Proposed Final Judgment submitted to the Lower Court by Westgate Miami Beach, Ltd., at R3-525, ¶1]. Indeed, as we will show, Westgate's Counsel stubbornly insisted throughout the proceedings that pre-judgment interest should be excluded from the Final Judgment and entered by way of a "separate order".

B. Westgate – Not Newport – Told The Court That It "Absolutely Can" Exclude Pre-Judgment Interest From the Final Judgment.

The selective excerpt of the June 08, 2007 Hearing offered by Westgate excludes a critical discussion in which Westgate – not Newport – told the Court that it "absolutely can" exclude pre-judgment interest from the Final Judgment. Initially, counsel for Newport had expressed that he was "only arguing entitlement at this point" with respect to the *appealability* of the Final Judgment itself and whether the Final Judgment was also required to have the requisite *dates of loss*. In fact, counsel for Newport, while admittedly unaware of the *McGurn* holding,

initially expressed doubt as to whether or not the amount had to be also calculated.

Here is the excerpt:

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[MR. ZEMEL]: Judge, the fact that Westgate came up with damage calculations where they, on their own, unilaterally decided that they would go month by month, I have problems with the way it's calculated to begin with, ***but I'm only arguing entitlement at this point***. Because in order for the judgment to be really appealable, I think that entitlement has to be determined. ***Amount, I don't believe needs to***.

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MR. ZEMEL: Read the cases. It [dates of loss] needed to be in the final judgment. It's not there. And they didn't ask you to put it in there. And they didn't file a motion for any post-trial motion asking you to fix the date of loss.

THE COURT: ***Well, we have to hear this at a separate time***.[6] I find it hard to believe that if I've got record evidence of what the day-by-day loss was, it's been submitted into the record, and I just wanted to come up with a damage amount, and I found entitlement or I said that they are eligible to get it, ***but held off the hearing to a later date***, that I can't then go and establish this at a later time.

MR. ZEMEL: First of all, Judge --

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THE COURT: Maybe I can't --

MR. FRANKEL: ***You absolutely can***.

[Petitioner's Appendix, Tab C, at p. 105].

[6] Westgate's assertions that the undersigned Counsel induced the Court to defer ruling on the issue is entirely inaccurate. See further below.

Simply stated, Counsel for Newport was addressing appealability and whether there was evidence in the record to support dates of loss by which to calculate pre-judgment interest given the annual "true-ups" or accountings the parties made as opposed to Westgate's position that pre-judgment interest should be calculated either daily or monthly. The point is that where Counsel for Newport initially expressed doubt as to whether ***the amount*** was required to be calculated and included in the Final Judgment for purposes of appealability [Petitioner's Appendix, Tab C, at p. 102-103], Counsel for Westgate emphatically stated to Judge Cohen, who herself was questioning the same point, that "absolutely you can" [Petitoner's Appendix, Tab C, at p. 105] find entitlement to prejudgment interest but hold off the hearing to determine the amount of prejudgment interest to a later date, and enter the amount by way of a "separate order," as Westgate's form of final judgment sought.

C. Newport Did Not "Persuade" the Trial Court To Defer Ruling.

Westgate's assertions on Page 2 of its Initial Brief (and indeed throughout the entirety of the Initial Brief) that at the June 8, 2007, hearing on Westgate's Motion to Assess Prejudgment Interest "Newport's counsel persuaded the Lower Court to defer ruling on Westgate's Motion to Assess," and that Westgate <u>insisted</u> at the hearing that the Lower Court issue the order promised by the Final Judgment calculating the prejudgment interest [IB at page 3] is entirely belied and

contradicted by the record. In addition to the excerpt immediately above in which the Court, on its own, seeks to defer the calculation to a later date with Westgate responding "absolutely you can," what follows is what really happened:

> WESTGATE'S COUNSEL: Your Honor, on the prejudgment interest question, we had filed the motion, it was set for today.
>
> THE COURT: I can't do this today.
>
> WESTGATE'S COUNSEL: I understand that.
>
> THE COURT: I can't. And I can't do it next week.
>
> WESTGATE'S COUNSEL: It was contemplated by the judgment. ***I'm not pushing to have it next week.***
>
> THE COURT: It's not going to go away.
>
> WESTGATE'S COUNSEL: I understand. That would be a ***separate order***, and it could be bonded.

[Petitioner's Appendix, Tab "C" at p. 112]. Westgate never objected to the Lower Court's election to defer the Motion to Assess Prejudgment Interest because of the Lower Court's vacation schedule, and certainly did not "insist" it be done at the hearing. The only "insistence" by Westgate was that the amount of prejudgment interest be by way of a "separate order."

It should also not go un-noticed that irrespective of why the purported Rule 1.530 Motion was "deferred", the *deferral* was not in any way, shape, or form the reason why Westgate waived its pre-judgment interest. Assuming *arguendo* that Westgate filed a proper Rule 1.530 Motion (which both the Trial Court and the Third District found Westgate did not do), Westgate's right to alter or amend the

Final Judgment would have been preserved pending the hearing and the resolution of its Motion. We say "*would* have been preserved" because Westgate made the choice to abandon its Motion before Judge Cohen could even get back from her vacation by filing its Notice of Appeal. In other words, Westgate decided that it was far more desirable for it to be the Appellant than the Appellee and raced to the Courthouse to file its Notice of Appeal before Newport could. [*Compare*, Westgate's Notice of Appeal, R3-527-528, to Newport's Notice of Appeal, R3-529-530].

D. Westgate Acknowledged That It Knew It Needed To Correct The Final Judgment But Failed to File a Rule 1.530 Motion.

Before addressing Westgate's intentional abandonment of its purported Rule 1.530 Motion, we pause for a moment to address two related issues. Counsel for Westgate represented to Judge Cohen that he knew that the Final Judgment failed to preserve pre-judgment interest and that it should be fixed at that time, implying Counsel's awareness of *McGurn* and its progeny. At the July 31, 2008, hearing when *McGurn* was being discussed, here is what happened:

> THE COURT: Well, hold on. Because I'm thinking that it's part and parcel – it's like an attorneys' fees thing. Now, I'm finding out that, no, the way it's calculated – the amount, et cetera under the law, they're considered an element of the damage itself. So it changes the landscape a bit.
>
> MR. FRANKEL: Your Honor, that's why I filed my motion within the ten days. It had to be done.

[Petitioner's Appendix, Tab "K" at p. 18].

The second point relates to whether Westgate filed a proper Rule 1.530 Motion as Westgate seems to repeatedly imply throughout its Initial Brief. Obviously Westgate did not file any motion seeking to correct the Final Judgment. To the contrary, neither Westgate's Motion to Assess Pre-Judgment Interest [Petitioner's Appendix, Tab "B"] or its Revised Motion to Assess Pre-Judgment Interest filed by Westgate [Petitioner's Appendix, Tab "F"] sought to have pre-judgment interest calculated in the Final Judgment. Instead, the Motion to Assess Pre-Judgment Interest demanded a "separate order" and the Revised Motion to Assess Pre-Judgment Interest was mysteriously and inexplicably silent on the issue. The point was not lost on Judge Cohen who did not lay blame solely on Newport's counsel and admonished many times Westgate's own counsel:

> THE COURT: Presumably if you [Westgate] would have filed a 1.530(b), look, Judge, you have not issued a final order, I'm in a conundrum and we want to get this appealed, so you absolutely must calculate this prejudgment interest in this order and I would have said no, no, I can reserve on it and do it later. Well, I wouldn't have said that if I read the case law.
>
> MR. FRANKEL: Then I would have lost my appeal rights. I could have endangered my ***appeal rights under the McGurn case***.[7]
>
> THE COURT: No, no, no, you take – when a judge does not --- when a judge ignores the essential requirements of the law, you take that judge on a writ immediately and force the judgment to act

[7] Again, Counsel for Westgate seems to imply that he knew what the law was and made calculated decisions based upon *McGurn* and progeny.

> commensurate with the law or you go to the appellate court and say, look, I had to appeal this case because the judge had final language in it, but I'm aware of McGurn and its progeny and the judge refused to calculate prejudgment interest, ***I want you to relinquish jurisdiction*** so we can get it done.
>
> MR. ZEMEL: Or also appeal the denial of the 1.530(b) motion.
>
> THE COURT: Right, you see, there are different things you can do, but, you see, the problem is this, and I don't know what case law says about this, but you gave me – you did not educate me on the law. Now, you could say, look, I don't have to educate you, Judge, you are a judge, you are supposed to know what the law is, but obviously I didn't know what the law is. Mr. Zemel told me – gave me a scenario and, by the way, the fact that I didn't know what the law is, a lot of other courts didn't, either, because it spawned a lot of litigation. That's no excuse for me because, actually, McGurn was decided back in the early 90's, so I should know it, but it's never come up. It's just never come up.

[Petitioner's Appendix, Tab "T" at pp. 29-31].

E. **Westgate Chose To Abandon Its Purported Rule 1.530 Motion.**

Westgate fails to mention that it was Westgate – not Newport – that was the first party to serve a Notice of Appeal by rushing to the Appellate Court so it could be the Appellant. [*See,* R3-527-528, Westgate's Notice of Appeal, showing service date of June 15, 2007]. Newport then filed its own Notice of Appeal. [*See,* R3-529-530, Newport's Notice of Appeal, showing service date of June 18, 2007]. This is significant because the filing of a notice of appeal by Newport would have had ***no effect*** on the pending Westgate 1.530 post-judgment motions filed. *Howell v. Jackson*, 810 So.2d 1081, 1082 (Fla. 4th DCA 2002). The only post-trial motion pending at the time Westgate filed its Notice of Appeal was Westgate's motion and

revised motion to assess prejudgment interest by way of a separate order. Only Westgate could abandon Westgate's own post-judgment motion by filing its own – and first – Notice of Appeal.

F. Westgate Could Have, But Failed To, Seek Relinquishment Of The Appellate Court's Jurisdiction.

At the same time counsel for Westgate was insisting he knew the final judgment needed to include prejudgment interest ("that's why I filed my motion within 10 days. It had to be done."), counsel for Westgate actually argued with the Trial Court that he did not have to seek relinquishment from the appellate court to correct this error:

> THE COURT: You should have gone up to the appellate court and said, relinquish jurisdiction.
>
> MR. FRANKEL: I don't have to do that, Your Honor.
>
> THE COURT: Yes, you do.
>
> MR. FRANKEL: No, I don't have to do that. Your Honor –
>
> THE COURT: Mr. Frankel, you have to go up to the appellate court and say, "relinquish jurisdiction."

[Petitioner's Appendix, Tab K at p. 19].

ARGUMENT

Throughout its Initial Brief, Westgate attempts to expand this Court's review beyond the certified questions and engage this Court in a *de novo* review of the underlying case. Westgate, for example, attempts to reargue that it did, in fact, file

a Rule 1.530 Motion for Rehearing, even though the Third District Court of Appeal, like the Trial Court, "refuse[d] to construe the plaintiff's motion to assess prejudgment interest as a rule 1.530(b) motion for rehearing." *Westgate Miami Beach, Ltd. v. Newport Operating Corp.*, 16 So.3d 855, 858 (Fla. 3d DCA 2009). Westgate also repeatedly reargues that Newport unilaterally led the Trial Court into error, even though the Third District Court of Appeal found that "a complete review of the record" reveals Newport did not. *Id.* This Court has exercised its discretionary jurisdiction, pursuant to article V, section 3 (b) (4) of the Florida Constitution, to consider three questions certified by the Third District Court of Appeal as being of great public importance. While this Court certainly can expand its jurisdiction after deciding the certified questions and then consider issues other than those upon which jurisdiction is based, this Court should do so only where these additional issues have been properly briefed and argued and, more importantly, *are dispositive of the case*. *See Warner v. City of Boca Raton,* 884 So.2d 1023, 1035 (Fla. 2004); *Savona v. Prudential Ins. Co. of America*, 648 So.2d 705, 707 (Fla. 1995). It is respectfully suggested that the issues of whether Westgate's post-trial motion was a Rule 1.530 motion, and whether one party invited error, are issues not dispositive of the case. Westgate's post-trial motion to assess prejudgment interest, even if it were to be construed on a *de novo* review to be a Rule 1.530 (b) motion, would not be dispositive of the case because that

motion was abandoned by Westgate when Westgate filed the first Notice of Appeal in the underlying action thereby divesting the Trial Court of subject matter jurisdiction. In other words, Westgate abandoned its purported Rule 1.530 motion and thereby waived its prejudgment interest. Likewise, the invited error doctrine cannot be used to confer subject matter jurisdiction, so even if a *de novo* review revealed that this case involved the doctrine of invited error that doctrine would not alter the result here. The Trial Court was divested of subject matter jurisdiction and could not amend the final judgment once Westgate filed its Notice of Appeal, and the doctrine of invited error does not cure that problem. Ultimately, this Court will decide, upon answering the certified questions, whether to review these other issues *de novo.* The Respondent will address the certified questions in the order they were presented by the Third District Court of Appeal.

I. <u>First Certified Question</u>.

The Third District Court of Appeal has certified three questions to this Court. The first question reads:

> "Where there has been an agreement on, or no objection to, a reservation of jurisdiction to award prejudgment interest, should the reservation be upheld in order to prevent an injustice notwithstanding the rule in *McGurn v. Scott*, 596 So.2d 1042 (Fla. 1992)?"

This certified question posits whether a "well-settled" rule of law[8] that has existed for eighteen years should be disregarded in instances where its application would create "an injustice." The "injustice" sought to be prevented, and referred to in the certified question, is the inadvertent waiver of prejudgment interest that can occur, and has occurred in a few cases since *McGurn*, where a party does not adhere to the "clear-cut rule." The clear-cut rule established by *McGurn* and its progeny is that the amount of a final judgment must be plain on its face and not require further calculations to be performed prior to execution of the judgment. When an order for final judgment leaves the determination of prejudgment interest for future adjudication, a party should move for rehearing under Rule 1.530 to correct the error in order to secure a prejudgment interest award. After moving for rehearing, that party must not abandon its own motion for rehearing by filing a notice of appeal while the motion for rehearing is still pending.

To be sure, bright-line rules always create an "injustice" to the party that fails to adhere to the rule, and *McGurn* is no exception. The injustice sought to be avoided by a modification of *McGurn* is the "inadvertent waiver of prejudgment interest" that has occurred to a handful of litigants in post-*McGurn* cases: *Avatar Dev. Corp. v. DeAngelis*, 944 So.2d 1107 (Fla. 4th DCA 2006); *Home Ins. Co. v.*

[8] In its majority opinion, the Third District refers to the *McGurn* decision, and the cases that flow from *McGurn*, as "the well-settled rule" and "the clear-cut rule set forth in Florida's case law." *Westgate Miami Beach, Ltd. V. Newport Operating Corp.*, 16 So.3d 855, 859 (Fla. 3d DCA 2009).

Crawford & Co., 890 So.2d 1186 (Fla. 4th DCA 2005); and *Emerald Coast Communications v. Carter*, 780 So.2d 968 (Fla. 1st DCA 2001), to name a few. A bright-line rule, however, is *meant* to apply in *all* cases, without exception, or else it is not a "bright-line" rule.

Westgate, in its Initial Brief, attempts to broaden the certified question, as framed, and imply that the "injustice" sought to be prevented in the certified question is something more than the inadvertent waiver of prejudgment interest. In its section dealing with this first certified question [IB at pages 26 – 30], Westgate argues that it was the victim of "the classic 'gotcha' scenario;" that enforcing the *McGurn* rule under the facts of this case "condones express trickery by opposing counsel to the prevailing party's detriment[9];" and that "there must be an exception crafted from the *McGurn* rule to fit the facts of the instant case." [IB at pages 28 and 29]. By attempting to twist the "injustice" referred to in the certified question from inadvertent waiver into "express trickery" or deliberate deceit, Westgate is arguing contrary to the findings of the Third District Court of Appeal, inviting this Court to answer a question not presented by the facts of this case, and essentially engaging this Court in a *de novo* review rather than a review limited to the question

[9] Yet, in its Reply Brief to the Third District Court of Appeal, Westgate acknowledged that Newport's Counsel's representations to the Court on this issue were innocently done: "Westgate accepts Newport's counsel's protestations that his misguided assurances to the Lower Court were not purposeful." [Westgate's Reply Brief at p. 5, fn.8, R3-540].

certified. In its majority opinion, the Third District found that "counsel for Newport did not unilaterally lead the trial court to error;" declined to hold that "the improper provision in the trial court's judgment was invited solely by counsel for Newport;" and that the trial court and the lawyers mistakenly (and "innocently") believed that the amount of prejudgment interest could be determined in post-appeal proceedings. *Westgate v. Newport*, 16 So.3d at 858, 859, and 861 fn. 2. To suggest that a "fraud" or "deceit" exception should be carved out of the *McGurn* rule raises an issue not presented by the facts of this case, and is not representative of the issue framed by the certified question.

The certified question fairly asks, ***where there has been an agreement on, or no objection to***, a trial court's reservation of jurisdiction to award prejudgment interest, should *McGurn* still apply? As pointed out by the majority, the issue raised is one of "subject matter jurisdiction:"

> "Once the plaintiff took an appeal from the final order (along with its improper prejudgment interest provision) without challenging the provision by way of a rule 1.530(b) motion for rehearing, exclusive jurisdiction over the subject matter of the final order, excluding attorneys' fees and costs, was vested with this Court."

Westgate v. Newport, 16 So.3d at 858. It has long been the law in Florida that subject matter jurisdiction cannot be conferred by agreement of the parties and the Court, by the doctrine of judicial estoppel, or even by the invited error doctrine. Florida courts have consistently held that "subject mater jurisdiction cannot be

created by waiver, acquiescence or agreement of the parties, ***or by error or inadvertence of the parties or their counsel***, or by the exercise of power by the court; **it is a power that arises solely by virtue of law**." *84 Lumber Company v. Cooper*, 656 So.2d 1297, 1298 (Fla. 2d DCA 1994) (*quoting Florida Exp. Tobacco Co. v. Dept. of Revenue*, 510 So.2d 936, 943 (Fla. 1st DCA 1987), *review denied sub. Nom. Lewis v. Fla. Exp. Tobacco Co.*, 519 So.2d 987 (Fla. 1987)) (bold emphasis added). Therefore, to grant the change in the law requested by Westgate, this Court would have to entirely vacate these cases. Further, the principle of invited error does not overcome lack of jurisdiction, and neither does the doctrine of judicial estoppel. *Younger v. City of Palm Bay*, 697 So.2d 589 (Fla. 5th DCA 1997) (concurring opinion stating that subject matter jurisdiction cannot be conferred through the doctrine of invited error); *FCCI Mut. Ins. V. Cayce's Excavation*, 675 So.2d 1028 (Fla. 1st DCA 1996) (it is well-settled that subject matter jurisdiction cannot be conferred by estoppel). Because the appellate court's jurisdiction is exclusive with respect to the subject matter of an appeal, **once the appeal is taken the trial court will lack the jurisdiction to take any further action in the matter**. *Emerald Coast Communications, Inc. v. Carter*, 780 So.2d 968, 970 (Fla. 1st DCA 2001) (bold emphasis added). This Court previously addressed this very issue in *McGurn*:

> "Whether the parties stipulated to the reservation of jurisdiction is irrelevant to our decision. An agreement by both parties to reserve jurisdiction does not make the order final."

McGurn, 596 So.2d at fn. 1 (citing *Ralston Purina v. Tancak*, 508 So.2d 549 (Fla. 1st DCA 1987).

The purported "harshness" of the bright-line rule of *McGurn* is, as the majority points out in its opinion, "softened, to some extent, by Florida Rule of Civil Procedure 1.530(b), and Florida Rule of Appellate Procedure 9.600(b)."[10] The fact that Westgate "did not avail itself of either of these two options"[11] does not call out for a modification of *McGurn* solely to benefit Westgate. Westgate waived its prejudgment interest because: (a) Westgate created the error in the first place by drafting the final judgment with the unusual provision that prejudgment interest would be entered by "separate order" and then advising the Trial Court "you absolutely can" establish the amount of prejudgment interest at a hearing held at a later date; (b) Westgate kept insisting that prejudgment interest be assessed by way of a "separate order;" (c) Westgate did not file a Rule 1.530 motion; (d) Westgate did file the first Notice of Appeal while its own post-trial motion was still pending thereby abandoning its own post-trial motion and divesting the Trial Court of subject matter jurisdiction; and (e) Westgate did not seek relinquishment of jurisdiction from the appellate court to determine prejudgment interest, claiming

[10] 16 So.3d at 857.
[11] 16 So.3d at 857.

"it didn't have to," but instead waited until a Mandate had issued from the Appellate Court. Westgate now seeks to have this Court carve out an exception to the *McGurn* rule for its "inadvertent" waiver of prejudgment interest despite the fact that well-established rules and century-old case law on subject matter jurisdiction will need to be tossed in the process. Bright-line rules usually do impose a harsh result upon the side that runs afoul of them, but few provide so many escape hatches as the *McGurn* rule does. Statutes of Limitation are one example of a bright-line rule that imposes a harsh result on the litigant that misses it. Here, Westgate seeks a carve-out from a bright-line rule that has been applied uniformly by the District Courts of Appeal for the last eighteen years, or alternatively, seeks to reverse century-old law to now have prejudgment interest be declared ancillary to a final judgment and not a substantive part of it. And, Westgate seeks this special exemption from the Florida Supreme Court even where Westgate has already ***released*** its current claim for prejudgment interest by way of executing a broad general release that Westgate entered into with Newport (and other parties) post-appeal. [*See*, Respondent's Suggestion of Mootness, filed contemporaneous with this Answer Brief]. For all of these reasons, this Court should answer the first certified question in the negative.

II. **Second Certified Question**.

The second question certified by the Third District Court of Appeal reads as follows:

> "Where a judgment contains a reservation of jurisdiction to award prejudgment interest[12], should the appeal of such a judgment be treated as a premature appeal under Florida Rule of Appellate Procedure 9.100(l), or must the appeal be treated as accomplishing a waiver of prejudgment interest pursuant to *McGurn v. Scott*, 596 So.2d 1042 (Fla. 1992)?"

As framed, this question presumes an "either/or" scenario that does not currently exist. The question presupposes that where a judgment improperly reserves jurisdiction to award prejudgment interest, the appeal must either (a) be dismissed as premature; or (b) accomplish a waiver of prejudgment interest. In fact, there is a third option, an "escape hatch": the appellate court can exercise its discretion to relinquish jurisdiction back to the trial court to calculate the prejudgment interest and include it in the final judgment before resuming jurisdiction and proceeding with the appeal. The question, as posed, fails to provide for the safety net already in existence. The question, as framed, is also not entirely representative of the issue presented by the facts of this case. Missing from the certified question is the additional fact that here the affected party

[12] The premise of this question is that courts will ignore *McGurn* and write final judgments that reserve jurisdiction to award prejudgment interest. The Florida Supreme Court wrote *McGurn* precisely to inform the judiciary that final judgments should not be reserving jurisdiction to award prejudgment interest.

(Westgate) was the party that initiated the appeal in the first place, by being first to file a Notice of Appeal. The "inadvertent" waiver of prejudgment interest by Westgate was not created by the fact that an appeal was taken, but by the fact that Westgate initiated the appeal while its "purported" rule 1.530 motion was still pending.[13] A party who files a notice of appeal is deemed to have abandoned his own pending post-trial motions.[14] A notice of appeal that is filed by another party has no such effect on any pending post-trial motions that were filed by the other party or parties. *Howell v. Jackson*, 810 So.2d 1081, 1082 (Fla. 4th DCA 2002). Only Westgate could abandon Westgate's own post-judgment motion by filing its own – and first – Notice of Appeal on June 15, 2007.

In any event, Westgate did not bring a Rule 1.530(b) motion. This Court rejected the practice of dismissing an appeal of a judgment that improperly reserves the issue of prejudgment interest for further adjudication in *McGurn*:

> "We agree with the district court in the instant case that the trial court's order was not final and that it was improper for the trial court to render an order in the form of a final judgment while simultaneously reserving the issue of prejudgment interest for further adjudication. *We do not, however, agree that the appeal was premature and should have been dismissed*."

[13] The appellate court, like the trial court, refused to construe Westgate's motion to assess prejudgment interest as a rule 1.530(b) motion for rehearing.

[14] See, *In re: Forfeiture of $104,591*, 589 So.2d 283,284 (Fla. 1991), in which this Court wrote "We emphasize that the rule that a party abandons a post-trial judgment motion by filing a notice of appeal is the proper rule, and we hold that the abandonment doctrine still applies in this state."

McGurn, at 1044. This Court reasoned that a final order "upon which execution could have issued" placed the judgment debtor in a procedural quandary. If the judgment were not considered final, but merely interlocutory, the judgment debtor would be unable to exercise his right to both an immediate appeal and a supersedeas to stay the enforcement of the judgment. Yet, the judgment creditor would have an immediate right to execute against the judgment debtor's property. The judgment (and the amended judgment) at issue in this instant case likewise contained the words of finality "for which let execution issue." [Petitioner's Appendix, Tab "A," at p. 46, par. 3; Petitioner's Appendix, Tab "E," at p. 2]. Were Westgate's appeal dismissed as "premature," Westgate would have had the immediate right to execute against Newport's property, while Newport could not exercise its right to both an immediate appeal and to seek a supersedeas to stay enforcement of the judgment. The solution to this procedural quandary, as established in *McGurn*, was to deem the judgment final, not to dismiss the appeal as "premature," and to allow the safeguards provided by Rule 1.530(b), Fla.R.Civ.P., and 9.600(b), Fla.R.App.P., to cure any mishaps.

III. Third Certified Question.

The third question certified by the Third District as one of great public importance reads:

> "Whether a trial court should be allowed to reserve jurisdiction to award prejudgment interest post-appeal as it can with attorneys' fees and costs?"

The issue raised by this question is whether this Court should reverse century-old Florida law that prejudgment interest is a substantive part of the judgment, "an element of damages as a matter of law," and not merely ancillary to the subject matter of the cause like costs and attorneys' fees:

> "Thus, since at least before the turn of the century, Florida has adopted the position that prejudgment interest is merely another element of pecuniary damages."

Argonaut Ins. Co. v. May Plumbing Co., 474 So.2d 212, 214 (Fla. 1985). The determination of prejudgment interest is directly related to the cause at issue and is not incidental to the main adjudication. *McGurn v. Scott*, 596 So.2d 1042, 1044 (Fla. 1992). A trial court's reservation of jurisdiction to award costs or attorneys' fees does not affect the finality of an underlying judgment for purposes of appeal; reserving jurisdiction to determine an element of damages, such as prejudgment interest, does.

The trial court's task of assessing prejudgment interest is not always "ministerial." The trial court must fix a date, or dates, of loss from which prejudgment interest begins to accrue which can be exceedingly complex in some cases such as this. *Argonaut*, at 215. At the first hearing on Westgate's motion to assess prejudgment interest, on July 31, 2008, and after the final judgment was

affirmed and the Mandate had issued, Westgate argued to the Trial Court that the calculation of its prejudgment interest was simply "a ministerial act," to which the Trial Court vehemently disagreed. The Trial Court noted that because Westgate completely failed to fix a date (or dates) of loss in its form of final judgment, that additional complex and substantial proceedings would be required because Newport contests the version of "dates of loss" used by Westgate in its interest calculation – which would necessarily entail additional appellate proceedings. [Petitioner's Appendix, Tab "T" at p.58-59].

> THE COURT: Okay, but if you can't agree on [the method of calculating prejudgment interest], which I didn't – I guess I vaguely remember it was a big dispute, but if you can't agree on it, and there has to be testimony about how to calculate it based on industry standards, whatever, I don't know, I can't answer the question sitting here right now.
>
> MR. FRANKEL: There's no industry standard, there's a report, Your Honor, most respectfully.
>
> THE COURT: There must be some industry standards.
>
> MR. FRANKEL: No, no, there's a report that Mr. Crabtree – was received in evidence, relied upon by the Court, that shows you day by day how much money got collected, which comprises the $5 million compensatory damages award.
>
> THE COURT: Sitting here right now, I can't remember.
>
> MR. FRANKEL: We are making a mountain out of a molehill; it's easy.
>
> THE COURT: We may be, but if he's going to take a position that there are different ways to calculate and if I have to go back and look at all of the evidence to see how it should be calculated, which I don't

> know on which basis I'm going to determine that sitting here right now. I can't remember all the facts of the case. If I have to do that, then it's not efficient for me to do that before the court rules. It's only efficient for me to do it if we agree on a number because then I can send them a number and they can say enforce it, but if I have to do a complete hearing, I'd rather just wait for them.
>
> MR. FRANKEL: Well, he's never going to agree to it, so what are talking about, let's not kid each other.
>
> THE COURT: So then this is going to go on forever.

[Petitioner's Appendix, Tab "T" at p. 58-59]. The method of calculating prejudgment interest, and the dates of loss from which to calculate it, were not established by the Trial Court, and therefore the amount of prejudgment interest was not a mere ministerial calculation.

If this Court were now to hold that prejudgment interest is not a substantive part of the judgment, like attorneys' fees and costs, how many appeals would potentially result from one judgment? The plenary appeal; the appeal from the prejudgment interest award; and the appeal from the attorneys' fees and costs award. Where, as here, the prejudgment interest amount may not be brought on for hearing until after the plenary appeal, and after issuance of a Mandate on the plenary appeal, there would be no chance of consolidating these appeals for one review. The Florida rules of civil procedure are set up to establish deadlines for filing motions to tax fees and costs, but the rules do not address any such time period to address the determination of prejudgment interest leaving that entirely open-ended were this Court to reverse long standing law that prejudgment interest

is an element of damages that must be included in the final judgment. There are certain to be unintended consequences in changing century-old law and now treating prejudgment interest as ancillary to the subject matter of the cause and incidental to a final judgment like attorneys' fees and costs. This Court should answer the third certified question in the negative.

IV. Westgate's Re-Argument That Newport Invited The Trial Court's Error, And That The Instant Set Of Facts Demand A Specific Exception To *McGurn*, Should Be Stricken.

In the majority opinion, the Honorable Judge Rothenberg noted that: "A complete review of the record reflects that counsel for Newport did not unilaterally lead the trial court to error. It appears that the lawyers and the trial court were all operating under the same misapprehension of the law. Thus, the invited error doctrine and judicial estoppel do not provide the relief the plaintiff now seeks." *Westgate*, at 858. By rearguing that Newport "invited the trial court's error," as Westgate does in its Initial Brief [IB at pages 24-26], Westgate is directly contradicting the Third District Court of Appeal and inducing this Court to conduct its own *de novo* review of these issues. As set forth above, the Supreme Court's authority to consider issues other than those upon which jurisdiction is based is discretionary and should be exercised only when these other issues have been properly briefed and argued and are dispositive of the case. *See, Warner v. City of Boca Raton*, 884 So.2d 1023, 1035 (Fla. 2004); *Savona v. Prudential Ins. Co. of*

America, 648 So.2d 705, 707 (Fla. 1995). Westgate's continued contradictions of both the Trial Court's and the majority's findings after a complete review of the record, by continuing to declare that Newport "invited the trial court's error," [IB at p. 24], or that Newport "blindsided" the Lower court [IB at p. 8]; or that Newport unilaterally convinced the judge to defer awarding prejudgment interest, [IB at p. 26], even if reviewed *de novo* by this Court, would not be dispositive of this case because of the fact that subject matter jurisdiction – here, prejudgment interest – cannot be conferred by the doctrine of invited error. As the majority recognized:

> "Furthermore, even if we were to conclude that this case involved the invited error doctrine or judicial estoppel, which we do not, it is equally clear that those doctrines may not now be used to confer jurisdiction over the subject matter – here, prejudgment interest. *See, e.g., FCCI Mut. Ins. Co. v. Cayce's Excavation, Inc.*, 675 So.2d 1028, 1029 (Fla. 1st DCA 1996); *Fla. Exp. Tobacco Co. v. Dep't of Revenue*, 510 So.2d 936, 943 (Fla. 1st DCA 1987).

Westgate Miami Beach, Ltd. v. Newport Operating Corp., 16 So.3d 855, 858 (Fla. 3d DCA 2009). A *de novo* review of the complete record to review the issue of whether or not Newport invited error would not be dispositive of the case and this Court should not expand its review beyond answering the questions certified. This is especially true where, as set forth in Respondent's Suggestion of Mootness, Westgate has already released all claims against Newport, including its claim for prejudgment interest.

CONCLUSION

The one certain foreseeable consequence of a reversal or modification of the bright-line rule established by *McGurn* and its progeny is the mass confusion and conflict it will create among Florida litigants and the courts. The rule of "stare decisis" is a rule which is designed to promote uniformity, certainty and stability in the courts of law. *Waller v. First Savings and Trust Company*, 138 So. 780 (Fla. 1931). Should the standard for including prejudgment interest in the final judgment suddenly become dependent upon the degree of "injustice" that might be visited upon one party by adherence to the *McGurn* rule, uncertainty and confusion will undoubtedly result. The current state of Florida law regarding prejudgment interest, as in the majority of other jurisdictions that have adopted the "loss theory" of prejudgment interest[15], is clear and unambiguous: prejudgment interest is an element of damages, it is not ancillary to the cause of action, and it must be included in the final judgment. The *McGurn* rule is not one of petrifying rigidity, as there are several safeguards already in place to protect a judgment creditor whose final judgment does not contain the amount of prejudgment interest: file a rule 1.530(b) motion for rehearing, and do not abandon the motion by thereafter filing a notice of appeal before the motion is ruled upon. If the judgment creditor

[15] *See, Argonaut Ins. Co. v. May Plumbing Co.*, 474 So.2d 212, 214-215, fn. 2 (Fla. 1985) (the alternative to the "loss theory" of prejudgment interest is the "penalty theory" which few jurisdictions still adhere to and which is linked to the medieval disapproval of all interest as a form of usury).

initiates an appeal before his or her motion for rehearing is ruled upon, then the judgment creditor should request relinquishment of subject matter jurisdiction from the appellate court to permit the trial court to assess the prejudgment interest and include it in the final judgment.

Suddenly reversing nearly twenty years of post-*McGurn* law will most certainly create unintended consequences. Having considered the effects only in the context of this appeal, we can point to some, but certainly not all, of these unintended consequences to a modification of the current bright-line rule of *McGurn*. A final judgment "for which let execution issue" that nevertheless reserves jurisdiction to award prejudgment interest at some later date: (1) may or may not be immediately appealable; (2) may or may not be stayed by supersedeas bond; (3) may or may not be subject to a second (or third) appeal after a Mandate has already issued in the plenary appeal (and appeal of the fees/costs award); and (4) may or may not actually be a final judgment. If, after one hundred years of established law in Florida, prejudgment interest is suddenly deemed "ancillary" to the subject matter of the cause, and not an element of damages, then prejudgment interest could be applied for at any time, even years after entry of the final judgment, as there currently exists no rule of civil procedure in Florida to limit the time for filing a motion to seek assessment of prejudgment interest, as currently exists for attorneys' fees and costs.

This Court has long recognized that the doctrine of stare decisis "counsels us to follow our precedents unless there has been a significant change in the circumstances after the adoption of the legal rule, or … an error in legal analysis." *Rotemi Realty, Inc. v. Act Realty Co., Inc.*, 911 So.2d 1181, 1188 (Fla. 2005) (quoting *Dorsey v. State*, 868 So.2d 1192, 1199 (Fla. 2003)). The Petitioner, Westgate, points to no changed circumstances in the eighteen years since *McGurn*, and no analytical error in the century-old view that prejudgment interest is an element of damages as a matter of law. Westgate proposes no grounds for receding from *McGurn* and its progeny, other than to obtain some kind of a moral victory. Westgate has already released all pending and known claims against Newport in a broad general release that Westgate executed post-appeal. Westgate's Counsel's own insistence to the Trial Court that "absolutely you can" exclude prejudgment interest from the final judgment, and that he did not have to request relinquishment from the appellate court after initiating the appeal, do not point to an analytical error in this Court's thinking in the *McGurn* decision, but only an error in Westgate's Counsel's thinking. *McGurn* should be neither be reversed or modified.

Respectfully submitted this 15th day of March, 2010.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was sent via Federal Express to: Robert P. Frankel, Esquire, ROBERT P. FRANKEL & ASSOCIATES, P.A., City National Bank Building, Suite 900, 25 West Flagler Street, Miami, Florida 33130, this 15th day of March, 2010.

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CERTIFICATE OF COMPLIANCE

WE HEREBY CERTIFY that this brief was prepared in Times New Roman, 14-point font, in compliance with Rule 9.210(A)(2) of the Florida Rules of Appellate Procedure.

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