IN THE SUPREME COURT FOR
THE STATE OF FLORIDA

CASE NO.: SC09-1881
LOWER TRIBUNAL NO.: 3D09-264, 03-12769 CA 01 (06)

WESTGATE MIAMI BEACH, LTD., a
Florida Limited Partnership

Appellant,

vs.

NEWPORT OPERATING CORP., a
Florida corporation

Appellee.

APPELLANT'S INITIAL BRIEF

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PREFACE

This brief results from an Order entered by the Third District Court of Appeal certifying questions of great public importance to the Florida Supreme Court. The Appellant and Plaintiff in the trial court proceedings is Westgate Miami Beach, Ltd. ("Westgate"), and the Appellee and a Defendant below is Newport Operating Corp. ("Newport").

The following symbols will be used:

A. Appendix

e.s. Emphasis Supplied

For the convenience of this Court, the page numbers of the Appendix will be the page numbers of the various documents tabbed in the Appendix. Hence, there will be multiple page "1s" and the documents will be differentiated by alphabetical tabs. For example, a citation may read Appendix, Tab "A," p.1. A separate citation may state Appendix, Tab "B," p.1.

STATEMENT OF THE CASE AND FACTS

This brief arises from the appeal of post-judgment proceedings in a lawsuit brought originally by Westgate against Newport and two (2) affiliated companies, Five Seas Investors, Inc. and Atlantic Resort Development, Ltd. On May 18, 2007, Judge Jeri Beth Cohen of the Eleventh Judicial Circuit in and for Miami-Dade County, Florida (the "Lower Court") entered its Final Judgment awarding damages to Westgate and against Newport in the amount of $7,744,169.00 which was subsequently reduced to $5,000,867.00. Pertinent to the present post-judgment proceedings and to this appeal is a provision located on page 46 of the Final Judgment, in which the Lower Court determined that Westgate was entitled to prejudgment interest on the damages the Lower Court awarded to it and ruled that "[a] separate order will be entered awarding prejudgment interest."[1]

Within ten (10) days of the Final Judgment,[2] on May 29, 2007, Westgate filed a post-trial motion, as contemplated by Fla.R.Civ.P. 1.530, requesting that the Lower Court calculate the amount of prejudgment interest the Lower Court had

1. The Final Judgment, as originally entered by the Lower Court, is found at Appendix, Tab "A."

2. Westgate's Motion to Assess (defined below) appears to be contemplated by Fla.R.Civ.P. 1.530, and was, accordingly, served in accordance with its time constraints. *See Emerald Coast Communications, Inc. v. Carter*, 780 So. 2d 968 (Fla. 1st DCA 2001).

already determined was due Westgate.[3] Newport also pursued post-trial motions which, among other things, challenged Westgate's entitlement to prejudgment interest. On June 8, 2007, Westgate's Motion to Assess was called for hearing, as were Newport's post-trial motions.[4] At the June 8, 2007 hearing, the Lower Court rejected Newport's challenge to Westgate's entitlement to prejudgment interest and reaffirmed its initial determination, in the Final Judgment, that Westgate was entitled to prejudgment interest.

During the June 8, 2007 hearing, Newport's counsel persuaded the Lower Court to defer ruling on Westgate's Motion to Assess. Specifically, Newport's counsel stated:

> [T]he Court has already found that it is intending in its language to give entitlement to Westgate. That's all that's necessary to make an appealable judgment assuming you're going to stand by the amount of calculating, that doesn't affect the appeal. That's the number. That is what it is once we agree on how to calculate it . . . . Now that you've clarified that you've made a finding that the language is to be construed as an entitlement in their favor it now becomes final . . . . **It's a ministerial calculation.** I have been very clear about that . . . . You've already ruled in their favor on entitlement to prejudgment interest.[5]

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3. *See* Motion to Assess Prejudgment Interest Pursuant to Final Judgment ("Motion to Assess"), Appendix, Tab "B." The prejudgment interest calculations were already received into evidence during the trial.

4. A transcript of the proceedings is found at Appendix, Tab "C."

5. June 8, 2007 hearing, pp. 130, 134, 136, Appendix, Tab "C" (e.s.).

To this Judge Cohen agreed: "[a]nd at this point we'll just agree on what the calculation will be."[6] Indeed, Newport's counsel encouraged the Lower Court not to rule on Westgate's Motion to Assess:

> THE COURT: Can it go up to the appellate court prior to litigating how to calculate it?
> MR. ZEMEL (Newport's Counsel): **It can go up—the amount can be calculated later as long as entitlement has been determined.**
> THE COURT: Then that can go up prior to me—
> MR. ZEMEL: Yes. That's why I'm saying, if you've determined entitlement, if you'll give us an order on this motion that we can appeal prior to June 17th, that will be a final appealable judgment and order that we can take up. The amount could be done when you come back. Because that amount is going to run no matter what.[7]
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> * * *
>
> THE COURT: So I can just find entitlement, but defer on—
> MR. ZEMEL: you're thinking about post-judgment interest, which is what we're—is the purpose of the bond. The prejudgment is what it is. Okay?[8]

In fact, the Lower Court, persuaded by Newport's counsel, Mr. Zemel, never did rule and issue the "separate order" on Westgate's Motion to Assess. Despite Westgate's insistence that the Lower Court issue the order promised by the Final Judgment calculating the prejudgment interest, the Lower Court stated that she did not have the time to do so as she was going to be out for the next month:

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6. June 8, 2007 hearing, p. 136, Appendix, Tab "C."
7. June 8, 2007 hearing, p. 131, Appendix, Tab "C" (e.s.).
8. June 8, 2007 hearing, p. 133, Appendix, Tab "C."

> MR. FRANKEL (Westgate's Counsel): Your Honor, may I ask this: When are you taking off for a month? When is that going to happen? When are you leaving?
> THE COURT: I am leaving next week. I will be gone until July 16th. I'm going away for a month. Then I'm returning, but I have another thing that I have to do that's going to take me most of August. I'm getting a senior judge to cover for me.[9]
>
> * * *
>
> MR. FRANKEL (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.
> MR. FRANKEL: I understand that.
> THE COURT: I can't. And I can't do it next week.
> MR. FRANKEL: It was contemplated by the judgment. I'm not pushing to have it next week.
> THE COURT: It's not going to go away.[10]

Thereafter, on June 11, 2007, the Lower Court, by written order, denied Newport's post-trial motions, while amending the Final Judgment as to the amount of compensatory damages only. The Lower Court further amended the damages amount on June 13, 2007.[11]

On June 18, 2007, within the ten (10) day period contemplated by Fla.R.Civ.P. 1.530, Westgate served its Revised Motion to Assess Prejudgment

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9. June 8, 2007 hearing, p. 133, Appendix, Tab "C."

10. June 8, 2007 hearing, p. 135, Appendix, Tab "C."

11. Copies of the orders of June 11 and June 13, 2007 are found at Appendix, Tabs "D" & "E," respectively.

Interest ("Revised Motion to Assess"),[12] which was not heard by the Lower Court before the parties perfected their respective appeals.

Once Newport's post-trial motions were denied, the Final Judgment, as twice amended, became subject to execution and levy. Newport did not, however, seek an automatic stay of the enforcement of the judgment per Fla.R.App.P. 9.310(b) or apply to the Lower Court for a supersedeas of the Final Judgment. On September 6, 2007, as a private, extra-judicial alternative to Fla.R.App.P. 9.310, or a court approved supersedeas, the parties, without judicial intervention, agreed, via a letter agreement (the "Letter Agreement"), that, in consideration of Westgate's agreement to defer collection of the Final Judgment, Newport would obtain a letter of credit issued in favor of Westgate (the "Letter of Credit"). The Letter Agreement did not require judicial sanction or approval, and was not, in fact, filed with the Lower Court or otherwise judicially approved or made part of any court order. The Letter Agreement contained a provision by which Westgate reserved its right to pursue the prejudgment interest the Lower Court awarded it and Newport reserved its right to challenge Westgate's entitlement to prejudgment interest.[13] Yet, despite Newport's reservation and although Newport argued vigorously in its post-trial motions that Westgate was not entitled to prejudgment interest, Newport failed to raise the issue of Westgate's entitlement to prejudgment interest on appeal

12. Revised Motion to Assess, Appendix, Tab "F."
13. *See* Letter Agreement, p.1, Appendix, Tab "G."

even though it appealed the Final Judgment which included the reservation for prejudgment interest.

The Third District Court of Appeal (the "Appellate Court") *per curiam* affirmed the Final Judgment on March 19, 2008,[14] and denied Newport's various motions for rehearing and written opinion on May 30, 2008. The Appellate Court's Mandate to the Lower Court was thereafter issued on June 16, 2008. Newport did not seek further appellate review of the Final Judgment. With post-judgment jurisdiction now restored to the Lower Court via the Mandate, Westgate called its pending Revised Motion to Assess up for hearing on July 31, 2008. In advance of the hearing, Westgate supplemented the Revised Motion to Assess on July 15, 2008 to include updated prejudgment interest calculations.[15] On July 29, 2008, Newport filed a Motion to Release Letter of Credit,[16] and on the afternoon of July 30th, less than twenty-four (24) hours before the scheduled hearing to calculate the amount of prejudgment interest and enter judgment thereon, Newport filed a Response to Westgate's Motion/Amended Motion to Assess Prejudgment Interest (hereinafter the "Response in Opposition"), claiming for the first time that Westgate lost its entitlement to prejudgment interest by failing to have it calculated

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14. *Newport Operating Corp. v. Westgate Miami Beach, Ltd.*, 982 So.2d 698 (Fla. 3d DCA 2008).

15. Supplement to Revised Motion to Assess Prejudgment Interest, Appendix, Tab "H."

16. Newport's Motion to Release Letter of Credit, Appendix, Tab "I."

and included in the Final Judgment before appeals were perfected.[17] The Response in Opposition was a surprising and shocking reversal of Newport's pre-appeal posture regarding the prejudgment interest, when it persuaded the Lower Court not to calculate the prejudgment interest despite Westgate's insistence.

The Response in Opposition claimed that Westgate forfeited its already determined right to prejudgment interest by failing to seek the Court's calculation to be included in the Final Judgment either by filing a timely Rule 1.530(b) motion (which Westgate did on no less than two (2) distinct occasions) or by requesting relinquishment of jurisdiction from the Appellate Court to permit the Lower Court to perform the calculation (which Westgate had no reason to do as Newport, not Westgate, precipitated the Lower Court's refusal to enter the order calculating the interest to which she had already determined entitlement by assuring the Lower Court that it was no more than a "ministerial" act).

At the July 31, 2008 hearing, the Lower Court, notwithstanding the actual language of the Final Judgment that a separate order would be entered awarding prejudgment interest and the post-trial argument of Newport and its counsel that the calculation was ministerial and could be performed after the appeal, concluded that, because of the appeal, it lost all jurisdiction and any ability to calculate the

17. *See* Response in Opposition, p. 1, Appendix, Tab "J."

prejudgment interest based upon the holding in *McGurn v. Scott*.[18] The Lower Court, although it desperately wanted to do so, did not believe it had the authority to complete the calculation of pre-judgment interest.[19] In essence, Westgate and the Lower Court were blindsided by Newport's change of position, a position dramatically different than the pre-appeal position earlier taken that the Court could assess prejudgment interest at a later time notwithstanding the appeal.

In the Lower Court's own words, parroting Newport's argument, "[m]y problem is that I can't . . . because I don't know if I have jurisdiction."[20] The Lower Court also pondered: "I probably didn't know the law on prejudgment interest . . . . But if I've lost jurisdiction, I can't give it to myself and that's what is worrying me."[21] During the July 31, 2008 hearing the Lower Court empathized with Westgate that her ruling "creates an inequity . . . And I really feel very very bad about it and extremely apologetic and sorry."[22] The Lower Court further stated "if I thought that there was any way possible under this case law that I had jurisdiction to give [Westgate] money, I would do it, because I think [Westgate] deserves it, based on my ruling."[23] While the Lower Court may have apologized greatly, the apology does not allay the serious consequences of its actions or the

18 . 596 So. 2d 1042 (Fla. 1992).
19. July 31, 2008 hearing, pp. 14-15, 51, Tab "K."
20. July 31, 2008 hearing, p. 29, Appendix, Tab "K."
21. July 31, 2008 hearing, pp. 14-15, Appendix, Tab "K."
22. July 31, 2008 hearing, p. 51, Appendix, Tab "K."
23. July 31, 2008 hearing, p. 59, Appendix, Tab "K."

conduct by Newport and its counsel. In fact, by deciding that Westgate was not entitled to prejudgment interest, the Lower Court deprived Westgate of almost two (2) million dollars, and created a windfall for Newport.

At the same time, the Lower Court announced her intent to order the release of the Letter of Credit Newport procured per the Letter Agreement to preclude Westgate's enforcement of the Final Judgment, although neither the Letter Agreement nor the Letter of Credit had ever before been brought within the sphere of the Lower Court's jurisdiction. Before any formal orders were entered on the Revised Motion to Assess, Westgate initiated two new actions in the Appellate Court, a Petition for Writ of Prohibition (Case Number 3D08-2025)[24] on August 6, 2008 and a Petition for Writ of Mandamus (Case Number 3D08-2115)[25] on August 14, 2008 in order to protect its rights under the Letter of Credit and to require that the Lower Court award the prejudgment interest it had already determined Westgate was due. Westgate subsequently filed a Motion to Enforce Mandate in the original appellate proceeding (Case Number 3D07-1599)[26] on August 13, 2008 which similarly arose from the Lower Court's refusal to award prejudgment interest pursuant to its Final Judgment. On September 3, 2008, the Appellate Court entered an Order denying Westgate's Motion to Enforce Mandate without

24. Petition for Writ of Prohibition, Appendix, Tab "L."
25. Petition for Writ of Mandamus, Appendix, Tab "M."
26. Motion to Enforce Mandate, Appendix, Tab "N."

prejudice to either party's right to appeal an order on Westgate's Revised Motion to Assess, or to seek a writ of mandamus if the Lower Court did not timely rule on that motion (the "Mandate Order").[27] On November 18, 2008, the Appellate Court entered two separate orders denying Westgate's Petition for Writ of Mandamus and Westgate's Petition for Writ of Prohibition.[28] These two orders and the previously issued Mandate Order effectively restored jurisdiction to the Lower Court to enter a final appealable order on Westgate's Revised Motion to Assess.

On November 21, 2008, in accordance with the Appellate Court's Mandate Order, Westgate filed a Motion to Conduct Hearing in Accordance with Order of the Third District Court of Appeal, which was set for hearing on December 8, 2008. Prior to the scheduled hearing the Lower Court requested the parties to seek clarification from the Third District Court of Appeal on the Orders denying Westgate's Writs of Prohibition and Mandamus and on the Mandate Order, specifically as they related to the Lower Court's jurisdictional ability to rule on the Revised Motion to Assess and to calculate prejudgment interest.

In accordance with this request, Newport submitted Motions for Clarification and Motions to Stay Issuance of Mandate Pending Clarification of

27. *See* Mandate Order, Appendix, Tab "O."

28. These two Orders are found at Appendix, Tabs "P" and "Q," respectively.

Order to the Appellate Court, and Westgate filed its responses.[29] On December 23, 2008, the Appellate Court issued two orders, one granting Newport's motion for clarification and instructing the Lower Court to rule on the determination of prejudgment interest (the "Clarification Order")[30] and one denying Newport's Motion to Stay Issuance of Mandate Pending Clarification of Order.[31]

On January 7, 2009, a hearing was held on Westgate's Revised Motion to Assess and on Newport's Motion to Release Letter of Credit in which the Lower Court denied Westgate's Revised Motion to Assess and granted Newport's Motion to Release Letter of Credit, admitting that Newport's counsel led it to error when he represented to the Court that the interest could be awarded post-appeal.[32] At the January 7, 2009 hearing, the Lower Court entered orders denying Westgate's Revised Motion to Assess (the "Interest Order")[33], and granting Newport's Motion to Release Letter of Credit[34]

Westgate immediately appealed, challenging the Interest Order. On June 3, 2009, the Third District Court of Appeal affirmed the Interest Order with a written

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29. Newport filed five such motions, a motion for clarification of order in each of the three appellate cases and two motions to stay in the prohibition and mandamus proceedings.

30. The Clarification Order can be found at Appendix, Tab "R."

31. The Order Denying Newport's Motion to Stay Issuance of Mandate Pending Clarification of Order can be found at Appendix, Tab "S."

32. January 7, 2009 hearing, p.23, Appendix, Tab "T."

33. The Interest Order can be found at Appendix, Tab "U."

34. The Letter of Credit Order can be found at Appendix, Tab "V."

opinion.[35] Therein, the Third District Court of Appeal noted that their "decision imposes a harsh result upon one side; however, under the clear-cut rule set forth in Florida's case law", specifically *McGurn v. Scott*, the Appellate Court was compelled to affirm.[36] Thereafter, Westgate filed a Motion for Rehearing and Rehearing En Banc and a Motion for Certification to the Supreme Court. On September 16, 2009, the Third District Court of Appeal denied Westgate's Motion for Rehearing and Rehearing En Banc and granted Westgate's Motion for Certification (the "Certification Order").[37] In the Certification Order, the Third District Court of Appeal noted that "district courts of appeal may suggest a change in law by certifying questions,"[38] and concluded that "it is our view that the rule in *McGurn v. Scott* should be revisited."[39] Specifically, the Certification Order certified the following questions of great public importance:

> 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, 569 So. 2d 102 (Fla. 1992)?

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35. The written opinion affirming the Interest Order can be found at Appendix, Tab "X." *Westgate Miami Beach, Ltd. v. Newport Operating Corp.*, 16 So.3d 855 (Fla. 3d DCA 2009).
36. *See* Appendix, Tab "W" at p.8.
37. The Certification Order can be found at Appendix, Tab "Y."
38. *See* Certification Order, Appendix, Tab "Y," p. 2.
39. *Id.*

> WHERE A JUDGMENT CONTAINS A RESERVATION OF JURISDICTION TO AWARD PREJUDGMENT INTEREST, 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, 569 So. 2d 102 (Fla. 1992)?
>
> WHETHER A TRIAL COURT SHOULD BE ALLOWED TO RESERVE JURISDICTION TO AWARD PREJUDGMENT INTEREST POST-APPEAL AS IT CAN WITH ATTORNEYS' FEES AND COSTS?

On December 3, 2009, this Court accepted jurisdiction to review the certified questions presented in the Certification Order.[40]

SUMMARY OF ARGUMENT

First, this Court should overrule the *McGurn* decision to avoid a harsh and unjust result. Here, Westgate's initial appeal of the improperly rendered Final Judgment should be treated as a premature appeal under Florida Rule of Appellate Procedure 9.100(*l*) and should not be treated as accomplishing a waiver of prejudgment interest.

The record is clear on this: The Lower Court ruled in the Final Judgment on entitlement; the record made at trial contains Westgate's evidence sufficient to support the amount of interest; Westgate filed timely motions at each step of the

40. *Westgate Miami Beach, Ltd. v. Newport Operating Corp.*, 22 So.3d 69 (Fla. 2009).

proceedings to bring the "ministerial" matter before the Lower Court before Newport commenced its appeal; and the Lower Court declined to calculate the amount of the interest only because it was induced by Newport to do so. Westgate did anything and everything within its power in an attempt to recover the prejudgment interest to which it is rightfully entitled. Westgate should not be deemed to have waived its entitlement to prejudgment interest or to have abandoned its timely filed motions since it relied on Newport's conduct, which induced the Lower Court not to award Westgate its interest until post-appeal. After Newport convinced the Lower Court that it could award the prejudgment interest post-appeal, Westgate, relying on Newport's representations, had no choice but to protect its appellate rights and file its appeal.

Procedural rules should operate to avoid the unintentional loss or waiver of substantive rights. Rule 9.110(*l*) of the Florida Rules of Appellate Procedure governs the procedure for final judgments that are not truly "final." This rule states that appeals of such non-final judgments are subject to dismissal on motion by the appellee or the court's own motion, permitting the matter to be returned to the trial court for completion of the judicial labor.[41] This rule should govern judgments such as the judgment in this case, which improperly reserve jurisdiction

41. Fla.R.App.P. 9.110(*l*).

to award prejudgment interest post-appeal. This would create a more equitable result and would avoid parties' inadvertent waiver of substantive rights.

Moreover, *McGurn* should be overruled because prejudgment interest is more akin to attorneys' fees and costs and can be ministerially calculated post-appeal. At the hearing on the Motion to Assess, Newport agreed and essentially stipulated that Westgate's entitlement to the prejudgment interest had been adjudicated as part of the Final Judgment and that the calculation, a ministerial act, could be deferred until after the appeals were completed.[42] Therefore, *McGurn* should be overruled to permit trial courts to reserve jurisdiction to calculate prejudgment interest post-appeal.

Second, should this Court deny to overrule or modify the *McGurn* decision, this Court should carve out an exception to the rule in *McGurn*, to fit the facts of this unique case. The exception should permit the reservation of jurisdiction to award prejudgment interest where there has been an agreement on or no objection to such reservation. Essentially, parties should be able to agree to award prejudgment interest at a later date to avoid an inadvertent waiver of such interest in accordance with the rule of law set forth in *McGurn*.

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42. *See* Fla.R.Jud.Admin. 2.505 (governing stipulations: "Parol agreements may be made before the court if promptly made a part of the record or incorporated in the stenographic notes of the proceedings . . . .").

ARGUMENT

I. *MCGURN* SHOULD BE OVERRULED

a. History of *McGurn*

In *McGurn v. Scott*,[43] the Supreme Court accepted jurisdiction to review an express and direct conflict between the First District Court of Appeal decision in *McGurn v. Scott,*[44] and the Third District Court of Appeal decision in *City of Miami v. Bailey & Dawes*.[45] The case originally arose from a suit filed against a trustee of a trust, whereby the plaintiff sought a three percent share of the profits earned by the trust, interest, costs and attorneys' fees.[46] After the conclusion of a nonjury trial, the circuit court entered judgment in favor of the plaintiff, and reserved jurisdiction to award appropriate costs, prejudgment interest and attorneys' fees.[47] The parties did not stipulate to the reservation of trial court jurisdiction, unlike in this case, but the circuit court did reserve such jurisdiction on its own accord.

After notices of appeal of the circuit court decision were filed, the plaintiff filed a motion with the district court requesting that the trial court be permitted to consider his motion for an award of interest and that the district court relinquish

43. 596 So. 2d 1042 (Fla. 1992).
44. 573 So. 2d 414 (Fla. 1st DCA 1991).
45. 453 So. 2d 187 (Fla. 3d DCA 1984).
46. *McGurn*, 596 So. 2d at 1043.
47. *Id.*

jurisdiction to the circuit court for that purpose.[48] The district court dismissed the appeal holding that it did not have jurisdiction to hear the case since the order presented for review was non-final.[49] The Court also noted a direct conflict with the *City of Miami* case, and as a result, the decision was reviewed in the Florida Supreme Court.

This Court held that a judgment or order which reserves jurisdiction to award prejudgment interest technically is not a final order, but in the event that a trial court improperly renders such a judgment which appears to be, or has the attributes of a final judgment, the order will be deemed to have become a final judgment requiring review by immediate appeal.[50] Moreover, this Court held that once the appeal is taken, the trial court lacks jurisdiction to take any further action in the matter, such as enter an order awarding prejudgment interest.[51] In short, "the parties will be deemed to have waived any matter reserved for future adjudication by the trial court, with the exception of attorneys' fees and costs."[52]

The Court arrived at this holding based upon the presumption that prejudgment interest is an element of damages that must be decided before a final

48. *Id.* Notably, this motion was filed well after ten (10) days of the final judgment.
49. *Id.*
50. *Id.* at 1045.
51. *Id.*
52. *Id.*

judgment is rendered.[53] The Court also distinguished final judgments that reserve jurisdiction to award fees and costs, holding that, unlike prejudgment interest, the award of such fees and costs "is ancillary to, and does not interfere with, the subject matter of the appeal, and thus, is incidental to the main adjudication."[54]

b. Where a judgment contains a reservation of jurisdiction to award prejudgment interest, the appeal of such a judgment should not be treated as accomplishing a waiver of prejudgment interest but should be treated as a premature appeal under Fla.R.App.P. 9.100(*l*)

The inadvertent waiver rule created by *McGurn* and applied in this case essentially and effectively holds that even where a party requests the entry of prejudgment interest within ten (10) days of a final judgment, and even where the parties and the court stipulate to the entry of the interest post-appeal, the party seeking this interest effectively waives its right to the interest if it does not seek to correct the improper form of the final judgment. Indeed, it treats such an incorrect judgment as a purported "final" judgment which must be immediately appealed in order for the parties to preserve their appellate rights.[55] This inadvertent waiver is contrary to Florida's public policy which favors the resolution of all cases on their

53. *Id.*
54. *Id.* at 1044.
55. *Id.* at 1045 ("if a trial court improperly renders such a judgment which appears to be, or has the attributes of a final judgment, the order will be deemed to have become a final judgment requiring review by immediate appeal").

merits.[56] The Supreme Court ought to revisit the rule set forth in *McGurn* to modify such a harsh policy.

This rule of law unfairly places this burden on the innocent party. As Judge Cope stated in the concurring opinion provided by the Appellate Court: "It would better serve [Florida's public policy] to modify the *McGurn* rule to eliminate the automatic waiver. An appeal containing an improper reservation of jurisdiction should be subject to dismissal on motion or a party, or the court. This is the procedure for dealing with other premature appeals, and it is hard to see a good reason why an improvident retention of jurisdiction should be treated differently."[57]

This proposed modification will protect the inadvertent loss of rights, including the right to prejudgment interest. The Supreme Court should set a bright line rule that allows either party or the court to dismiss an appeal where a final judgment is not truly "final"—for example, in a case where a final judgment contains the improper retention of jurisdiction to award prejudgment interest. This is consistent with Florida procedures for handling other premature appeals, as set

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56. *See O.R. v. Dep't of Children & Family Services*¸ 979 So. 2d 1105 (Fla. 3d DCA 2008); *see also North Shore Hospital, Inc. v. Barber*, 143 So. 2d 849, 852-53 (Fla. 1962).

57. *Westgate Miami Beach, Ltd. v. Newport Operating Corp.*, 16 So. 3d 855, 860 (Fla. 3d DCA 2009).

forth in Fla.R.App.P. 9.110(*l*),[58] and would permit the trial court to fully finalize the judgment without an inadvertent waiver or loss of rights. It is hard to see any reason why Fla.R.App.P. 9.110(*l*) should not apply in this case.

Moreover, the *McGurn* rule creates confusion among litigants as to when a final judgment is actually final. This Court stated that an improper final judgment that "appears to be" or "has the attributes of a final judgment . . . will be deemed to have become a final judgment requiring review by immediate appeal."[59] But when is this really the case? Litigants will be forced to assume that these improperly rendered judgments are final in order to protect appellate rights. Therefore, parties will be forced to file a notice of appeal within thirty (30) days of the seemingly "final" judgment as a precautionary measure. Those parties will then face the inevitable loss of prejudgment interest to which they should be rightfully entitled, even in cases like this one where a motion is filed within ten (10) days requesting the award of such interest.

Florida's public policy dictates that parties should not be faced with an inadvertent waiver of prejudgment interest where a lower court renders an

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58. *See* Fla.R.App.P. 9.110 (*l*) (explaining that where a notice of appeal is filed before rendition of a final order, the appeal shall be subject to dismissal as premature); *see also Romain v. Quinnell*, 937 So. 2d 824 (Fla. 1st DCA 2006) (dismissing the appeal without prejudice in the Court's own discretion due to a premature appeal); *see also Brown v. Housing Authority of City of Orlando*, 680 So. 2d 620 (Fla. 5th DCA 1996) (dismissing an appealed order where the appealed order merely granted a motion to dismiss, and the appeal was therefore premature).

59. *McGurn*, 596 So. 2d at 1045.

improper final judgment, and where the opposing party is on notice that prejudgment interest has been awarded. Additionally, the *McGurn* case sets forth an ambiguous and confusing standard for seemingly final judgments. These issues can be easily resolved through a modification of the *McGurn* rule. The rule should be modified so that a judgment that is not truly "final," such as a judgment containing an improper retention of jurisdiction to award prejudgment interest, is treated as a premature appeal under 9.110(*l*) and is subject to dismissal by either party or the court.

c. Prejudgment interest is akin to attorneys' fees and costs and a trial court should be allowed to reserve jurisdiction to award prejudgment interest post-appeal

The decision in *McGurn* seems to rest upon a notion that a case is fully litigated once a final judgment is issued and there remain no additional issues to be decided except attorneys' fees and costs. This is simply not always the case. As Judge Cope correctly points out, courts "allow bifurcated proceedings or severance of claims. Where provisional remedies are involved, we allow immediate appeals in injunction cases, receivership matters, and rulings deciding the immediate possession of property."[60]

60. *Westgate Miami Beach, Ltd.*, 16 So. 3d at 860.

In January of 2009, this Court in *Amerus Life Ins. Co. v. Lait*,[61] resolved an inter-district conflict by holding that where a final judgment reserves jurisdiction to award fees and costs, a party is not bound by the timeframe set forth in the Florida Rules of Civil Procedure to file a motion for these fees and costs post-appeal.[62] The rationale for this holding, in part, was due to the fact that a motion requesting such fees and costs would be redundant where the court has, in essence, already ruled to award them and "all that remains is a determination of the reasonable amount."[63] The rule logically should be the same for prejudgment interest. It follows that Westgate should not have been bound by the timeframe set forth in Rule 1.530 to file its motion for prejudgment interest since the entitlement to interest was already determined in the Final Judgment. Moreover, a final judgment should be able to reserve jurisdiction to award attorneys' fees, costs and prejudgment interest, where such entitlement has been adjudicated, as all three of these awards are ministerial acts that can be accomplished post-appeal. This is especially true in cases where there is a liquidated amount of prejudgment interest.

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61. 2 So. 3d 203, 207 (Fla. 2009) (reasoning that parties "are on notice with the trial court's ruling on entitlement that the amount of the award will be determined at a later date.").

62. Indeed, it is established that a trial court may reserve jurisdiction to determine the amount of attorney's fees and costs. *See Chamizo v. Forman*, 933 So. 2d 1240 (Fla. 3d DCA 2006) (holding that a party was not bound by the thirty-day timeframe to file a motion for fees and costs where the final judgment reserved jurisdiction to determine the amount of attorneys' fees and costs).

63. *See Amerus* at 207.

This Court noted in *McGurn* that prejudgment interest is an element of pecuniary damages and therefore held that "the determination of the prejudgment interest is directly related to the cause at issue and is not incidental to the main adjudication."[64] However, there ought to be a distinction drawn between the determination of ***entitlement*** to prejudgment interest and the actual ***calculation*** of the interest after entitlement has been determined. Here, all of the evidence needed to calculate Westgate's prejudgment interest award was adduced at trial and already appeared in the record, so no evidentiary hearing was required.[65] In addition, the Final Judgment was clear that Westgate was entitled to prejudgment interest. Therefore, all that needed to be done post-judgment was the calculation of Westgate's prejudgment interest. In this factual scenario, the calculation of the interest is not directly related to the cause at issue and is merely incidental to the main adjudication. This Court should modify the *McGurn* rule and hold that where a final judgment determines entitlement to prejudgment interest, and the evidence needed to calculate such interest is already contained in the record, the prejudgment interest can be ministerially calculated post-appeal similar to attorneys' fees and costs.

II. IN THE ALTERNATIVE, THE HARSH RULE SET FORTH IN *MCGURN* OUGHT TO HAVE EXCEPTIONS TO AVOID AN UNJUST AND UNFAIR RESULT

64. *McGurn*, 596 So. 2d at 1044.
65. June 8, 2007 hearing pp. 127-28, Appendix, Tab "C."

a. The *McGurn* line of cases rests upon a different posture of facts and thus an exception to *McGurn* ought to be crafted out of the instant set of facts to maintain an equitable and just result

The Appellate Court relied on the *McGurn v. Scott* line of cases in holding that Westgate waived its right to prejudgment interest since it failed to file timely motions for rehearing with the Lower Court or seek relinquishment of jurisdiction from the Appellate Court during the initial appeals.[66] While *McGurn* purportedly applies in this case, the *McGurn* line of cases is based upon different facts. The cases are either based on final judgments that did not clearly and unambiguously—as here—award prejudgment interest or they center on parties who failed to file any post-judgment motion. More importantly, none of the cases contemplates a situation where one party invites the trial court's error in failing to award the prejudgment interest. *McGurn v. Scott*[67] is the first illustration: the final judgment did not award prejudgment interest, as did the Final Judgment here; rather the trial court reserved jurisdiction to later determine entitlement and possibly award prejudgment interest after a motion by the party seeking it. In stark contrast, the

66. This line of cases follows the Florida Supreme Court case of *McGurn v. Scott*, 596 So. 2d 1042 (Fla. 1992) and include the following District Court of Appeals cases: *Avatar Dev. Corp. v. DeAngelis*, 944 So. 2d 1107 (Fla. 4th DCA 2006); *Home Ins. Co. v. Crawford & Co.*, 890 So. 2d 1186 (Fla. 4th DCA 2005); *Emerald Coast Commc'ns, Inc. v. Carter*, 780 So. 2d 968 (Fla. 1st DCA 2001); *Wyatt v. Milner Document Prods., Inc.*, 932 So. 2d 487 (Fla. 4th DCA 2006); *Liberty Transportation, LLC v. Banyan Air Services, Inc.*, 7 So. 3d 1138 (Fla. 4th DCA 2009).

67. 596 So. 2d 1042 (Fla. 1992).

Final Judgment here unambiguously determined Westgate's entitlement to prejudgment interest, with the amount to be set—a "ministerial" act according to Newport—in a separate order.[68]

In *Avatar Development Corp. v. DeAngelis*,[69] prejudgment interest was waived when it was not requested to be calculated by rehearing or amendment within ten (10) days of the final judgment. Similarly, the Court in *Home Insurance Co. v. Crawford & Co.*[70] determined that the failure to file a post-judgment motion coupled with the failure to seek the appellate court's relinquishment of jurisdiction to permit the trial court to award prejudgment interest waived the claim for prejudgment interest because it divested the trial court of jurisdiction to award the interest. Because the party failed to timely seek rehearing of the final judgment in *Emerald Coast Communications, Inc. v. Carter*[71] and *Liberty Transportation, LLC v. Banyan Air Services, Inc.*,[72] it waived the right to prejudgment interest. Finally, in *Wyatt v. Milner Document Products, Inc.*,[73] prejudgment interest not requested within the timeline for rehearing and amendments of judgments pursuant to Fla.R.Civ.P. 1.530(b) was not recoverable.

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68. *See* Final Judgment, p. 46, Appendix, Tab "A."
69. 944 So. 2d 1107 (Fla. 4th DCA 2006).
70. 890 So. 2d 1186 (Fla. 4th DCA 2005).
71. 780 So. 2d 968 (Fla. 1st DCA 2001).
72. 7 So. 3d 1138,1140 (Fla. 4th DCA 2009).
73. 932 So. 2d 487 (Fla. 4th DCA 2006).

Unlike the parties to this line of cases, Westgate filed two (2) motions, each within ten (10) days of the Final Judgment and the Amended Final Judgment, respectively, demanding that the Lower Court perform the "ministerial" act of calculating Westgate's prejudgment interest. So, Westgate preserved its right to recover prejudgment interest. Most importantly, none of the *McGurn* cases contemplates a scenario where the adverse party convinces the judge to defer awarding prejudgment interest once the matter was brought to hearing by the proper motion of the other party, and later claims that, by virtue of the resulting delay it induced, the right to prejudgment interest was waived or abandoned. Based upon the facts of this case, the only just and equitable result is to find that Westgate is entitled to prejudgment interest and thus craft a specific exception to the harsh *McGurn* rule.

b. Where there has been an agreement on, or no objection to, a reservation of jurisdiction to award prejudgment interest, the reservation should be upheld in order to prevent an injustice notwithstanding the rule in *McGurn*

The facts in this case are clearly unique. Here, the Lower Court rendered an improper final judgment which erroneously reserved jurisdiction to award prejudgment interest in a separate order. The Lower Court committed an error in failing to rule on Westgate's Motion to Assess at the June 8, 2007 hearing. At that hearing, Newport's counsel precipitated that error by persuading the Lower Court to delay calculating and assessing the prejudgment interest to which Westgate was

then entitled. Newport's counsel acknowledged that the Lower Court had already determined that Westgate was entitled to prejudgment interest but urged the Lower Court to perform what he characterized as the "ministerial" act of calculating the amount at a later date after the appeal was concluded.[74] Newport's argument was not one made in passing; its counsel repeatedly assured the Lower Court the calculation and assessment of interest can be done post-appeal: "You've already ruled in [Westgate's] favor on entitlement to prejudgment interest . . . . From that point, we'll just agree on what that calculation will be"[75] ***and*** "the amount could be done when you come back. Because that amount of money is going to run no matter what"[76] ***and*** "the amount [of prejudgment] interest can be calculated later as long as entitlement has been determined."[77] Unsurprisingly, Newport ultimately convinced the Lower Court that the calculation and assessment of prejudgment interest which Westgate insisted be done then could be deferred post-appeal.[78]

Indeed, in direct response to the Lower Court's inquiry, Newport's Counsel affirmed that he assured the Lower Court that the appeal could go forward without

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74. *See* June 8, 2007 hearing, pp. 130-31, Appendix, Tab "C." "[T]he Court has already found that it is intending, in its language, to give entitlement [of prejudgment interest] to Westgate . . . . The amount of the calculation . . . . That's a number that is what it is once we agree on how to calculate it . . . the amount can be calculated later as long as entitlement has been determined."

75. June 8, 2007 hearing, p. 136, Appendix, Tab "C."

76. June 8, 2007 hearing, p. 131, Appendix, Tab "C."

77. June 8, 2007 hearing, p. 131, Appendix, Tab "C."

78. June 8, 2007 hearing, p. 131, Appendix, Tab "C."

prejudice to Westgate's right to prejudgment interest and that the amount of prejudgment interest could be calculated at a later date.[79] In essence, this was the classic "gotcha" scenario. While the Lower Court was ultimately prepared to calculate and assess Westgate's prejudgment interest, it, in keeping with Newport's repeated assurances, acknowledged that "it's not going to go away."[80] In reality, the record of the June 8, 2007 hearing reflects what was in essence a stipulation between Newport and Westgate, approved by the Lower Court, that entitlement to prejudgment interest had been determined in favor of Westgate and that the ministerial act of making the calculation would occur after the appeal had ended.[81] Post-appeal, the Lower Court held that it had lost jurisdiction to award the

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79. THE COURT: Can it go up to the appellate court prior to litigating how to calculate it?
MR. ZEMEL (Newport's Counsel): It can go up—the amount can be calculated later as long as entitlement has been determined.
THE COURT: Then that can go up prior to me—
MR. ZEMEL: Yes. That's why I'm saying, if you've determined entitlement, if you'll give us an order on this motion that we can appeal prior to June 17th, that will be a final appealable judgment and order that we can take up. The amount could be done when you come back. Because that amount is going to run no matter what. June 8, 2007 hearing, p. 131, Appendix, Tab "C."

80. Westgate's counsel, Mr. Frankel stated: 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. Mr. Frankel: I understand that. The Court: I can't. And I can't do it next week. Mr. Frankel: It was contemplated by the judgment . . . . The Court. **It's not going to go away**. June 8, 2007 hearing, p. 135, Appendix, Tab "C" (e.s.); *see supra* nn. 9-10.

81. *See* Fla.R.Jud.Admin. 2.505 governing stipulations: "Parol agreements may be made before the court if promptly made a part of the record or incorporated in the stenographic notes of the proceedings . . . ."

prejudgment interest and entered an order denying Westgate's Motion to Assess and Revised Motion to Asses Prejudgment Interest. On appeal, the Third District affirmed relying on *McGurn*.[82]

Here, while *McGurn* presumably requires that Westgate inadvertently waived its right to prejudgment interest, this creates a harsh and unjust result. Westgate and the Lower Court relied upon the representations of opposing counsel and the stipulations made between the Lower Court and the parties to calculate the prejudgment interest at a later date. Indeed, it was the parties' intentions to calculate this amount post-appeal, yet such amount was never calculated due to Westgate's inadvertent waiver of such interest. By denying Westgate's right to prejudgment interest, which in this case totaled over two (2) million dollars, this decision creates a grave inequity. It also condones express trickery by opposing counsel to the prevailing party's detriment. There must be an exception crafted from the *McGurn* rule to fit the facts of the instant case.

If entitlement is determined by final judgment, and the parties agree to calculate the interest at a later date, this should not operate as an automatic waiver of the party's right to prejudgment interest. Essentially, this Court should set up a mechanism whereby parties can effectively "opt-out" of *McGurn* and have a final appealable judgment that does not award a specific amount of prejudgment interest

82. 596 So. 2d 1042 (Fla. 1992).

but that merely finds entitlement. It is well within Florida's public policy to encourage fair and equitable access to the courts to resolve disputes on their merits and to avoid an unintentional waiver of rights. As this Court has previously stated, "[t]he public policy encouraging fair access to the courts for those who are in good faith pursuit of their equitable rights must be protected from the deterrent certain to be posed by unknown liability for mistake."[83] Moreover, the crafting of an exception to the *McGurn* rule to fit the facts of this case would also harmonize this case with Florida's judicial and public policy and principles of law and equity.

III. CONCLUSION

Based upon the foregoing, it is evident that the certified questions in the Certification Order concern issues of great public importance. Prejudgment interest is an element of most, if not all, damage awards in litigation matters, and affects a large number of litigants. The harsh rule in *McGurn* creates an inadvertent waiver of rights which is clearly contrary to Florida's judicial and public policy that favors the adjudication of cases upon their merits and ensures litigants access to legal and equitable remedies. For this reason alone, the *McGurn* decision should be overruled. Moreover, the *McGurn* rule should be overruled and modified so that prejudgment interest can be ministerially awarded post-judgment along with attorneys' fees and costs.

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83. *Parker Tampa Two, Inc. v. Somerset Development Corp*., 544 So. 2d 1018,1021 (Fla. 1989).

Should this Court decline to overrule or modify *McGurn*, this Court ought to create a limited exception to the rule given the unique set of facts in this case. The exception should encompass situations such as these, where there has been an agreement on, or no objection to, a reservation of jurisdiction to award prejudgment interest. In these instances, an improper reservation of jurisdiction should be upheld and maintained in order to prevent a grave injustice and loss of substantive rights.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent via Federal Express to: FRANKLIN L. ZEMEL, ESQ., Arnstein & Lehr, LLP, 200 East Las Olas Boulevard, Suite 1700, Fort Lauderdale, Florida 33301 this 26th day of January, 2010.

By: _____
ROBERT P. FRANKEL

CERTIFICATE OF COMPLIANCE

I 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.

By: _____
ROBERT P. FRANKEL

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