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

Petitioner,

vs.

NEWPORT OPERATING CORP., a
Florida corporation

Respondent.
_____/

PETITIONER'S AMENDED REPLY BRIEF

Respectfully submitted,
Robert P. Frankel & Associates, P.A.
City National Bank Bldg., Suite 900
25 West Flagler Street
Miami, Florida 33130
Phone: (305) 358-5690
Fax: (305) 358-2306
Robert P. Frankel, Esq.
Florida Bar No. 304786
Attorneys for Petitioner

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RESPONSE TO NEWPORT'S STATEMENT OF THE CASE AND FACTS

Westgate incorporates the statement of the facts that appears in its Initial Brief as though fully set forth herein. Westgate does, however, disagree with certain claims made by Newport in its Response and will address these discrepancies in this Reply.

In particular, Newport asserts that "[t]he 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."[1] Here, Newport is wrong; economic data allowing for all damages calculations including prejudgment interest was already received into evidence during the trial, and the Lower Court acknowledged this fact. Specifically, the Lower Court stated "[t]heir findings are in the record because they've submitted the damage model day by day. So they have the findings in the record. . . . .I've got record evidence of what the day-by-day loss was, it's been submitted into the record. . . . ." [2] As the Lower Court recognized, Westgate prepared a comprehensive damage model and report, which was submitted as an exhibit in the original trial.[3] Newport did not once, at trial, argue that the mathematical calculations in this damage model did not accurately present the

1. Newport's Answer Brief, p.27.
2. *See* June 8, 2007 hearing, p. 127, Appendix to Westgate's Initial Brief, Tab "C."
3. The damage model is Westgate's Trial Exhibit 39.

totality of damages that Westgate was seeking. More importantly, Newport's counsel himself admitted that the calculation was ministerial:

> MR. ZEMEL: As far as the prejudgment interest, and what I've said on the record several times, is assuming that they establish entitlement, ***it's a ministerial calculation. I've been very clear about that.*** Since you've made the issue of entitlement clear at this point . . . . . the calculation could probably be worked out.[4]

Additionally, Newport claims that Westgate never insisted that the Lower Court award its prejudgment interest at the June 8, 2007 hearing on the Motion to Assess and that Westgate somehow persuaded the Lower Court to defer awarding it by stating ***"absolutely you can."***[5] Such portrayal entirely misconceives what occurred. Westgate's counsel obviously sought the assessment of prejudgment interest; the Motion to Assess was one of the scheduled matters for the hearing and Westgate's motion, which was unquestionably discussed at the hearing, specifically requested that the Lower Court assess the prejudgment interest awarded in the Final Judgment. What Westgate's counsel could not do was *insist* the Lower Court disrupt its planned vacation to actually take up the motion and perform the calculation *at that hearing*. Rather, Westgate agreed to allow the Lower Court to defer to some later time the actual calculation of the amount of the

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4. June 8, 2007 hearing, pp. 134, Appendix to Initial Brief, Tab "C".

5. Newport's Answer Brief, pp.7-9 ("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.").

prejudgment interest, relying upon Newport's counsel's representations, albeit misleading ones, that the ministerial function of actually assessing the amount of interest could wait.[6] While neither the parties nor the Lower Court may have foreseen the end result in this case, the old saying two wrongs do not make a right should not apply in this case given that both parties and the court essentially stipulated to a procedure for awarding prejudgment interest—thus, leading to the harsh result in *McGurn*. It is this very scenario that led the Appellate Court to certify these three important questions being reviewed by this Court.

ARGUMENT

I. Introduction

Whether or not Westgate's loss of over two million dollars in prejudgment interest was due to Westgate's failure to file a 1.530 motion for rehearing, Newport's determined insistence that prejudgment interest need not be awarded prior to the parties' filings of their respective appeals, or the Lower Court's misapprehension of the law, these particular issues are not to be decided by this Court. Instead, this Court has been tasked with and has accepted jurisdiction to decide three certified questions of great public importance which affect not only the parties in this case but all litigants and judicial officers. Specifically, the

6. June 8, 2007 hearings, pp. 130, 131 134, 136, Appendix to Initial Brief, Tab "C."

certified questions ask this Court to revisit its 1992 decision in *McGurn v. Scott*,[7] to decide if the rule of law set forth therein should be overruled or modified in accordance with Florida's judicial and public policy. In deciding the certified questions, this Court should investigate and consider the specific facts and procedure of this case to understand the full implications of *McGurn* so as to analyze how this rule of law plays out in a practical setting.

II. The Certified Questions are the basis for jurisdiction, not the specific issues decided by the Lower Court and the Appellate Court

In its response brief, Newport seems to miss a salient point—Westgate is not rearguing the issues presented on appeal with regard to the Lower Court's denial of its prejudgment interest. To the contrary, Westgate's initial brief deals solely with the certified questions and the *McGurn* case as a matter of judicial policy. Westgate is not making specific arguments about invited error or judicial estoppel as Newport claims, but merely is demonstrating to this Court that, in the alternative, the *McGurn* line of cases rests entirely upon a different set of facts and argues that an exception to *McGurn* should be recognized in this specific instance.

While generally the Florida Supreme Court has the authority to consider issues other than those upon which jurisdiction is based, this authority is discretionary and should be exercised only when these other issues have been

7. 596 So. 2d 1092 (Fla. 1992).

properly briefed and argued and are dispositive of the case.[8] Here, Westgate included in its initial brief argument requesting that this Court craft an exception to *McGurn* given the unique set of circumstances of this case. Therefore, these factual issues have been properly briefed and argued and certainly would be dispositive of this case, in spite of Newport's contentions.

A. This Court should consider the facts of this case to decide the Certified Questions

Even despite the fact that this Court's review of the case is limited to the certified questions, this Court still must consider the specific facts and unique procedural posture of this case to make a proper determination. This Court has been asked whether or not the rule in *McGurn* should be modified to avoid a harsh result. Therefore, this Court should consider the facts of this case to fully evaluate and decide the effect of the *McGurn* rule upon the parties of this case. This case exemplifies the precise procedural quandary that can be created through the *McGurn* rule and shows how harsh *McGurn* can be in application.

Additionally, the *McGurn* rule must have an underlying set of events to create and activate its application. The rule only operates under a set of certain circumstances, i.e. a seemingly final judgment reserving jurisdiction to award prejudgment interest. For this reason, the underlying facts of this case must be

8. *See Savona v. Prudential Insurance Co. of America*, 648 So. 2d 705, 707 (Fla. 1995).

considered by this Court on their merits. As Judge Cope points out in the concurring opinion, "[w]e reach an unfair result ***in this case*** because the decision in *McGurn v. Scott*, 596 So. 2d 1042 (Fla. 1992) requires us to do so."[9] Likewise, Judge Rothenberg in the majority opinion recognizes "that our decision imposes a ***harsh result*** upon one side; however, under the clear-cut rule set forth in Florida's case law, we are compelled to affirm."[10] The underlying facts and procedure of this case are inherently included in the certified questions that are being reviewed. Without question, the arguments raised by Westgate in its main brief fall within the scope of those questions and within this Court's review.

III. Newport's four-step process is not a solution to the procedural problems arising from *McGurn*

Newport blindly asserts that it is quite simple to abide by *McGurn*. All a party has to do is: (i) provide for prejudgment interest in the final judgment; (ii) file a motion pursuant to Rule 1.530; (iii) do not abandon the motion pursuant to 1.530; and (iv) use the "safety feature".[11] However, this four step process is not infallible and is not always equitable. While the Appellate Court in this matter has conceded that *McGurn* dictates a specific result, it has recognized through its certification of not one but ***three*** questions to this Court that there are various

9. *See Westgate Miami Beach, Ltd. v. Newport Operating Corp.*, 16 So. 3d 855, 859 (Fla. 3d DCA 2009) (emphasis added).

10. *See Id.* (emphasis added).

11. *See* Newport's Response, pp.1-2.

procedural problems and inequities that arise from *McGurn*—namely, the inadvertent waiver or prejudgment interest at the behest of opposing counsel insisting that "it's a ministerial calculation."[12] While the *McGurn* rule may have been workable in theory, the facts of this case clearly show that as a practical matter there are some procedural glitches that ought to be revised.

Specifically, it is not always incumbent upon the prevailing party to provide for prejudgment interest in the final judgment. In cases such as this one, where the lower court and opposing counsel agree to enter a separate order awarding prejudgment interest, the resulting waiver of prejudgment interest should not unfairly inflict the prevailing party while providing a windfall to the opposing side. Moreover, Newport suggests that the prevailing party can file a Rule 1.530 Motion and should "not abandon it" by filing a notice of appeal. However, litigants will face undoubted confusion as to whether or not judgments are deemed final under *McGurn* and in order to protect their appellate rights, will be forced to file a notice of appeal within thirty (30) days, while at the same time potentially abandoning their 1.530 motion. Therefore, Newport's suggestion that parties file a 1.530 motion and not abandon it simply does not work in practice.

Finally, while Newport suggests that litigants utilize the "safety feature" of the relinquishment doctrine, this does not answer the Appellate Court's certified

12. June 8, 2007 hearing, pp. 134, Appendix to Initial Brief, Tab "C".

question. The Appellate Court asks if an appeal of an improperly rendered final judgment should be treated as premature under Fla. R. App. P. 9.100 (*l*), or if it should be treated as accomplishing a waiver of prejudgment interest. It is the classification of the appeal, not the relinquishment of such an appeal, that is at issue in this case.

IV. As a policy matter, this Court should answer the certified questions in the affirmative

Newport argues that the answer to each of the certified questions should be an unequivocal "no." However, Newport makes improper assumptions about the underlying policy reasons for certifying the questions in the first place. As to the first question, Newport states that an agreement on or no objection to the reservation of jurisdiction to award prejudgment interest post-appeal should have no effect so as not to contravene the "bright line" *McGurn* rule. Newport states that "[b]right-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."[13] On this point, Newport is wrong. Statutes of limitation are not bright-line rules that create or destroy subject matter. They are affirmative defenses that if not raised, are waived. Additionally statutes of limitation are subject to equitable tolling. Newport's counsel cannot in any way

13. *See* Newport's Response Brief, p.21.

take the position that he did not agree and acquiesce to the Lower Court's reservation of jurisdiction to award prejudgment interest. This really is no different than an equitable tolling agreement to waive a statute of limitations defense. For these reasons, Newport's analogy fails.

As to the second certified question that asks if the appeal of an improperly rendered final judgment should be considered premature pursuant to Fla.R.App. P. 9.110 (*l*), Newport misses the point and avoids the important issue being questioned. Instead of discussing the policy implications and the potential confusion plaguing litigants regarding the finality of judgments under *McGurn*, Newport diverts the Court's attention to the fact that Westgate never moved for relinquishment of appellate jurisdiction. However, Newport's suggestion of a third option, the so-called "escape hatch" in which the appellate court relinquishes jurisdiction is not a solution. It merely provides a separate option further emphasizing the procedural confusion resulting from the *McGurn* rule. And, as previously stated, it is the classification of the appeal, either as premature or as accomplishing a waiver of prejudgment interest that is to be decided in the second certified question—not whether or not litigants have a third "escape hatch" option to cure an improper final judgment.

In its discussion of the second certified question, Newport also raises a hypothetical "problem" that does not really exist. Newport argues that if an

improperly rendered final judgment is considered interlocutory, such as the Appellate Court suggests, "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."[14] This is wrong. If the judgment is technically non final and there is still judicial labor to be completed, then it will not be deemed final for execution purposes.[15] Ordinarily in these instances, the clerk will not issue warrants of execution, writs of garnishment and other enforcement writs. Therefore, a judgment debtor would not be in any immediate danger of execution. As a result, and contrary to Newport's assertion, there is no harm to the judgment debtor to treat appeals of non-final judgments as premature under Rule 9.100(*l*).

The third question asks this Court to consider permitting a trial court to reserve jurisdiction to award prejudgment interest as it can with attorneys' fees and costs. However, Newport argues that prejudgment interest cannot be treated like fees and costs because is an element of damages which requires evidentiary hearings with regard to dates of loss and it will create unnecessary judicial labor.

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14. *See* Newport's Response Brief, p.24.

15. *See Geico Financial Svcs., Inc. v. Kramer*, 575 So. 2d 1345, 1346 (Fla. 4 DCA 1991) ("A self-executing final judgment in an action wherein no further judicial labor is required or contemplated ends the litigation between the parties. It is truly a final judgment.").

But this is not always true. In fact, in most cases, it is not until a jury renders a verdict or a judge makes a final ruling that parties will have an exact date of loss upon which prejudgment interest will flow. In these instances, the date of loss must ultimately be determined so it would be pointless for a party to present definitive evidence of the dates of loss during trial. It is already included in the court's post-trial duty to ascertain the relevant dates for the calculation of prejudgment interest. The Appellate Court's suggestion that prejudgment interest be akin to attorneys' fees and costs would not make the judicial process any more difficult nor would it create unnecessary judicial labor.[16]

In cases such as this one where the dates of loss appear on the record, no evidentiary hearing is required. Moreover, in cases where prejudgment interest is a liquidated amount, the interest can easily be awarded post-judgment.[17] In these cases, all that is needed to award the interest is a simple mathematical

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16. It should also be noted that the Lower Court has similarly reserved jurisdiction to award fees and costs in the underlying case. This case will be returned to the Lower Court for further judicial labor. Is there any difference between the supplemental judgment resulting from this later determination of fees and costs and prejudgment interest upon which entitlement has already been determined and upon which unrebutted evidence of dates of loss appear on the record?

17. *Keyes Co v. Spencer,* 16 So. 3d 213, 215 (Fla. 4th DCA 2009) ("Once a verdict liquidates damages as of a date certain, computation of prejudgment interest is **merely a mathematical computation** and is an element of damages as a matter of law, to be calculated at the statutory rate in effect at the time the interest accrues.") *citing Argonaut Ins. Co. v. May Plumbing Co. et al.,* 474 So. 2d 212 (Fla. 1985) (emphasis added).

calculation.[18] Additionally, attorneys' fees and costs at times require evidentiary hearings to determine proper allocation of fees and costs to those claims upon which fees and costs are awarded.[19] The fact that an evidentiary hearing may be required should not preclude a trial court from being able to award fees, costs and interests after a judgment has been entered and an appeal has been taken.

Newport also argues that the "Florida rules of civil procedure are set up to establish deadlines for filing motion to tax fees and costs but the rules do not address any such time period to address the determination of prejudgment interest…"[20] As this Court recently noted, a party is not bound by the timeframe set forth in the Florida Rules of Civil Procedure to file a motion for fees and costs post-appeal if the final judgment reserves jurisdiction to award them.[21] Likewise, where a final judgment reserves jurisdiction to award prejudgment interest, there is no timeframe that should restrict the prevailing party's filing of a motion for prejudgment interest. For these reasons, Newport's argument that prejudgment interest should not be treated like attorneys' fees and costs fails.

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18. *See Id.*

19. *See Vose v. Gulfside Const. Svcs., Inc.*, 12 So. 3d 322, 323-24 (Fla. 2d DCA 2009) (remanding the case to the trial court to conduct an evidentiary hearing to determine competing claims for attorneys' fees).

20. Newport's Response Brief, p.27.

21. *See Amerus Life Ins. Co. v. Lait*, 2 So. 3d 203, 207 (Fla. 2009).

V. The Release is in an entirely different matter, limited to only those claims settled and in no way affects the jurisdiction of this case or the ripeness of the issues to be decided

Newport improperly states that there is an "absence of a pending case or controversy since the Parties executed and delivered a broad mutual general release in July 2009 thereby releasing each other of any and all claims then existing, whether known or unknown or even suspected to exist."[22] Westgate hereby incorporates its arguments made in the Response to Newport's Suggestion of Mootness as though fully set forth herein. It is quite clear from the release executed by the parties in an action styled Burke v. Westgate Miami Beach, Ltd. et al., filed in the United States District Court for the Southern District of Florida, Case No.: 08-21904 (the "Burke Case"), that the claims released between the parties therein were only those claims "arising out of Burke's visits to the Resort" and in no way limit Westgate's right to prejudgment interest or otherwise make the issues in this case moot. Additionally, it is crystal clear that the intentions of the parties in settling the Burke Case were in no way meant to release any claims relating to prejudgment interest or to the instant matter. A release must be interpreted according to the intent of the parties which can be gleaned from the language of the release itself or from allegations of the parties as to their

22. *See* Newport's Response Brief, pp. 4-5.

intentions.[23] As stated in more detail in Westgate's Response to Newport's Suggestion of Mootness, it is abundantly clear from the release in the Burke Case and from the intentions of the parties that the release was not meant to and does not include a release of the instant matter.

Alternatively, at the very least, the language of the release is not properly decided in this Court and instead should be remanded to the trial court level for a factual determination as to the effect of the release itself and the intention of the parties.[24] It is well-established that mootness does not destroy the jurisdiction of the Supreme Court to decide issues of great public importance, such as the three questions certified by the Third District Court of Appeal in this instance.[25]

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23. *See Hydro Mechanical Co, Inc. v. E.J.T. Construction Co, Inc.*, 1989 WL 33803, at *4 (E.D. Pa. April 7, 1989); *see also Soncoast Community Church of Boca Raton, Inc. v. Travis Boating Center of Fla., Inc.*, 981 So. 2d 654 (Fla. 4th DCA 2008).

24. *See Richardson v. State*, 765 So. 2d 881 (Fla. 2d DCA 2000) (remanding a case to the trial court for a determination of whether an issue was moot).

25. *See Enterprise Leasing Co. v. Jones*, 789 So. 2d 964 (Fla. 2001) (holding that the mootness doctrine does not destroy jurisdiction when a question is before the court as a matter of great public importance or is an instance that is likely to recur); *see also In re Guardianship of J.D.S.*, 864 So. 2d 534 (Fla. 5th DCA 2004) (deciding the case on the merits, notwithstanding its mootness, as the issues is one of great public importance is and capable of recurring); *Gould v. State*, 974 So. 2d 441, 444 (Fla. 2d DCA 2007) ("mootness does not destroy a court's jurisdiction if the question raised is of great public importance or is likely to recur").

VI. **CONCLUSION**

While this Court's review is limited to the certified questions presented, no determination can be made without a detailed investigation and consideration of the substantive facts of this case. The very events that occurred in this case show how the *McGurn* rule simply does not work in practice and is not consistent with Florida's public and judicial policy. Newport's arguments in its Response brief do not present any substantive or procedural reasons why this Court should not either overrule or modify *McGurn.* For these reasons, this Court should revisit the *McGurn* rule, and either overrule it or make appropriate modifications. Alternatively, if a court makes a clear determination that a party is entitled to prejudgment interest in the final judgment and the parties agree to or do not object to the reservation of jurisdiction to award this interest, then that should qualify as a a reasonable exception to the application of *McGurn.*

Respectfully submitted,
Robert P. Frankel & Associates, P.A.
City National Bank Bldg., Suite 900
25 West Flagler Street
Miami, Florida 33130
Phone: (305) 358-5690
Fax: (305) 358-2306
Robert P. Frankel, Esq.
Attorneys for Petitioner

By: _____
ROBERT P. FRANKEL
Florida Bar No. 304786

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., and JOHN M. COONEY, ESQ., Arnstein & Lehr, LLP, 200 East Las Olas Boulevard, Suite 1700, Fort Lauderdale, Florida 33301 this ___th day of _____, 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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