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IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

CASE NO. 4D21-195

CENTRAL PALM BEACH PHYSICIANS
& URGENT CARE, INC.
a/a/o Elber Velasquez Lopez,

Appellant,

v.

MGA INSURANCE COMPANY, INC.,

Appellee.

ANSWER BRIEF OF APPELLEE MGA INSURANCE COMPANY, INC.

On Appeal of a Final Order of the County Court of the Seventeenth Judicial Circuit in and for Broward County, Florida

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Nancy W. Gregoire Stamper, Esq.
Florida Bar No. 475688
gregoirecourt@kblglaw.com;
cal@kblglaw.com
BIRNBAUM, LIPPMAN &
GREGOIRE, PLLC
1301 East Broward Boulevard
Suite 230
Fort Lauderdale, Florida 33301
Tel: 954.617.2300

Scott E. Danner, Esq.
Florida Bar No. 718971
pleadings@kirwanspellacy.com
KIRWAN SPELLACY DANNER
WATKINS & BROWNSTEIN, P.A.
200 South Andrews Avenue
8th Floor
Fort Lauderdale, Florida 33301
Tel: 954.463.3008

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PREFACE

This appeal is of a December 15, 2020 Order on Plaintiff's Motion to Enforce Payment of Post-Judgment Interest on Final Judgment and a December 15, 2020 Order Denying Plaintiff's Motion for Award of Accrued Pre-Judgment Interest on Attorney's Fees.

Appellant Central Palm Beach Physicians & Urgent Care, Inc. will be referred to as the "Provider."

Appellee MGA Insurance Company, Inc. will be referred to as "MGA."

The Provider's Initial Brief will be cited as "IB.__" to indicate the cited pages.

The Provider's Supplement to the Record on Appeal will be cited as "A.1-___-___," using the Provider's Bates numbers, to indicate the cited pages.

MGA's Appendix will be cited as "SA.__-__" to indicate document and pages.

STATEMENT OF THE CASE AND OF THE FACTS

A. Introduction

The Provider's Statement of the Case and Facts omits critical portions of the record. Those missing portions explain in detail the reasons leading to the trial court's December 15, 2020 Order on Plaintiff's Motion to Enforce Payment of Post-Judgment Interest on

Final Judgment ("Post-Judgment Interest Order") and the December 15, 2020 Order Denying Plaintiff's Motion for Award of Accrued Pre-Judgment Interest on Attorney's Fees ("Pre-Judgment Interest Order").

Those missing portions of the record also explain why the cases on which the Provider relies do not apply here and do not support its position.

B. Proceedings Below

MGA agrees: (1) it confessed judgment in the amount the Provider claimed; (2) it stipulated that the Provider was entitled to attorney's fees; and (3) the Provider's March 23, 2020 Motion for Attorney's Fees and Costs ("Fee Motion") requested interest from the date of entitlement (R.58-62; R.63-65; IB.2-3). From that point, however, MGA disagrees that the Provider's rendition of the facts leading to the Pre- and Post-Judgment Orders is complete, and because it is incomplete it is incorrect (IB.2-8).

At the same time the Provider filed its Fee Motion it filed a Motion for Entry of Final Judgment (R.66-67). That Motion contains no mention of any kind of interest. On April 9, 2020, in response to that Motion, the court entered Final Judgment for Plaintiff (R.68). The Final Judgment reserves jurisdiction to determine the amount of attorney's fees and costs but contains no mention of any kind of

interest. The Provider did not seek rehearing of or appeal the Final Judgment.

From April through September 2020 the court entered three Orders Preliminary to Hearing on Motion to Tax Costs and Award Attorney's Fees (R.69-71, 221-23, 226-28). Each explained the steps the parties were to take before scheduling a hearing on the Provider's Motion, and each directed the Provider to state with reasonable specificity the demanded attorney's fees and costs.

As directed by the Orders, the parties filed a number of documents, with MGA's attempt to analyze the Provider's demand frequently frustrated because of its redactions (R.72, 73-74, 75-96, 97-132, 133, 134, 135-215, 216-18, 219-20, 224-25, 229, 230-72, 273-93).

Among the Provider's documents was a June 5, 2020 Motion to Strike Defendant's Untimely Objections to Plaintiff's Costs, Hourly Rate of Plaintiff's Counsel and Tasks ("Sanctions Motion"), accusing MGA of failing to timely object to its Fee Motion and seeking sanctions as a result (R.216-18).

Not one of the Provider's documents mentions interest. Consistent with that, MGA's Expert Report is silent on the issue (R.230-72).

On September 11, 2020 the trial court entertained hearing on the Provider's Sanctions and Fee Motions (R.216-18; SA.1). The Provider has not submitted a transcript of that hearing. On September 17, 2020 the court entered an Order on Motion for Sanctions ("Sanctions Order") and an Order and Final Judgment Awarding Attorney's Fees, Expert Witness Fees and Costs ("Fee Judgment") (R.295-96, 297-99).

The Sanctions Order awards the Provider 2.5 hours at $400 hourly (R.295-96). The Fee Judgment states that the court considered, among other things, argument of counsel and testimony. Based on that, the Fee Judgment awards:

- 16.6 hours at $400 hourly for the Provider's counsel;
- 3.5 hours at $500 hourly for its expert; and
- $310 in taxable costs (R.297-99).

The Fee Judgment also finds that the "amount of benefits and interest owed has been satisfied because of Defendant's Confession of Judgment" (R.298). Like every document filed by the Provider, the Fee Judgment is otherwise silent on any claim for interest, and the Provider has not submitted any evidence that it ever requested interest at the September 11, 2020 hearing.

On October 1, 2020 the Provider filed a Motion for Award of Accrued Pre-Judgment Interest on Attorney's Fees ("Pre-Judgment

Interest Motion"), seeking pre-judgment interest on the Fee Judgment from the date of entitlement, and, later, a Motion to Enforce Payment of Post-Judgment Interest on Final Judgment ("Post-Judgment Interest Motion"), incorporating the Pre-Judgment Interest Motion argument and seeking post-judgment interest on the entire attorney's fee award, including pre-judgment interest (R.303-14, 326-33).

MGA opposed the Provider's stale attempt to recover interest, explaining that the parties stipulated that the "sole issue" in the case was attorney's fees, that the Fee Judgment entered by the trial court was the form submitted by the Provider, that MGA had already satisfied the $6,950 Fee Judgment, that the Provider did not seek rehearing of or appeal the Fee Judgment as insufficient in any way, and that the Pre-and Post-Judgment Interest Motions should therefore be denied (R.334-36).

On December 7, 2020 the court conducted a hearing on MGA's Motion for Rehearing on the Sanctions Order and the Provider's Pre- and Post-Judgment Interest Motions (A.1). The Provider has submitted only an incomplete transcript of the proceedings (A.1-5). Referring to the earlier, September 11, 2020 hearing resulting in the Sanctions Order and Fee Judgment, for which there is no transcript, the court said:

> Counsel, counsel, stop, stop. All right, you guys have not – I haven't had a chance to speak yet, so just listen.
>
> I was under the impression that the request for the sanctions was not just in reference to the delay in filing, but Counsel was also asking for compensation for the hearing that we had previously in October, that I would consider in the future, and that's part of the reason why I gave her – the last time what she was asking for, I gave her the 2.5 hours (A.1-5).
>
> * * *
>
> Basically what I did was, after I looked at it I gave her something and didn't give her everything that she was asking for based on the consideration for the Defense, and the reason why I didn't give any pre-judgment interest – and I actually considered it at the time that I was doing the order, but Counsel never asked for interest, never addressed a pre-judgment or post-judgment interest, and so I didn't even consider that, and that's not something that I'm going to consider now.
>
> So Counsel, when you have a hearing in reference to fees and costs and everything else, what you don't ask for you're not going to get, so interest is not on the table at this point (A.1-7).

In support, MGA's counsel explained that in the cases on which the Provider relied interest was requested at some point in the proceedings, while in this case there was no such request.

> You have to ask for it and it has to be part of the record.
>
> She did not do that at the time of the hearing, she's now trying to have an order

> entered on something that wasn't considered before . . ., and it was supposed to be established by the Court at the time of the hearing, and it's not improper for Your Honor to deny it if they didn't bring it forth (A.1-10).

On December 15, 2020 the court entered the Pre- and Post-Judgment Interest Orders and an Order Denying MGA's Motion for Rehearing (R.344-45, 346-67, 348-49).

SUMMARY OF ARGUMENT

MGA disagrees that the standard of review is de novo in the circumstances of this case. MGA also disagrees that the trial court abused its discretion in denying the Provider's demand for pre- and post-judgment interest on the Fee Judgment. While a preserved, well-pleaded request for interest may leave a court without discretion, a court cannot be found to have abused its discretion when the issue is never brought to its attention. Even if the Provider had filed a Florida Rule of Civil Procedure 1.530 motion, which it did not, the court would have discretion to deny it based not only on waiver but also on the doctrine of invited error.

Nor does any Florida case support the Provider's position to the contrary – that a litigant may ignore a final judgment that is silent on any interest award, fail to seek rehearing, fail to appeal, and then tardily demand an interest award. In each case on which the Provider

relies for its argument, the request for pre- or post-judgment interest was timely made and preserved. Those cases do not apply here.

ARGUMENT

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE PROVIDER'S DEMAND FOR EITHER PRE- OR POST-JUDGMENT INTEREST.

A. The standard of review is abuse of discretion.

MGA disagrees that the cases cited by the Provider control. In *Alexander v. Kalitan*, 263 So. 3d 70, 71 (Fla. 4th DCA 2019), the issue is interpretation of a statute and an appellate rule. The issue in *D'Agostino v. CCP Ponce, LLC*, 274 So. 3d 1141, 1149-50 (Fla. 3d DCA 2019), is whether to apply a contract interest rate or a statutory interest rate in calculating post-judgment interest.

In *Sterling Villages of Palm Beach Lakes Condominium Association, Inc. v. Lacroze*, 255 So. 3d 870, 872-73 (Fla. 4th DCA 2018), the trial court found entitlement to pre-judgment interest from a date certain, then declined to determine an amount.

Not one of the cases involves the type of record in this case, or a trial court's factual finding that the right to pre- and post-judgment interest has been waived. In those circumstances, the proper standard of review is abuse of discretion. *See Schoeff v. R.J. Reynolds Tobacco Co.*, 232 So. 3d 294, 305 (Fla. 2017); *Philip Morris USA Inc. v.*

Marchese, 231 So. 3d 473, 477 (Fla. 4th DCA 2017); *General Motors Corp. v. McGee*, 837 So. 2d 1010, 1033 (Fla. 4th DCA 2002).

B. The trial court did not abuse its discretion in finding that the Provider waived its right to pre- and post-judgment interest.

1. The Provider waived its right to pre-judgment interest on the attorney's fee award.

The Provider's position is based on its failure to recognize the difference in the cases on which it relies and the circumstances here (IB.10-15). The issue is not:

- whether pre-interest must be pled, as in *Phenion Development Group, Inc. v. Love*, 940 So. 2d 1179, 1182 (Fla. 5th DCA 2006), and *Mercedes-Benz of North America Inc. v. Florescue & Andrews Investments, Inc.*, 653 So. 2d 1067, 1068 (Fla. 4th DCA 1995);

- or whether it is compensatory or punitive, as in *Argonaut Ins. Co. v. May Plumbing Co.*, 474 So. 2d 212, 215 (Fla. 1985), and *Gallo v. Department of Banking and Finance*, 749 So. 3d 582, 584 (Fla. 5th DCA 2000);

- or when it begins to accrue, as in *Quality Engineered Installation, Inc. v. Higley South, Inc.*, 670 So. 2d 929, 930-31 (Fla. 1996), and *Cox v. Great American Insurance Company*, 203 So. 3d 204, 206 (Fla. 4th DCA 2016);

- or whether it must be formally raised before submission of a case to a jury, as in *RDR Computer Consulting Corporation v. Eurodirect, Inc.*, 884 So. 2d 1053, 2054 (Fla. 2d DCA 2004).

Nor, contrary to the Provider's understanding, did the court deny the Pre-Judgment Interest Motion merely because the Provider did not make the request before the Fee Judgment was entered – which it did not in any event (IB.11). The court ruled as it did because of the chronology from April through September 2020 supporting the court's finding that the Provider waived the issue (R.63-65).

Before entry of the September 2020 Fee Motion the Provider's only mention of interest on attorney's fees was in its March 2020 Fee Motion (R.63-65). Although not required, not even its January 2020 Complaint contains any reference to it, which distinguishes these circumstances from *Napp v. Carman*, 576 So. 2d 361, 362 (Fla. 4th DCA 1991), and *Leila Corporation of St. Pete v. Ossi*, 230 So. 3d 488, 492-93 (Fla. 2d DCA 2017), on which the Provider relies (R.3-8; IB.13-14).

Similarly, its Motion for Entry of Final Judgment contains no mention of interest on attorney's fees (R.66-67). Consistent with that, the Final Judgment does not mention interest or reserve jurisdiction to award it (R.66-67, 68). According to the trial court, the Provider also failed to make any mention of interest on attorney's fees at the September 11, 2020 hearing, for which there is no transcript. Consistent with that, the September 17, 2020 Fee Judgment does not mention interest or reserve jurisdiction to award it (R.297-99).

Not until October 1, 2020 did the Provider raise the pre-judgment interest on the attorney's fees issue and, as it acknowledges, it did not raise the issue as a motion for rehearing under Florida Rule of Civil Procedure 1.530 (R.303-14; IB.15). Whether or not the Pre-Judgment Interest Motion was properly named, however, is immaterial to the trial court's discretionary decision to deny it on the basis of waiver.

Also contrary to the Provider's position, there is no evidence that its "proposed fee judgment," which first appears on the trial progress docket on December 7, 2020, was ever submitted to the trial court before entry of the September 17, 2020 Fee Judgment (R.297-99, 337-43; IB.12-13).

Under these circumstances, a series of Florida cases has found that a trial court was within its discretion in finding that a litigant waived its right to a particular form of relief, including interest. Waiver is the "voluntary and intentional relinquishment of a known right or conduct which implies the voluntary and intentional relinquishment of a known right." *Pearson v. Peoples Nat. Bank*, 116 So. 3d 1283, 1284 (Fla. 1st DCA 2013). The relinquishment need not be with actual knowledge of the waiver as long as it is voluntary. *See id.* A party may waive any right to which it is legally entitled, by actions or conduct warranting an inference that a known right has

been relinquished. *See Band v. Libby*, 113 So. 3d 113, 115 (Fla. 2d DCA 2013).

Among the Florida cases applying the waiver doctrine is *Woodbury v. State*, 46 Fla. L. Weekly S74, *13 (Apr. 15, 2021), in which the Florida Supreme Court confirmed that the standard of review of a trial court's waiver findings is abuse of discretion and affirming the lower court's findings that the defendant had effectively waived his right to counsel and mental health mitigation evidence.

Similarly, in *R&I Shipping Line, LLC v. Hempstead Marine, Inc.*, 288 So. 3d 1215, 1215 (Fla. 3d DCA 2019), this Court reversed a trial court's granting of pre-judgment interest, explaining that the final judgment did not reserve jurisdiction to do so and there was no timely rule 1.530 motion. While here the Final Judgment reserved jurisdiction to award attorney's fees and costs, the Fee Judgment awarded those fees without reserving jurisdiction over the pre-judgment interest issue, just as in *Harbor Communities, LLC v. Jerue*, 81 So. 3d 568, 571 (Fla. 4th DCA 2012), which *R&I* cited.

And while the Provider filed its Pre-Judgment Interest Motion within 15 days, as it argues, a trial court's ruling on a rule 1.530 motion is also reviewed for abuse of discretion. The purpose of the rule is to call to the court's attention any "error, omission, or oversight

that may have been committed in the first consideration." *Langer v. Aerovias, S.A.*, 584 So. 2d 175, 176 (Fla. 3d DCA 1991).

But here there was no "error, omission, or oversight" within the scope of rule 1.530. As the trial court found, the Provider simply failed to present its argument regarding pre-judgment interest. Even given the Provider's argument that its Pre-Judgment Interest Motion should be treated as a rule 1.530 motion, the court was within its discretion in denying it. *See Forty One Yellow, LLC v. Escalona*, 305 So. 3d 782, 791 (Fla. 2d DCA 2020).

Finally, the doctrine of invited error also supports the trial court's conclusions. "It is well settled that under the invited error rule, 'a party cannot successfully complain about an error for which he or she is responsible or of rulings that he or she has invited the trial court to make.'" *Fuller v. Palm Auto Plaza, Inc.*, 683 So. 2d 654, 655 (Fla. 4th DCA 1996) (quoting *Gupton v. Village Key & Saw Shop, Inc.*, 656 So. 2d 475, 478 (Fla. 1995)).

For several months, through at least one hearing, numerous filings, and entry of the Final Judgment, the Provider never advised the court that the issue of pre-judgment interest was pending. It should not now be permitted to claim that the trial court erred – or abused its discretion – in declining to retroactively address the issue.

2. The Provider waived its right to post-judgment interest on the attorney's fee award.

The Provider's argument for post-judgment interest is even weaker (IB.16-20).

First, while, as it argues, there need not be a specific request for post-judgment interest in a pleading, a litigant may not remain silent on the issue until after entry of a final judgment that does not include it, fail to timely seek rehearing, and then fail to timely appeal, as the Provider has done here. That is a classic example of waiver.

Second, contrary to the Provider's understanding, the Fee Judgment language "for which let execution issue at the legal rate" does not equate to an award of post-judgment interest (IB.18-19). The post-judgment language approved by the Florida Supreme Court is:

> making a total of $_____ that shall bear interest at the rate of __% a year, for which let execution issue.

Forms 1.988, 1.990. Florida Rules of Civil Procedure.

Third, the Fee Judgment does not retain jurisdiction for an award of post-judgment interest on the attorney's fee award. The Provider did not timely file any motion under rule 1.530 to correct the Fee Judgment, and it did not file a notice of appeal within 30 days as required by Florida Rule of Appellate Procedure 9.030(b)(1)(A). Therefore, the issue is again waived.

Fourth, as the Provider admits, the total due it as reflected in the Fee Judgment was $6,950 – $6,640 for attorney's fees and $310 for costs (R.298). MGA tendered that total in satisfaction of the Fee Judgment long before the December 7, 2020 hearing on the Provider's Post-Judgment Interest Motion, and the Provider refused to accept it (R.328; A.1-9; IB.18-19). Once again, therefore, the Provider's demand for post-judgment interest was waived.

Fifth, the Provider did not request an award of post-judgment interest in its Fee Motion (IB.16-17). The request in that document was for "interest from the date of entitlement," which implies pre-judgment interest, not post-judgment interest (IB.17). *See Napp*, 576 So. 2d at 362 (explaining that a prayer for "interest" can only refer to prejudgment interest).

Sixth, the Provider's argument regarding its proposed Final Judgment is also incorrect (IB.17-18). As MGA explained above, the only evidence in the record of that proposed Final Judgment is months after the court entered the Fee Judgment (R.297-99, 337-43).

Finally, none of the cases cited by the Provider support its position. In *Okun v. Litwin Securities, Inc.*, 652 So. 2d 387, 388 (Fla. 3d DCA 1995), the interest request was after entry of an arbitration award and before confirmation of the award. There was no waiver.

Port-A-Weld, Inc. v. Padula & Wadsworth Construction, Inc., 984 So. 2d 564, 570 (Fla. 4th DCA 2008), holds only that a pre-judgment tender did not affect the right to post-judgment interest. Here, however, MGA tendered the entire amount of the Fee Judgment; the Provider simply refused to accept it, as it admits (R.326-33; IB.19).

CONCLUSION

For the foregoing reasons, the Pre- and Post-Judgment Interest Orders should be affirmed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document was filed electronically and was sent by E-Mail from the Florida Courts' E-Filing Portal system, unless otherwise noted below, on all counsel or parties of record listed below, this 7th day of October 2021. The foregoing document has also been sent from the undersigned counsel by E-Mail to all counsel or parties of record listed below.

CERTIFICATE OF COMPLIANCE

We certify that this brief complies with the font requirements set forth in Florida Rule of Appellate Procedure 9.045 and that this brief

complies with the type-volume limitation of Florida Rule of Appellate Procedure 9.045(e) because this brief contains 3,358 words.

Respectfully submitted,

/s/ Nancy W. Gregoire Stamper, Esq.

Nancy W. Gregoire Stamper, Esq.
Florida Bar No. 475688
Board Certified in Appellate Practice
Primary e-mail: gregoirecourt@kblglaw.com
Secondary e-mail: cal@kblglaw.com
BIRNBAUM, LIPPMAN & GREGOIRE, PLLC
1301 East Broward Boulevard, Suite 230
Fort Lauderdale, Florida 33301
Tel: 954.617.2300
Attorneys for Appellee

SERVICE LIST

Belayne Guerrero, Esq.
BGPleadings@forthepeople.com
MORGAN & MORGAN, P.A.
8151 Peters Road
Suite 4000
Plantation, Florida 33324
Tel: 954.327.2317

Douglas H. Stein, Esq.
dhs@steinappeal.com
DOUGLAS H. STEIN, P.A.
121 Alhambra Plaza
Suite 1500
Coral Gables, Florida 33134
Tel: 786.633.6571