IN THE CIRCUIT COURT FOR THE
ELEVENTH JUDICIAL CIRCUIT IN AND
FOR MIAMI-DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO. 02-14638 CA 8

OTIS. J. MCDUFFIE,

Plaintiff,

vs.

JOHN W. URIBE, M.D.

Defendant.
_____/

PLAINTIFF'S NOTICE OF FILING PROPOSED ORDER ON PLAINTIFF'S MOTION FOR (1) ENTRY OF FINAL JUDGMENT AND (2) DETERMINATION OF PREJUDGMENT INTEREST AND DEFENDANT'S MOTION FOR SETOFF AND PROPOSED FINAL JUDGMENT

Plaintiff Otis J. McDuffie, by and through undersigned counsel, hereby gives notice of filing his proposed Order on Plaintiff's Motion for (1) Entry of a Final Judgment, and (2) Determination of Prejudgment Interest and the Defendant's Motion for Setoff and his proposed Final Judgment.

It should be noted that the interest scenario in Plaintiff's proposed Order and Final Judgment is Scenario 1. Under this scenario, the setoff is deducted after interest is calculated.

If the Court were to accept the Defendant's argument that the setoff is to be deducted before interest is calculated, Plaintiff submits that Scenario 4 should be employed, rather than Scenario 3. Under Scenario 4 the principal amount is adjusted as of the time the settlement amount was paid. Scenario 3 (advocated by the Defendant) gives a credit on the principal before the settlement amount was paid.

RUSSOMANNO & BORRELLO, P.A.
Attorneys for Plaintiff
Museum Tower – Penthouse 2800
150 West Flagler Street
Miami, Florida 33130
Telephone: (305) 373-2101
Fax: (305) 373-2103

By: _____
Herman J. Russomanno (Fla. Bar No. 240346)
Robert J. Borrello (Fla. Bar No. 764485)

Stuart N. Ratzan, Esquire
RATZAN & RUBIO, P.A.
200 South Biscayne Blvd., 54th Floor
Miami, Florida 33131
Telephone: (305) 374-6366
Fax: (305) 374-6755

Joel D. Eaton, Esquire
PODHURST ORSECK, P.A.
25 West Flagler Street, Suite 800
Miami, Florida 33130
Telephone: (305) 358-2800
Fax: (305) 358-2382

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was faxed and mailed on this 4th day of June, 2010, to: Charles Michael Hartz, Esquire, Attorney for John W. Uribe, M.D., George Hartz Lundeen, 4800 Le Jeune Road, Coral Gables, Florida 33146, and Wendy F. Lumish, Esquire, Carlton Fields, P.A., Attorneys for John W. Uribe, M.D., 4200 Miami Tower, 100 Southeast Second Street, Miami, Florida 33131.

Robert J. Borrello

IN THE CIRCUIT COURT FOR THE
ELEVENTH JUDICIAL CIRCUIT IN AND
FOR MIAMI-DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO. 02-14638 CA 8

OTIS. J. MCDUFFIE,

Plaintiff,

vs.

JOHN W. URIBE, M.D.

Defendant.
_____/

ORDER ON PLAINTIFF'S MOTION FOR (1) ENTRY OF FINAL JUDGMENT AND (2) DETERMINATION OF PREJUDGMENT INTEREST AND DEFENDANT'S MOTION FOR SETOFF

THIS CAUSE came before the Court on May 27, 2010, on the Plaintiff Otis J. McDuffie's Motion for (1) Entry of Final Judgment and (2) Determination of Prejudgment Interest and Defendant John W. Uribe, M.D.'s Motion for Setoff, and having reviewed the motions and memoranda of counsel, heard argument of counsel, and being duly advised in the premises, it is

ORDERED AND ADJUDGED as follows:

1. This case was an action for damages as a result of medical malpractice. The plaintiff sought damages for past loss of earnings/earning capacity as well as for non-economic damages including mental pain and suffering.

2. On this issue of economic losses, the jury received the following instruction:

You shall consider the following elements:

a. *Lost earnings, lost lost [sic] earning capacity:*

Any earnings or loss of ability to earn money sustained in the past.

3. Following a jury trial, on May 5, 2010, a verdict was entered in Plaintiff's favor. The jury awarded past loss of earnings or earning capacity in the amount of $10,000,000 and non-economic damages in the amount of $1,500,000. The jury also found that the period of time for which the plaintiff suffered lost earnings or loss of earning capacity was 2001 to 2004.

4. Plaintiff seeks an award of prejudgment interest on the economic damages awarded by the jury.

5. Under Florida law, "[w]hen a verdict liquidates damages on a plaintiff's out-of-pocket, pecuniary losses, plaintiff is entitled, as a matter of law, to prejudgment interest at the statutory rate from date of such loss." *Argonaut Ins. Co. v. May Plumbing Co.*, 474 So. 2d 212 (Fla. 1985). Prejudgment interest should be awarded on the loss of past earnings provided the jury fixes a date of that loss. *Nova Southeastern University of Health Sciences, Inc. v. Sharick*, 21 So. 3d 41, 44 (Fla. 3d DCA 2009).

6. Defendant argues that a plaintiff is entitled to prejudgment interest only on liquidated damage awards, i.e., where the sum is certain but the defendant refuses to pay. This is not correct. In *Argonaut Ins. Co.*, the Florida Supreme Court rejected the line of cases referred to as the "penalty theory" under which damages had to be a "liquidated" amount for prejudgment interest to be awardable. The Court instead recognized that Florida follows the "loss theory." Under the "loss theory," "neither the merit of the defense nor the uncertainty of the amount of loss affects the award of prejudgment interest." 474 So. 2d at 215. *See Berloni S.P.A. v. Della Casa, LLC*, 972 So. 2d 1007 (Fla. 4th DCA 2008) ("Prejudgment interest cannot be denied simply because the amount of damages was disputed."). Under *Argonaut*, "the loss itself is a wrongful deprivation by the defendant of the plaintiff's property." 474 So. 2d at 215.

7. Defendant argues that prejudgment interest should not be awarded in personal injury cases. This statement is overbroad. A plaintiff may not obtain prejudgment interest on intangible, non-economic damages. In addition, a plaintiff may not seek prejudgment interest on future economic damages which are reduced to present value. The cases cited by the Defendant on this point are off the mark. For example, in *Amerace Corp. v. Stallings*, 823 So. 2d 110, 111 n. 2 (Fla. 2002), the Court denied prejudgment interest on a personal injury damage award for pain and suffering, past medical expenses, and loss of consortium. Past lost earnings were not at issue. Similarly, *Lumbermen's Casualty Co. v. Percefull*, 653 So. 2d 389 (Fla. 1995), was a claim under an insurance contract for medical payments arising after a motorcycle accident. There was no issue of past earnings. In *Scheible v. Joseph L. Morse Geriatric Center*, 988 So. 2d 1130 (Fla. 4th DCA 2008), there was no claim for lost wages or lost earnings. In *Aetna Casualty and Surety Co. v. Langel*, 587 So. 2d 1370, 1373 (Fla. 4th DCA 1991), a personal injury action against an uninsured motorist carrier, the jury awarded a general verdict of damages and did not apportion the lost earnings and other elements of damages.

8. As Defendant concedes, even in personal injury cases, a plaintiff may recover out of pocket losses which the courts have referred to as "vested property rights." In *Alvarado v. Rice*, 614 So. 2d 498 (Fla. 1993), a plaintiff sought prejudgment interest on past medical expenses arising from an automobile accident. Citing *Argonaut*, the Florida Supreme Court noted that "[i]t is well settled that a plaintiff is entitled to prejudgment interest when it is determined that the plaintiff has suffered an actual, out-of-pocket loss at some date prior to the entry of judgment." *Id.* at 499. The Court then explained, "[t]o date, cases recognizing a right to prejudgment interest have all involved the loss of a vested property right." *Id.* As an example of "vested property rights," the *Alvarado* Court cited to *Barnes Surgical Specialties, Inc. v. Bradshaw*, 549 So. 2d 1189 (Fla. 2d

DCA 1989), which held that a salesman has a right to prejudgment interest on commissions which were improperly withheld. Thus, *Alvarado*, a personal injury case, pointed to a lost earnings case as an example of a "vested property right" to which prejudgment interest may be awarded. *See also Underhill Fancy Veal, Inc. v. Padot*, 677 So. 2d 1378 (Fla. 1st DCA 1996) ("prejudgment interest may be awarded in tort cases as to those damages where there has been an ascertainable out-of-pocket loss occurring at a specific time prior to the entry of the judgment").

9. The *Alvarado* Court held that the plaintiff was not entitled to interest on her medical expenses because she had not paid them and was not charged interest by her health care providers. As a result, the Court concluded that the plaintiff was not "denied the use of her money:"

> Unlike the plaintiffs in *Argonaut* and the other cases cited above, Alvarado has not suffered the loss of a vested property right. She was not forced to use her private funds to pay medical bills incurred as a result of Rice's negligence. Had Alvarado actually paid her medical bills when they became due, **she would be suffering the loss of a vested property right because she would be denied the use of her money**. However, in the absence of such payment by Alvarado, she is not entitled to prejudgment interest.

614 So. 2d at 499-500 (emphasis added). By contrast, McDuffie, like the salesman in the *Barnes* decision cited by the *Alvarado* Court, was denied the use of his earnings. *See also Samek v. Gerson*, 717 So. 2d 117 (Fla. 3d DCA 1998) (awarding prejudgment interest on claim for fees for services rendered where evidence was not so uncertain, speculative, remote, contingent and inconclusive that it could not support the verdict rendered). "Out of pocket damages" are either monies that a plaintiff had to lay out (such as medical expenses) or monies that the plaintiff did not receive (such as lost earnings).

10. Defendant attempts to distinguish *Barnes* as a case involving "liquidated" damages. First, this is not accurate. The commissions in *Barnes* were disputed. *See Barnes*, 549 So. 2d at 1189-90 (noting that the parties disputed the existence of the alleged oral agreement on which the

claim for commissions was based and whether prior payments to plaintiff were based on sales). Second, as noted above, the whole point of *Argonaut* is that damages need not be undisputed for prejudgment interest to be awarded.[1] Thus, this argument is a non starter.

11. In support of the granting of prejudgment interest on lost earnings, Plaintiff has cited *Nova Southeastern University Health Sciences, Inc. v. Sharick* 21 So. 3d 41 (Fla. 3d DCA 2009). There, an osteopathic student brought suit against the University, alleging that he was wrongfully dismissed shortly before he was to receive a degree in osteopathic medicine. In an earlier appeal, after the jury had found for the student on liability, the Third District allowed the student to assert a claim for lost earnings. As Defendant does in this case, the University asserted that lost earnings were "too remote, contingent, conjectural and speculative and could not be established within a reasonable degree of certainty." *Sharick v. Southeastern University Health Sciences, Inc.*, 780 So. 2d 136, 140 (Fla. 3d DCA 2000). The Third District rejected the University's argument and remanded the case for a trial on the student's claim of lost earnings.

12. Following a retrial on damages, the jury awarded the student $813,000 for past earnings and $3.5 million (present value) in earnings that he would lose in the future as a result of his improper dismissal from the program. On appeal following the retrial, the Third District held that the student was not entitled to prejudgment interest on the loss of past earnings because the jury failed to fix a date of that loss.

13. *Sharick* is on point. While that claim sounded in "breach of implied in law contract," it involved a claim for lost earnings, the defendant hotly contested the claim for lost

[1] Defendant suggests that the "penalty" theory rejected by *Argonaut* is still alive and well in personal injury cases when prejudgment interest is claimed on economic losses. Of course, neither *Argonaut* nor any of its progeny have ever recognized such an exception. Defendant has not advanced any logical rationale for such a distinction. And a distinction of this nature would, at the very least, raise concerns under the Equal Protection clauses of the Florida and United States Constitutions.

earnings, and the jury awarded lost earnings. The only difference is that the jury in *Sharick* did not fix the date of loss while the jury here did so.

14. Based on the foregoing, Plaintiff is entitled to prejudgment interest from January 1, 2005 through the date of entry of judgment. The jury liquidated pecuniary, out of pocket losses as of a prior date.

15. Defendant argues that the Court has equitable jurisdiction to deny prejudgment interest. According to Defendant, prejudgment interest would be a "windfall" to the plaintiff. The Court disagrees. The jury determined that the Defendant negligently failed to diagnose or treat the injury to the Plaintiff's left great toe and that as a result the Plaintiff suffered $10 million in economic losses. It is not unfair, inequitable or a windfall for the plaintiff to be awarded the time value of his lost earnings. Plaintiff had to wait at least six years to receive the economic losses to which the jury found he was entitled. The Defendant, on the other hand, benefitted by waiting at least six years before having to compensate for those losses. Moreover, unlike *Perdue Farms, Inc. v. Hook*, 777 So.2d 1047 (Fla. 2d DCA 2001), Plaintiff did not "stretch the outer limits" of an economic award. The Plaintiff was awarded $10 million of the $15 million sought for past earnings. Defendant also argues that the damage award is speculative and that the jury could have found that the losses were the result of the injury itself. However, any uncertainty as to the true cause of Plaintiff's outcome resulted from the Defendant's failure to diagnose the injury or communicate the diagnosis to the patient so that he could obtain an opinion from a specialist and consider early surgical treatment. Defendant's actions, as found by the jury, took away that opportunity. Defendant cannot now capitalize on the very uncertainty he created as an "equitable consideration" against the granting of prejudgment interest on the lost earnings.

16. Defendant has filed a Motion for Setoff. The parties have agreed that the appropriate setoff is $598,000. They differ, however, as to how the setoff should be deducted from the damages. Plaintiff contends that the entire loss should be determined, including interest, and then the setoff applied to the total amount. Defendant contends that the deduction should occur before interest is calculated. Defendant argues that the deduction should occur as of the date of the loss (i.e., January 1, 2005) or, alternatively, no later than the dates on which the setoff amounts were paid (which were on June 14, 2006 and March 23, 2010 respectively).

17. The setoff statutes control this issue.[2] Both Florida Statute §§ 46.015 and 768.041 provide that if any settlement amount has been paid "in partial satisfaction of the damages sued for, the court shall set off this amount from the amount of any judgment to which the plaintiff would be otherwise entitled at the time of rendering judgment and enter judgment accordingly." This language makes clear that the judgment should be determined by adding the principal and prejudgment interest accruing on the economic damages and then reducing the judgment by the setoff amount. Thus, the deduction occurs after interest is calculated, not before. Accordingly, the judgment shall be $11,500,000 in principal plus $4,862,740, in prejudgment interest from January 1, 2005, through June 7, 2010 (and $1,643.84 per diem thereafter), for a total of $16,362,740, less the setoff of $598,000 for a total judgment of $15,764,740.

[2] The decision cited by the Defendant, *Gilliard v. Wright*, 667 So. 2d 815 (Fla. 2d DCA 1995), does not address how the setoff should be calculated.

18. A separate final judgment will be entered in accordance with this Order.

DONE AND ORDERED in Chambers at Miami, Miami-Dade County, Florida this ____ day of June, 2010.

MICHAEL A. GENDEN
CIRCUIT COURT JUDGE

Copies furnished to:
Counsel of record

IN THE CIRCUIT COURT FOR THE
ELEVENTH JUDICIAL CIRCUIT IN AND
FOR MIAMI-DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO. 02-14638 CA 8

OTIS. J. MCDUFFIE,

Plaintiff,

vs.

JOHN W. URIBE, M.D.

Defendant.
_____/

FINAL JUDGMENT

Pursuant to the verdict rendered in this action,

IT IS ADJUDGED that Plaintiff, Otis J. McDuffie, 1331 N.W. 121st Avenue, Plantation, Florida 33323, recovers from Defendant John W. Uribe, M.D., 3311 South Moorings Way, Miami, Florida 33133, the sum of $15,759,808 that shall bear interest at the rate of 6% a year, for which let execution issue. Jurisdiction of this case is retained as to the issues of costs and attorney's fees.

ORDERED at Miami-Dade County, Florida this _____ day of June, 2010.

_____
MICHAEL A. GENDEN
CIRCUIT COURT JUDGE

Copies furnished to:
Herman J. Russomanno, Esq.
Robert J. Borrello, Esq.
Stuart N. Ratzan, Esq.
Charles P. Hartz, Esq.
Wendy F. Lumish, Esq.
Joel Eaton, Esq.