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Vining v. Martyn
Fla.App. 4 Dist.,1995.

District Court of Appeal of Florida,Fourth District.
Edward C. VINING, Jr., Appellant/Cross-Appellee,
v.

Eva MARTYN, Appellee/Cross-Appellant.

No. 94-0415.

Aug. 16, 1995.

Rehearing and Certification of Question Denied Oct.
12, 1995.

Client brought action for conversion, civil theft, and fraud on court, against counsel. The Circuit Court, Martin County, [Scott Kenney](#), J., entered judgment for client. Counsel appealed, and client cross-appealed. The District Court of Appeal, [Polen](#), J., held that: (1) client was entitled to prejudgment interest on compensatory damages from date theft occurred; and (2) offset should not have been deducted prior to computation of trebling of verdict in awarding damages.

Reversed with directions.

[Farmer](#), J., filed special concurring opinion.

West Headnotes

[1] Interest 219 ☞39(2.20)**219** Interest**219III** Time and Computation

219k39 Time from Which Interest Runs in
General

219k39(2.5) Prejudgment Interest in General

219k39(2.20) k. Particular Cases and Issues. [Most Cited Cases](#)

Client was entitled to prejudgment interest on compensatory damages from date theft occurred, in action for conversion and civil theft against counsel, despite lack of date certain for loss set out in verdict form.

[2] Interest 219 ☞39(2.20)**219** Interest**219III** Time and Computation

219k39 Time from Which Interest Runs in
General

219k39(2.5) Prejudgment Interest in General

219k39(2.20) k. Particular Cases and Issues. [Most Cited Cases](#)

Interest 219 ☞39(2.55)**219** Interest**219III** Time and Computation

219k39 Time from Which Interest Runs in
General

219k39(2.5) Prejudgment Interest in General

219k39(2.55) k. Punitive Damages; Penalties. [Most Cited Cases](#)

Prejudgment interest on judgment for conversion and civil theft should only be awarded on actual amount stolen, and not on treble damages.

[3] Damages 115 ☞63**115** Damages

115III Grounds and Subjects of Compensatory
Damages

115III(B) Aggravation, Mitigation, and Reduction of Loss

115k63 k. Reparation by Wrongdoer. [Most Cited Cases](#)

Treble damages, in action for conversion and civil theft, should be computed before deduction of off-set for settlement amount received from codefendant.

***1081** Edward C. Vining, Jr., pro se.

***1082** Stephen Gellman, Miami, Elton H. Schwarz, Stuart, and [Douglas H. Stein](#) of Douglas H. Stein, P.A., Coral Gables, for appellant/cross-appellee.

[Lauri Waldman Ross](#) of Maland & Ross, Miami, for appellee/cross-appellant.

[POLEN](#), Judge.

This appeal stems from an attorney-client dispute which grew out of Edward J. Vining's representation of Eva Martyn in a 1980 dissolution of marriage proceeding in Martin County. As a result of this dispute,

Martyn filed a complaint against Vining, which included counts for conversion, civil theft, and fraud on the court. The trial court entered judgment in favor of Martyn on these counts, and Vining raised five points on appeal challenging the judgment. We affirm on all of appellant's points, but reverse based on a consideration of both points regarding damages that Martyn raised on her cross-appeal.

[1][2] As to Martyn's first point on cross-appeal, we agree that the trial court should have awarded prejudgment interest from the date the theft occurred. See *Florida Steel Corp. v. Adaptable Dev., Inc.*, 503 So.2d 1232 (Fla.1986) (under the "loss theory" applicable in Florida, prejudgment interest is merely another element of compensatory damages and that once a defendant is held liable for a plaintiff's damages "interest should follow as a matter of law"); *O'Donnell v. Arcoiries, Inc.*, 561 So.2d 344 (Fla. 4th DCA 1990) (recognizing that prejudgment interest was an element of damages in a civil theft case). We are not persuaded by Vining's argument that Martyn was not entitled to prejudgment interest because there was no date certain for the loss set out in the verdict form. See *Charles Buzbee & Sons, Inc. v. Falkner*, 585 So.2d 1190 (Fla. 2d DCA 1991) (reversible error not to award prejudgment interest on ostensible basis that date of loss could not be determined where it was apparent from the record). However, we agree with Vining that because the purpose of prejudgment interest is restitution, rather than retribution, the prejudgment interest should only be awarded on the actual amount stolen and not on the treble damages. *Zucker v. Sears Roebuck & Co.*, 589 So.2d 454 (Fla. 5th DCA 1991) (in a worthless check action, creditor could only recover prejudgment interest on face amount of check but not on treble damages based on the principle that such interest was restitution and not retribution). Although this court in *O'Donnell*, 561 So.2d at 345, stated that "the trial court properly computed treble damages by including prejudgment interest as an element of damages," this single sentence does not make clear whether this court was authorizing prejudgment interest on the treble damages or the compensatory portion of the award. Thus, we do not read *O'Donnell* as restricting our opinion at bar.

[3] With regard to Martyn's second point on cross-appeal, we also agree that the trial court erred in its computation of treble damages. The trial court calculated the damages due and owing Eva Martyn by deducting as an off-set the settlement Eva received from codefendant Florida National Bank before trebling the damages. While there is no Florida case law directly on point, Martyn has cited numerous federal cases which support her argument that the verdict should have been trebled *before* deducting the off-set. See *Flintkote v. Lysfjord*, 246 F.2d 368, 398 (9th Cir.), cert. denied, 355 U.S. 835, 78 S.Ct. 54, 2 L.Ed.2d 46 (1957) (the plaintiffs having already received \$20,000, it was proper to deduct that sum from the trebled amount. Any other method would have resulted in plaintiffs receiving less than the whole to which they were entitled); *Burlington Industries, Inc. v. Milliken & Co.*, 690 F.2d 380, 391 (4th Cir.1982), cert. denied, 461 U.S. 914, 103 S.Ct. 1893, 77 L.Ed.2d 283 (1983) ("[T]he heretofore unbroken rule has been that any settlement payments are deducted from the damages awarded after trebling"). Thus, we reverse with directions for the trial court to deduct the off-set in the amount of the Florida National Bank settlement *after* the verdict is trebled, in addition to awarding prejudgment interest on the compensatory damages from the date the theft occurred.

GUNTHER, C.J., concurs.

FARMER, J., concurs specially with opinion.*1083
FARMER, Judge, concurring specially.

I write separately only to make clear that our decision today is not inconsistent with *Christenson & Associates, Mtg. Co. v. Palumbo-Tucker*, 656 So.2d 266 (Fla. 4th DCA 1995). In that case we held that prejudgment interest was part of the total compensatory damages package for purposes of calculating the presumptive range of allowable punitive damages under section 768.73(1)(a), Florida Statutes (1993).

In today's case, we hold that prejudgment interest should be awarded only on the actual amount of the loss before any statutory trebling of compensatory damages. That is certainly agreeable with the *Christenson & Associates* holding, in which prejudgment interest was added to the amount of the actual loss, and the combined sum was then trebled to cal-

culate the punitive damages.

With that understanding, I concur in today's decision.

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