

IN THE SUPREME COURT OF OHIO

ROBERT H. DUES, : CASE NO. 06-1069
: :
Appellant/Cross-Appellee, : On Appeal from the Court of Appeals of
: the Third Appellate Judicial District of
: Ohio, Shelby County
v. :
: :
MINSTER FARMERS COOPERATIVE : Court of Appeals
EXCHANGE COMPANY, INC. : Case No. 17-05-28
: :
Appellee/Cross-Appellant. :

**COMBINED REPLY BRIEF OF APPELLANT/CROSS-APPELLEE ROBERT H. DUES
TO APPELLEE/CROSS-APPELLANT MINSTER FARMERS' RESPONSE AND
MERIT BRIEF IN RESPONSE TO CROSS APPEAL**

Bryan A. Niemeyer (0068255)
John M. Deeds (0076721)
FAULKNER, GARMHAUSEN,
KEISTER & SHENK
A Legal Professional Association
Courtview Center – Suite 300
100 South Main Avenue
Sidney, Ohio 45365(937) 492-1271
(telephone)
(937) 498-1306 (facsimile)
bniemeyer@fgks-law.com
Counsel for Appellant/Cross-Appellee,
Robert H. Dues

Michael A. Burton (0064921)
15 Willipie Street, Suite 300
P.O. Box 33
Wapakoneta, Ohio 45895-0033
(419) 738-8195 (telephone)
(419) 738-8182 (facsimile)
wlawmab@bright.net
Counsel For Appellee/Cross-Appellant,
Minster Farmers Cooperative Exchange
Company, Inc.

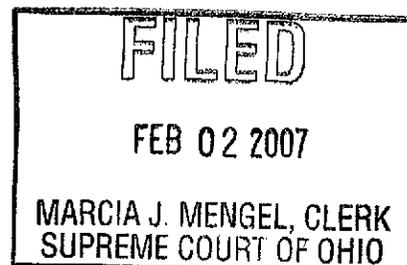


TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES.....	ii
STATEMENT OF FACTS.....	1
ARGUMENT.....	2
<u>Proposition of Law No. I: Invoices and account statements attempting to establish a non-statutory simple interest rate on a book account do not support, and in fact directly contradict, imposition of a compounding interest rate, which compounding rate, in order to be effective, is required to be specifically agreed to by the parties.</u>	9
CONCLUSION	11
PROOF OF SERVICE.....	12

TABLE OF AUTHORITIES

<u>CASE LAW:</u>	<u>Page</u>
<i>Albee v. Wolfeboro Railroad Co.</i> (N.H. 1985), 489 A.2d 148	3
<i>Pacific Pools Const. Co. v. McClain's Concrete, Inc.</i> (Nev. 1985), 706 P.2d 849, 851-52	3
<i>Celotex Corp. v. Buildex, Inc.</i> (Fla. App. 1985), 476 So.2d 294, 295-96	3
<i>Southwest Storage & Distribution Co. v. Smith's Food & Drug Centers Inc.</i> (D. Az. Dec. 7, 2005), Case No. 03-1785-PHX-NVW, 2005 WL 3312787	3
<i>Advance Concrete Forms, Inc. v. McCann Const. Specialties Co.</i> (7 th Cir. 1990), 916 F.2d 412	4
<i>Mid-State Contracting, Inc. v. Superior Floor Co., Inc.</i> (Wis. App. 2002), 655 N.W.2d 142, 145-146	4
<i>Vulcan Automotive Equipment, Ltd. v. Global Marine Engine & Parts, Inc.</i> (D. R.I. 2004), 240 F. Supp.2d 156	4
<i>Preston Farm & Ranch Supply, Inc. v. Bio-Zyme Enterprises</i> (Tex. 1982), 625 S.W.2d 295	4
<i>Review Video, LLC v. Enlighten Technologies, Inc.</i> (N.D. Iowa Jan. 12, 2005), Case No. CO4-0123, 2005 WL 91297	5
<i>Jerry Palmer Homes, Inc. v. Simpson</i> (Iowa App. 2006), 2006 WL 1230018.....	5
<i>Southwest Concrete Products v. Gosh Construction Corp.</i> (1990), 274 Cal. Rptr. 404	5
<i>Rangen, Inc. v. Valley Trout Farms, Inc.</i> (1983), 104 Idaho 284.....	6
<i>Farm Credit Services of Mid-America, ACA v. Runyan</i> (May 28, 1999), Champaign App. No. 98CA28, 1999 WL 335124	6
<i>Taylor v. Hiestand & Co.</i> (1889), 47 Ohio St. 345.....	10
<i>State ex rel. City of Elyria v. Trubey</i> (1984), 20 Ohio App. 3d 8.....	10
<i>Berdyck v. Shinde</i> (1998), 128 Ohio App. 3d 68.....	10

STATUTES:

R.C. § 1343.03.....	passim
R.C. § 1302.10.....	2
R.C. § 1343.01.....	6
R.C. § 1302.07.....	9
R.C. § 1302.04.....	9

STATEMENT OF FACTS

This is a simple case involving the proper method of computing interest in an open account. Appellant Robert H. Dues (“Dues”) set up an open account with Appellee The Minster Farmers Cooperative Exchange Company, Inc. (“Minster Farmers”) in or around 1982. (October 14, 2005 Order-Entry of the Shelby County Court of Common Pleas). Minster Farmers alleges that Dues owes it in excess of \$40,000, which amount represents interest charges that were compounded monthly at 2% per month. (See Account Statement, Minster Farmers’ Exhibit “B” at the July 6, 2005 trial). Minster Farmers asserts it is entitled to interest at the rate of two percent (2%) per month, compounded monthly, on the account of Dues. The basis for Minster Farmers assertion is that its invoices and delivery tickets stated that interest would be charged at the rate of “2% per month (24% per annum).”

The trial court concluded that because a contract between merchants was implied under the UCC provisions of the Ohio Revised Code based on the actions of the parties, Dues thereby accepted the interest rate stated on Minster Farmers’ invoices and account statements. (See Decision Order-Entry of the Shelby County Court of Common Pleas dated October 14, 2005, a copy of which is included in the Appendix of Dues’ Merit Brief at p. 18). The trial court further held that R.C. § 1343.03(A)(1) was inapposite to this matter because the case involved a transaction between merchants governed by the Uniform Commercial Code, who have bargained for this finance charge provision. *Id.* In so holding, the trial court granted Minster Farmers’ Motion for Summary Judgment without even addressing the issue of the method by which Minster Farmers compounded interest. *Id.*

Dues timely filed a Notice of Appeal in the Ohio Third District Court of Appeals. The Court of Appeals issued its Opinion in this matter on April 17, 2006 in which it reversed the trial

court's decision on the compounding interest issue, but upheld the trial court's finding that a "contract existed between two merchants under the U.C.C.," and that the written contract requirements of R.C. § 1343.03(A) were, therefore satisfied. Dues timely filed a Notice of Appeal to this Court on June 1, 2006 (App. p. 1) and, after submitting a Memorandum in Support of Jurisdiction, this Court accepted this appeal¹.

ARGUMENT

A. Reply to Appellee/Cross-Appellant's Merit Brief in Response to Appellant/Cross-Appellant's Merit Brief.

It appears Appellee/Cross-Appellant Minster Farmers Cooperative Exchange Company, Inc. ("Minster Farmers") makes the following arguments to support its position that it permissibly charged non-statutory interest on the account of Appellant/Cross-Appellee Robert H. Dues ("Dues"): (1) case law in other states supports the argument that an interest rate noted on an invoice, without further assent from the buyer, is enforceable; (2) the non-statutory interest charged on Dues' account was not usurious; and (3) Dues' position, if accepted, would require a signed written contract in order for non-statutory interest to be charged to an account. None of these arguments is persuasive. Dues will not address Minster Farmers' assertion that its interest rate is not a "material alteration" of the contract for purposes of R.C. § 1302.10, primarily because R.C. § 1302.10 is not applicable to this case, as further discussed in Dues' Merit Brief, and because Dues has never made the argument that an interest rate would be a "material alteration" for purposes of that statute.

¹ Dues proceeded *pro se* in the trial court and court of appeals. He retained the undersigned to appeal this matter to this Court.

1. Case law in other jurisdictions supports Dues' argument that a written assent is required in order to enforce a non-statutory interest rate on an account.

Since four of the five appellate districts in Ohio that have decided the issue involved in this appeal in favor of Dues and against Minster Farmers, Minster Farmers has resorted to reviewing case law outside of Ohio. Unfortunately, however, Minster Farmers' analysis of those cases is flawed, as detailed below, and Minster Farmers ignores decisions from states with statutes more analogous to R.C. § 1343.03 that favor Dues. Under circumstances similar to those in this case, the New Hampshire Supreme Court has held that a creditor cannot recover non-statutory interest. *Albee v. Wolfeboro Railroad Co.* (N.H. 1985), 489 A.2d 148. In *Albee*, a creditor sought to impose non-statutory interest on an account debtor, arguing that its invoices contained that interest rate and the terms of those invoices were enforceable. *Id.* at 151. The applicable statute provided that statutory interest applies "unless otherwise agreed to in writing." *Id.* The court held that non-statutory interest may only be charged if the debtor consents *in writing* to the interest that is to be charged. *Id.* Since the debtor never assented in writing to the non-statutory interest rate, it was found unenforceable. *Id.* At least three other state courts have considered statutory language virtually identical to the statutory language in *Albee*, and have each held that the submission of invoices does not create a "written contract" for application of non-statutory interest. See *Pacific Pools Const. Co. v. McClain's Concrete, Inc.* (Nev. 1985), 706 P.2d 849, 851-52 (statute provides for interest at the statutory rate "[w]hen there is no express contract in writing fixing a different interest rate"); *Celotex Corp. v. Buildex, Inc.* (Fla. App. 1985), 476 So.2d 294, 295-96 (statute provides for application of statutory interest, but the parties "may contract for a lesser or greater rate by contract in writing"); *Southwest Storage & Distribution Co. v. Smith's Food & Drug Centers Inc.* (D. Az. Dec. 7, 2005), Case No. 03-1785-PHX-NVW, 2005 WL 3312787 (statutory interest rate applies unless "a different rate is contracted for in writing").

The statutes in New Hampshire (see *Albee*), Florida (see *Celotex*), Nevada (see *Pacific Pools*), and Arizona (see *Southwest Storage*), like the Ohio statute at issue in this case (R.C. 1343.03(A)), require that there be a written contract containing a non-statutory interest rate, in order for that rate to be enforceable. On the other hand, a majority of the out-of-state cases cited by Minster Farmers in its Merit Brief involved completely different statutory language. For example, Minster Farmers asserts that the Seventh Circuit Court of Appeals held that the interest rate set forth in a creditor's invoices are enforceable under Wisconsin law. *Advance Concrete Forms, Inc. v. McCann Const. Specialties Co.* (7th Cir. 1990), 916 F.2d 412. What Minster Farmers fails to note is that the Wisconsin statute at issue in that case states that non-statutory interest is only enforceable if the "rate" is "clearly expressed in writing." Wisconsin Statutes 138.04. The statute "requires only that the interest rate, not an agreement about the interest rate, be clearly expressed in writing." *Mid-State Contracting, Inc. v. Superior Floor Co., Inc.* (Wis. App. 2002), 655 N.W.2d 142, 145-146. In other words, a non-statutory interest rate on an invoice is enforceable because that rate is clearly expressed in writing (on the invoice), even though it does not appear in a written contract.

Minster Farmers' reliance on case law in Rhode Island and Texas is equally unappealing. See *Vulcan Automotive Equipment, Ltd. v. Global Marine Engine & Parts, Inc.* (D. R.I. 2004), 240 F. Supp.2d 156; *Preston Farm & Ranch Supply, Inc. v. Bio-Zyme Enterprises* (Tex. 1982), 625 S.W.2d 295. In both cases, the courts upheld an interest rate on an invoice despite no written agreement between the parties with respect to that interest rate. However, in both cases the interest rate statute at issue limited creditors to statutory interest unless there was a "contract" or "agreement" as to a different interest rate. See Rhode Island Statutes 9-21-10; Texas Civil Statutes Art. 5069-1.03. Neither statute required that the interest rate be in writing, only that there be a

“contract” or “agreement” as to that rate. The *Preston Farm* court specifically noted that the statute in question did not require that a non-statutory interest rate be in “writing.” *Preston Farm*, 625 S.W.2d at 300.

The Northern District of Iowa’s decision cited by Minster Farmers did involve an interest rate statute that required a written agreement governing the interest rate before it would be enforceable. *Review Video, LLC v. Enlighten Technologies, Inc.* (N.D. Iowa Jan. 12, 2005), Case No. CO4-0123, 2005 WL 91297. Further, the court did hold that a debtor could acquiesce to a non-statutory interest rate set forth in the seller’s written acceptance. However, in that case, the court relied upon UCC 2-207 and the fact that the seller specifically conditioned its acceptance of the debtor’s purchase order on the debtor’s agreement to the interest rate. As has been noted on a number of occasions, and despite Minster Farmers’ numerous protests to the contrary, UCC 2-207 (in Ohio, R.C. § 1302.10) is not applicable to this case because the interest rate terms Minster Farmers seeks to enforce were not provided to Dues until after each transaction between the parties was completed. In other words, Minster Farmers made no attempt to condition acceptance of Dues’ orders on his agreement to Minster Farmers’ interest rate terms, instead attempting to unilaterally impose those terms after-the-fact. It is also worth noting that *Review Video’s* interpretation of Iowa law is questionable in light of recent case law from an Iowa appellate court. *Jerry Palmer Homes, Inc. v. Simpson* (Iowa App. 2006), 2006 WL 1230018 (letter sent to debtor, containing non-statutory interest rate, is not sufficient to establish an “agreement in writing” necessary to enforce the non-statutory interest rate).

Finally, the California and Idaho cases relied upon Minster Farmers simply hold that a sale on credit does not fall within the types of agreements to which the respective state’s usury laws apply. *Southwest Concrete Products v. Gosh Construction Corp.* (1990), 274 Cal. Rptr. 404;

Rangen, Inc. v. Valley Trout Farms, Inc. (1983), 104 Idaho 284. It is unclear how these cases are applicable, inasmuch as the case at bar does not involve a usury statute. Further, unlike the usury statutes in *Southwest Concrete* and *Rangen*, the interest rate statute at issue in this case (R.C. § 1343.03) does apply to the book account Dues maintained with Minster Farmers.

R.C. § 1343.03(A) requires that a “written contract” provide for a different interest rate if a creditor seeks to obtain non-statutory interest. That requirement is identical to the New Hampshire, Nevada, Florida, and Arizona statutes in *Albee*, *Pacific Pools*, *Celotex*, and *Southwest Storage*, respectively, where the courts found that invoices containing a non-statutory interest rate were insufficient to establish the written agreement required by statute. Case law from other states does not support Minster Farmers’ position, primarily because the statutes at issue in those cases either required only that the interest rate be in writing (see *Advance Concrete*), or did not require that the interest rate be in writing (see *Vulcan Automotive* and *Preston Farm*). While out-of-state case law is obviously not binding upon this Court, it does support Dues’ position that his assent to Minster Farmers’ non-statutory interest rate must be in writing, in order for that rate to be enforceable under Ohio law.

2. R.C. § 1343.03(A) is not a usury statute, and as such the question of whether the interest rate charged by Minster Farmers on the account of Dues is usurious does not impact the analysis of this case.

Minster Farmers’ argument that it can charge non-statutory interest because, in this case, that interest rate is not usurious, is confusing and has no applicability to the case at bar. The term “usury” is defined as “an unconscionable and exorbitant rate or amount of interest.” Black’s Law Dictionary (4 Ed. 1968), 1714; see also *Farm Credit Services of Mid-America, ACA v. Runyan* (May 28, 1999), Champaign App. No. 98CA28, 1999 WL 335124. In Ohio, R.C. § 1343.01 determines under what circumstances an interest rate is usurious and therefore unenforceable.

Dues makes no contention that Minster Farmers' non-statutory interest rate is usurious. Dues' argument pertains to R.C. § 1343.03(A), which is not a usury statute. R.C. § 1343.01 determines the maximum rate of interest to be charged under certain circumstances (i.e. determines in which situations an interest rate is usury), while R.C. § 1343.03(A) pertains to the establishment of a fixed, statutory interest rate, which applies unless a different interest rate is set forth in a "written contract."

Minster Farmers' numerous attempts to demonstrate why the interest rate set forth in its invoices and monthly account statements is not usurious simply establish a point Dues has never argued against. The question is not whether Minster Farmers' purported interest rate is usurious: the question is whether there was a "written contract" between the parties that would allow Minster Farmers to charge a non-statutory interest rate on Dues' account, a requirement of R.C. § 1343.03. As more fully set forth in Dues' Merit Brief, a "written contract," for purposes of R.C. 1343.03, did not exist, and as a result Minster Farmers is not entitled to interest other than at the statutory rate.

- 3. R.C. § 1343.03(A) does not require a signed written contract in order for a creditor to enforce a non-statutory interest rate, and the requirement imposed by R.C. § 1343.03(A), a written assent by the debtor, is neither burdensome nor contrary to the intent of the Ohio legislature.**

Minster Farmers asserts that Dues' argument, if accepted, would require a signed written contract in order for a party to charge non-statutory interest. Minster Farmers also argues that this requirement would have a "chilling effect" on modern commerce, and would amount to a requirement of a higher level of assent than required to form the underlying contract itself. Initially, Minster Farmers' summation of Dues' position is incorrect. A purchaser would not necessarily have to sign a contract, containing the non-statutory interest rate terms, in order to satisfy the "written contract" requirement of R.C. § 1343.03(A). That requirement could be met,

for example, by a seller's written offer, containing the non-statutory interest rate, and the purchaser's written acceptance of that offer, neither the offer nor the acceptance containing a signature of the parties. Under those circumstances, there would be a "written contract," consisting of the written offer and the written acceptance, which would satisfy the requirements of R.C. § 1343.03(A). The important point is that the purchaser has expressly assented in writing to the interest rate terms. The opposite situation exists in this case. Minster Farmers submitted invoices and monthly statements, with non-statutory interest rate terms in fine print, after the conclusion of each individual transaction constituting Dues' book account, without obtaining Dues' written (or any other) assent to that non-statutory interest rate. Under those circumstances, a "written contract" cannot exist such that non-statutory interest can be charged on the account.

As noted above, a "written contract" for purposes of R.C. § 1343.03(A) does not necessarily require a written contract signed by the parties. The purported "chilling effect on modern commerce" asserted by Minster Farmers is equally inaccurate. It is difficult to imagine, in the modern world of fax machines and electronic mail, that the requirement of a signed written contract, or the requirement of a written acceptance of an offer, would affect commerce in any substantial manner. Further, even if it did, Minster Farmers' solution would be to favor relaxation of a specific statutory requirement (i.e. a "written contract" under R.C. § 1343.03(A), however slight the purported benefit, over ensuring that the parties reached a clear consensus as to the interest rate terms governing their relationship in order to avoid disputes similar to the case at bar. The intent of R.C. § 1343.03(A) in imposing a "written contract" requirement in order to charge non-statutory interest is to favor just the opposite, requiring that the parties demonstrate that they expressly assented to non-statutory interest, despite the insignificant burden it may or may not place on commerce.

Although Minster Farmers' assertion that Dues' position would require a higher level of assent to a non-statutory interest rate than the formation of the underlying contract between the parties is accurate, that is precisely what the legislature intended by enacting R.C. § 1343.03. A contract for the sale of goods can be made in "any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract." R.C. § 1302.07. Further, the UCC statute of frauds is satisfied, despite the existence of an oral contract, if the goods (or payment for the goods) has been received and accepted. R.C. § 1302.04. The UCC clearly contemplates various scenarios by which a contract can become binding upon the parties. On the other hand, R.C. § 1343.03(A) is very specific with respect to charging interest on an account: in order to charge non-statutory interest, there must be a "written contract." The Legislature could have simply referenced, in R.C. § 1343.03(A), that the interest rate charged with respect to a sale of goods is enforceable if the contract is enforceable under R.C. § 1302.07, or if the statute of frauds in R.C. § 1302.04 is satisfied. The list of possible statutory language is endless. However, the Legislature chose to be more restrictive with respect to non-statutory interest, requiring the existence of a "written contract," a requirement Minster Farmers is unable to satisfy.

B. Response to Appellee/Cross-Appellant's Merit Brief on Cross Appeal

Proposition of Law No. I: Invoices and account statements attempting to establish a non-statutory simple interest rate on a book account do not support and in fact directly contradict imposition of a compounding interest rate, which compounding rate, in order to be effective, is required to be specifically agreed to by the parties.

The Third District Court of Appeals held that Minster Farmers could not charge compounding interest on Dues' account because the interest rate noted on Minster Farmers' invoices and account statements, 2% per month (24% annual), did not reflect compounded interest. Dues argues, in its appeal, that Minster Farmers was not entitled to charge non-statutory interest at

all (with statutory interest being simple interest), much less interest that compounds. However this Court decides Dues' appeal, Minster Farmers' cross-appeal is without merit.

Minster Farmers continues to argue that its interest rate is not usurious and is thus enforceable. Usury statutes, as noted above, are not even at issue in this case. Nevertheless, Dues will address the apparent contentions of Minster Farmers. It appears Minster Farmers is arguing that the parties agreed to compounding interest, relying upon a decision of this Court from 1889 that involved the terms of a promissory note. *Taylor v. Hiestand & Co.* (1889), 47 Ohio St. 345. *Taylor* merely stands for the proposition that, *if the parties agree in writing* (in that case, in a promissory note), compounded interest is available. In that case, the note, executed by the debtor, specifically provided that interest would accrue on outstanding interest (i.e. compounded interest).

In this case, there is no indication that the parties ever agreed that interest would compound. Minster Farmers' own invoices and account statements reflect interest at 24% annually, yet Minster Farmers' calculated interest by charging 2% per month, adding that interest to the account balance, and charging 2% on that entire balance the following month. That effectively results in an interest rate of over 30% per year. Even if the interest rate in Minster Farmers' invoices and account statements is enforceable, it is wholly illogical that Minster Farmers could charge Dues more interest than Minster Farmers sought to impose in the first place. The rule is quite simple: unless specifically stated otherwise, interest on a contract is simple, not compounding, interest. *State ex rel. City of Elyria v. Trubey* (1984), 20 Ohio App. 3d 8; *Berdyck v. Shinde* (1998), 128 Ohio App. 3d 68. In this case, compounding interest was not "specifically stated," nor stated at all. Therefore, it cannot be charged on Dues' account.

CONCLUSION

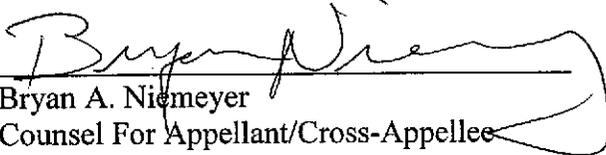
The Third District Court of Appeals erred in upholding the trial court's decision that allowed non-statutory interest to accrue on Dues' account with Minster Farmers. It is unquestioned that Dues never signed a written contract or otherwise assented in writing to any non-statutory interest rate. Therefore, Minster Farmers cannot establish compliance with the "written contract" requirement of R.C. § 1343.03(A) and should be entitled only to statutory interest on Dues' account. Even assuming, *arguendo*, that Minster Farmers could charge non-statutory interest on Dues' account, the interest rate would be simple interest at the rate of 24% per annum, as there is no evidence that Dues agreed to a compounding interest rate. This Court should affirm the Third District Court of Appeals decision denying compounded interest, reverse that court's decision allowing Minster Farmers to recover non-statutory interest on Dues' account, and remand this case to the Shelby County Court of Common Pleas for a determination of the interest to which Minster Farmers is entitled, using simple interest at the statutory rate.

Respectfully submitted,


Bryan A. Niemeyer (0068255)
John M. Deeds (0076721)
Counsel For Appellant/Cross-Appellee
Robert H. Dues

PROOF OF SERVICE

I certify that a copy of this Combined Reply Brief of Appellant/Cross-Appellee Robert H. Dues to Appellee/Cross-Appellant Minster Farmers' Response and Merit Brief in Response to Cross Appeal was sent by ordinary U.S. mail to counsel for Appellee/Cross-Appellant, Minster Farmers Cooperative Exchange Company, Inc. on this 1st day of February 2007.


Bryan A. Niemeyer
Counsel For Appellant/Cross-Appellee
Robert H. Dues