IN THE SUPREME COURT OF OHIO

NANCY STONER	:	Case No. 2006-1749
Appellee,	:	On Appeal from the Morrow County Court of Appeals, Fifth Appellate District
v.	:	
ALLSTATE INSURANCE COMPANY	:	
Appellant.	:	

****

MERIT BRIEF OF APPELLANT, ALLSTATE INSURANCE COMPANY

****

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FILED
APR 23 2007
MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO

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STATEMENT OF FACTS

This case arose from a two-car collision on September 11, 1994. The Appellee, Nancy Stoner, (hereinafter Plaintiff) filed her complaint for personal injuries against the tortfessor on December 13, 1995 in the Common Pleas Court of Morrow County, Ohio (Record). During the pendency of the Plaintiff's case in Morrow County, the Plaintiff filed a second suit on, September 14, 2001, in the Common Pleas Court of Crawford County, Ohio against Westfield Insurance Companies seeking recovery of the same tort damages as sought in Morrow County against the Appellant, Allstate Insurance Company. (Supp. 1). The Plaintiff alleged in her Crawford County suit that she was an employee at the time of the motor vehicle accident and therefore she demanded coverage under her employer's policy with Westfield. (Supp. 1 ¶11 and ¶12).

The Plaintiff settled this UMI claim with Westfield Insurance Company on or about September 9, 2003 and received a sum of $30,000.00. (Supp. 2). Even after that settlement the Plaintiff's demand was never less than Allstate's policy limits of $100,000.00. (App. 3). The Plaintiff's claims for past, present and future damages proceeded to trial in the Morrow County Common Pleas Court on January 24th, 2005. The jury returned a total verdict for the Plaintiff of $69,000.00. (Supp. 3)

Per the jury interrogatories, the Plaintiff's damages were itemized as $15,000.00 for past pain and suffering, $14,024.18 for medical expenses, $24,000.00 for lost wages, $10,000.00 for future pain and suffering, and $5,975.82 for loss of ability to perform usual activities of life. (Supp. 4). Post trial, the Plaintiff moved for prejudgment interest. On the basis of the memoranda, the Trial Court set off the $30,000.00 UMI settlement received from Westfield from the total verdict of $69,000.00. The Trial Court then

denied prejudgment interest on the Plaintiff's medical expenses of $14,024.18 and future pain and suffering of $10,000.00 and ordered interest paid from the date of the motor vehicle accident on the remaining items of damages without articulating a reason for this triggering date. (App. 3)

On appeal the Court of Appeals basically overruled the Plaintiff's First Assignment of Error that the Trial Court did not have the discretion to decide which types of damages should be subject to prejudgment interest; . . ." (App. 2 at ¶13), Opinion of the Court of Appeals of August 2, 2006.

However the Court of Appeals then held that the Trial Court also abused its discretion in denying the Plaintiff prejudgment interest from the date of the accident on the amount the jury found to be for the Plaintiff's future pain and suffering.

Further, the Court of Appeals then held that the Trial Court also abused its discretion in denying interest from the date of the accident to the date of the trial on the award to the Plaintiff of her total medical expenses of $14,024.18, which amount the Trial Court had found to have already been paid by Allstate under its Automobile Medical Payments coverage. (App.2).

This case is now before this Court to clarify the law and standards to be applied to requests for prejudgment interest.

ARGUMENT

Proposition of Law No. I:

Prejudgment interest on an UM/UIM claim should be calculated per R.C. 1343.03 (A) only when the issue is contractual as to coverage and the Court must articulate a reason for the date the money was "due and payable" otherwise the claim should be determined under R.C. 1343.03 (C).

This case presents the question of the proper interpretation and application of RC 1343.03 (A) and (C).

A historical review of the principals of prejudgment interest demonstrates that the theory has been recognized as a common law right in Ohio since the 1800's. Moskovitz v. Mount Sinai Med. Ct.,(1994), 69 Ohio St. 3d 638, 656, 635 N.E. 2d 331, 349[1]. The cases cited in Moskovitz illustrated that in the common law "contract" area prejudgment interest was to make the creditor whole, by not only awarding him what he was owed, but also interest on that money from when the debt should have been "due and payable[2]." On the other hand a second line of cases cited in Moskovitz dealt with the common law theory of prejudgment interest in tort, cases where the interest was given because there was "delay for a long time by the wrong-doer . . ." or "where the insurer does not make a reasonable offer of settlement . . .[3]"

This later concept of the common law became a statutory right expressed in the 1983 amendment of R.C. 1343.03, which added Section C. (Am. Sub. H.B. No. 189).

Specifically as noted in Moskovitz at 657, this Court, in several of its decision, declared that the purpose of Section C of R.C. 1343.03 is to "encourage good faith effort

[1] Citing Hogg v. Zanesville Canal and Mfg. Co. (1832), 5 Ohio 410, 424.
[2] Citing Lawrence RR. Co. v. Cobb (1878), 35 Ohio St. 94.
[3] Citing Clevenger v. Westfield Co. (1978), 60 Ohio App. 2d 1, 140 3d 3, 395 N.E. 2d 377.

effort to settle their cases[4]."

On the other hand, R.C. 1343.03 (A) retained the common law contract principal that prejudgment interest is given to make the prevailing party whole by providing interest from when the sum was found to be due and payable.

In 1998 this Court was presented with the uninsured/underinsured motorist ("UMI") case of Landis v. Grange Mutual Insurance Company; 82 Ohio St. 3d 339, 695 N.E. 2d 1140.

In that case it was observed;

> Grange spent considerable effort attempting to persuade us that uninsured/underinsured motorist insurance ("UMI") claims are based on tortious conduct and therefore that R.C. 1343.03 (A) does not allow prejudgment interest. Landis spend considerable effort attempting to persuade us that UMI claims are contract claims and therefore that R.C. 1343.03 (A) does allow prejudgment interest. We concluded that Landis' UMI claim is a contract claim, while acknowledging that there would be UMI claims absent tortious conduct, the accident. (Citations omitted).

In that decision the specific finding was that ". . . Landis' UMI claim was a contract claim . . ." not that all UMI claims are contract claims. Therefore, in Landis, once the legal determination that Mr. Landis contract made him an insured under the policy was made, it followed that the right to prejudgment interest would proceed pursuant to R.C. 1343.04 (A). This is underscored by the Court's citation to Royal Elec. Const. v. Ohio State Univ. (1996), 73 Ohio St. 3d 110, 662 N E 2d 687 which was a classic contract case dealing with prejudgment interest as a basis of making one whole. Here the claim of the Plaintiff is not like that of Landis and what is sought is not to be

[4] Peyko v. Fredrick (1986), 25 Ohio St. 3d 164, 167, 495 N.E. 2d 918, and Kalain v. Smith (1986), 25 Ohio St. 3d 157, 159, 495 N.E. 2d 872, 574.

made whole but rather to recover interest because of the alleged delay in the determination of the Plaintiff's tort damages.

As noted be Justice Lundberg in the dissent in Miller v. Gunckle, 96 Ohio St. 35 359, 367, 2002-Ohio-4932 p. 6.

> . . . I believe that case law supports the conclusion that it is best left to a Court to decide if and when prejudgment interest should be awarded whether the award is pursuant to (A) or (C) of R.C. 1343.03.

The Courts below, in this case, failed to make the initial distinction of whether the Plaintiff's claim was a contract claim or a tort claim.

The Trial Court below stated;

> It is clear in the law that underinsured motorist benefits are based upon contract and not tort. Journal Entry of the Morrow Common Pleas Court (October 27, 2005) (App. 3)

The Court of Appeals below at ¶ 10, App. 2 made the same sweeping finding;

> Uninsured/underinsured motorist insurance claims are contract claims and therefore R.C. 1343.03 (A) allows prejudgment interest for the insured under such provisions. See Landis v. Grange Mutual Insurance Company, 82 Ohio St. 3d 339, 695 N.E. 2d 114, 1998-Ohio-387.

The overly broad interpretation of Landis has resulted in all UMI claims for prejudgment interest to be treated as "contract" claims under R.C. 1343.03 (A).

It is not the label but rather the basis of the claim for prejudgment interest that should determine under which section of R.C. 1343.03 that the issue should be decided.

Here the Plaintiff was not claiming that she was denied coverage under her policy which would be a contract issue but rather that she was entitled to interest on her tort damages because she believes that there was a delay in recovering them.

R.C. 1343.03, effective June 2, 2004, retains the common law distinction between the award of prejudgment interest in contract claims under R.C. 1343.03 (A) or tort claims under R.C. 1343.03 (C). In this case the Plaintiff's claim was one for prejudgment interest under R.C. 1343.03 (C) but because it involved UMI coverage it was treated as a claim under R.C. 1343.03 (A). Therefore the Trial Courts' initial finding that Allstate did not fail to make a good faith settlement effort or that the Plaintiff failed to do so, should have concluded the inquiry and the Plaintiff's claim for prejudgment interest been denied as a matter of law under R.C. 1343.03 (C).

Conversely the Plaintiff's claims should not have been considered under Sec. A of 1343.03 because the Plaintiff's claims were not for a determination of "when money becomes due and payable". This case further demonstrates the illogical results of attempting to apply contract principals to tort issues.

The Trial Court attempted to analysis the Plaintiff's request on the basis of the purpose of R.C. 1334.03 (A), i.e., to make whole.

As to the medical expenses, the Trial Court found that since those had been paid as incurred, there was no loss to the Plaintiff or gain to the insurer. (App. 2).

The Court of Appeals on the other hand totally ignored the make whole issue and by "extension" of Grange Mutual Casualty Insurance Company v. Lindsey (1986), 22 Ohio St. 3d 153, 489 N.E. 2d 281 and Shearer v. Motorist Mutual Insurance Company (1978), 53 Ohio St. 2d 1, N.E. 2d 210 held that there can be no set off of medical payments coverage from UMI coverage. There was no set off here. The Plaintiff received a double award of her medical expenses by the Jury verdict as the bills themselves had already been paid by another source. Therefore any inquiry under R.C.

1343.03 (A) as to whether it was necessary to grant the Plaintiff interest on her medical expenses in order to make her whole is illogical.

There was not, as the Trial Court found, any loss by the Plaintiff in regard to her medical expenses. Not only did the Plaintiff receive a "double recovery" of her medical expenses, the Court of Appeals' decision would award her interest on top of that. Such a result does not comport with the purpose of R.C. 1343.03 (A) and demonstrates why the consideration of the claim should have been made under R.C. 1343.03 (C).

The Court of Appeals' analysis of this claim under R.C. 1343.03 (A) also ignores one of the primary principals to be considered in UMI cases. As noted in Barlett v. Nationwide Mutual Insurance Company (1973), 33 Ohio St. 2d 50, 52, 294 N.E. 2d 665, 667;

> * * * [T]he legislative purpose in creating compulsory uninsured motorist coverage was to place the injured policyholder in the same position, with regard to the recovery of damages, that he would have been in if the tortfeasor had possessed liability insurance.

This principal was reiterated in Clark v. Scarpelli (2001), 91 Ohio St. 3d 271, 275, 2001-Ohio-39 at P. 4, where the Court reaffirmed its observation in Cincinnati Ins. Co. v. Phillips (1990), 52 Ohio St. 3d 162, 165, 556 N.E. 2d 1150, 1153 that "it would make no sense for this Court to reach the absurd result that an injured party is better off when struck by an uninsured tortfessor than by a person who possesses liability insurance." The award of prejudgment interest in this case under R.C. 1343.03 (A) runs contrary to this principal and logic.

In like manner, the Appellate Courts' award of interest on future damages results in a windfall recovery by the Plaintiff of greater damage then if the tortfessor possessed liability insurance.

The Trial Court found that no interest should be awarded on the verdict for future pain and suffering because that damage had not been incurred. This would be a proper analysis under R.C. 1343.03(A) as prejudgment interest would not logically be necessary to "make whole."

However, the conclusion that prejudgment interest is not applicable to future damages is more appropriately mandated by R.C. 1343.03 (C) (2), which provides;

> No Court shall award interest - - - on future damages . . .

Again the error arose because the Court of Appeals started its analysis with the assumption that all UMI claims are contractual. It based its holding, in part, on Dwyer Electric, Inc. v. Confederate Builders, Inc. (October 29, 1998), Crawford App. No. 3.98-18. Dwyer is informative in that it discussed specifically that R.C. 1343.03 (A) pertains to contract claims and R.C. 1343.03 (C) addresses tort based claims. Further, Dwyer specifically found that ". . . once a party has a judgment for an underlying contract claim, - - - we find that he is entitled to interest - - -." The key to that decision is that the claim for prejudgment interest in that case was one based on contract not on a tort claim; as here.

CONCLUSION

As noted in the numerous cases cited in Appellant's Memorandum in Support of Jurisdiction, there is a need for guidance as to the standards to be applied to the award of prejudgment interest. This particular case demonstrates that.

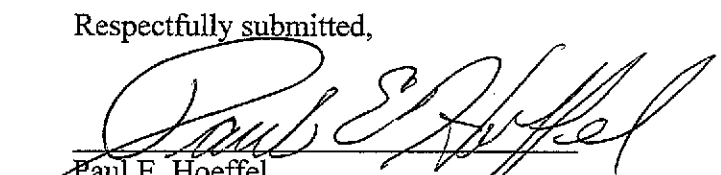
From a review of the history of the evolution of prejudgment from the common law to its statutory form in R.C. 1343.03 it seem clear that contract claims are to be determined under R.C. 1343.03 (A). The Court then is to determine the date the underlying obligation became legally due and payable and award interest from that date.

Conversely, when the claim ". . . is based on tortuous conduct" as here then the provisions of R.C. 1343.03 (C), need to be applied The inquiry is not whether it is a UMI claim, but rather whether the claim is one under contract or based on tort.

The treatment of all UMI claims as contract claims and determining them under R.C. 1343.03 (A) runs contra to the purpose of UMI coverage and the clear language of R.C. 1343.03 (C).

The decision below must be reversed and as a matter of law the Plaintiff's award of prejudgment interest be denied on the basis of R.C. 1343.03 (C).

Respectfully submitted,



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This is to certify that a copy of the foregoing has been served via regular U.S. mail this 23rd day of April 2007 upon the following:

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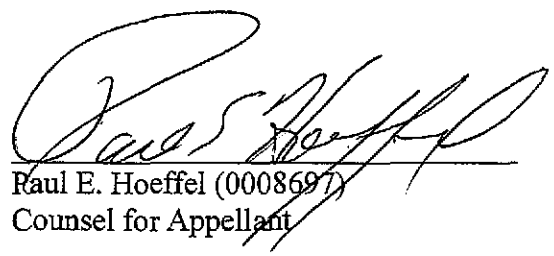

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NOTICE OF APPEAL FROM A COURT OF APPEALS

IN THE SUPREME COURT OF OHIO

06-1749

NANCY STONER	:	
Appellee,	:	On Appeal from the Morrow County Court of Appeals, Fifth Appellate District
v.	:	
ALLSTATE INSURANCE COMPANY	:	Court of Appeals Case No. 2005 CA 0016
Appellant.	:	

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NOTICE OF APPEAL OF APPELLANT, ALLSTATE INSURANCE COMPANY

****

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FILED
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SUPREME COURT OF OHIO

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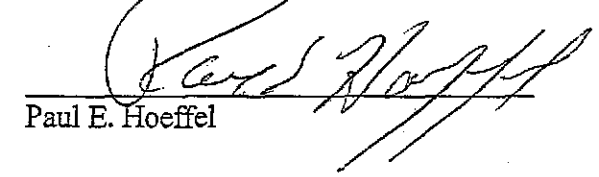
Notice of Appeal of Appellee, Allstate Insurance Company

Appellee, Allstate Insurance Company, hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Morrow County Court of Appeals, Fifth District, entered in Court of Appeals Case No. 2005 CA 0016 on August 2, 2006.

This case raises a questions and of public or great general interest.

Respectfully submitted,

Paul E. Hoeffel, Counsel of Record



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COUNSEL FOR APPELLANT,
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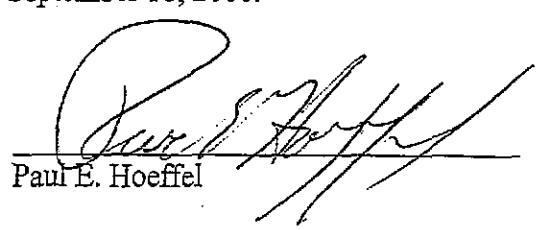
Certificate of Service

I certify that a copy of this Notice of Appeal was sent by ordinary U.S. mail to Counsel for Appellee, Jay Wagner, WAGNER LAW FIRM, P.L.L., PO Box 576, 118 Harding Way West, Galion, Ohio 44833 on September 18, 2006.



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ALLSTATE INSURANE COMPANY

Appendix 2

COURT OF APPEALS
MORROW COUNTY, OHIO
FIFTH APPELLATE DISTRICT

NANCY STONER

Plaintiff-Appellant

-vs-

ALLSTATE INSURANCE COMPANY

Defendant-Appellee

JUDGES:
Hon. John W. Wise, P. J.
Hon. Julie A. Edwards, J.
Hon. John F. Boggins, J.

Case No. 05 CA 16

OPINION

CHARACTER OF PROCEEDING: Civil Appeal from the Court of Common Pleas, Case No. 23,039

JUDGMENT: Affirmed in Part; Reversed in Part and Remanded

DATE OF JUDGMENT ENTRY:

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COURT OF APPEALS
MORROW COUNTY, OHIO
FILED
AUG - 2 2006
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Deputy

Wise, P. J.

{¶1} Appellant Nancy Stoner appeals from an award of prejudgment interest against Appellee Allstate Insurance Company in the Court of Common Pleas, Morrow County. The relevant facts leading to this appeal are as follows.

{¶2} On September 11, 1994, appellant, an insured of Appellee Allstate, was injured as a result of an automobile collision with another motorist. On December 13, 1995, appellant filed an action against the alleged tortfeasor. On March 6, 1996, appellant added a claim against Appellee Allstate, seeking compensation under her uninsured/underinsured motorist policy provision. During the course of the litigation, it is undisputed appellant received settlement proceeds of $30,000 from another insurer, Westfield Insurance Company, which fact was not made known to the jury.

{¶3} The matter proceeded to a jury trial on January 24 and 25, 2005. The jury returned a unanimous verdict in favor of appellant and awarded damages of $69,000, broken down as follows: $15,000 for past pain and suffering, $14,024.18 for medical expenses, $24,000.00 for lost wages, $10,000.00 for future pain and suffering and $5,975.82 for loss of ability to perform usual activities of life, for a total of $69,000.00.

{¶4} Appellant filed a motion for prejudgment interest on April 11, 2005. Via a judgment entry filed October 27, 2005, the trial court granted prejudgment interest on $15,000 of the aforesaid $69,000 verdict, not on the entire amount of the verdict less the Westfield offset (i.e., on the amount of $39,000) as sought by appellant. The judgment entry reads in pertinent part as follows:

{¶5} "The Court considers all of the following factors in determining the 'fully compensated' issue: 1) the jury found that the Plaintiff's total medical expenses from

1994 to 2005 were $14,024.18. The Plaintiff had her medical expenses already paid by Allstate. Therefore, no loss of use of that money can be found for the Plaintiff. 2) The Plaintiff had already received $30,000 from another settlement. 3) The jury awarded the Plaintiff $10,000 for future pain and suffering. Those expenses have not as yet been incurred. Therefore, the $30,000 shall be deducted, along with the $14,000 and the $10,000 from the $69,000 verdict and prejudgment interest shall be paid on the balance, which is $15,000, from the date of the incident * * *." Judgment Entry, October 27, 2005, at 1.

{¶6} On November 27, 2005, appellant filed a notice of appeal. She herein raises the following three Assignments of Error:

{¶7} "I. THE TRIAL COURT ABUSED ITS DISCRETION PREJUDICIAL TO THE APPELLANT BY NOT AWARDING PREJUDGMENT INTEREST ON THE ENTIRE JUDGMENT AFTER AN OFFSET.

{¶8} "II. THE TRIAL COURT ABUSED ITS DISCRETION PREJUDICIAL TO THE APPELLANT BY NOT AWARDING PREJUDGMENT INTEREST ON FUTURE PAIN AND SUFFERING DAMAGES.

{¶9} "III. THE TRIAL COURT ABUSED ITS DISCRETION PREJUDICIAL TO THE APPELLANT BY NOT AWARDING PREJUDGMENT INTEREST ON MEDICAL EXPENSES."

I.

{¶10} In her First Assignment of Error, appellant contends the trial court abused its discretion by not awarding prejudgment interest on the entire amount of the judgment after subtracting the Westfield award. Uninsured/underinsured motorist insurance

claims are contract claims, and therefore R.C. 1343.03(A) allows prejudgment interest for the insured under such provisions. See *Landis v. Grange Mut. Ins. Co.*, 82 Ohio St.3d 339, 695 N.E.2d 1140, 1998-Ohio-387. An appellate court's review of a trial court's award of prejudgment interest is governed by an abuse of discretion standard. Id.

{¶11} R.C. 1343.03(A) reads as follows:

{¶12} "In cases other than those provided for in sections 1343.01 and 1343.02 of the Revised Code, when money becomes due and payable upon any bond, bill, note, or other instrument of writing, upon any book account, upon any settlement between parties, upon all verbal contracts entered into, and upon all judgments, decrees, and orders of any judicial tribunal for the payment of money arising out of tortious conduct or a contract or other transaction, the creditor is entitled to interest at the rate per annum determined pursuant to section 5703.47 of the Revised Code, unless a written contract provides a different rate of interest in relation to the money that becomes due and payable, in which case the creditor is entitled to interest at the rate provided in that contract. Notification of the interest rate per annum shall be provided pursuant to sections 319.19, 1901.313, 1907.202, 2303.25, and 5703.47 of the Revised Code."

{¶13} Appellant does not herein challenge the court's finding of September 11, 1994, as the date on which the accrual of prejudgment interest should have commenced. See Appellant's Brief at 4. Appellant contends instead that R.C 1343.03(A) does not give the trial court the authority to decide which types of damages should be subjected to prejudgment interest; the discretion of the trial court lies in determining the triggering accrual date only. In order to avoid overlapping analysis in

this matter, we will not address the issues of prejudgment interest as to the future pain and suffering award and the medical expenses award, as these will be discussed in appellant's Second and Third Assignments of Error, infra.

{¶14} This leaves before us the question of prejudgment interest as to appellant's award for past pain and suffering, lost wages, and loss of ability to perform usual activities of life; however, under the mathematical circumstances of this case, it is not apparent from the record that the trial court erred regarding these awards as urged by appellant. Instead, as noted in our statement of the facts, the trial court deducted the $30,000 Westfield award from the jury verdict of $69,000, and then subtracted the medical expense award of $14,024.18 (rounded to $14,000) and the future pain and suffering award of $10,000, to arrive at a basis of $15,000. See Judgment Entry, October 27, 2005, at 1, recited supra.

{¶15} It logically follows that the trial court's $15,000 basis for prejudgment interest must have included the remainder of appellant's awards for past pain and suffering, lost wages, and loss of ability to perform usual activities of life. Presumably, this $15,000 amount would have been greater but for the other deductions from the original $69,000 verdict.

{¶16} Accordingly, appellant's First Assignment of Error is found moot in part and overruled in part.

II.

{¶17} In her Second Assignment of Error, appellant maintains the trial court abused its discretion in denying prejudgment interest for her future pain and suffering damages. We agree.

{¶18} In support of her argument, appellant directs us to our decision in *Norton v. Allstate Ins. Co.* (March 26, 2001), Stark App.No. 2000CA00348, wherein we approved a trial court's calculation of prejudgment interest on future damages, noting that R.C. 1343.03(A) provides for prejudgment interest on "all judgments." Furthermore, in *Indiana Ins. Co. v. Farmers Ins. of Columbus*, Tuscarawas App. No. 2002 AP 11 0090, 2003-Ohio-4851, we concluded that the General Assembly's use of the phrase "creditor is entitled to interest" in R.C. 1343.03(A) is mandatory language which requires the trial court to award prejudgment interest. " 'The statute references no predicate determinations which need to be made before a creditor will be entitled to interest. Thus, once a party has a judgment for an underlying contract claim, * * * we find that he [or she] is entitled to interest as a matter of law.' " Id. at ¶ 61, quoting *Dwyer Elec., Inc. v. Confederated Builders, Inc.* (Oct. 29, 1998), Crawford App. No. 3-98-18.

{¶19} Accordingly, we hold the trial court abused its discretion in declining to award prejudgment interest on future damages. We will therefore direct that the $10,000 award for future pain and suffering be added back to the basis for prejudgment interest. Appellant's Second Assignment of Error is sustained.

III.

{¶20} In her Third Assignment of Error, appellant contends the trial court abused its discretion by not awarding prejudgment interest on her medical expenses. We agree.

{¶21} In the case sub judice, the trial court explained its denial of prejudgment interest for medical expenses as follows: "[T]he jury found that the Plaintiff's medical expenses from 1994 to 2005 were $14,024.18. The Plaintiff had her medical expenses

already paid by Allstate. Therefore, no loss of use of that money can be found for the Plaintiff." Judgment Entry at 1.

{¶22} However, the Ohio Supreme Court has twice enunciated a refusal "to allow medical payments to be deducted from uninsured motorist benefits due under the same policy." *Staas v. McAllister* (March 10, 2000), Miami App. No. 99-CA-34, citing *Shearer v. Motorists Mut. Ins. Co.* (1978), 53 Ohio St.2d 1, 371 N.E.2d 210 and *Grange Mut. Cas. Co. v. Lindsey* (1986), 22 Ohio St.3d 153, 489 N.E.2d 281. By extension, we cannot condone the trial court's disallowance of prejudgment interest by utilizing a "set-off" of medical payments coverage by uninsured motorist coverage under the same insurance policy. Under such circumstances, we find the court's denial of prejudgment interest for medical expenses constituted an abuse of discretion. We will therefore direct that the $14,000 (rounded) award for medical expenses be added back to the basis for prejudgment interest.

{¶23} Appellant's Third Assignment of Error is therefore sustained.

{¶24} For the reasons stated in the foregoing opinion, the judgment of the Court of Common Pleas, Morrow County, Ohio, is hereby affirmed in part, reversed in part, and remanded with directions to award prejudgment interest to appellant on the sum of $39,000.

By: Wise, P. J.

Boggins, J., concurs.

Edwards, J., concurs separately.

HON. JOHN W. WISE

HON. JULIE A. EDWARDS

HON. JOHN F. BOGGINS

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EDWARDS, J., CONCURRING OPINION

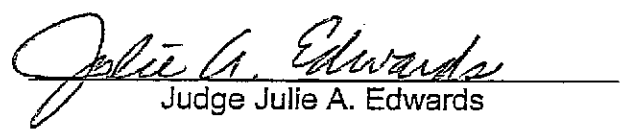
{¶25} I concur with the majority as to the disposition of this case.

{¶26} I write separately only to express my concern as to the way the trial court set off the $30,000, from the Westfield Insurance Company, from the $69,000 judgment. When calculating prejudgment interest, the trial court seems to have set off the $14,024.18 in medical expenses and the $10,000 in future pain and suffering from the $69,000 prior to reducing the judgment by the $30,000 recovery from Westfield Insurance. I assert that that is incorrect. The $69,000 judgment should be reduced by the $30,000 payment from Westfield first. And, unless it is known what that $30,000 payment was for, I contend that the $30,000 has to be set off, pro rata, from each of the categories of damages represented in the $69,000 judgment. For example, since the $14,024.18 in medical payments represents approximately 20% of the $69,000 judgment, then 20% of the $30,000 from Westfield ($6,000) should be subtracted from the $14,024.18 in medical payments.

{¶27} Therefore, even if the trial court were correct in its theory of awarding prejudgment interests, its application was incorrect. The trial court awarded prejudgment interest on the amount of $15,000 ($69,000 minus ($30,000 + $14,000 + $10,000)). Under its theory, the trial court should have awarded prejudgment interest on $25,435:

Damages Awarded	Portion of $30,000 that each Category should be reduced by
$15,000 Pain & Suffering	$ 6,522
$14,000 Medicals	$ 6,087
$24,000 Lost Wages	$10,435
$10,000 Future Pain & Suffering	$ 4,348
$ 6,000 Loss of Abilities	$ 2,608
$69,000	$30,000

Remaining in each category after credit	
$ 8,478 Pain & Suffering	$39,000
$ 7,913 Medicals	- $ 7,913 Medicals
$13,565 Wages	
$ 5,652 Future Pain & Suffering	- $ 5,652 Future Pain & Suffering
$ 3,392 Abilities	$25,435
$39,000	



Judge Julie A. Edwards

JAE/rmn

IN THE COURT OF APPEALS FOR MORROW COUNTY, OHIO
FIFTH APPELLATE DISTRICT

NANCY STONER	:	
Plaintiff-Appellant	:	
-vs-	:	JUDGMENT ENTRY
ALLSTATE INSURANCE COMPANY	:	
Defendant-Appellee	:	Case No. 05 CA 16

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Morrow County, Ohio, is affirmed in part, reversed in part and remanded for further proceedings consistent with this opinion.

Costs to be split evenly between appellant and appellee.

HON. JOHN W. WISE

HON. JULIE A. EDWARDS

HON. JOHN F. BOGGINS

IN THE COURT OF COMMON PLEAS, MORROW COUNTY, OHIO

NANCY STONER, ET. AL., PLAINTIFF	*	CASE NO 23,039
vs.	*	JUDGE HOWARD E. HALL
ALLSTATE INSURANCE CO., DEFENDANT	*	JOURNAL ENTRY

This matter is before the Court for consideration of the issue of prejudgment interest, which the Plaintiff has requested. The case was tried to a jury which returned a verdict on January 25, 2005, in the total amount of $69,000 in favor of the Plaintiff, Nancy Stoner. The Plaintiff had previously received the amount of $30,000 from Westfield Insurance Company, which fact was not known by the jury returning the $69,000 verdict. Therefore, the Court considers the verdict to be the total damages. The claim against Allstate Insurance Company is an underinsured motorist claim based upon the automobile insurance contract between the Plaintiff and the Defendant in this case. It is clear in the law that underinsured motorist benefits are based upon contract and not tort. Therefore, the amount of underinsured motorist coverage that the insured contracted for is a finite amount set forth in the policy. The Court is obligated to make a determination as to whether or not the Defendant has been fully compensated, based upon the verdict of the jury, or if prejudgment interest would be required in order to make the Defendant fully compensated. As in most cases such as this where personal injuries resulted from an automobile accident, negotiations sometimes go on for many years. In this case, it has been represented to the Court that the Defendant's demand was never less than $125,000 and that the maximum coverage was $100,000.00. Since the jury found the damages to be $69,000, that clearly eliminates the prospect of bad faith on the part of the Defendant Allstate. Further, the Plaintiff did not have to pay any of her medical expenses out of pocket.

The Court considers all of the following factors in determining the "fully compensated" issue: 1) the jury found that the Plaintiff's total medical expenses from 1994 to 2005 were $14,024.18. The Plaintiff had her medical expenses already paid by Allstate. Therefore, no loss of use of that money can be found for the Plaintiff. 2) The Plaintiff had already received $30,000 from another settlement. 3) The jury awarded the Plaintiff $10,000 for future pain and suffering. Those expenses have not as yet been incurred. Therefore, the $30,000 shall be deducted, along with the $14,000 and the $10,000 from the $69,000 verdict and prejudgment interest shall be paid on the balance, which is $15,000, from the date of the incident, being

September 11, 1994. That would then be 10% interest for 3,552 days totaling $14,597.26, 4% interest for 212 days totaling $348.49 and 5% interest from January 1, 2005 forward at $2.05 per day until paid.

The Clerk is directed to enter this Judgment upon the Journal, and shall within three (3) days thereafter, in compliance with Civil Rule 58 (B), serve the parties through their attorneys in a manner prescribed by Civil Rule 5 (B) and note the service in the Appearance Docket.

IT IS SO ORDERED.

Howard E. Hall

Howard E. Hall, Judge

Dated: 10-27-05

§ 1343.03

Statutes & Session Law

TITLE [13] XIII COMMERCIAL TRANSACTIONS -- OHIO UNIFORM COMMERCIAL CODE

CHAPTER 1343: INTEREST

1343.03 Rate not stipulated.

1343.03 Rate not stipulated.

(A) In cases other than those provided for in sections 1343.01 and 1343.02 of the Revised Code, when money becomes due and payable upon any bond, bill, note, or other instrument of writing, upon any book account, upon any settlement between parties, upon all verbal contracts entered into, and upon all judgments, decrees, and orders of any judicial tribunal for the payment of money arising out of tortious conduct or a contract or other transaction, the creditor is entitled to interest at the rate per annum determined pursuant to section 5703.47 of the Revised Code, unless a written contract provides a different rate of interest in relation to the money that becomes due and payable, in which case the creditor is entitled to interest at the rate provided in that contract. Notification of the interest rate per annum shall be provided pursuant to sections 319.19, 1901.313, 1907.202, 2303.25, and 5703.47 of the Revised Code.

(B) Except as provided in divisions (C) and (D) of this section and subject to section 2325.18 of the Revised Code, interest on a judgment, decree, or order for the payment of money rendered in a civil action based on tortious conduct or a contract or other transaction, including, but not limited to a civil action based on tortious conduct or a contract or other transaction that has been settled by agreement of the parties, shall be computed from the date the judgment, decree, or order is rendered to the date on which the money is paid and shall be at the rate determined pursuant to section 5703.47 of the Revised Code that is in effect on the date the judgment, decree, or order is rendered. That rate shall remain in effect until the judgment, decree, or order is satisfied.

(C) (1) If, upon motion of any party to a civil action that is based on tortious conduct, that has not been settled by agreement of the parties, and in which the court has rendered a judgment, decree, or order for the payment of money, the court determines at a hearing held subsequent to the verdict or decision in the action that the party required to pay the money failed to make a good faith effort to settle the case and that the party to whom the money is to be paid did not fail to make a good faith effort to settle the case, interest on the judgment, decree, or order shall be computed as follows:

(a) In an action in which the party required to pay the money has admitted liability in a pleading, from the date the cause of action accrued to the date on which the order, judgment, or decree was rendered;

(b) In an action in which the party required to pay the money engaged in the conduct resulting in liability with the deliberate purpose of causing harm to the party to whom the money is to be paid, from the date the cause of action accrued to the date on which the order, judgment, or decree was rendered;

(c) In all other actions, for the longer of the following periods:

(i) From the date on which the party to whom the money is to be paid gave the first notice described in division (C)(1)(c)(i) of this section to the date on which the judgment, order, or decree was rendered. The period described in division (C)(1)(c)(i) of this section shall apply only if the party to whom the money is to be paid made a reasonable attempt to determine if the party required to pay had insurance coverage for liability for the tortious conduct and gave to the party required to pay and to any identified insurer, as nearly simultaneously as practicable, written notice in person or by certified mail that the cause of action had accrued.

(ii) From the date on which the party to whom the money is to be paid filed the pleading on which the judgment, decree, or order was based to the date on which the judgment, decree, or order was rendered.

(2) No court shall award interest under division (C)(1) of this section on future damages, as defined in section

2323.56 of the Revised Code, that are found by the trier of fact.

(D) Division (B) of this section does not apply to a judgment, decree, or order rendered in a civil action based on tortious conduct or a contract or other transaction, and division (C) of this section does not apply to a judgment, decree, or order rendered in a civil action based on tortious conduct, if a different period for computing interest on is specified by law, or if it is rendered in an action against the state in the court of claims, or in an action under Chapter 4123. of the Revised Code.

Effective Date: 06-02-2004

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