

IN THE SUPREME COURT OF OHIO

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

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 MERIT BRIEF OF APPELLEE, NANCY STONER  
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## STATEMENT OF FACTS

On September 11, 1994, the Appellee, Nancy Stoner (hereinafter Plaintiff), was involved in automobile accident due to the sole negligence of an uninsured motorist. On December 13, 1995, the Plaintiff filed her Complaint for personal injuries in the Common Pleas Court of Morrow County, Ohio (Record). During the course of litigation, the Plaintiff received \$30,000.00 from Westfield Insurance Company (Appellant Supp. 2). On January 25, 2005, a Morrow County Common Pleas Jury returned a verdict in favor of the Plaintiff. Encompassed within said verdict, the Jury awarded the Plaintiff \$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 the usual activities of life for a total of \$69,000.00 (Appellant Supp. 3).

The Plaintiff timely filed her Motion for prejudgment interest on April 11, 2005 (Record). On October 27, 2005, after deducting the \$30,000 received from Westfield Insurance Company, the Trial Court granted prejudgment interest on \$15,000.00 (Appellant App. 3). However, the Trial Court denied prejudgment interest on Plaintiff's medical expenses of \$14,024.18 and future pain and suffering of \$10,000.00.

On appeal the Fifth District Court of Appeals ruled that the Trial Court abused its discretion in denying prejudgment interest on the Plaintiff's medical expenses and future pain and suffering (Appellant App. 2 at Paragraphs 17 and 20).

This case is now before this Court to address Appellant's Proposition of Law.

## 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).**

The landmark case by this Court of Landis v. Grange Mutual Ins. Co., (1998), 82 Ohio St.3d 339, 695 N.E.2d 1140 held that an uninsured motorist claim is a contract claim, thus entitling the insured to prejudgment interest as a matter of law under the provisions of R.C. 1343.03(A). In Landis, Judge Pfeifer opined that although the uninsured motorist claim is based in contract, “...there would be no UMI claim absent tortious conduct, the accident.” Benefits were due and payable to the insured because of the insurance contract, although the automobile accident was caused by the tortfeasor.

This Court has long recognized that UMI claims between an insurer and an insured is an issue sounding in contract rather than in tort. Motorists Mutual Insurance Company v. Tomanski, (1971), 27 Ohio St.2d 222, 223, 56 O.O.2d 133,134 (“The right to recover under an uninsured motorist insurance policy is on the contract, not in tort.”); Kurent v. Farmers Insurance of Columbus, Inc., (1991), 62 Ohio St.3d 242, 243, 581 N.E.2d 533, 535 (“The basis of Farmers’ obligations to the Kurents lies in the insurance contract....”); Kraly v. Vannewkirk, (1994), 69 Ohio St.3d 627, 632, 635 N.E.2d 323, 327 (“...legal basis for recovery under the uninsured motorist coverage of an insurance policy is contract....”); Miller v. Progressive Casualty Insurance Company, (1994), 69 Ohio St.3d 619, 624, 635 N.E.2d 317, 321 (“We recognize that an insured against an insurance carrier for payment of uninsured or underinsured motorists benefits is a cause of action sounding in contract.”).

The Appellant (hereinafter Allstate) in the case sub judice suggests that all UMI claims for prejudgment interest should not be treated as “contract” claims pursuant to R.C. 1343.03(A), as they have since Landis. Rather, Allstate argues that prejudgment interest pursuant to R.C. 1343.03(A) on UMI claims should only be calculated when the issue is contractual as to coverage. Such a result would simply allow insurers to earn more money. Judge Pfeifer wrote in the Landis opinion that when parties litigate, “...they will be subject to a prejudgment interest award, not as a punishment but as a way to prevent them from using money then due and payable to another for their own financial gain.” In this case, Allstate has derived financial gain over the last 12 years by utilizing the money which is due the Plaintiff. The Plaintiff should be made whole and awarding prejudgment interest is a basis for making the aggrieved party whole, as this Court ruled in Royal Electric Constr. v. Ohio State University, (1995), 73 Ohio St.3d 110, 116-117, 652 N.E.2d 687, 692.

If prejudgment interest was only calculated pursuant to R.C. 1343.03(A) on UMI claims when the issue is contractual as to coverage, settlement in cases would be discouraged and litigation would likely increase. This Court has confirmed the necessity of encouraging settlement and to prevent protracted litigation by awarding prejudgment interest to an insured. Miller v. Gunckle, (2002), 96 Ohio St.3d 359, 365, 2002-Ohio-4932 p. 5. In Miller, Justice Douglas stated:

“If we were to adopt appellee’s position it would frustrate the policy of encouraging settlement, since there would be little incentive for an insurer to settle a meritorious claim. The insurer in such a situation, knowing that its loss is confined to the insured’s policy limit, has less incentive to prevent protracted litigation in which the insured is deprived of the use of the money. Once a lengthy litigation process is complete, the insured is not compensated for the lapse of time between the accrual of the claim and judgment. The insurer would clearly have the benefit of retaining control over, and earning interest on, money due and payable to their insured. We find that such a result would clearly contradict the well-established statutory and common-law basis for prejudgment interest.”

Allstate incorrectly argues that the Plaintiff's claim for prejudgment interest should be denied as a matter of law under R.C. 1343.03(C) because the Trial Court found that Allstate did not fail to make a good faith settlement effort. The Trial Court did not specifically find that Allstate made a good faith effort to settle the case. Based upon the Plaintiff's post-verdict Motion, the Trial Court did not analyze the issue of prejudgment interest pursuant to R.C. 1343.03(C), but rather pursuant to R.C. 1343.03(A). The Trial Court did find that underinsured motorists benefits are based upon contract and not tort. (Appellant's App. 3)

The Court of Appeals held that the Trial Court's denial of prejudgment interest for medical expenses constituted an abuse of discretion. The Court of Appeals went on to apply Grange Mutual Casualty Insurance Company vs. Lindsey, (1986), 22 Ohio St.3d 153, 154-155 and Shearer vs. Motorists Mutual Insurance Company (1978), 53 Ohio St.2d 1, 8, whereby this Court held that the uninsured motorist coverage required to be offered in all automobile policies "...cannot be diluted or diminished by payments made to the insured pursuant to the medical payment provision of the same contract of insurance." In the case at bar, because the Trial Court denied prejudgment interest for medical expenses, the uninsured motorist coverage provided by Allstate to the Plaintiff would otherwise be diluted or diminished. More importantly, 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 Fifth District Court of Appeals in the case of Indiana Insurance Company vs. Farmers Insurance of Columbus, et al., (September 9, 2003), Tuscarawas App. No. 2002 AP 11 0090, accurately analyzed R.C. 1343.03(A) wherein it held:

"The plain language of R.C. 1343.03(A) states in no uncertain terms that when money is due and payable on a written instrument or on a judgment for payment of money based on contract, the creditor is entitled to 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, as in this case, we find that he is entitled to interest as a matter of law. R.C. 1343.03(A) reposes no discretion in the Trial Court.”

The Court of Appeals also maintained that the Trial Court abused its discretion in denying prejudgment interest for Plaintiff’s future pain and suffering damages. The Court of Appeals relied upon Indiana Insurance Company vs. Farmers Insurance of Columbus, et al., (September 9, 2003), Tuscarawas App. No. 2002 AP 11 0090, whereby the Court concluded that the General Assembly’s use of the phrase “creditor is entitled to interest” in R.C. 1343.03(A) is mandatory language requiring prejudgment interest. Again, 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.

## CONCLUSION

The Plaintiff is asking this Court to no longer recognize a UM/UMI claim solely as a contractual issue and thereby denying prejudgment interest to an insured except if coverage is disputed. Should Allstate prevail, each and every automobile insurance carrier in Ohio would obtain financial gain by utilizing money which belongs to their insured during the course of litigation without recourse. Allstate, along with all other automobile insurance carriers, would have less incentive to prevent protracted litigation. Also, an insured would not be made whole due to the lapsing of time. All UM/UMI claims are clearly based upon a contractual relationship between the insurer and the insured and the application of R.C. 1343.03(A) for computing prejudgment interest is appropriate.

The decision of the Court of Appeals must be affirmed.

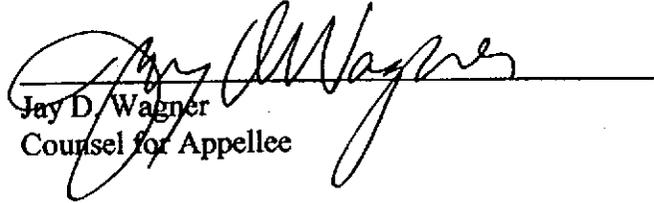
Respectfully submitted,



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**PROOF OF SERVICE**

I certify that a copy of the foregoing Merit Brief of Appellee, Nancy Stoner, was sent by regular U.S. Mail to Paul E. Hoeffel, Counsel for Appellant, Kennedy, Purdy, Hoeffel & Gernert, LLC, P.O. Box 191, Bucyrus, Ohio 44820, this 16<sup>th</sup> day of May, 2007.

  
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