

IN THE SUPREME COURT OF OHIO

NANCY STONER

Appellee,

v.

**06 - 1749**

On Appeal from the Morrow  
County Court of Appeals,  
Fifth Appellate District

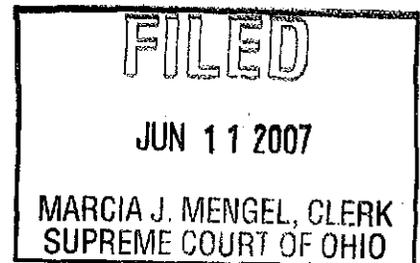
ALLSTATE INSURANCE COMPANY

Appellant.

Court of Appeals  
Case No. 2005 CA 0016

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REPLY BRIEF OF APPELLANT, ALLSTATE INSURANCE COMPANY  
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**REPLY ARGUMENT IN SUPPORT OF THE PROPOSITION OF LAW**

**Proposition of Law No. I: Prejudgment interest on an UM/UIM claim should be calculated per RC 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 Appellee’s reply simply reasserts that Landis<sup>1</sup> requires the application of R.C. 1343.03(A) to all UMI cases.

However, as pointed out, the finding in Landis was quite specific, i.e., “Landis’s UMI claim is a contract claim” (at 341), not that all UMI claims are contract claims. This fact is further supported by the next paragraph where the Landis’ Court notes that the claim under consideration was a contract issue of coverage; decided in a declaratory action.

Further, all the cases cited by the Appellee<sup>2</sup> to support her sweeping contention that all UMI claims are subject to R.C. 1343.03 (A) dealt with contract coverage issues determined either by declaratory judgment or by summary judgment. None of these cases cited by Appellee involved a determination of the amount of tort damages that the insured was legally entitled to recover.

The rationale of R.C. 1343.03 (A) as it evolved from the common law is to make whole a contract claimant from the time the Court determines the date the money was due and payable. When the issue is the amount of damages that the insured is legally entitled to recover, it is not a contract issue but rather a tort claim. In those cases R.C. 1343.03

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<sup>1</sup> Landis v. Grange Mutual Insurance Company, 100 Ohio Misc. 2d 31, 717 N.E. 2d 1199.

<sup>2</sup> Kraly v. Vannewkirk (1994), 69 Ohio St. 3d 627, 632, 635 N.E. 2d 323, 327.

Kurent v. Farmers Insurance of Columbus, Inc. (1991), 62 Ohio St. 3d 242, 243, 581 N.E. 2d 533, 535.

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(C) is applicable by its very language which states that it applies in “a civil action that is based on tortious conduct.” When a UMI claimant files a suit for the determination of the damages legally entitled to be recovered, the action is one based on tortious conduct, not contract issues.

The argument between the Trial Court and the Court of Appeals about which damages should be the subject of prejudgment interest demonstrates that the wrong analysis and statute were being used. For instance, the Trial Court found that no interest should be given for future pain and suffering because that element of damages had “not as yet been incurred.” This would be a logical result under a R.C. 1343.03 (A) “due and payable” analysis. Further, since interest on future damages clearly does not arise until after the verdict, it is by its nature, subject to postjudgment interest, as provided for in R.C. 1343.03 (B).

Moreover however, R.C. 1343.03 (C) (2) specifically addresses future damages and provides; “No Court shall award interest . . . on future damages . . .”

This clear mandate of this Section of the Statute demonstrates the legislative intent that there is not to be any award of prejudgment interest on future damages.

Likewise, the award of interest on the medical expenses was treated differently by the Trial Court and the Court of Appeals. Since the Appellee received a double recovery of those monies it makes no sense under a make whole theory of contract law and R.C. 1343.03 (A) to give prejudgment interest from the date of the motor vehicle accident. If R.C. 1343.03 (A) is applied then the Court would have to find the dates on which each medical expense was “due and payable.” This again is illogical compared to applying R.C. 1343.03 (C), which specifies the dates on which interest should begin to run, and

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negates the necessity of the Court trying to fix a “due and payable” date for each item of damage. In Landis and those cases where contract issues were involved the “due and payable” date was when the Court decided that coverage did exist not when each item of the underlying damages were incurred.

In both instances there is no logical basis for a Court to analyze prejudgment interest for tort damages under the provisions of R.C. 1343.03 (A) when R.C. 1343.03 (C) specifically address when and for what reasons prejudgment interest should be awarded in such cases.

Appellees’ argument is that regardless of the fact that her claim was not a contract claim as to coverage, she should still get prejudgment interest because “Allstate derived financial gain over the last 12 years,” an unsupported assertion, and the Appellee should be made whole per Royal Electric<sup>3</sup>.

The theory of Royal Electric and R.C. 1343.03 (A) does not apply when the claim is for tort damages. There is no logical basis to differentiate between a Plaintiff with a UMI claim for tort damages and that of a Plaintiff with the same type of claim against an insured tortfeasor.

The Appellee never addresses in her reply that her position runs afoul of Barlett, Clark, and Phillips<sup>4</sup> in that the use of R.C. 1343.03 (A) as proposed by Appellee would result in a UMI claimant being better off than one struck by a tortfeasor with insurance.

Appellee next argues in her reply brief that she is entitled to an award of

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<sup>3</sup> Royal Electric Company v. Ohio State University (1996), 73 Ohio St. 3d 110, 116-117, 662 N.E. 2d 687, 692

<sup>4</sup> Barlett v. Nationwide Mutual Insurance Company (1973), 33 Ohio St. 2d 50, 52, 294 N.E. 2d 665, 667 .  
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Cincinnati Ins. Co. v. Phillips (1990), 52 Ohio St. 3d 162, 165, 556 N.E. 2d 1150, 1153.

prejudgment interest on the amount determined by the jury to be all of her medical expenses from the date of the motor vehicle accident even though those expenses had already been paid.

Neither Shearer or Lindsey<sup>5</sup> was violated here because Appellee recovered both the medical payments coverage and the UMI recovery of those expenses.

Assuming, as the Appellee asserts, that these were analyzed as contract damages under R.C. 1343.03 (A) then the issue would be to make the Appellee whole. In contract cases that is determined by the finding of the date of when the party should have paid and awarding the other party interest from that time. In the case of these medical expenses, they did not exist on the day of the motor vehicle accident. Secondly, an award of interest is to compensate the entitled party for the lose of the use of such money. Here the Appellee, as found by the Trial Court had no loss of use because theses expenses had been paid; actually twice.

Finally, the Appellee ignores these inconsistencies and argues that the Courts should not be allowed to analyze what is necessary to “make whole.” This argument is based on the Fifth Districts’ opinion in Indiana Insurance Company<sup>6</sup>.

This was again a declaratory judgment action concerning coverage. In that case prejudgment interest on an arbitration award was denied by the Trial Court.

The Appellate Court went on to find that R.C. 1343.03 (A) mandates the award of prejudgment interest. This statement was supposedly supported by Pioneer and Dwyer<sup>7</sup>.

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<sup>5</sup> Shearer v. Motorist Mutual Insurance Company (1978), 53 Ohio St. 2d 1, 8.

Grange Mutual Casualty Insurance Company v. Lindsey (1986), 22 Ohio St. 3d 153, 154-155.

<sup>6</sup> Indiana Insurance Company v. Farmers Insurance of Columbus, et. al. (September 9, 2003), Tuscarawas App. No. 2002 AP 11 0090.

<sup>7</sup> Pioneer Rural Elec. Co-Op v. Strunk, Shelby App. No. 17-99-09, 1999-Ohio-939.

Dwyer Electric, Inc. v. Confederate Builders, Inc. (October 29, 1998), Crawford App. No. 3.98-18

Both of those cases were contract cases and not UMI claims. Furthermore, the Dwyer Court specifically noted “. . . these subsections (“A” and “C”) refer to different types of cases. The legislature has imposed additional and preliminary requirements on tort based claimants seeking prejudgment interest under R.C. 1343.03 (C) which do not apply to contract based claimants.” (at Page 2).

Further, the Appellee offers no rationale for an award of prejudgment interest on future pain and suffering other than to again refer to the Indiana Insurance Company case.

As already demonstrated, that case’s finding is an example of the improper blurring of the distinction between a contract claim and a tort claim. In Indiana Insurance Company the case was remanded to the Trial Court to determine “the date money became due and payable.” That date had to do with whether coverage arose at the time of the arbitrator’s decision or some other time. The decision was more concerned with the Trial Court picking a date, any date, and had nothing to do with determining when the damages found for the wrongful death would accrue interest.

This also illustrates the further problem with trying to apply R.C. 1343.03 (A) to tort/UMI cases because of the requirements that the date the money becomes due and payable must be identified. As already pointed out, this does not work when tort damages are being considered. On the other hand, R.C. 1343.03 (C) provides specific events from which the Court can determine from when the interest should run and the elements of damages for which prejudgment interest can be given.

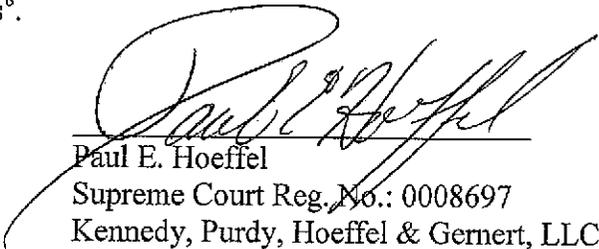
## CONCLUSION

Before this Court lies the question of the application of R.C. 1343.03 to claims in UMI cases which seek tort damages rather than a determination of coverage under the policy.

The development of the common law and R.C. 1343.03 (A) addresses prejudgment interest in contract actions. When a UMI claim is for a determination of coverage under a policy, then it is like a construction contract case and when the Court finds such coverage did exist, then it should determine the date from which that coverage should have been paid.

Conversely, when the insured is seeking damages from an underinsured motorist, then the claim is one based on tortious conduct and therefore controlled by the specific language of R.C. 1343.03 (C).

As a matter of law the Appellee is not entitled to prejudgment interest under R.C. 1343.03 (A) for her tort based damages<sup>8</sup>.



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<sup>8</sup> The Appellee did not claim prejudgment interest under R.C. 1343.03 (C), Plaintiff's Memorandum in Response to Defendant's Trial Brief dated May 18, 2005. Page 1, Record, "As a point of clarification, the Plaintiff is not requesting prejudgment interest per Section 1343.03 (C) of the O.R.C."

**PROOF OF SERVICE**

This is to certify that a copy of the foregoing has been served via regular U.S. mail

this 7<sup>th</sup> day of June 2007 upon the following:

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