

IN THE SUPREME COURT OF OHIO

LEONARD MAYNARD

Plaintiff/Appellee,

vs.

EATON CORPORATION,

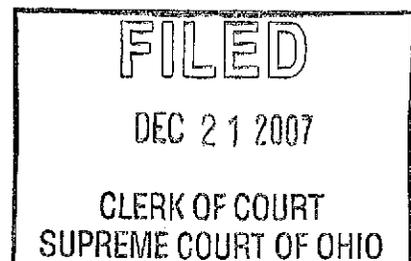
Defendant/Appellant.

: CASE NO. 2007-1069
:
: On Appeal from the Marion County
: Court of Appeals, Third Appellate District
: Case No. 9-06-33
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:

MERIT BRIEF OF AMICUS CURIAE,
THE OHIO EMPLOYMENT LAWYERS
ASSOCIATION IN SUPPORT
OF PLAINTIFF/APPELLEE SHELLEY BICKERS

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MEMORANDUM OF LAW

I. STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus Curiae, The Ohio Employment Lawyers Association (AOELA@), has participated in many of the most important judicial proceedings affecting Ohio's laws governing discrimination and employment.¹ Collectively, OELA members have a great deal of experience and knowledge related judgments and the vital role played by statutes such as R.C. 1343.03 and preserving the constitutionality of non-retroactive legislation.

The decision in *Maynard v. Eaton Corp.*, 3rd Dist. No. 9-06-33, 2007-Ohio-1906 was well-reasoned with respect to its application of R.C. 1343.03 to post-judgment interest, properly determining that the 10-percent interest rate applied prior to June 2, 2004 applied in *Maynard*, which was decided and final judgment entered in 2003, prior to the amendment of R.C. 1343.03.

¹ See, e.g., *Kish v. Akron* (2006), 109 Ohio St.3d 162, 846 N.E.2d 811; *Williams v. Akron* (2005), 107 Ohio St.3d 203, 837 N.E.2d 1169; *Wiles v. Medina Auto Parts* (2002), 96 Ohio St.3d 240, 773 N.E.2d 526; *Smith v. Friendship Village of Dublin, Ohio, Inc.*, (2001) 751 N.E.2d 1010; *Gliner v. Saint-Gobain Norton Indus. Ceramics Corp.*, 89 Ohio St.3d 414 (2000); *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451 (1999); *Genaro v. Cent. Transport, Inc.*, 84 Ohio St.3d 293, 703 N.E.2d 782 (1999); *Kulch v. Structural Fibers, Inc.* (1997), 78 Ohio St.3d 134, 138; *Byrnes v. LCI Communication Holdings Co.* (1996), 77 Ohio St.3d 125; *Fox v. City of Bowling Green* (1996), 76 Ohio St.3d 534, *Mauzy v. Kelly Services, Inc.* (1996), 75 Ohio St.3d 578; *Ohio Civ. Rights Comm. v. Case Western Reserve University* (1996), 76 Ohio St.3d 168, 173, 666 N.E.2d 1376, 1382; *Hood v. Diamond Products, Inc.* (1996), 74 Ohio St.3d 298, 301, 658 N.E.2d 738, 741; *Wright v. Honda of America Mfg., Inc.* (1995), 73 Ohio St.3d 571; *Haynes v. Zoological Soc=y of Cincinnati* (1995), 73 Ohio St.3d 245; *Cosgrove v. Williamsburg of Cincinnati Mgt. Co., Inc.* (1994), 70 Ohio St.3d 281, 281; *Ohio Civil Rights Commission v. Ingram* (1994), 69 Ohio St.3d 89; *Bellian v. Bicron Corp.* (1993), 67 Ohio St.3d 1435 (order granting leave to participate as *amicus curiae*); *Burnworth v. Ohio Bell Telephone Co.* (1993), 67 Ohio St.3d 1480 (same); *Ricciardi v. Babcock & Wilcox Co.* (1993), 66 Ohio St.3d 1490 (same); *Schwartz v. Comcorp, Inc.* (1993), 66 Ohio St.3d 1468 (same); *Elek v. Huntington National Bank* (1991), 60 Ohio St.3d 135, 573 N.E.2d 1056; *Baker v. Pease Co.* (1991), 60 Ohio St.3d 703 (order granting leave to participate as *amicus curiae*); *Bittner v. Tri-County Toyota, Inc.* (1991), 58 Ohio St.3d 143; *Kerans v. Porter Paint Co.* (1991), 58 Ohio St.3d 709 (order granting leave to participate as *amicus curiae*); *Little Forest Medical Center of Akron v. Ohio Civil Rights Commission* (1991), 57 Ohio St.3d 704 (same); *Manning v. Ohio State Library Board* (1991), 57 Ohio St.3d 713 (same); *Masek v. Reliance Electric Corp.* (1991), 57 Ohio St.3d 723 (same); *Kohmescher v. Kroger Co.* (1991), 61 Ohio St.3d 501; *Russ v. TRW, Inc.* (1990), 51 Ohio St.3d 708 (order granting leave to participate as *amicus curiae*); *Greeley v. Miami Valley Maintenance Contractors, Inc.* (1990), 49 Ohio St.3d 228; *Parsons v. Denny's Restaurants* (1989), 44 Ohio St.3d 704 (same); *Karnes v. Doctors Hospital* (1989), 44 Ohio St.3d 710 (order granting leave to participate as *amicus curiae*); *Helmick v. Cincinnati Word Processing, Inc.* (1989), 41 Ohio St.3d 719 (same).

Maynard also correctly determined that this rate would remain in effect for as long as the monies due remained unpaid. This amicus believes that the Court should find in favor of *Maynard* based on the plain language of R.C. 1343.03, the clear legislative intent of H.B. 212, Ohio's constitution, and this Court's prior jurisprudence on related issues. Each requires analytically that, for any final judgments entered by a court of original jurisdiction prior to the effective date of the new R.C. 1343.03, the 10% post-judgment interest rate must apply.

OELA is a state-wide professional membership organization comprised of lawyers who represent employees in labor, employment and civil rights disputes. OELA is the only state-wide affiliate of the National Employment Lawyers Association (NELA) in Ohio. NELA and its 67 state and local affiliates have a membership of over 3,000 attorneys nationwide who are committed to working on behalf of those who have denied equal opportunity or fairness in the workplace.

OELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace. OELA advocates for employee rights and workplace fairness while promoting the highest standards of professionalism, ethics and judicial integrity. OELA likewise stands by its dedication to protecting the fairness of final judgments, and workers' and the public's interest in the constitutional application of Ohio's legislative enactments, particularly where they, as in this case, impact the rights of wrongfully treated employees.

It is recognized that this decision will also have a longstanding impact on business-to-business litigation that likewise was concluded prior to the effective date of the statute's amendment, but still may be mired in appellate court proceedings.

II. STATEMENT OF THE CASE AND FACTS

Amicus Curiae adopts the statement of the case and facts set forth in the merit brief of Appellee Maynard.

III. LAW AND ARGUMENT

A. Proposition of Law No. 1: With respect to all final judgments on the merits in a court of original jurisdiction entered prior to June 2, 2004, post-judgment interest shall be calculated at the 10 percent rate annum specified in former R.C. 1343.03.

This Court, citing a conflict between the decision in the instant case and those of *Hilliard v. First Indus., L.P.*, 165 Ohio App.3d 335, 2005-Ohio-6469 (10th Dist.) and *Hausser & Taylor, LLP v. Accelerated Sys. Integration, Inc.*, Cuyahoga App. No. 86547, 2006-Ohio-1582, certified the following question:

Does the amendment to R.C. 1343.03, effective June 2, 2004, adjust the 10% rate of post-judgment interest calculated on a final judgment that was entered prior to the date of the amendment, but not paid in full and pending on appeal?

Maynard v. Eaton Corp., (2007), 114 Ohio St. 3d 1503, 2007-Ohio-4285.

As set forth below, the plain language of the statute as well as H.B. 212 require application of the 10% rate to any outstanding final judgment entered prior to the date of amendment. The key terms in both the statute as amended and also the question posited involve “final judgment” and “pending,” which, although plain and uncontroversial in this case, lie at the source of the issues raised by Appellant in this appeal.

Further, neither Appellant nor its amicus can reasonably rely on an unconstitutional interpretation of “retroactive” in application of section 1343.03. In accordance with this Court’s own jurisprudence, retroactivity is not applicable in this case for it was not expressly made, nor was it the General Assembly’s intent to make the revision of the statute retroactive in its application. Indeed, this Court need not even reach such a constitutional question, the issue being resolved easily in the plain language and intent of the amendment to R.C. 1343.03 itself.

1. The plain language of R.C. 1343.03 and HB 212 establish that the 10% per annum rate applies to the instant case and others in which final judgment was entered into prior to the statute's 2004 amendment.

a. Post-judgment interest under Section 1343.03 is necessarily tied to, and flows from the final judgment in the original court or tribunal.

Section 1343.03(A), as amended, states in pertinent part (emphasis added):

(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.... Notification of the interest rate per annum shall be provided pursuant to sections 319.19, 1901.313 [1901.31.3], 1907.202 [1907.20.2], 2303.25, and 5703.47 of the Revised Code.

As stated in *Kocsorak v. Cleveland Trust Co.* (1949), 151 Ohio St. 212, 216: "[W]ords of a statute must be given their common, ordinary and accepted meaning in the connection in which they are used." *See, also*, R.C. 1.42. ("Words and phrases shall be read in context and construed according to the rules of grammar and common usage. Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly.")

This Court recently had the opportunity to address R.C. 1343.03 in *Miller v. First Int'l Fid. & Trust Bldg.* (2007), 113 Ohio St. 3d 474, 476, 2007-Ohio-2457, PP 3-8. In that case, the Court analyzed the statute at length; central to the Court's analysis was what constituted a "final judgment." This Court well-defined "final judgment," and made clear that such judgments, when they become ripe and appealable, signal an end to the original proceedings on the merits.

Neither the parties in this case nor any court decisions at issue dispute the proper timing of the application of post-judgment interest and R.C. 1343.03 – *i.e.*, that the meter begins to run *at*

the time of final judgment entry when the monies become due and payable. This is so notwithstanding any subsequent appeal. Thus the final judgment referenced in the statute itself is that of the court with original jurisdiction in which the judgment was originally rendered.²

- b. The General Assembly's use, as well as the plain meaning, of "pending" means "while a case remains undecided in the court of original jurisdiction in which it was filed"; it cannot reasonably be interpreted to apply to cases on appeal for the purposes of applying post-judgment interest.**

Notwithstanding the Appellant's and its amicus' gratuitous focus on constitutionality and retroactivity, the real underlying dispute in this case lies in the meaning of the word "pending," as the General Assembly used it in H.B. 212, which was clearly intended to instruct courts how to cope with the change in the statutory interest rates on cases currently before trial courts and not yet adjudicated on the merits:

Section Notes:

The provisions of § 3 of H.B. 212 (150 v --) read as follows (emphasis added):

SECTION 3. The interest rate provided for in division (A) of section 1343.03 of the Revised Code, as amended by this act, **applies to actions pending on the effective date of this act.** In the calculation of interest due under section 1343.03 of the Revised Code, *in actions pending on the effective date of this act, the interest rate provided for in section 1343.03 of the Revised Code prior to the amendment of that section by this act shall apply up to the effective date of this act, and the interest rate provided for in section 1343.03 of the Revised Code as amended by this act shall apply on and after that effective date.*

ORC Ann. 1343.03

Appellant Eaton and its amicus merely assume without much, if any, analysis, that "pending" includes cases already fully adjudicated but trapped somewhere in the appellate process, often as a tactic by the party seeking to appeal the judgment and to delay payment of

² As discussed *infra*, while it is true that a court of limited jurisdiction, such as a reviewing appellate court, can modify, vacate or affirm, it is undisputed that R.C. 1343.03 post-judgment interest flows from the date of the original final judgment.

monies due. Regardless, this overly broad interpretation of “pending” is inapposite and contrary to both statutory and case law.

Appellant liberally uses and interchanges the word “pending” in its statement of the facts in referring to both issues prior to final judgment of the trial court and also issues addressed on appeal.³ In addition, Appellant relies primarily on two cases for its proposition: *State ex rel. Kilbane v. Industrial Comm'n of Ohio* (2001), 91 Ohio St. 3d 258, 259, and *State ex rel. Beacon Journal Pub. Co. v. Ohio Dep't of Health* (1990), 51 Ohio St. 3d 1, 3.

Both of these decisions, however, are readily distinguishable from the instant case and language in H.B. 212. First, in *Kilbane* it was undisputed that that case had not reached a final determination in the original court. The Court noted: “If a state fund employer or an employee of such an employer **has not filed an application for a final settlement** under this division, the administrator may file an application on behalf of the employer or the employee....” *Id.*, emphasis added. Clearly, because the settlement and underlying requirements for a final judgment in the original tribunal had not been met, the original case remained “pending” and unconsummated. That is not the case here, in which the case was tried to final verdict and judgment entry was made, disposing of the entire case *on the merits*.

Likewise, *Beacon Journal v. Ohio Dept. of Health* is inapplicable, because in amending that statute (under Ohio Public Records Act), the General Assembly did not merely use the word “pending,” as here, but used an entirely different phrase that expressly showed its intent to apply the amendment retroactively (emphasis added and citation omitted):

³ The issues on appeal involved: Appellant’s appeal on post-judgment interest (the subject of this certified question) and the granting of attorney fees, and Appellee’s appeal on the denial of pre-judgment interest (the Court denied jurisdiction on the latter two issues).

"A statute is presumed to be prospective in its operation unless expressly made retrospective." [The amendment to the statute reads]"Any action in which a writ of mandamus is sought to compel compliance with section 149.43 of the Revised Code, or any appeal of such action, pending in any court as of the effective date of this act may proceed as if this division had been in effect at the time such action was filed." We are satisfied that this language declares the legislature's unmistakably clear intent that the statute be applied retroactively.

Id. at 3.

It is axiomatic and expected that the General Assembly chooses its words with care (particularly if it plans to possibly run afoul of the standing mandate against retroactive legislation found in Ohio Constit. Art. II, § 28). The General Assembly's legislative intent is to be derived from both the plain language of any statutory amendment and any additional guiding principles embodied in the legislative service and explanation of the purpose of the particular bill. Here we have both, and the legislature is careful in its use of the simple and unmodified word "pending" in H.B. 212, as opposed to "pending in any court" and "or on appeal," as used in the cases relied on by Appellant and its amicus. *See, also, R.C. 2505.02(D)*, which defines with particularity the timing and application of determining what is a "final order" (emphasis added):

(D) This section applies to and governs any action, **including an appeal, that is pending in any court** on July 22, 1998, and all claims filed or actions commenced on or after July 22, 1998, notwithstanding any provision of any prior statute or rule of law of this state.

Contrary to the clearly and carefully defined meaning of "pending" as used in the above, the language in H.B. 212 attaches no significant meaning to what is pending – and indeed, makes clear its intent, through the statutory enactment, that the interest calculations apply to final judgments when "money becomes due and payable" but that different calculations apply to

actions where such monies have not been determined following the 2004 amendment and not yet due. R.C. 1343.03(A).⁴

Likewise, the ordinary meanings of “pending” and “pendency” are readily ascertainable from Black’s Law Dictionary (Pocket, 1996) (emphasis added):

Pending: adj: “The state or condition of being pending *or continuing undecided*.”; *see, also, Pendent elite*, adv. “**During the proceeding or litigation**; contingent on the outcome of litigation.”; *Lis pendens*, n. – “a pending **litigation**.”

In short, there can be no doubt that the definition of “pending” as used by the legislature, without the added clear intent to expressly make it retroactive to “all” cases even those on appeal, applies in its ordinary sense: Once a litigation is finally adjudicated on the merits in a court of original jurisdiction, then it is subject to the rates set forth in R.C. 1343.03, which begin to run from the date of judgment entry. In the event that that particular litigation concludes and culminates into a final judgment prior to the statute’s amendment, then the prior set interest rate of 10% applies until the monies are paid in full.

As with Appellant Eaton, its amicus relies primarily on inapplicable case law, specifically, *Van Fossen v. Babcock & Wilcox Co.* (1988), 36 Ohio St. 3d 100. The *Van Fossen* Court was dealing with a sudden change in the Workers Compensation Act Section 4123.80. Notably, that statutory enactment likewise carried the phrase

"This section applies to and governs any action based upon a claim that an employer committed an intentional tort against an employee **pending in any court** on the effective date of this section and all claims or actions filed on or after the effective date, notwithstanding any provisions of any prior statute or rule of law of this state." The court of appeals, however, determined that the General Assembly did not intend to make this

⁴ Appellant and its amicus also ask this Court to go beyond the certified question and find that the amendment to R.C. 1343.03 was intended to apply a confusing formula to “pending” cases, *i.e.*, applying each yearly statutory rate during the time the recalcitrant debtor reneges on its obligations to pay a judgment. This is not only inaccurate but contra H.B. 212’s legislative intent expressed in amicus’ own attachment to its Brief (H.B. Legislative Service Comm’n, H.B. 212, at 3, 4. See *infra*.

section applicable to cases pending on appeal. In the appellate court's view, once a trial court enters its final judgment, the case is no longer "pending in any court."

Id., 36 Ohio St. 3d at 103 (emphasis added).⁵

As such, the *Van Fossen* Court was interpreting a statute that the legislature made clear applied to all courts, whether those of original or appellate jurisdiction. Again, such is not the case here. Moreover, to the extent that the *Van Fossen* Court relied on other courts' interpretations to bolster its definition of "pending," the underlying authority is either overruled or inapplicable. The Court cited (opinion at 103) three federal cases in support of its broad definition of pending: *Midkiff v. Colton* (C.A. 4, 1917), 242 F. 373, 381; *Ex parte Craig* (C.A. 2, 1921), 274 F. 177, 187 (cause is pending while still open to appeal, modification or rehearing, and until final judgment is rendered); *Nichols v. Pierce* (C.A. D.C. 1984), 740 F. 2d 1249, 1256. *Id.*

However, none of these cases stands for the proposition that a case tried to final judgment is still "pending." For example, in *Midkiff*, the issue was whether the case was still open when two beneficiaries were fraudulently excluded from a closing; the court determined that since the others were wrongfully excluded, then the case was still pending and the excluded parties could be factored into subsequent proceedings.

Likewise, the *Nichols* case defined the word "pending, stating:

⁵ Moreover, the *Van Fossen* Court cited to Ohio. Const. Art. IV, § 3, dealing with original jurisdiction of appellate courts and limited jurisdiction of appellate courts in their role as reviewing final judgments from lower courts. Included in the category of original jurisdiction is Sec. (f): "In any cause on review **as may be necessary to its complete determination...**" – which was relevant and applicable to the determination of amended R.C. 4123.80 dealt with in *Van Fossen*. That particular amendment expressly declared its intent to be applied in the process pending in "any court," meaning courts of appeals were included for purposes of application of that statute. More important for our purposes is that Sec. 3 also declares that appellate courts have only limited jurisdiction to review and then to affirm, modify, or vacate lower court decisions *that have been completed on the merits* – but in this role, such courts are not imbued with original jurisdiction to entirely retry a case already completed. Hence, the case is not "pending" on the merits at the appellate stage.

The Act itself offers no definition of the term "pending." One may safely assume Congress intended it to use the word in its ordinary sense. Dictionaries confirm what ordinary usage suggests: A pending matter is one which is undecided, awaiting decision or settlement; a lawsuit is pending from its inception through the final judgment. The complaint raised many substantive legal issues related to the merits of the case, but these issues were all finally resolved by the district court's memorandum and order of 12 September 1980. That decision essentially ended the lawsuit.

Id. Although the court noted that there had been no appeal taken, the use of "pending" and the court's decision relates entirely to its conclusion that there was a final judgment in the original court.

The *Van Fossen* Court also relied on *Ex parte Craig* (C.A. 2, 1921), 274 F. 177, 187, postulated the proposition that a "cause is pending while still open to appeal, modification or rehearing, and until final judgment is rendered." However, *Craig* was *reversed by the same Court* in a later proceeding. See *Ex parte Craig*, 282 F. 138 (2d Cir. 1922). The reversing decision expressly found that the prior court's analysis and use of the word "pending" was wrong in a habeas corpus action and held that it was the original court, not a later reviewing court, that had final, original jurisdiction over the matter. *Id.*

Regardless, *Van Fossen* itself is inapplicable because it was applying language by the General Assembly which clearly applied to "any court" in which an action was pending – and "any" could easily include an appellate court and thus be intended to be "retroactive." However, in R.C. 1343.03, "pending" as used with respect to post-judgment interest refers solely to original judgments and not any subsequent decision in any other court. There is no qualifying language. There is no express intent that it be applied to cases already tried to final judgment. Clearly, the interest begins to run and the amount is calculated at the point in which the original

case was terminated on the merits and the judgment or settlement amount was rendered due and payable in a final determination in the original court. R.C. 1343.03(A).

In short, the General Assembly judiciously and carefully applied the word “pending” in H.B. 212 to mean “in a court of original jurisdiction,” and the language of H.B. 212 was intended to assist only in interest calculations for cases *not fully terminated on the merits* at the time of the amendment – cases that therefore had not yet triggered the post-judgment meter. When it has meant otherwise, specifically that an amendment be applied (and tested in the courts) retroactively, the General Assembly has quite clearly used qualifying language such as “any court” or “even on appeal,” etc.

Not so here.

Thus, in applying post-judgment interest pursuant to R.C. 1343.03, “pending” means its ordinary use: *i.e.*, during the pendency of *litigation and before final judgment* and not involving any subsequent appeal. On final judgments rendered prior to the amendment, the set rate of 10% comprises the interest, and that set amount applies without restriction or adjustment until the final judgment is paid in full -- regardless of the length of time the recalcitrant debtor attempts to string out the payments. See Sub. H.B. 212 at 2-4 (attached to Appellant’s amicus brief as Appendix I).

B. Proposition of Law No. 2: Section 1343.03 was not intended by the General Assembly to apply retroactively, as there was no clear, express language indicating legislative intent for such application.

1. The General Assembly was clear that the amendment was intended to be prospective only.

The bedrock for this second proposition of law is set forth above. The definition of “pending” is clearly used in H.B. 212 to make the amendment apply prospectively to all cases

that were filed and uncompleted by the effective date of the amendment on June 2, 2004. This case, decided in 2003, falls outside that window of time. Nonetheless, Appellants raise several arguments that not only depart from this Court's certified question, but are disturbingly contra the express intent of the General Assembly in H.B. 212's Legislative Service comments.

First, this Court has long recognized that, where a case can be decided without delving into constitutional questions, then the courts will generally dispense with the case on other grounds. See *Greenhills Home Owners Corp. v. Greenhills* (1966), 5 Ohio St. 2d 207, syllabus. Yet, Appellant Eaton and its amicus immediately pass on the crux of the case, definitions and statutory interpretations of the language used in the amendment, and catapult into constitutional issues of retroactivity, "substantive" vs. "remedial," etc., which are in reality nonexistent and not a part of this Court's inquiry into the matter at hand.

However, even in their analysis, Eaton and its amicus are wrong. This Court in *Van Fossen*, and more recently in *State v. Consilio* (2007), 114 Ohio St. 3d 295, 299. laid out the criteria for determining retroactive legislation in a two-step process: 1) whether the legislature expressly intended, through its unequivocal language, that a statute or amendment be applied retroactively, rather than prospectively, and 2) if intent for retroactive application is found, whether the statute or amendment runs afoul of the Ohio Constitution, Art II, Sec. 28 (i.e., that the statute or amendment is "remedial" or "procedural," rather than "substantive" – an admittedly difficult analysis in itself). See, also, R.C. 1.48, requiring prospective legislation in nearly all instances; R.C. 1.47 ("In enacting a statute, it is presumed that: (A) Compliance with the constitutions of the state and of the United States is intended; (B) The entire statute is intended to be effective; (C) A just and reasonable result is intended; (D) A result feasible of execution is intended.")

This Court has rarely permitted inquiry to pass the first threshold of the retroactivity test. *See, e.g., Consilio*, 114 Ohio St.3d at 299, 2007-Ohio-4163 at P 9-10 (“The General Assembly's failure to clearly enunciate retroactivity ends the analysis, and the relevant statute may be applied only prospectively.”); *see, also*, R.C. 1.48. There is a clear presumption that statutes are intended to work prospectively and that retroactivity is not to be lightly inferred, and the intention for retroactivity must be explicit and unambiguous. *Consilio*, 114 Ohio St.3d at 299, 2007-Ohio-4163 at PP. 15, 9-10. Indeed, although the statute in question in *Consilio* carried language that included application in the present tense, this Court declined to find intentional declaration of retroactivity by the General Assembly (*Id.* at P. 15, citations omitted and emphasis added):

A statute must clearly proclaim its own retroactivity to overcome the presumption of prospective application. Retroactivity is not to be inferred. If the retroactivity of a statute is not expressly stated in plain terms, the presumption in favor of prospective application controls. **Moreover, the General Assembly is presumed to know that it must include expressly retroactive language to create that effect, and it has done so in the past.**

As argued above, R.C. 1343.03, as well as Sec. 3 of H.B. 212, are precise and definite that post-judgment interest flows from final judgments in original courts, and also that “pending” is used in the ordinary sense. Because there is no express “retroactive” language, then any action fully adjudicated in the original court prior to the effective date of the amendment is not “pending” on the merits in the original court, and thus cannot be herded into the same corral of cases that were still pending in their original courts at the time the amendment took effect.

In short, Appellant cannot even meet the first prong of the “retroactivity language test.” Thus, the question of whether R.C. 1343.03 post-judgment interest is “remedial” or “substantive”

is moot. This is particularly so in that this Court does not unnecessarily visit constitutional issues when such issues can be resolved on their face, as here.

- 2. The General Assembly clearly set forth that the date on which final judgment was entered would control as to the set interest rate until all of the money due and payable was finally paid.**

Although not clear from Appellant's and amicus' briefs, it appears they are attempting to improperly broaden this Court's certified question and seeking a determination that, in any case that is found "pending" at the time of the statute's 2004 amendment, a court must go through the arduous process of calculating and recalculating the interest rate for each year in which the case remains "pending" in the original court.⁶

This not only violates the limits of this Court's certified question, it also goes entirely against the express intent of H.B. 212, as set forth in its Legislative Service Commentary. Appellant, and (more vaguely) its amicus, argue that the rate should be recalculated and applied yearly. This argument not only is irrelevant to the instant case, it also shows the Appellant's and amicus' ignorance of H.B.'s own legislative service commission explanation and comments, attached as an exhibit to the amicus brief on behalf of Appellant.

In short, in enacting H.B. 212 and the amendment to the statute, the legislature was careful to explain (in its Act summary, emphasis added):

[The amendment] specifies that the applicable postjudgment rate of interest is the rate *as determined that is in effect on the date of the judgment*, decree, or order is rendered and *that that rate remains in effect until the judgment, decree, or order is satisfied*.

Id., at p. 2. This is likewise reiterated on page 4 of the same document:

The act provides that...interest on a judgment decree, or order for the payment of money in a civil action based on tortious conduct.....must be computed *from the date of the*

⁶ See, e.g., p. 16 of Appellant's brief.

judgment... as described above, that is in effect on the date the judgment... is rendered. That rate remains in effect until the judgment, decree, or order is satisfied. Id., at 4.

Notwithstanding, that fact that this Court has always taken the position that it need not reach issues not certified or not pertaining to the instant appeal (including this case), it is clear that the Appellant and its amicus are misleading in their discussion of legislative intent behind the amendment to R.C. 1343.03. The rate applies to final judgments in courts of original jurisdiction, and remains constant throughout the time the noncompliant defendant fails to pay what is due at the time of judgment. Therefore, the 10% rate in former 1343.03 applies to this case until Appellant decides to pay the monies undisputedly owed to Appellee Maynard.

IV. CONCLUSION

For the foregoing reasons, the Amicus Curiae OELA on behalf of Maynard respectfully requests that this Court affirm the appellate decision in this case, which properly applied a 10% rate of post-judgment interest because the money became due and payable upon entry of final judgment, which occurred prior to the 2004 amendment of Section 1343.03 by the General Assembly.

Respectfully submitted,

A handwritten signature in cursive script that reads "Christy B. Bishop" followed by a stylized flourish.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the Foregoing Merit Brief of Amicus Curiae, The Ohio Employment Lawyers Association in Support of Plaintiff/appellee Laonard Maynard was sent via regular U.S. mail, postage prepaid, to Laren Knoll, Kennedy, Reeve & Knoll, 98 Hamilton Park, Columbus, Ohio 43203; Harry T. Quick, Brzwa, Quick & McCrystal, 900b Skylight Office Tower, 1660 W. Second St., Cleveland, Ohio 44113; and Thomas F. Glassman, Smith, Rolfes & Skavdahl, 1014 Vine St., Ste. 2350, Cincinnati, Ohio 45202, this ___ day of December, 2007.


Christy B. Bishop 0076100