
In the Supreme Court of Ohio

MARCIA A. MAYER, ET AL.

Plaintiffs-Appellees,

v.

MARIO MEDANCIC, ET AL.

Defendants-Appellants.

COURT OF APPEALS, ELEVENTH APPELLATE DISTRICT
GEAUGA COUNTY, OHIO
CASE Nos. 2008G2826, 2008G2827, 2008G2828 (CONSOLIDATED)

MEMORANDUM IN OPPOSITION TO JURISDICTION

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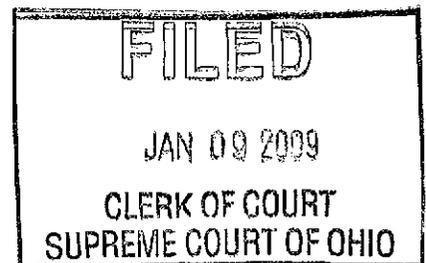


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I.

**EXPLANATION OF WHY THE ISSUES RAISED IN THIS
APPEAL ARE NOT OF PUBLIC OR GREAT GENERAL
INTEREST**

Section 2(B)(2)(e) of Article IV of the Ohio Constitution dictates that the Supreme Court of Ohio's discretionary jurisdiction is reserved for "cases of public or great general interest." Cases presenting questions and issues of public or great general interest are to be distinguished from cases where the outcome is primarily of interest to the parties in a particular piece of litigation. *Williamson v. Rubich* (1960), 171 Ohio St. 253, 254. While undoubtedly important to the parties here, this appeal falls into the latter category of cases referenced in *Williamson*. Because this case does not present issues of public or great general interest, jurisdiction over this appeal should be declined.

Appellants have filed this discretionary appeal in order to avoid paying the compound interest ordered by the Court of Appeals. Appellants contend, wrongly, that the Court of Appeals either had no jurisdiction to hear the appeal in the first place or that the Court of Appeals erroneously ordered that they pay compound interest on the trial court's judgment. By seeking review in this Court, Appellants hope that a different outcome might be achieved so that they ultimately will avoid paying compound interest on the judgment against them, a judgment they do not deny owing. That self-interest notwithstanding, this Court's discretionary jurisdiction does not encompass their appeal or important issues of great general interest. There is nothing unique or distinctive about this case. There is no credible suggestion that this Court

needs to resolve an emerging divergence in legal holdings from different appellate districts. Nothing of public or great general interest warrants the Court accepting jurisdiction over this appeal. The Court should thus decline to hear this appeal.

II.

STATEMENT OF THE CASE AND OPINIONS BELOW

In 1992, Appellees Marcia and Robert Mayer (collectively "the Mayers") entered into an agreement with Appellants Mario, Marija, Mladen and Karoline Medancic (collectively "the Medancics") to sell them two parcels of property in Geauga County, Ohio. In order to finance the purchase, Karoline and Mladen Medancic executed two promissory notes in favor of the Mayers. The first note, executed on July 3, 1995, was in the amount of \$20,000 payable on November 1, 1995 at 13% interest per annum. The second note, executed on December 11, 1995, was in the amount of \$67,000 payable on November 1, 1997 at 10% interest per annum. Both promissory notes were secured by a mortgage deed. A third promissory note was executed in favor of the Mayers by A-Custom Builders (owned by the Medancics) on January 8, 1996 in the amount of \$37,500, payable November 1, 1997 at 12% interest per annum.

In 1998, the Mayers filed three separate complaints for foreclosure on each of the above promissory notes. The Medancics counterclaimed for breach of contract. In a bench trial conducted in December of 1999, the trial court ruled in favor of the Mayers on all three foreclosure actions and ordered parts of the contracts rescinded due to mutual mistake. The Medancics have been in default since the Fall of 2000.

A series of appeals followed the trial, after which the Eleventh District Court of Appeals ultimately affirmed the foreclosure judgments and ordered the Mayers to refund the Medancics the amount of \$148,000. Despite the rulings by the Eleventh District Court of Appeals, several issues remained in litigation before the trial court. On January 13, 2006, the Medancics filed a motion to modify the rate of post-judgment interest to the statutory rate. The Mayers opposed this motion and contended that (1) the interest on the notes should be at the rates stated in the promissory notes, and (2) the interest should be compounded. On April 19, 2006, the trial court ordered that the Mayers were entitled to the interest set forth in the promissory notes, but that the interest would not be compounded.

After the April 19, 2006 judgment entry, additional issues remained in dispute before the trial court.¹ The parties ultimately filed an agreed judgment entry on March 4, 2008, which concluded the case. The March 4, 2008 agreed judgment entry noted that the Mayers disputed the trial court's April 19, 2006 ruling ordering payment of simple interest and further ordered that the April 19, 2006 judgment entry be reissued with the Civ. R. 54(B) language making it a final appealable order. The April 19, 2006 judgment entry was reissued the same day and captioned "Nunc Pro Tunc Judgment Entry."

On April 2, 2008, the Mayers timely filed their appeal containing the following assignment of error: "The trial court erred in ordering the interest on the three

¹Issues that remained after the April 19, 2006 judgment entry included: Plaintiffs' motion for injunction, the filing of the judgment lien, and Defendant's motion to dismiss the foreclosure action.

Promissory Notes to be calculated as simple interest instead of compound interest.” The Medancics opposed the appeal and further argued that there was no appellate jurisdiction because the Mayers had not filed an appeal thirty days after the April 19, 2006 judgment entry, which did not contain the Civ. R. 54(B) language.

On October 28, 2008, the Eleventh District Court of Appeals issued their decision on the appeal. First, it determined that the court did have jurisdiction holding that the trial court’s March 4, 2008 Judgment Entry was improperly labeled “Nunc Pro Tunc” and the appeal was timely filed within thirty days after the March 4, 2008 judgment entry. The Court of Appeals also reversed the trial court’s decision to award simple interest holding that under Ohio law, compound interest is permissible where there is default of payment of interest under a contract where payment of interest is specified at an annual rate.

In spite of clear case law from this Court supporting the Eleventh District Court of Appeals determination, Appellants have brought this appeal in order to avoid paying compound interest on the foreclosure judgment against them. There is nothing about this case that warrants additional appellate review by this Court. There is no confusion in the courts below on the applicable law applicable to this matter. There are no conflicting appellate court opinions on the law. There is no issue of public or great general interest that would justify this Court exercising its discretionary jurisdiction over this case. The Court should decline to accept this appeal.

III.

ARGUMENT OPPOSING APPELLANT'S PROPOSITIONS OF LAW

Counter-Proposition of Law No. I: Where there is a contract that calls for the annual payment of interest at a specified rate and there is a default on payment of such interest it is appropriate to award interest upon the interest due. *State, ex rel. Bruml v. Brooklyn* (1943), 141 Ohio St. 593.

In its Opinion reversing the trial court's decision awarding the Mayers simple interest on the amounts owed to them by the Medancics, the Eleventh District Court of Appeals noted that its decision followed the law set forth by this Court in *State, ex rel. Bruml v. Brooklyn* (1943), 141 Ohio St. 593. In *Bruml*, this Court allowed the collection of interest upon interest (i.e., compound interest) owed on municipal bonds and determined "[w]here a bond of a municipality provides for the payment of interest at a specified rate, payable semiannually, and where there is a default payment of such interest, interest on such defaulted interest should be allowed and computed at the legal rate." *Id.* at paragraph 2 of syllabus. Except for the fact that this case concerns a promissory note and not a municipal bond, the circumstances are the same. As the Court of Appeals noted, the three notes between the Medancics and the Mayers provide for payment of interest at a specific rate and the Medancics are in default in payment of that interest. Thus, compound interest or interest upon the interest on the note, which is what the Court of Appeals awarded the Mayers, is permissible. See, *Bruml*.

Appellants argue that there is no specific agreement in the note stating that compound interest will be charged and thus compound interest should not apply. Appellants cite to various case law and statutes in support of their position. However,

the facts in this case differ from the cases Appellants cite. The various statutes cited by Appellants are inapplicable to the facts here. The notes at issue here were in default and the Court of Appeals awarded the Mayers interest upon the interest owed under those notes. Further, each of the three notes specified the interest rate.

Appellants cite to R.C. 1343.03 in support of their claim. However, that statute is inapplicable here. R.C. 1343.03 concerns the interest to be charged on a note where the rate is not stipulated. In this case, the rate was stipulated – each of the three notes specifically stated the rate upon which interest would be calculated. That rate was not changed by the Court of Appeals decision. Furthermore, here, Appellants have defaulted in the payment of interest already specified in the notes.

Appellants' reliance on *State, ex rel. Elyria v. Trubey* (1984), 20 Ohio App.3d 8 is also erroneous. In *Trubey*, one party received a judgment which failed to specify an interest rate and objected to the rate set by the trial court. The court of appeals ruled that simple interest was appropriate. However, unlike the case at bar, *Trubey*, dealt with calculating the interest on a judgment. Here, the interest was specified in each of the notes and the Medancics have been in default on the interest they owe on the notes for several years. The Court of Appeals, in accordance with *Bruml*, has permitted interest to be charged on the interest owed. *Trubey* does not alter that outcome.

Appellants claim that in *Lehrner v. Safeco Ins./Am. States Ins. Co.*, 171 Ohio App.3d 570, 2007-Ohio-795, the court of appeals held that interest upon interest is not compound interest. However, that case can again be easily distinguished from the facts at bar. In *Lehrner*, the plaintiff received a favorable jury verdict and was awarded as

the final judgment the amount of the verdict in addition to prejudgment interest. The trial court combined these two figures and then awarded post judgment interest on this sum. The issue was whether the trial court had impermissibly awarded compound interest. The Court of Appeals disagreed and upheld the trial court's decision finding that compound interest had not been awarded since prejudgment interest is a part of the judgment and thus was part of the debt owed. *Id.* at ¶ 82.

Appellants reliance on *In re Testamentary Trust of Hamm* (1997), 124 Ohio App.3d 683, *Viock v. Stowe-Woodward Co.* (1989), 59 Ohio App.3d 3, *Bank One, Steubenville, NA v. Buckeye Union Ins. Co.* (1996), 114 Ohio App.3d 248 and *Thirty Four Corp. v. Sixty Seven Corp.* (1993), 91 Ohio App.3d 818 is similarly misplaced. *Hamm* was a tort case and concerned a fiduciary who negligently managed a trust. The appellate court held that where a trustee is found negligent, he can be ordered to reimburse the trust for both principle and interest lost and that in the absence of intentional misconduct or bad faith, the interest is simple. *Id.* at 692. *Hamm* does not address the situation in this case. *Viock* and *Steubenville* both concern the calculation of post-judgment interest. *Thirty Four* is also inapplicable because it did not involve a situation where there is a contract that calls for the annual payment of interest at a specified rate and there is a default on payment of such interest.

Appellants have also argued erroneously that *Bruml* is inapplicable here and has nothing to do with compound interest. Appellants are wrong – *Bruml* is directly on point. The interest awarded in *Bruml* (and by the Court of Appeals to the Mayers) is the definition of compound interest. Compound interest is “interest paid on both the

principal and the previously accumulated interest.” *Black’s Law Dictionary* 329 (pocket ed. 1996). The interest awarded in *BrumI*, regardless of whether the phrase “compound interest” was used in the opinion, is the same as the interest awarded to the Mayers.

The three notes between the Medancics and the Mayers provide for payment of interest at a specific rate and the Medancics are in default in payment of that interest. Under *BrumI*, which is applicable to this case, compound interest or interest upon the interest on the note is permissible. The decision of the Court of Appeals was correct and is consistent with long-standing Ohio law. There is no additional indication or evidence that this case is of great public interest and this Court should decline jurisdiction.

Counter-Proposition of Law No. 2: A judgment entry ruling upon a motion to modify post-judgment interest to the statutory rate is not a final appealable order under Civ. R. 54(B) or R.C. 2502.02.

The Eleventh District Court of Appeals had jurisdiction in the this case since the trial court’s April 19, 2006 judgment entry was not a final appealable order and the Mayers could only file their appeal after the March 4, 2008 final judgment. The Court of Appeals correctly determined that the trial court’s judgment entry of March 4, 2008, modifying the April 19, 2006 judgment entry, was not a true nunc pro tunc entry despite its caption.

Appellants claim that since the journal entry of March 4, 2008 was labeled “nunc pro tunc” by the trial court, the Mayers should not have been permitted to file an appeal from that date. While it is true that appeals are generally not allowed from nunc pro tunc judgment entries, in this case the Court of Appeals correctly determined

that the March 4, 2008 nunc pro tunc judgment entry was erroneously labeled as such by the trial court.

The function of a nunc pro tunc journal entry is to correct an omission in a prior journal entry so as to enter upon the record judicial action actually taken but erroneously omitted from the record. *Roth v. Roth* (1989), 65 Ohio App.3d 768, citing, *McKay v. McKay* (1985), 24 Ohio App.3d 74, 75. A nunc pro tunc judgment cannot be used to change a prior journal entry unless it did not reflect what was actually decided by the court. *Id.*, citing, *State, ex rel Cincinnati v. Schneider* (1950), 89 Ohio App. 96. Here, the trial court's March 4, 2008 judgment entry did not correct an omission from the April 18, 2006 judgment entry. Rather, it added language to the entry modifying it to reflect that a final judgment had been reached.

Generally, appeals can only be filed in connection with a trial court's order or judgment that is deemed to be final. *Cunningham v. Hamilton County, Ohio* (1999), 527 U.S. 198, 119 S.Ct. 1915, 144 L.Ed.2d 184; *General Acc. Ins. Co. v. Insurance Co. of North America* (1989), 44 Ohio St.3d 17. In Ohio state court, the definition or types of orders or judgments considered to be final are defined in R.C. 2505.02, and consist, in part, of the following:

- a. an order that affects a litigant's substantial right that in effect fully determines the action, R.C. 2505.02(B)(1);
- b. an order that affects a litigant's substantial right where the order is made in a special proceeding or upon a summary application in an action after judgment, R.C. 2505.02(B)(2);

The Medancics argue that the April 19, 2006 entry was final and appealable under R.C. 2505.02(B)(2) since that order affected a substantial right of the Mayers. However,

the Medancics conveniently ignore the second part of the section requiring that the order be made in a special proceeding or upon summary application. As the Court of Appeals correctly determined, the Medancics' motion to modify post-judgment interest to the statutory rate was not a summary application or special proceeding. Further, numerous other issues existed and were litigated in the nearly two years between the April 19, 2006 judgment entry and the March 4, 2008 nunc pro tunc entry.²

As a general rule, a final order or judgment disposing of fewer than all claims and/or parties still cannot be appealed unless the trial court has certified the order as immediately appealable pursuant to Civ.R. 54(B). *Chef Italiano Corp v. Kent State Univ.* (1989), 44 Ohio St.3d 86. Once a partial final order has been certified as appealable per Civ.R. 54(B), an appeal must be filed within 30 days. In this case, the Mayers could only appeal after the final appealable order was entered on March 4, 2008. The Mayers timely appealed on April 2, 2008. Thus, the jurisdiction of the Court of Appeals was proper.

This Court should decline to accept jurisdiction over this appeal as the Eleventh District's decision here is a correct statement and application of the law regarding its jurisdiction to hear the Mayers' appeal.

²See footnote 1.

IV.

CONCLUSION

WHEREFORE, Defendants-Appellees, respectfully request and move the Supreme Court of Ohio to decline jurisdiction over this appeal.

Date: January 8, 2009.

Respectfully submitted,



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PROOF OF SERVICE

A copy of the foregoing *Memorandum in Opposition to Jurisdiction* was sent by regular U.S. Mail, postage pre-paid, this 8th day of January, 2009 to the following:

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