
In the Supreme Court of Ohio

MARCIA A. MAYER, et al.

Plaintiffs-Appellees,

v.

MARIO MEDANCIC, ET AL.

Defendants-Appellants.

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

**APPELLEES' MOTION TO DISMISS
CERTIFIED CONFLICT**

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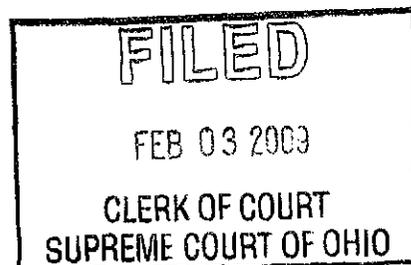


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The Eleventh Appellate District’s order of December 12, 2008

I.

MOTION TO DISMISS

NOW COME Plaintiffs-Appellees Marcia and Robert Mayer (collectively "the Mayers"), by and through their undersigned counsel, and hereby move this Court pursuant to S. Ct. Prac. R. IV, §2(B) and XIV, §4(A) to dismiss this certified conflict appeal which has been filed by Defendant-Appellants Mario, Marija, Mladen and Karoline Medancic (collectively "the Medancics").

While the Eleventh Appellate District has certified its decision in *Mayer v. Medancic*, 11th Dist. Nos. 2008-G-2826, 2008-G-2827 and 2008-G-2828, 2008-Ohio-5531 as being in conflict with the Tenth Appellate District's judgment in *Thirty Four Corp. v. Sixty Seven Corp.* (1993), 91 Ohio App.3d 818, there is in actuality no inter-district conflict "upon the same question" and the alleged conflict is not upon a rule of law.

For the reasons set forth more fully herein, the Court should determine that a conflict is not present such that this Court's jurisdiction pursuant to Art. IV, §2(B)(2)(f) of the Ohio Constitution does not exist, and issue an order dismissing this case.

II.

INTRODUCTION

The Eleventh Appellate District has erroneously determined that its decision in *Mayer v. Medancic* conflicts with the Tenth Appellate District's judgment in *Thirty Four Corp. v. Sixty Seven Corp.* with respect to an award of compound interest. The Eleventh Appellate District already pointed out, correctly we submit, in its order

denying the Medancics' Motion to Reconsider,¹ its decision in *Mayer v. Medancic* was based on this Court's precedent in *State, ex rel. Bruml v. Brooklyn* (1943), 141 Ohio St. 593. In that very same order, the Eleventh Appellate District also appropriately distinguished the *Thirty Four* decision on the grounds that it did not follow, much less mention the *Bruml* decision. There can be no conflict on a rule of law in this case because *Thirty Four* did not consider the *Bruml* decision and thus did not address the same question of law as *Mayer*.

There is no conflict between *Mayer* and *Thirty Four*. *Mayer* followed this Court's binding precedent in *Bruml*, while *Thirty Four* did not even address *Bruml*. The Eleventh Appellate District's holding in *Mayer* awarding interest upon the defaulted interest (*i.e.*, compound interest) was based upon this Court's precedent in *Bruml*. The holding in *Thirty Four* did not address *Bruml*. Without a conflict upon the same question or upon a "rule of law," this Court has lacks the jurisdiction bestowed by Sections 2(B)(2)(f) and 3(B)(4) of Article IV to the Ohio Constitution to resolve conflicts between Ohio's intermediate appellate districts. Consequently, this appeal should be dismissed pursuant to S. Ct. Prac. R. IV, §2(B).

¹ The Eleventh Appellate District's order of December 12, 2008, denying reconsideration is attached as Appendix A.

III.

LAW AND ARGUMENT

A. The Standard for Certification of a Conflict Has Not Been Met.

In *Whitelock v. Gilbane Bldg. Co.* (1993), 66 Ohio St.3d 594, the Supreme Court of Ohio articulated three conditions that must be met before a case should be certified as being in conflict with a decision from another appellate district:

* * * First, the certifying court must find that its judgment is in conflict with the judgment of a court of appeals of another district and the asserted conflict *must* be “upon the same question.” Second, the alleged conflict must be on a rule of law—not facts. Third, the journal entry or opinion of the certifying court must clearly set forth the rule of law which the certifying court contends is in conflict with the judgment on the same question by other district courts of appeals.

Id. at 596 (italics sic).

As recognized in *Whitelock*, “[f]actual distinctions between cases do not serve as a basis for conflict certification.” 66 Ohio St.3d at 599 (italics sic). See also, *Lonas v. Kail* (2000), 139 Ohio App.3d 6, 7-8. This appeal based upon the certified conflict from the Eleventh Appellate District should be dismissed because it fails to satisfy the conditions for certifying a conflict to the Supreme Court of Ohio.

B. The Judgment of the Eleventh Appellate District in *Mayer v. Medancic* Does Not Result in a Conflict Based “Upon the Same Question” or “Rule of Law” Decided by the Tenth Appellate District in *Thirty Four Corp. v. Sixty Seven Corp.*

The issue before the Eleventh Appellate District in *Mayer* was 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, is it appropriate to award interest upon the interest due? The Eleventh Appellate District’s determination that it was appropriate

to award interest on the defaulted interest was not based upon “the same question” that was decided by the Tenth Appellate District’s judgment in *Thirty Four*.

In denying the Medancic’s Motion to Reconsider, the Eleventh Appellate District acknowledged that *Mayer* and *Thirty Four* did not address the same issue of law. The Eleventh Appellate District noted in rendering the decision to allow the compound interest that it “applied the rule set forth by the Supreme Court of Ohio in *State, ex rel. Bruml v. Brooklyn* (1943), 141 Ohio St. 593, 599, in holding that the Mayers were entitled to interest on the interest – i.e., compound interest.”² The Eleventh Appellate District also examined the opinion in *Thirty Four* and determined that the Tenth Appellate District’s decision was rendered without considering the applicability of *Bruml*.³ There can be no “rule of law” conflict between *Thirty Four* and *Mayer* since the decisions were rendered based on different legal authority. The *Mayer* decision thus followed precedent set by this Court in *Bruml* but the decision in *Thirty Four* never considered the law in *Bruml*.

In *Bruml*, this Court allowed the award 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.” *Bruml*, paragraph two of syllabus.

² Appx. A at 1.

³ Appx. A at 3-4.

Except for the fact that *Mayer* concerns a promissory note and not a municipal bond, the circumstances are the same.

In this case, the Medancics defaulted on three notes that provide for payment of interest at a specific rate. The Medancics are in default in payment of not just the principle owed on the notes but on the interest that has accrued as well. Thus, compound interest – or interest upon the defaulted interest due on the note – is permissible per the holding in *Bruml*. That is what the Eleventh Appellate District properly awarded the Mayers.

The Eleventh Appellate District already ruled, when it denied the Medancic's Motion to Reconsider, that the conflicts claimed by the Medancics between the *Mayer* decision and the decisions in other courts, including *Thirty Four*, did not exist. See, Appx. A. In rendering that decision, the Eleventh Appellate District specifically pointed out that *Thirty Four* did not consider or address the precedent set by this Court in *Bruml* because "the applicability of *Bruml* seems not to have been argued."⁴ *Thirty Four* did not concern – because it was not argued by the parties – whether it was permissible to award interest upon defaulted interest due on a note. Rather, *Thirty Four* concerned only whether compound interest could be awarded upon default where "no evidence [was] presented that the note in question was anything other than a six-percent *simple interest loan*." *Thirty Four*, 91 Ohio App.3d at 825 (emphasis added). There is no question that *Thirty Four* did not discuss *Bruml* or its impact upon the

⁴ Appx. A, at 4.

facts present in *Thirty Four*. For the same reason, *Thirty Four* differs factually from *Mayer* and there is no inter-district conflict between the decisions.⁵

IV.

CONCLUSION

WHEREFORE, in the absence of a conflict on the same legal issue and a “rule of law” between the Eleventh’s District’s judgment in *Mayer v. Medancic* and the judgment of the Tenth Appellate District in *Thirty Four Corp. v. Sixty Seven Corp.*, this certified conflict appeal should be dismissed pursuant to S. Ct. Prac. R. IV, §2(B).

Date: January 30, 2009

Respectfully submitted,

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⁵ Even though *Thirty Four* does not mention or apply *Brumf*, the conflict that has been certified by the Eleventh Appellate District is predicated solely upon “the rule in *State, ex rel. Brumf v. Brooklyn* (1943), 141 Ohio St. 593,” a “rule” that appears nowhere in the *Thirty Four* opinion. How can there be a conflict on the same “rule of law” that was not addressed at all by one of the appellate courts?

PROOF OF SERVICE

A copy of the foregoing was sent by regular U.S. Mail, postage pre-paid, this _____ day of February, 2009 to the following:

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APPENDIX

STATE OF OHIO

COUNTY OF GEAUGA

MARCIA A. MAYER, et al.

FILED
IN COURT OF APPEALS
SS.

DEC 12 2008

DENISE M. KAMINSKI
CLERK OF COURTS

GEAUGA COUNTY

IN THE COURT OF APPEALS

ELEVENTH DISTRICT

Plaintiffs-Appellants,

- vs -

CASE NOS. 2008-G-2826
2008-G-2827
and 2008-G-2828

MARIO MEDANCIC, et al.,
MLADEN MEDANCIC, et al.,

Defendants-Appellees.

November 7, 2008, Mario, Marija, Mladen, and Karoline Medancic filed an application pursuant to App.R. 26(A), requesting this court to reconsider its decision in *Mayer v. Medancic*, 11th Dist. Nos. 2008-G-2826, 2008-G-2827, and 2008-G-2828, 2008-Ohio-5531. In that case, we held the Medancics owed compound interest on certain promissory notes held by Marcia and Robert Mayer, and which were in default. *Id.* at ¶19-22. The notes contained specified rates of interest. *Id.* at ¶2. We affirmed, inter alia, the trial court's judgment that R.C. 1343.02 controlled, and that the Mayers were entitled to interest at the rates set forth in the various notes. *Cf. id.* at ¶20-21. However, we further applied the rule set forth by the Supreme Court of Ohio in *State, ex rel. Bruml v. Brooklyn* (1943), 141 Ohio St. 593, 599, in holding that the Mayers were entitled to interest on the interest – i.e., compound interest. *Id.* at ¶21-22. The Medancics contend our decision is contrary to those of the courts in *State, ex rel. Crockett v. Robinson* (1981), 67 Ohio St.2d 363; *Lehmer v. Safeco Ins. /Am. States Ins. Co.*, 171 Ohio App.3d 570, 2007-Ohio-795; *Berdyck v. Shinde* (1998), 128 Ohio

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App.3d 68; *Nakoff v. Fairview Gen. Hosp.* (1997), 118 Ohio App.3d 786; *Thirty Four Corp. v. Sixty Seven Corp.* (1993), 91 Ohio App.3d 818; *Trebmal Constr. Inc. v. Sherway Application Co.* (Feb. 7, 1991), 8th Dist. No. 58033, 1991 Ohio App. LEXIS 522; *Viock v. Stowe-Woodward Co.* (1989), 59 Ohio App.3d 3; and, *State, ex rel. Elyria v. Trubey* (1984), 20 Ohio App.3d 8.

App.R. 26(A) does not provide specific guidelines for the use of appellate courts in determining whether to reconsider a prior decision. The accepted standard was set forth by the Tenth Appellate District in *Matthews v. Matthews* (1981), 5 Ohio App.3d 140, at paragraph two of the syllabus:

"[t]he test generally applied upon the filing of a motion for reconsideration in the court of appeals is whether the motion calls to the attention of the court an obvious error in its decision or raises an issue for consideration that was either not considered at all or was not fully considered by the court when it should have been."

However, "[a]n application for reconsideration is not designed for use in instances where a party simply disagrees with the conclusions reached and the logic used by an appellate court. App.R. 26 provides a mechanism by which a party may prevent miscarriages of justice that could arise when an appellate court makes an obvious error or renders an unsupportable decision under the law." *State v. Owens* (1997), 112 Ohio App.3d 334, 336.

Utilizing these principles, we cannot find that the cases relied upon by the Medancics bring forth an obvious error, or matter not considered, in our prior decision. Each of the cases cited is distinguishable.

In *Crockett*, the Supreme Court of Ohio affirmed the holding of the Eighth District Court of Appeals that relator was entitled to simple interest on an award of back pay stemming from a wrongful discharge case. *Id.* at 367-368. The case is obviously unrelated to that instant, which involves promissory notes, and thus, contract law. *Mayer* at ¶19.

Lehmer, a recent decision out of the Second Appellate District does concern contract law: i.e., prejudgment interest on an underinsured motorist claim. *Cf. id.* at ¶2. However, the applicable statute controlling such interest is R.C. 1343.03(A), which itself sets forth the rate of interest to be paid. In this case, R.C. 1343.02 applies to determining the rate of interest owed the Mayers – i.e., that set forth in the various notes.

In *Berdyck*, the Sixth Appellate District affirmed the trial court's award of simple interest, at the statutory rate, in calculating prejudgment interest on a tort award pursuant to R.C. 1343.03(C). *Berdyck* at 87-88. Again, the case instant involves interest set forth in contracts under R.C. 1343.02, and a rule of contractual construction announced by the Supreme Court of Ohio.

In *Nakoff*, the Eighth Appellate District affirmed the judgment of the trial court, merging prejudgment interest and the underlying damage award in a tort case for purposes of determining post-judgment interest. Again, the matter arose in tort, not contract.

In *Thirty Four Corp.*, the Tenth Appellate District did consider whether compound interest was due on a note, and relying on the general rule that interest is only to be compounded when an agreement specifically calls for it,

confirmed the trial court's decision that the note in question provided simple interest. *Id.* at 825. Generally, we would agree with that holding. However, the applicability of *Bruml* seems not to have been argued.

In *Trebmal*, a contract action, the Eighth Appellate District again stated the general rule that interest on a judgment should be simple interest, absent an agreement or statute authorizing compound interest. *Id.* at 18-19. Again, the applicability of *Bruml* is not discussed. Further, the issue of interest arose under R.C. 1343.03(A), not R.C. 1343.02.

In the lead case of *Viock*, the Sixth Appellate District again restated the general rule that simple interest should be awarded on judgments, unless there is a specific agreement or provision requiring payment of compound interest. *Id.* at 7. However, the case concerned post-judgment interest on an award arising from an intentional tort action, and was considered under R.C. 1343.03. *Id.* at paragraph one of the syllabus, and 3.

Finally, in *Trubey*, the Ninth Appellate District held that R.C. 1343.03 governs post-judgment interest; and, that simple interest is to be awarded post-judgment absent an agreement or statute providing otherwise. *Id.* at paragraphs one and two of the syllabus. Once again, it differs fundamentally from the instant case, which concerns interest governed by the contracts at issue, and R.C. 1343.02. *Bruml* addresses itself solely to written contracts containing a specified

rate of interest. Id. at 599.

The application for reconsideration is denied.


JUDGE COLLEEN MARY O'TOOLE

FOR THE COURT

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