ORIGINAL

IN THE SUPREME COURT OF OHIO

CASE NOS. 2009 - 0170 and 2008-2363

MARCIA A. MAYER, et al	)
	)
Appellees	)
	)
vs.	)
	)
MARIO MEDANCIC, et al.,	)
MLADEN MEDANCIC, et al.	)
	)
Appellants	)

MERIT BRIEF OF APPELLANTS

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STATEMENT OF FACTS

This case raises the question whether a judgment on a written instrument for money due bears compound interest even without a statutory or contractual provision therefor. The 11th district appellate court in this case answered that question affirmatively and has certified that decision as being in conflict with the 10th District Appellate Court's decision in *Thirty Four Corp. V. Sixty Seven Corp.*, 91 Ohio App. 3d 318.

The history of this appeal began with appellee's appeal of a Nunc Pro Tunc Judgment Entry of the Court of Common Pleas of Geauga County finding that the judgments it awarded appellees on three (3) promissory notes should bear simple interest, not compound interest (Supplement to Merit Brief).

Those notes contained no language which could be construed as a contract for the payment of compound interest. (See Supplement to Merit Brief of Appellants.) Nor is there any statutory language providing for compound interest on these notes.

Appellant had questioned the propriety of appealing a nunc pro tunc entry but the appellate court rejected the argument.

The 11th District Court of Appeals relied on this court's 1943 decision in *State ex rel Bruml v. Brooklyn* (1943), 141 Ohio St. 593, finding that the notes should bear compound interest even absent a statutory or contractual provision for compound interest. Appellant contends that the Appellate Court's reliance on *Bruml* is misplaced, as the notes in this case do not contain the same interest provision as did the written instruments in *Bruml.*

Appellant further contends that the decision of the 11th District Court of Appeals is not supported by any of the Ohio appellate decisions on this matter, as will be more fully discussed below.

This Court's determination that a conflict exists further orders the parties to brief the following issue: "When a written instrument sets forth a specific rate of interest to be paid and

there is a default in the payment of that interest, is the creditor entitled to compound interest, even absent a statute or provision therefore in the written instrument, pursuant to the rule in *State ex rel Bruml v. Brooklyn* (1943), 141 Ohio St. 593."

ARGUMENT

Proposition of Law

A written instrument for the payment of money with interest at a specified rate per annum calls for simple interest unless there is a statutory or contractual provision for compound interest.

The above proposition was followed in the case certified to this court, *Thirty Four Corp. V. Sixty Seven Corp.*, (1993) 91 Ohio Ap. 3d 818, 825; 633 N.E.2d 1179.

The 10th District court of Appeals in *Thirty Four Corp.* said: "...there was no evidence presented that the note in question was anything other than a six-percent simple interest loan. In the absence of such evidence, simple interest is the rule and is to be applied, absent a specific agreement that interest be compounded. *State ex rel Elyria v. Trubey (1984),* 20 Ohio App 3d 8, 20 OBR 8, 484 N.E.2d 169."

That case was in conflict with the 11th district appellate court in this case which did not require a statutory or contractual provision in ruling in favor of compound interest on the notes in the instant case which provided only for payment of the sum due with interest at a specific rate per annum.

In reaching its decision the 11th district appellate court relied on this court's 1943 decision in *State ex rel Bruml v. Brooklyn* (1943), 141 Ohio St. 593, which appellants contend is not applicable to this case.

In *Bruml*, the written instruments (bonds) provided for the payment of interest every six (6)

months, the interest being paid directly to the bond holder or added to the principal, the combined total of principal and interest being subject to interest each 6-month period thereafter. In other words, it provided for interest on interest, which the appellate court construed as compound interest.

No such provision appears in the notes in this case.

In this case the notes were payable with interest at a given percentage per annum. They contain no provision for interest to be paid each year to be added to principal, or compounded, which distinguishes this case from *Bruml*.

This court's order for the parties to brief the rule in *Bruml* omits an important word contained in the *Bruml* rule – "annually." The correct statement reads: "Under a contract for the payment of interest at a specified rate annually . . .interest on interest will be computed at the regular rate."

The payment of interest annually is distinguishable from payment of the debt with interest at a specific rate per annum.

In its opinion, the appellate court in this case rejected several of the cases which held that simple interest is to be applied, absent a specific agreement or statutory provision that interest be compounded. That court's reason for rejecting those cases was that they either did not discuss *Bruml* or arose from tort claims.

But why should those courts discuss *Bruml* if it did not apply to cases where the written instruments in those cases did not contain language providing for interest on interest?

And O.R.C. 1343.03 (A) provides that "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 transation, the creditor is entitled to interest at the rate per annum determined pursuant to section 5703.47 of the Revised Code. . ." Appendix 22.

This court held in *State ex rel Crockett v. Robinson (1983)*, 67 Ohio St 2d 363, *423 N.E. 2d 1099* that a judgment awarding back pay earned simple interest, not compound interest.

Indeed, the 11th district appellate court followed this court's ruling in the *Crockett* case by awarding simple interest on a judgment awarding back pay in *Testamentary Trust of Hamm* (1997) 124 Ohio App. 3d 683, 707 N.E. 2d 524.

The Sixth District Court of Appeals has said that "simple interest is to be used when there is no specific agreement to compound interest or a statutory provision authorizing the compound interest". It went on to say, "Interest contained in the statement 'with interest at the rate per annum' generally means interest is from date at a simple rate per annum until paid." *Berdyck v. Shinde*, 128 Ohio App. 3d 68 87, 88.

In 2009 the 3rd District Court of Appeals held that when calculating the method of computing interest under R.C. 1343.03 (A) simple interest and not compound interest is to be awarded absent an agreement or statute providing otherwise." *Fifth Third Mtg. Co. V. Goodman Realty Corp.*, 2009 Ohio–81, at 10–unreported (Appendix 25).

Other Ohio appellate courts that are in agreement with the *Thirty Four Corp.* case and the above proposition of law are:

> *Bank One Steubenville NA v. Buckeye Union Ins. Co.*, 114 Ohio App. 3d 248–7th District;
> *Lerner v. Saveco Ins. Co.*, 171 Ohio App. 3d 570–2nd District
> *Nakoff v. Fairview Gen. Hosp.* 118 Ohio App. 3d 786, 788–8th District.
> *State ex rel Elyria v. Trubey,* 20 Ohio App 3d 8, 20–9th District.
> *Trebmal Constr., Inc. V. Sherway Application Co*, Cuyahoga App. No. 580 33 , unreported
> *Viock et al v. Stowe-Woodward Co.*, 59 Ohio App 3d–6th District.

The 11th District's reliance on this court's *Bruml* case, appellant contends, is misplaced and does not apply in the instant case.

A number of other states have also found that simple interest is to be computed absent a statutory or contractual agreement for compound interest. Among the many other states are the following:

South Carolina has said that "compound interest is not favored and will be allowed only where clearly stipulated." *Hodge v. Delaine* (1926), 137 S.C. 337, 135 S.E. 857.

In an earlier case, South Carolina found that "a party collecting compound interest under an honest belief of the legal right to do so, under the terms of the note, is guilty of collecting usurious interest, and is liable for double all the interest collected on the note." *Plyer v. McGee* (1907), 76 S.C. 450

Washington held that "to create an obligation to pay compound interest, there must be a direct promise to do so, and it is not enough that the note provides for annual payments of interest." *Stauffer v. Northwestern Mut. Life Ins. Co.* (1935), 184 Wash. 431, 51 P. 2nd 390.

Washington also held in a 1938 case that "In the absence of an express agreement to pay interest upon interest upon installment of overdue interest, it should not be compounded." *Goodwin v. Northwestern Mut. Life Ins. Co.*, 196 Wash. 391; 83 P. 2nd 231.

Arkansas held in 1992 that the payment of interest on interest is not generally favored by the courts, and the General Assembly has not mandated compound interest as a necessary part of just compensation for the taking of private property. *Wilson v. City of Fayetteville*, 310 Ark 154 (1992).

West Virginia held as early as 1884 that "after interest on a debt has become due, an agreement that compound interest shall be allowed on the various amounts of interest which had previously fallen due, in consideration of a forbearance on the part of the creditor to collect the debt, is a usurious contract." *Stansbury's Adm. V. Stansbury*, 24 W. Va. 634.

A Michigan appellate court held that "in the absence of a statute to the contrary, an explicit

agreement of the parties, or some special circumstance dictating otherwise, interest must be calculated on the basis of simple interest rather than compound interest. *Norman v. Norman* (1993) 201 Mich. App. 182, 185, 186, N.W. 2nd 254.

In an early case, Colorado held in syllabi 1 - 5, that compound interest contracted for in advance is, in general, not recoverable and that "courts simply decline to enforce payment of the interest upon interest." *Hochmark v. Richler* (1890) 16 Colo.263, 26 P. 2nd 818.

A Washington appellate court in1988 reversed a lower court granting of compound interest on a judgment, saying that the governing statutes "authorize only simple interest on a judgment." *Caruso v. Local* 690, 50 W. App. 688, 749 P.2nd 1304.

Maine and New York have identical statutes that prohibit compounding of interest but approve of a second note agreed to by the parties which incorporated both principal and interest accrued on the first note, thus permitting interest on interest in that special circumstance. *Beneficial Finance Co. v. Fusco* (1964) 160 ME 273.

California, citing Section 2 of the Usury Law, stated that compounding of interest is prohibited "unless an agreement to that effect is clearly expressed in writing and signed by the party to be charged."

That court did validate a contract which provided for a variable interest rate that sometimes exceeded the constitutional rate if the parties contracted "in good faith for a variable rate . . ." *John McConnell et al v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 21 Cal 3rd (1978) 365, 373, 377, 378.

For the reasons cited in all of the above cases, the decision of the 11th District Court of Appeals in this case should be reversed.

CONCLUSION

The 11th District's decision in this case awarding compound interest in the absence of a statutory or contractual provision therefor is contrary to all of the cases cited above and should be reversed. Interest on neither the notes that are the subject of this case nor on the judgment rendered on these notes should be compounded. If allowed to stand, the concepts of usury and simple interest would vanish from Ohio law.

Respectfully submitted,

Joel A. Nash [0061081]
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CERTIFICATE OF SERVICE

A copy of the foregoing has been served on Timothy T. Brick and Catherine Peters, Counsel for Plaintiffs-Appellees, Marcia A. Mayer and Robert Mayer at GALLAGHER SHARP, Bulkley Building, Sixth Floor, 1501 Euclid Avenue, Cleveland, OH 44115-2108 by regular mail on May 20, 2009.

Joel A. Nash [0061081]
Counsel for Appellants,

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IN THE SUPREME COURT OF OHIO

08-2363

MARCIA A. MAYER, et al	**)On Appeal from**
	)Court of appeals Eleventh Appellate District
Appellees	**)**
	) Court of Appeals Case Nos.
vs.	**)2008-G-2826, 2827 and 2828 (Consolidated)**
	)
MARIO MEDANCIC, et al.,	**)**
	)
Appellants	**)**

NOTICE OF APPEAL OF APPELLANTS MARIO MEDANCIC, ET AL

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NOTICE OF APPEAL OF APPELLANTS MARIO MEDANCIC, ET AL

Appellants Mario Medancic, et al hereby give Notice of Appeal to the Supreme Court of Ohio from the Judgment of the Court of Appeals, Eleventh District, entered in Court of Appeals Case Nos. 2008-G-2826, 2008-G-2827, 2008-G-2828, consolidated, on October 28, 2008.

This case is one of public or great general interest.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing has been served on Appellees, Marcia A. Mayer and Robert Mayer at 11154 Sperry Road, Chesterland OH 44026 and on Paul T. Murphy, Attorney for Appellees at 5843 Mayfield Road, Mayfield Heights, OH 44124 by regular mail on December 8, 2008.

Joel A. Nash [0061081]
Counsel for Appellants,

FILED
IN COURT OF APPEALS
OCT 28 2008
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GEAUGA COUNTY

STATE OF OHIO)SS.
COUNTY OF GEAUGA

IN THE COURT OF APPEALS
ELEVENTH DISTRICT

MARCIA A. MAYER, et al.,

Plaintiffs-Appellants,

- vs -

MARIO MEDANCIC, et al.,

Defendants-Appellees.

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

For the reasons stated in the opinion of this court, it is the judgment and order of this court that the judgment of the Geauga County Court of Common Pleas is reversed and these matters are remanded for further proceedings consistent with this opinion.

It is the further order of this court that appellees are assessed costs herein taxed. The court finds there were reasonable grounds for this appeal.

Colleen Mary O'Toole
JUDGE COLLEEN MARY O'TOOLE

FOR THE COURT

12/612

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IN COURT OF APPEALS
OCT 28 2008
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GEAUGA COUNTY

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

GEAUGA COUNTY, OHIO

MARCIA A. MAYER, et al.,	:	**OPINION**
Plaintiffs-Appellants,	:	**CASE NOS. 2008-G-2826**
		2008-G-2827
- vs -	:	**2008-G-2828**
MARIO MEDANCIC, et al.,	:	
Defendants-Appellees.	:	

Civil Appeal from the Court of Common Pleas, Case Nos. 98 F 000851, 98 F 000850 and 98 F 000515.

Judgment: Reversed and remanded.

Paul T. Murphy, Paul T. Murphy Co., L.P.A., 5843 Mayfield Road, Cleveland, OH 44124 (For Plaintiffs-Appellants).

Joel A. Nash, 4325 Mayfield Road, Cleveland, OH 44121 (For Defendants-Appellees).

COLLEEN MARY O'TOOLE, J.

{¶1} Marcia and Robert Mayer appeal from the March 4, 2008 "nunc pro tunc" judgment entry of the Geauga County Court of Common Pleas, awarding them simple interest on three promissory notes, in these consolidated cases stemming from certain actions in foreclosure of parcels of real estate in Geauga County, Ohio. We reverse and remand.

{¶2} These cases have a tortured history. This is the fourth appeal. See, e.g., *Mayer v. Medancic* (Dec. 21, 2001), 11th Dist. Nos. 2000-G-2311, 2000-G-2312, and 2000-G-2313, 2001 Ohio App. LEXIS 5863, dissenting opinion at 2001 Ohio App.

LEXIS 6098 ("*Mayer* I"); *Mayer v. Medancic*, 11th Dist. Nos. 2002-G-2431, 2002-G-2432, and 2002-G-2433, 2003-Ohio-5355 ("*Mayer* II"); *Mayer v. A-Custom Builders, Inc.*, 11th Dist. No. 2004-G-2563, 2005-Ohio-2083 ("*Mayer* III"). In 1992, the Mayers entered an agreement to sell two parcels of property to appellees, Mario Medancic, Marija Medancic, Mladen Medancic, and Karoline Medancic. See, e.g., *Mayer* II at ¶2. On or about July 3, 1995, Mladen and Karoline Medancic executed a promissory note in the amount of $20,000 in favor of the Mayers, secured by a mortgage deed. *Mayer* I at 3. It was payable no later than November 1, 1995, Id.; and, carried interest in the amount of thirteen percent, per annum. December 11, 1995, Mladen and Karoline Medancic executed another promissory note in favor of the Mayers, in the amount of $67,000, also secured by a mortgage deed. Id. at 2-3. This note was payable no later than November 1, 1997, Id. at 2; and carried interest in the amount of ten percent, per annum. Finally, on or about January 8, 1996, A-Custom Builders (evidently, a corporation owned or controlled by the Medancic family), executed a promissory note in the amount of $37,500 in favor of the Mayers. Id. at 2. This note was payable no later than November 1, 1997, Id.; and, carried interest in the amount of twelve percent, per annum.

{¶3} In 1998, the Mayers filed their three complaints in foreclosure against the Medancics. *Mayer* I at 2-3. The Medancics answered and counterclaimed for breach of contract. Id. at 4. The trial court consolidated the actions; and, bench trial was held in December 1999. Id. at 5. In September 2000, the trial court issued two judgment entries. Id. It ruled in favor of the Mayers regarding their foreclosure actions, and ordered the Medancics to pay on the promissory notes, with interest at the amounts

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specified therein. Cf. Id. It further ordered that portions of various contracts for the purchase of land between the parties be rescinded, due to mutual mistake, and that the Mayers refund some $148,000 to the Medancics' corporate entity, A-Custom Builders. Id. at 6-7. The trial court issued a nunc pro tunc entry in October 2000.

{¶4} The appeal by the Medancics in *Mayer* I ensued. In relevant part, this court affirmed the trial court's judgment regarding the foreclosures. Id. at 29. This court remanded for clarification or recalculation regarding the amount of the refund owed by the Mayers. Id. at 29-30. The trial court issued a new judgment entry in March 2002, ordering the Mayers to refund $178,000. *Mayer* II at ¶11. The Mayers appealed, Id. at ¶1; and, this court reversed and remanded for clarification. Id. at ¶45. The trial court then decided the Mayers should refund $148,000. *Mayer* III at ¶13. The Medancics appealed; and, this court affirmed. Id. at ¶36.

{¶5} The parties continued to dispute various issues in the trial court. January 13, 2006, the Medancics filed a motion to modify the rate of post-judgment interest owed on the notes, from that set forth in those instruments, to the statutory rate. Hearing was held before the trial court on this and other issues January 17, 2006. The trial court ordered that the Mayers brief their contention that interest on the notes should be at the rate set forth therein, and should be compounded. They did so; and, the Medancics opposed.

{¶6} April 19, 2006, the trial court filed a judgment entry, pertaining not merely to the interest rate question, but the continued viability of the $37,500 judgment entry against A-Custom Builders, the identities of the parties in these actions, and whether set-off could be allowed. Regarding the interest rate question, the trial court, relying on

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the opinion of the Eighth District Court of Appeals in *Capital Fund Leasing, L.L.C. v. Garfield* (1999), 135 Ohio App.3d 579, determined that R.C. 1343.02, governing judgments on certain written instruments, applied, and that the Mayers were entitled to interest on the notes, post-judgment, at the rates set forth in the notes. The trial court rejected the Mayers' contention they were entitled to compound interest. The trial court further ordered the parties to brief the other issues contained in the judgment entry.

{¶7} Further disputes continued between the parties. Finally, March 4, 2008, the trial court filed an agreed judgment entry, noting the conclusion of the balance of the disputes remaining between the parties. In paragraph 4 of this judgment entry, the trial court stated the Mayers disputed the conclusion set forth in the April 19, 2006 judgment entry that they were entitled only to simple, rather than compound, interest on the notes. The trial court ordered that its April 19, 2006 judgment entry be refiled, with appropriate Civ.R. 54(B) language, so the Mayers could appeal this issue. That same day, the April 19, 2006 judgment entry was refiled, with the additional language: "[t]his Court is entering final judgment as to the issue of interest, there being no just reason for delay. This is a final appealable order."

{¶8} April 2, 2008, the Mayers noticed this appeal, assigning a single error:

{¶9} "The trial court erred in ordering the interest on the three Promissory Notes to be calculated as simple interest instead of compound interest."[1]

{¶10} Prior to reaching the assignment of error, we must decide whether we have jurisdiction to hear this appeal. The Medancics argue we do not. They argue that

1. We note that the Mayers have filed a reply brief in this appeal, which does not incorporate a table of contents, as required by rule. Nevertheless, we are allowing the reply brief in, but have not considered it in rendering this decision.

the trial court's April 19, 2006 judgment entry, determining the Mayers were owed simple interest, at the rates specified in the notes, was not an interlocutory order, but a final appealable order as to that issue. Consequently, they believe the Mayers are outside the 30 day time limit for noticing an appeal, set forth at App.R. 4(A).

{¶11} The Medancics cite to R.C. 2502.02, defining final appealable orders, which provides, in relevant part:

{¶12} "(B) An order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is one of the following:

{¶13} "***

{¶14} "(2) An order that affects a substantial right *** upon a summary application in an action after judgment; *** [.]"

{¶15} The trial court's April 19, 2006 judgment entry was made in response to the Medancic's motion to modify post-judgment interest from the rates contained in the notes, to the statutory rate. They consider their motion to modify as being in the nature of a "summary application." They are certainly correct that it was made "after judgment" – the trial court found them in default on the notes in the autumn of 2000. They correctly note that the order affected a substantial right of the Mayers – i.e., the amount of interest they could collect from the Medancics. The Medancics further contend the issue of set-off, also mentioned by the trial court in its April 19, 2006 judgment entry had already been disposed of by this court by our decision in *Mayer* I. Consequently, the Medancics assert that the Mayers could, and should, have appealed the April 19, 2006 judgment entry, instead of the March 4, 2008 "nunc pro tunc" entry.

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{¶16} An appellate court has a duty to examine its jurisdiction, and must dismiss an appeal if jurisdiction is lacking. *Whitaker-Merrell Co. v. Geupel Constr. Co.* (1972), 29 Ohio St.2d 184, 186. The office of a nunc pro tunc judgment entry is merely to correct a clerical error, or clarify the true purpose of a judgment already made. Cf. *State v. Shamaly*, 8th Dist. No. 88409, 2007-Ohio-3409, at ¶8, fn. 1. Thus, a true entry nunc pro tunc relates back to the filing of the original judgment entry, and does not extend the time for appeal. Id.

{¶17} In this case, we find that the judgment entry of March 4, 2008, was not a true nunc pro tunc entry. It modified, rather than clarified, the April 19, 2006 judgment entry of the trial court. We respectfully disagree with the Medancic's argument that the only issue still pending before the trial court in April 2006 was the question of what interest rates applied to the notes. Even if the question of set-off had already been disposed of by our decision in *Mayer* I, other disputes remained pending before the trial court, many of which were simply not touched on by the April 19, 2006 judgment entry.[2] This is evinced by the voluminous filings made by each side in the period since the filing of that entry.

{¶18} Thus, the March 2008 judgment entry does not relate back to that of April 19, 2006, and this court has jurisdiction to hear the appeal.

{¶19} Promissory notes are written contracts. *JP Morgan Chase Bank v. Murdock*, 6th Dist. No. L-06-1153, 2007-Ohio-751, at ¶27. Consequently, we review decisions regarding them de novo.

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2. We further note that it appears, from the record that the Medancics were arguing in favor of set-off in April 2006.

{¶20} The trial court relied on the decision of the Eighth District in *Capital Fund Leasing, L.L.C.*, supra, for the proposition that R.C. 1343.02 controlled the rates of interest derived from the notes in this case. That statute provides: "[u]pon all judgments, decrees, or orders, rendered on any bond, bill, note, or other instrument of writing containing stipulations for the payment of interest in accordance with section 1343.01 of the Revised Code, interest shall be computed until payment is made at the rate specified in such instrument." From this, the trial court determined the Mayers were entitled to interest at the rates contained in the three notes, not the statutory interest rate. It further determined that the interest should be simple, not compound, as the notes contain no provision for the latter.

{¶21} On appeal, as in the trial court, the Mayers point to the decision of the Supreme Court of Ohio in *State, ex rel. Bruml v. Brooklyn* (1943), 141 Ohio St. 593, 599, for the proposition that, "[u]nder a contract for the payment of interest at a specified rate annually, whereon there is a default of payment of such interest when due, interest on interest will be computed at the regular rate." *Bruml* remains good law. See, e.g., *In re: Conneaut Metalcasters, Inc. v. Emco Wheaton, Inc.* (C.A. 6, 1997), 1997 U.S. App. LEXIS 23780, at 18-19; *Safdi v. Gallegos* (July 16, 1999), 1st Dist. Nos. C-980814 and C-980857, 1999 Ohio App. LEXIS 3294, at 12-14. [3]

{¶22} In this case, the Medancics have been in default in payment of interest on the notes for years. Consequently, under the authority of *Bruml*, the Mayers are entitled

3. As additional authority, the Medancics have submitted the recent decision of the Supreme Court of Ohio in *Minster Farmers Coop. Exchange Co., Inc. v. Meyer*, 117 Ohio St.3d 459, 2008-Ohio-1259, for the proposition that the Mayers are limited to receiving statutory interest on the subject notes. We respectfully find the case inapplicable, as it turns upon the Supreme Court's determination that invoices or account statements unilaterally setting forth interest terms are not written contracts. Id. at ¶28-29.

to compound interest on each note, at the rates specified in the notes.

{¶23} The judgment of the Geauga County Court of Common Pleas is reversed, and these matters are remanded for further proceedings consistent with this opinion.

{¶24} It is the further order of this court that appellees are assessed costs herein taxed.

{¶25} The court finds there were reasonable grounds for this appeal.

DIANE V. GRENDELL, P.J.,

CYNTHIA WESTCOTT RICE, J.,

concur.

11

STATE OF OHIO

COUNTY OF GEAUGA

FILED
IN COURT OF APPEALS
JAN 06 2009
DENISE M. KAMINSKI
CLERK OF COURTS
GEAUGA COUNTY

IN THE COURT OF APPEALS

ELEVENTH DISTRICT

MARCIA A. MAYER, et al.,

Plaintiffs-Appellants,

- vs -

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

Defendants-Appellees.

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

This matter is before the court on the motion of appellees, Mario, Marija, Mladen, and Karoline Medancic to certify a conflict to the Supreme Court of Ohio, pursuant to Section 3(B)(4), Article IV of the Ohio Constitution, S.Ct.Prac.R. IV, and App.R. 25. The Medancics contend that this court's decision in *Mayer v. Medancic*, 11th Dist. Nos. 2008-G-2826, 2008-G-2827, and 2008-G-2828, 2008-Ohio-5531, conflicts with the decisions of the courts in the following cases: *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 App.3d 68; *Nakoff v. Fairview Gen. Hosp.* (1997), 118 Ohio App.3d 786; *Bank One, Steubenville, NA v. Buckeye Union Ins. Co.* (1996), 114 Ohio App.3d 248; *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.*

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(1989), 59 Ohio App.3d 3; and, *State, ex rel. Elyria v. Trubey* (1984), 20 Ohio App.3d 8.[1]

Three conditions must be met for an appellate court to certify a question to the Supreme Court. *Whitelock v. Gilbane Bldg. Co.* (1993), 66 Ohio St.3d 594, 596. "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 that rule of law which the certifying court contends is in conflict with the judgment on the same question by other district courts of appeal." (Emphasis sic.)

In *Mayer*, 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. *Mayer* 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. *Mayer* at ¶21-22.

The Medancics have previously applied to this court for reconsideration citing, for the most part, to the same cases they instantly contend conflict with our

1. We respectfully note that decisions of the Supreme Court of Ohio, as in *State, ex rel. Crockett*, are not subject to certification

judgment in this appeal. The only new case they cite is the decision of the Seventh Appellate District in *Bank One Steubenville, NA*. And, like the balance of the cases the Medancics rely upon, we find it inapposite for certification. *Bank One, Steubenvlle, NA*, interprets R.C. 1343.03(A) – not R.C. 1343.02. The decisions of each of the courts otherwise cited by the Medancics also interpret R.C. 1343.03, or arise from tort judgments. We cannot certify conflicts with cases interpreting areas of the law different from those presented to us. *Gilbane* at 596.

However, our decision in *Mayer*, conflicts with that of the Tenth Appellate District in *Thirty Four Corp.* As in *Mayer*, the issue was presented of whether compound interest should be awarded on a defaulted promissory note, cf. *Thirty Four Corp.* at 821-822, 825; and, the Tenth Appellate District affirmed the decision of the trial court that it should not, absent a specific agreement otherwise. Id. at 825.

Consequently, we find our decision in *Mayer v. Medancic*, 11th Dist. Nos. 2008-G-2826, 2008-G-2827, and 2008-G-2828, 2008-Ohio-5531, conflicts with that of the Tenth Appellate District *Thirty Four Corp. v. Sixty Seven Corp.* (1993), 91 Ohio App.3d 818. And therefore certify the following question to the Supreme Court of Ohio:

"When a written instrument sets forth a specific rate of interest to be paid, and there is a default in the payment of that interest, is the creditor entitled to compound interest, even absent a statute or provision therefore in the written

instrument, pursuant to the rule in *State, ex rel. Bruml v. Brooklyn* (1943), 141 Ohio St. 593?"

The motion to certify is granted.

JUDGE COLLEEN MARY O'TOOLE

DIANE V. GRENDELL, P.J.,

CYNTHIA WESTCOTT RICE, J.,

concurs.

12/680

FILED
IN THE COURT OF COMMON PLEAS
GEAUGA COUNTY, OHIO
2008 MAR -4 PM 3:05

CLERK OF COURTS
GEAUGA COUNTY

MARCIA A. MAYER, et al.,		CASE NO. 98F000851 98F000850 98F000515 (Consolidated)
Plaintiffs,	:	JUDGE DAVID L. FUHRY
-vs-	:	
MARIO MEDANCIC, et al.,	:	NUNC PRO TUNC JUDGMENT ENTRY
Defendants.	:	

This matter comes on for consideration pursuant to oral hearing of January 17, 2006 dealing with the parties' continuing dispute over who owes how much. That hearing dealt primarily with the "how much" issue and revolved around the calculation of interest.

Defendants claim, first, that the judgment against them on the notes should be simple interest and not compounded annually. Second, they claim the post-judgment interest rate should be 10% because the notes don't provide for a different interest rate upon default in payment.

Plaintiffs claim Defendants' argument as to compounding is "preposterous". However, no where in the notes is the compounding of interest provided for. Interest simply accrues on the principal and at a stated rate per annum. Judgments themselves accrue interest at a stated rate per annum. It is uncontroverted that judgments accrue simple interest only, unless compounding is specifically provided for.

The Court finds that Plaintiffs' affidavit that compound interest was implied or intended is not sufficient to overcome the plain meaning provided by the language of the notes. Principal was to accrue interest computed at a certain rate, and no compounding is provided for.

As to Plaintiffs' second claim, it is asserted that Defendants' interest rate does not default to the lesser statutory judgment rate just because a judgment has been rendered, or because the notes don't contain an express provision as to what rate of interest applies in the event of default.

The Court has waded into what seems to be a labyrinth of cases concerning this issue. The Court finds the case of Capital Fund Leasing, LLC vs. Garfield, 135 O App 3d 579, 8TH Dist. CA, best sums up this Court's sentiments as apply to this case. R.C. Section 1343.03 doesn't apply if 1347.02 *does apply.* R.C. Section 1343.02 *does apply* because the instrument specifies a rate. Therefore, the Plaintiff's position is adopted as to this issue, and that post-judgment interest rate is the same as that provided for in the instrument..

WHEREFORE, the Court 's order of January 5, 2006 controls as to the amount of interest owed.

The Court further finds that the parties need to dispose of the issue as to whether the Court's order filed September 5, 2000 and awarding Plaintiffs judgment against Defendant A-Custom Builders in the amount of $37,500.00 is viable and not provided for in the Court's January 5, 2006 ruling. The Defendant A-Custom Builders has the burden of establishing that the $37,500.00 has been satisfied, or that it should be disregarded at this point.

The Court further finds that the parties have left much to be desired in arguing the set-off issue.

First, who are the parties, according to Defendants, as to each of the three consolidated cases?

Second, if they are not identical, why is set-off appropriate?

Third, the Court was unaware that almost six years ago the trial court directed there be no set-off between the parties. That this escaped the Court's notice is not

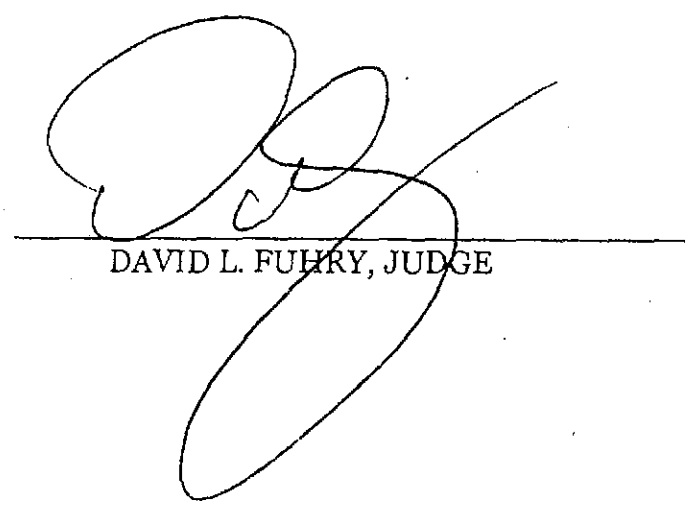
surprising since the parties have been contesting this matter for about eight years, and there are volumes of files and papers in the Court's file.

What was the rationale behind this order? The Defendants have the burden of demonstrating why it should be countermanded now since it is a pre-existing Court order.

WHEREFORE, the Defendant shall have twenty-one (21) days to address the issue of the viability of the $37,500.00 judgment; as well as the three issues relating to identifying the parties and the issue of set-off; Plaintiffs shall have twenty-one (21) days from date of service of Defendants' argument to respond.

This Court is entering final judgment as to the issue of interest, there being no just reason for delay. This is a final appealable order.

IT IS SO ORDERED.



DAVID L. FUHRY, JUDGE

cc: Paul T. Murphy, Esq.
Joel Nash, Esq.

IN THE COURT OF COMMON PLEAS
GEAUGA COUNTY, OHIO

2006 APR 19 PM 1:33

MARCIA A. MAYER, et al.,	:	CASE NO. 98F000851 98F000850 98F000515 (Consolidated)
Plaintiffs,	:	JUDGE DAVID L. FUHRY
-vs-	:	
MARIO MEDANCIC, et al.,	:	JUDGMENT ENTRY
Defendants.	:	

This matter comes on for consideration pursuant to oral hearing of January 17, 2006 dealing with the parties' continuing dispute over who owes how much. That hearing dealt primarily with the "how much" issue and revolved around the calculation of interest.

Defendants claim, first, that the judgment against them on the notes should be simple interest and not compounded annually. Second, they claim the post-judgment interest rate should be 10% because the notes don't provide for a different interest rate upon default in payment.

Plaintiffs claim Defendants' argument as to compounding is "preposterous". However, no where in the notes is the compounding of interest provided for. Interest simply accrues on the principal and at a stated rate per annum. Judgments themselves accrue interest at a stated rate per annum. It is uncontroverted that judgments accrue simple interest only, unless compounding is specifically provided for.

The Court finds that Plaintiffs' affidavit that compound interest was implied or intended is not sufficient to overcome the plain meaning provided by the language of the notes. Principal was to accrue interest computed at a certain rate, and no compounding is provided for.

As to Plaintiffs' second claim, it is asserted that Defendants' interest rate does not default to the lesser statutory judgment rate just because a judgment has been rendered, or because the notes don't contain an express provision as to what rate of interest applies in the event of default.

The Court has waded into what seems to be a labyrinth of cases concerning this issue. The Court finds the case of Capital Fund Leasing, LLC vs. Garfield, 135 O App 3d 579, 8TH Dist. CA, best sums up this Court's sentiments as apply to this case. R.C. Section 1343.03 doesn't apply if 1347.02 *does apply.* R.C. Section 1343.02 *does apply* because the instrument specifies a rate. Therefore, the Plaintiff's position is adopted as to this issue, and that post-judgment interest rate is the same as that provided for in the instrument..

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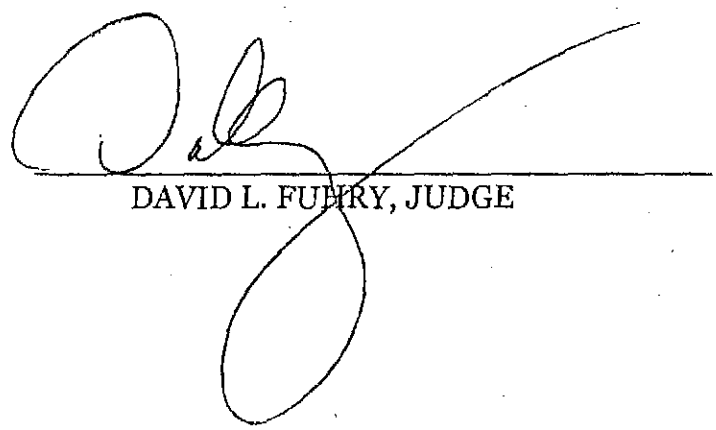
Third, the Court was unaware that almost six years ago the trial court directed there be no set-off between the parties. That this escaped the Court's notice is not

surprising since the parties have been contesting this matter for about eight years, and there are volumes of files and papers in the Court's file.

What was the rationale behind this order? The Defendants have the burden of demonstrating why it should be countermanded now since it is a pre-existing Court order.

WHEREFORE, the Defendant shall have twenty-one (21) days to address the issue of the viability of the $37,500.00 judgment; as well as the three issues relating to identifying the parties and the issue of set-off; Plaintiffs shall have twenty-one (21) days from date of service of Defendants' argument to respond.

IT IS SO ORDERED.



DAVID L. FURRY, JUDGE

cc: Paul T. Murphy, Esq.
Joel Nash, Esq.

1343.03

Statutes and Session Law

TITLE [13] XIII COMMERCIAL TRANSACTIONS -- OHIO UNIFORM COMMERCIAL CODE

CHAPTER 1343: INTEREST

1343.03 Rate not stipulated.

1343.03 Rate not stipulated.

(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, unless a written contract provides a different rate of interest in relation to the money that becomes due and payable, in which case the creditor is entitled to interest at the rate provided in that contract. Notification of the interest rate per annum shall be provided pursuant to sections 319.19, 1901.313, 1907.202, 2303.25, and 5703.47 of the Revised Code.

(B) Except as provided in divisions (C) and (D) of this section and subject to section 2325.18 of the Revised Code, interest on a judgment, decree, or order for the payment of money rendered in a civil action based on tortious conduct or a contract or other transaction, including, but not limited to a civil action based on tortious conduct or a contract or other transaction that has been settled by agreement of the parties, shall be computed from the date the judgment, decree, or order is rendered to the date on which the money is paid and shall be at the rate determined pursuant to section 5703.47 of the Revised Code that is in effect on the date the judgment, decree, or order is rendered. That rate shall remain in effect until the judgment, decree, or order is satisfied.

(C) (1) If, upon motion of any party to a civil action that is based on tortious conduct, that has not been settled by agreement of the parties, and in which the court has rendered a judgment, decree, or order for the payment of money, the court determines at a hearing held subsequent to the verdict or decision in the action that the party required to pay the money failed to make a good faith effort to settle the case and that the party to whom the money is to be paid did not fail to make a good faith effort to settle the case, interest on the judgment, decree, or order shall be computed as follows:

(a) In an action in which the party required to pay the money has admitted liability in a pleading, from the date the cause of action accrued to the date on which the order, judgment, or decree was rendered;

(b) In an action in which the party required to pay the money engaged in the conduct resulting in liability with the deliberate purpose of causing harm to the party to whom the money is to be paid, from the date the cause of action accrued to the date on which the order, judgment, or decree was rendered;

(c) In all other actions, for the longer of the following periods:

(i) From the date on which the party to whom the money is to be paid gave the first notice described in division (C)(1)(c)(i) of this section to the date on which the judgment, order, or decree was rendered. The period described in division (C)(1)(c)(i) of this section shall apply only if the party to whom the money is to be paid made a reasonable attempt to determine if the party required to pay had insurance coverage for liability for the tortious conduct and gave to the party required to pay and to any identified

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insurer, as nearly simultaneously as practicable, written notice in person or by certified mail that the cause of action had accrued.

(ii) From the date on which the party to whom the money is to be paid filed the pleading on which the judgment, decree, or order was based to the date on which the judgment, decree, or order was rendered.

(2) No court shall award interest under division (C)(1) of this section on future damages, as defined in section 2323.56 of the Revised Code, that are found by the trier of fact.

(D) Division (B) of this section does not apply to a judgment, decree, or order rendered in a civil action based on tortious conduct or a contract or other transaction, and division (C) of this section does not apply to a judgment, decree, or order rendered in a civil action based on tortious conduct, if a different period for computing interest on it is specified by law, or if it is rendered in an action against the state in the court of claims, or in an action under Chapter 4123. of the Revised Code.

Effective Date: 06-02-2004

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5703.47

Statutes and Session Law

TITLE [57] LVII TAXATION

CHAPTER 5703: DEPARTMENT OF TAXATION

5703.47 Definition of federal short term rate.

5703.47 Definition of federal short term rate.

(A) As used in this section, "federal short-term rate" means the rate of the average market yield on outstanding marketable obligations of the United States with remaining periods to maturity of three years or less, as determined under section 1274 of the "Internal Revenue Code of 1986," 100 Stat. 2085, 26 U.S.C.A. 1274, for July of the current year.

(B) On the fifteenth day of October of each year, the tax commissioner shall determine the federal short-term rate. For purposes of any section of the Revised Code requiring interest to be computed at the rate per annum required by this section, the rate determined by the commissioner under this section, rounded to the nearest whole number per cent, plus three per cent, shall be the interest rate per annum used in making the computation for interest that accrues during the following calendar year. For the purposes of sections 5719.041 and 5731.23 of the Revised Code, references to the "federal short-term rate" are references to the federal short-term rate as determined by the tax commissioner under this section rounded to the nearest whole number per cent.

(C) Within ten days after the interest rate per annum is determined under this section, the tax commissioner shall notify the auditor of each county in writing of that rate of interest.

Effective Date: 06-02-2004; 06-30-2005

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2009-Ohio-81
FIFTH THIRD MTG. CO. v. GOODMAN REALTY CORP.

2009-Ohio-81

Fifth Third Mortgage Company, Plaintiff-Appellee,
v.
Goodman Realty Corporation, Defendant-Appellant,
v.
Diane Kay Loss, aka D. Kay, Loss, aka Diana K. Loss, et al., Defendants-Appellees.

No. 5-08-30
Court of Appeals of Ohio, Third Appellate District, Hancock County.

January 12, 2009

Appeal from Hancock County Common Pleas Court, Trial Court No. 2007-F64.

Judgment Affirmed.

Alan Kirschner for Appellant.

John C. Filkins for Appellee.

OPINION

ROGERS, J.

2

{¶1} Defendant-Appellant, Goodman Realty Corporation, appeals from the judgment of the Hancock County Court of Common Pleas granting it a judgment of $10,000 plus simple interest at a rate of ten percent per annum from March 13, 1992, on a note secured by a mortgage. On appeal, Goodman Realty Corp. ("Goodman") argues that the trial court erred by failing to enforce the provision in the note providing for compound interest, and that the trial court erred by failing to give res judicata effect to a 1998 judgment by the trial court granting Goodman ten percent compound interest on the note. Based on the following, we affirm the judgment of the trial court.(fn1)

{¶2} In July 1989, Diana Loss executed an adjustable rate note for $65,200 to Fifth Third Bank ("Fifth Third"), with the note being secured by a mortgage on her residence. In September 1991, Loss executed a note for $10,000 to Alan Kirshner, with the note also being secured by a mortgage on her residence. The Kirshner note contained a blank where the interest rate was to be filled in, but the rate was omitted and the blank contained only a dash with Loss' initials. The note provided that "[a]ll sums, both principal and interest, not paid promptly at maturity, shall bear the interest rate of -- per cent per annum." (Sep. 1991 Note).

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{¶3} In February 1992, Fifth Third brought a foreclosure action against Loss for being in default on the note. Kirshner was named as a defendant in the foreclosure action because of his mortgage interest in Loss's residential property. In June 1992, the trial court filed a judgment entry in the foreclosure action, finding that Loss was in default on the Kirshner note and awarding judgment to him in the amount of $10,000 plus interest accruing from March 13, 1992.

Because the rate of interest was not provided in the note, the trial court awarded interest on the judgment and not on the note itself at a rate of ten percent per annum pursuant to R.C. 1343.03(fn2). Before a foreclosure sale could be executed on her residential property, Loss reinstated the Fifth Third mortgage and the sale was canceled. Subsequently, the Kirshner note and accompanying mortgage was assigned to Goodman.

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{¶4} In June 1997, Fifth Third again instituted foreclosure proceedings against Loss due to her default on the note. Goodman was named as a defendant in the action because of the interest it held through its mortgage on Loss's residence. In June 1998, the trial court filed its judgment entry, stating, in pertinent part:

The Court further finds that Defendant Goodman Realty Corp. has filed an answer herein claiming an interest in the real estate described herein by virtue of a mortgage filed on September 23, 1991 in the Office of the Clerk of Courts, Hancock County,

---

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Ohio, upon which there is now due and owing Seventeen Thousand Seven Hundred Fifteen and 61/100 Dollars ($17,715.61), plus interest at the rate of 10% per annum from September 3, 1997.

(June 1998 Judgment Entry). Subsequently, Loss again reinstated the Fifth Third mortgage prior to the foreclosure sale, and the sale was canceled.

{¶5} In January 2007, Fifth Third again instituted foreclosure proceedings against Loss due to her default on the note, and in February 2007, Goodman filed a cross-claim against Loss for the balance due on its note, on which Loss had also defaulted.

{¶6} In July 2007, the trial court granted a judgment to Fifth Third on its note, and found that the Goodman mortgage on the property was a valid lien, subject only to unpaid real estate taxes and the Fifth Third mortgage.

{¶7} In August 2007, the trial court issued a decree of foreclosure, ordering Loss's property to be sold to satisfy all debts owed thereon, and in September 2007, the property was sold.

{¶8} In October 2007, Goodman filed a motion for summary judgment on its cross claim against Loss for the amount due on its note. In the motion, Goodman claimed an amount due of $43,861.10 plus interest at a rate of ten percent per annum from September 13, 2007. Goodman computed this figure by starting with $17,715.61, which he asserted was provided by the trial court's June 1998 judgment, then he compounded interest at a rate of ten percent per annum.

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Goodman contended that the interest rate should be provided by former R.C. 1343.03, which was used in the trial court's June 1992 and June 1998 judgments, and that the compound interest was provided by the terms of the note and the trial court's June 1998 judgment.

{¶9} In November 2007, Loss filed a response to Goodman's summary judgment motion, arguing that, although Goodman was awarded a judgment of $17,715.61 by the trial court's June 1998 judgment, simple interest, not compound interest, at a rate of ten percent per annum from September 3, 1997, should be awarded, yielding a net judgment amount of $35,431.22.

{¶10} In June 2008, the trial court filed its judgment entry, granting summary judgment in favor of Goodman for $26,263.04, computed by beginning with the trial court's June 1992 judgment of $10,000 and adding simple interest at the statutory rate of ten percent per annum from former R.C. 1343.03. The judgment entry provided, in pertinent part:

First, while Goodman Realty cites the language of the original note, the amount due is on the judgment granted June 25, 1992, which * * * established interest at the statutory judgment rate. * * * Second, the note itself on which Goodman Realty relies does not specify an interest rate, so any "compounding" would be meaningless on 0% interest. Finally, `"simple interest is to be used when there is no specific agreement to compound interest or a statutory provision authorizing the compound interest.'" *Snyder v. Lindsay,* 8th Dist. No. 82663, 2003-Ohio-5388, 2003 WL 22310915, ¶14, quoting *Williams v. Colejon Mech. Corp.,* 8th Dist. No. 68819, 1995 Ohio App. LEXIS 5196. Therefore, post judgment interest must be simple interest, unless otherwise

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agreed or authorized. Id. The interest rate was fixed by statute at the time of the judgment * * *. Having begun accruing interest in 1992, that interest rate would continue to accrue, as simple interest, until the $10,000 principal is paid in full.

* * *

Goodman Realty incorrectly cites the 1997 foreclosure action as the basis for increased entitlement. * * * In this case, the original note merged into the judgment granted in 1992. * * * The 1997 reference to the amount asserted by Goodman Realty was no more than a finding that the amount was claimed. * * * A contract, in this case the promissory note, merges into the final judgment and extinguishes all claims that could have been litigated regarding the terms of that contract. See *Stand Energy Corp. v. Ruyan,* 1st Dist. No. C-050004, 2005-Ohio-4846, 2005 WL 2249107, ¶¶11-12 * * *. Having obtained judgment on the note in 1992, Goodman Realty is precluded from relitigating the terms of the original note on which statutory interest was granted. The judgment fixed Goodman Realty's rights, and that judgment accrues interest at the stated rate as simple interest.

(June 2008 Decision and Order, pp. 7-8).

{¶11} It is from this judgment that Goodman appeals, presenting the following assignments of error for our review.

Assignment of Error No. 1

THE TRIAL COURT ERRED BY ITS FAILURE TO ENFORCE THE COMPOUND INTEREST TERMS OF THE NOTE THAT PROVIDED THAT BOTH UNPAID PRINCIPAL AND INTEREST BEAR INTEREST ANNUALLY.

Assignment of Error No. 2

THE TRIAL COURT ERRED BY ITS FAILURE TO GIVE RES JUDICATA EFFECT TO THE 1998 DECISION THAT

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USED THE NOTE PROVISION FOR COMPOUND INTEREST TO DETERMINE THE AMOUNT THEN DUE.

{¶12} Due to the nature of Goodman's arguments, we elect to address its assignments of error together.

Assignments of Error Nos. 1 and 2

{¶13} In its first assignment of error, Goodman argues that the trial court erred in granting simple interest and failing to follow the terms of the note providing for compound interest. Specifically, Goodman asserts that the note specifically required interest to be paid upon "both principal and interest," thereby evidencing a requirement that compound interest be paid. In its second assignment of error, Goodman asserts that the trial court erred by failing to give res judicata effect to the trial court's 1998 judgment granting it compound interest on the trial court's 1992 judgment of $10,000, for a total of $17,715.61. Specifically, Goodman argues that the trial court's finding in the 1998 judgment was a final judicial determination on the issues of the applicable interest rate and the method of computing interest, thereby precluding the trial court from granting any judgment other than ten percent compounded interest on $17,715.61 from September 3, 1997, to the present. We disagree.

{¶14} An appellate court reviews an order granting summary judgment de novo. *Hillyer v. State Farm Mut. Auto. Ins. Co.* (1999), 131 Ohio App.3d 172, 175. Accordingly, a reviewing court will not reverse an otherwise correct

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judgment merely because the lower court utilized different or erroneous reasons as the basis for its determination. *Diamond Wine & Spirits, Inc. v. Dayton Heidelberg Distr. Co.,* 148 Ohio App.3d 596, 2002-Ohio-3932, ¶25, citing *State ex rel. Cassels v. Dayton City School Dist. Bd. of Ed.,* 69 Ohio St.3d 217, 222, 1994-Ohio-92. Summary judgment is appropriate when, looking at the evidence as a whole: (1) there is no genuine issue as to any material fact; (2) reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made; and, therefore, (3) the moving party is entitled to judgment as a matter of law. Civ.R. 56(C); *Horton v. Harwick Chemical Corp.,* 73 Ohio St.3d 679, 686-687, 1995-Ohio-286. If any doubts exist, the issue must be resolved in favor of the nonmoving party. *Murphy v. Reynoldsburg,* 65 Ohio St.3d 356, 358-59, 1992-Ohio-95.

{¶15} Although we review the trial court's grant of summary judgment de novo, "[a] trial court has inherent power to interpret and enforce its own judgments," *Clay v. Clay,* 7th Dist. No. 06 BE 40, 2007-Ohio-4638, ¶13, citing *Cramer v. Petrie,* 70 Ohio St.3d 131, 133, 1994-Ohio-404; *State ex rel. Adkins v. Sobb* (1988), 39 Ohio St.3d 34, 35, and such interpretations will not be reversed absent an abuse of discretion. *Paradise Homes, Inc. v. Limbacher,* 5th Dist. No. 2005AP100072, 2006-Ohio-1676, ¶23. An abuse of discretion "connotes more than an error of law or judgment; it implies that the court's attitude is

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unreasonable, arbitrary, or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. When applying the abuse of discretion standard, a reviewing court may not simply substitute its judgment for that of the trial court. Id.

{¶16} R.C. 1343.03 provides a statutory rate of interest on notes and other instruments when no such rate is established by the parties. Former R.C. 1343.03(A) provided, in part:

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 of ten per cent per annum, and no more, unless a written contract provides a different rate of interest in relation to the money that becomes due and payable, in which case the creditor is entitled to interest at the rate provided in that contract.

{¶17} The former version of R.C. 1343.03 was amended in 2004 by 2004 Sub.H.B. No. 212, 150 Ohio Laws, Part III, 3417, but the current version only applies to actions pending on June 2, 2004, the effective date of the amendment. An action is considered to be "pending"`"from its inception until the rendition of final judgment.'" Black's Law Dictionary (5th Ed. 1979) 1021. The Supreme Court of Ohio in *Maynard v. Eaton Corp.,* 119 Ohio St.3d 443, 2008-Ohio-4542, found that, for purposes of R.C. 1343.03(A), a matter is considered to be pending while on appeal because the trial court's judgment is suspended until the appellate

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court issues its disposition, and, consequently, revised R.C. 1343.03(A) applied to cases "in which the trial court has entered final judgment prior to June 2, 2004, but the judgment is not yet paid in full and the case was pending on appeal as of that date." Id. at paragraph one of the syllabus.

{¶18} Additionally, when calculating the method of computing interest under R.C. 1343.03(A), simple interest, and not compound interest, is to be awarded absent an agreement or statute providing otherwise. *Viock v. Stowe-Woodward Co.* (1989) 59 Ohio App.3d 3, 7-8; *Snyder v. Lindsay,* 8th Dist. No. 82663, 2003-Ohio-5388, ¶14.

{¶19} The doctrine of res judicata serves to end litigation of a matter once that matter has been conclusively established through a final judgment. See *Green v. Akron,* 9th Dist. Nos. 18284, 18294, 1997 WL 625484. The doctrine provides that, "[a] valid, final judgment rendered upon the merits bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action." *Grava v. Parkman Twp.* (1995), 73 Ohio St.3d 379, paragraph one of the syllabus. Res judicata further provides that "a fact or a point that was actually and directly at issue in a previous action, and was passed upon and determined by a court of competent jurisdiction, may not be drawn into question in a subsequent action between the same parties or their privies, whether

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the cause of action in the two actions be identical or different."

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Ft. Frye Teachers Assn. v. State Emp. Relations Bd., 81 Ohio St.3d 392, 395, 1998-Ohio-435.

{¶20} Because res judicata only applies to "valid, final judgments," an order must be final and appealable to preclude further litigation of the issue. See *Queen City S. & L. Co. v. Foley* (1960), 170 Ohio St. 383, paragraphs one and three of the syllabus. An order directing a foreclosure sale and finding the amount due to various claimants is a final appealable order. *Oberlin Sav. Bank v. Fairchild* (1963), 175 Ohio St. 311, 312; See, also, *Ohio Dept. of Taxation v. Plickert* (1998), 128 Ohio App.3d 445, 446. Furthermore, the judicial finding of an amount due in a foreclosure proceeding has been held to conclusively establish that finding as to subsequent proceedings under the doctrine of res judicata. *Italiano v. Commercial Fin. Corp.* (2002), 148 Ohio App.3d 261, 267; *Doyle v. West* (1899), 60 Ohio St. 438, 443-444.

{¶21} In the case at bar, Loss executed a note in September 1991 providing that "[a]ll sums, *both principal and interest,* not paid promptly at maturity, shall bear the interest rate of -- per cent per annum." (Emphasis added) (September 1991 Note). The blank space where the rate of interest was to be filled in only had a line through it, but the fact that the note identifies that both principal and interest will bear interest indicates that the note calls for compound interest.

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{¶22} In its June 1992 foreclosure judgment entry, the trial court found Loss in default on the note and ordered payment of the $10,000 principal amount plus interest at a rate of ten percent per annum from the date of judgment as provided under former R.C. 1343.03(A), as the note did not provide an interest rate, but the trial court's judgment entry did not state whether the interest was compound or simple.

{¶23} Goodman argues that the trial court's June 1998 judgment entry granted him a judgment of $17,715.61 on the note, plus interest at a rate of ten percent per annum from September 3, 1997. However, the wording of the judgment was ambiguous, as it did not explicitly find that Goodman was entitled to that sum, but that Goodman was "*claiming* an interest in the real estate * * * upon which there is now due and owing Seventeen Thousand Seven Hundred Fifteen and 61/100 Dollars ($17,715.61)." (Emphasis added) (June 1998 Judgment Entry). If the trial court's judgment was a finding of what was owed Goodman, and not simply what was claimed, then the trial court would have been granting compound interest on the note, as a grant of simple interest on the $10,000 June 1992 judgment would have yielded a smaller figure than $17,715.61.

{¶24} In its June 2008 judgment entry, the trial court awarded Goodman $26,263.04, computed by granting simple interest on the June 1992 $10,000 judgment. In awarding this amount, the trial court found that the June 1998

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judgment did not grant Goodman $17,715.61, but that the trial court was simply stating the amount that Goodman claimed. Because there was no finding of an amount actually due Goodman in the June 1998 judgment, the trial court went back to the June 1992 judgment and awarded simple interest on $10,000. The trial court reasoned that, although the terms of the note called for compound interest, simple interest should be awarded because the June 1992 judgment did not specify that interest was to be compounded, and the note did not provide an interest rate; therefore it was not a full agreement to compound interest, and when the interest rate is supplied by R.C. 1343.03(A), `"simple interest is to be used when there is no specific agreement to compound interest or a statutory provision authorizing the compound interest.'" (June 2008 Judgment Entry, p. 7, quoting *Snyder,* 2003-Ohio-5388 at ¶14.)

{¶25} In reviewing the trial court's decision, we find its interpretation of the June 1998 judgment to be reasonable. Although that judgment could also be interpreted as a finding of the amount due Goodman, and not simply of the amount it claimed, the trial court is granted discretion in interpreting its prior judgments, and we find there to be no abuse of discretion in this interpretation. Because the June 1998 judgment was not a finding of the amount owed Goodman, the trial court was correct in concluding that res judicata did not require it to grant compound interest on

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$17,715.61 from June 1998 to the present.

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{¶26} Furthermore, we find that the trial court was correct in granting Goodman a judgment of simple interest on the $10,000 June 1992 judgment, accruing from that date to the present. The June 1992 judgment was a finding of the amount owed Goodman in the foreclosure proceedings, and, as such, it was a final appealable order which fixed the rights of the parties on that issue. We note that because the June 1992 judgment did not award any amount of interest on the note prior to the date of judgment, the court implicitly found that the note did not intend any interest. Accordingly, res judicata required the trial court to grant Goodman $10,000 plus interest accruing from June 1992. However, the June 1992 judgment does not state the method for computing interest, and the June 1998 judgment was not a finding of the amount due Goodman, therefore, these judgments do not grant compound interest, and res judicata does not require an award of compound interest. Moreover, while the terms of the note called for compound interest, the note did not provide an interest rate, and without a rate, there was no agreement to compound interest. Because there was no prior judgment, specific agreement, or statute authorizing compound interest, a grant of simple interest was proper. See *Viock,* 59 Ohio App.3d at 7-8.

{¶27} Finally, we find the trial court accurately awarded interest at a ten percent rate, as that rate was conclusively established in the trial court's June 1992 judgment and granted pursuant to former R.C. 1343.03(A). Even though the

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present foreclosure action would have fallen under revised R.C. 1343.03(A) because it was filed after 2004, the former version of the statute was correctly applied to give a ten percent interest rate because a valid, final judgment granting ten percent interest was already issued on the note in June 1992, thereby not making the action pending on the effective date of revised R.C. 1343.03(A), and binding the trial court under res judicata principles.

{¶28} Because we find that the June 1998 judgment was not a finding on the amount owed Goodman and did not grant compound interest; that the note does not amount to an agreement for compound interest; and, that res judicata establishes a $10,000 judgment with ten percent interest accruing from 1992 to the present, we find that the trial court did not err in granting Goodman $10,000 plus simple interest accruing at a rate of ten percent per annum from March 13, 1992.

{¶29} Accordingly, we overrule Goodman's first and second assignments of error.

{¶30} Having found no error prejudicial to the appellant herein, in the particulars assigned and argued, we affirm the judgment of the trial court.

Judgment Affirmed

Preston, P.J. and Willamowski, J., concur.

Footnotes:

FN1. We note that all claims involving Fifth Third Bank have been resolved and that only the claims of Goodman Realty are the subject of this appeal.

FN2. R.C. 1343.03 was amended in 2004 to provide for a different rate of interest, but the former version of the statute was in effect at the time of these proceedings.

OH

Slip Opinions

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91-LW-3788 (8th)

TREBMAL CONSTRUCTION INC., PLAINTIFF-APPELLEE/CROSS-APPELLANT
v.
SHERWAY APPLICATION CO., ET AL., DEFENDANTS-APPELLANT/CROSS-APPELLEE

CASE NO. 58033
8th District Court of Appeals of Ohio, Cuyahoga County
Decided on February 7, 1991.

CHARACTER OF PROCEEDING: Civil appeal from Common Pleas Court, No. 099,881.

JUDGMENT: AFFIRMED IN PART, REVERSED IN PART AND REMANDED.

For Plaintiff-Appellee/Cross-Appellant: Keith R. Kraus, Esq., 1800 Ohio Savings Plaza, 1801 East 9 Street, Cleveland, OH 44114

For Defendants-Appellant/Cross-Appellee: Ronald A. Rispo, Esq., Weston, Hurd, Fallon, Paisley & Howley, 2500 Terminal Tower, Cleveland, OH 44113-2241

MATIA, J.

This appeal and cross-appeal arise from the verdict of the Cuyahoga County Court of Common Pleas upon a contractual dispute which resulted in a verdict and judgment in favor of appellee/cross-appellant, Trebmal Construction Co. in the amount of $300,000, against appellant Sherway Applications Co. and codefendant DuBois Chemical Corp.

THE FACTS, GENERALLY

In December of 1979, appellee Trebmal Construction Company (Trebmal) arranged for the purchase of the Statler Hotel from the Ameritrust Company.

In July of 1980 appellee Trebmal contracted with appellant Sherway Applications Co. (Sherway) to restore the exterior walls of the Statler Hotel building and to scrape and repaint the window sashes for a total contract price of $168,000. Appellant Sherway consulted with the regional sales director of codefendant DuBois Chemical Company, Richard Calendonato. Calendonato recommended the use of his own product, Peel Filmite to protect the windows of the Statler Hotel.

After cleaning operations were completed, appellee Trebmal began complaining that the windows were damaged. Appellant Sherway contended that the damage existed prior to the window cleaning. Appellee Trebmal contended the damage was due entirely to the work of Sherway and/or the failure of DuBois Chemical's product.

Trial began on April 11, 1989. Appellant Sherway's motion in limine to exclude expert testimony had been filed much earlier in December 8, 1986. The court denied this motion. On April 25, 1989, the jury returned a verdict of $300,000 against both defendants Sherway and DuBois Chemical. The jury's assigned 70% fault to Sherway and 30% fault to DuBois Chemical.

Appellant Sherway filed a motion for judgment notwithstanding the verdict and/or for a new trial. Appellee filed a motion to assess prejudgment interest, and a motion to tax costs. Following a hearing on May 10, 1989 the trial court denied Sherway's motions for judgment notwithstanding the verdict and for a new trial. The trial court did award appellee's motions for prejudgment interest and a small portion of the motion to tax costs.

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Appellant Sherway timely filed its notice of appeal on July 5, 1989.

I. APPELLANT'S ASSIGNMENT OF ERROR I

Appellant in his first assignment of error states:

"WHERE THE SOLE USE OF PROPERTY IS COMMERCIAL AND CLAIMED DAMAGES ARE SUCH THAT THEY DO NOT REQUIRE REPAIRS IN ORDER TO GENERATE A PROFIT, THE MEASURE OF DAMAGE IS EITHER THE LOSS OF ECONOMIC BENEFIT OR DIMINUTION IN MARKET VALUE AND NOT THE COST OF REPAIR."

Appellant, in its first assignment of error, argues that the trial court permitted testimony on the incorrect measure of damages. Specifically, appellant argues that appellee's expert witness should not have been permitted to testify on the cost of repair.

The assignment of error is not well taken.

Appellant's one assignment of error raises four questions for resolution.

"A. THE TRIAL COURT ERRED WHEN IT FAILED TO GRANT DEFENDANT'S MOTION IN LIMINE TO EXCLUDE THE TESTIMONY OF PLAINTIFF'S EXPERT."

"B. AS A RESULT OF THE TRIAL COURT'S FAILURE TO EXCLUDE THE PLAINTIFF'S PROPOSED TESTIMONY, HE WAS PERMITTED TO OFFER HIS OPINION BASED UPON THE COST TO CURE WITHOUT A PROPER FOUNDATION TO MISLEAD THE JURY."

"C. PLAINTIFF'S EVIDENCE OF THE COST OF REPAIRS WAS NEVER PROPERLY ESTABLISHED."

"D. THE TRIAL COURT SHOULD HAVE THEREFORE EXCLUDED MR. RITLEY'S MINIONS."

Issues B, C and D are related and will be discussed in the disposition of Issue A.

A. ISSUE: WHETHER THE TRIAL COURT ERRED WHEN IT FAILED TO GRANT APPELLANT'S MOTION IN LIMINE

Prior to trial, appellant filed a motion in limine questioning the admissibility of testimony from appellee's expert witness, Roger D. Ritley. In support of the motion, appellant argued that the expert's testimony did not support the damages standard of diminution in market value.

B. **MOTION IN LIMINE**

Our inquiry commences with an examination of the purpose and effect of a motion in limine. A "Motion in limine" is defined in Black's Law Dictionary (5 Ed. 1979) 914, as "[a] written motion which is usually made before or after the beginning of a jury trial for a protective order against prejudicial questions and statements * * * to avoid injection into trial of matters which are irrelevant, inadmissible and prejudicial[,] and granting of (the] motion is not a ruling on evidence and where properly drawn, granting of [the] motion cannot be error." State v. Grubb (1986), 28 Ohio St. 3d.

The threshold question to be answered upon review of the motion in limine is whether or not the proponent of the motion objected to the admission or exclusion of the evidence at trial. The denial of a motion in limine does not preserve error for review. A proper objection must be raised at trial to preserve error. State v. Brown (1988), 38 Ohio St. 3d 305, paragraph three of the syllabus. In the herein case, the appellant Sherway did object to the testimony of the opinion on the diminution of market value. (Supp. Tr. 41.) Therefore, appellant did not waive his right to assign this matter as error.

Accordingly, appellant argues, herein, that the court should have excluded the testimony of appellee's expert appraiser, Roger Ritley, because his report on his opinion on diminution in market value was a measure of the cost of cure. Appellant argues that the cost of cure was the incorrect measure of damages, and therefore should not have been submitted as evidence. This court disagrees with appellant's argument that the expert witness' testimony should have been excluded from evidence.

The rules of evidence encourage the admission of relevant evidence. Further, the admission or exclusion of relevant evidence rests within the sound discretion of the trial court. State v. Sage (1987), 31 Ohio St. 3d 173. Generally, opinion testimony is excluded from evidence. Notwithstanding, witnesses shown to be learned, skilled and experienced in a particular art, science, trade or business, i.e., expert witnesses, are permitted to testify in a proper case, and after proper qualification, to give their opinions upon a given state of facts within their field of knowledge, so that the jury may be assisted in judging the facts and draw inferences therefrom so as to enable it to come to a right verdict. Fulton v. Aszman (1982), 40 App. 3d 64.

In the case sub judice, appellee's expert witness was sufficiently qualified to give expert testimony on the economic impact of the damaged windows. (Tr. 533-538.) The fact that in the expert's opinion the diminution of the market value of the building was equal to the cost to repair was properly allowed and submitted to the jury. Comparison of expert witnesses, professional stature and the weight of the expert's testimony are for the trier of the facts. McQueen v. Goldey (Butler Cty. 1984), 20 Ohio App. 3d 41. Accordingly, the expert's testimony was properly submitted to the jury for determination.

Appellant relies on Denoyer v. Lamb (Hamilton Cty. 1984), 22 Ohio App. 3d 136. Appellant argues that the application of Denoyer precludes determining market value by the cost of repair. However, Denoyer states that the owner of a property may recover as damages the costs of reasonable restoration of his property to its preexisting condition or to a condition as close as reasonably feasible, without requiring grossly, disproportionate expenditures. Further, the owner of a property has a right to hold it for his own use as well as to hold it for sale, and that if he holds the property for sale, the injury might be unappreciable for purposes of sale. Thus, Denoyer does not hold that the owner of a property for sale is strictly prohibited from recovering as damages the costs of reasonable restoration of his property to its preexisting condition. Denoyer at 139.

Accordingly, appellee's expert witness could testify that, according to his opinion, the method to use to analyze the economic impact on the building's value caused by damaged windows was to examine buyer behavior. The cardinal rule of the law of damages is that the injured party shall be fully compensated. Brady v. Stafford (1926), 115 Ohio St. 67, 69. The expert proposed that the difference in value of the property before and after the damage to the windows closely approximated the cost of repairing the windows based on buyer expectations.

"THE COURT: Just a minute. I knew (sic) got these different transactions completed. Do you consider any of these actually comparable to the situation with respect to the Statler Hotel. Do you or don't you, real simple now, consider them comparable to the situation with respect to the Statler, that you testified about?

"THE WITNESS: Yes, with respect to the buyer's behavior, your Honor." (Tr. 595-596.)

Given the issues involved in this case and the court's charge to the jury, (fn1) the court properly allowed the appellee's expert opinion. In Cooper v. Feeney (1986, Butler Co.) 34 Ohio App. 3d 282, the appellate court held that when the market value cannot be feasibly determined, the standard of "value to the owner" is the measure of damages. This value is determined via consideration of a number of factors including value to the owner, original cost, replacement cost, salvage value, if any, and fair market value at the time of loss. Cooper, at 284.

Appellee's expert witness' opinion contrasted that of appellant's. However, this was not grounds for excluding the testimony. The expert was qualified to testify on the appraisal of real estate. (Tr. 534-538.) Appellant had the opportunity to cross-examine the expert, and appellant had the opportunity to submit their own expert testimony on the subject. Accordingly, expert witness' testimony on the issue of damages was properly submitted to the jury for determination.

II. APPELLANT'S ASSIGNMENT OF ERROR II

Appellant, in his second assignment of error states:

"THE TRIAL COURT ERRED AS A MATTER OF LAW WHEN IT FAILED TO GRANT DEFENDANTS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT BECAUSE THE JURY WAS PREVENTED FROM FOLLOWING THE COURT'S CLEAR INSTRUCTIONS THAT DAMAGES ARE LIMITED TO THE DIMINUTION IN MARKET VALUE."

Appellant, in his second assignment of error, argues that the trial court erred as a matter of law when it failed to grant defendant's motion for judgment notwithstanding the verdict. Specifically, appellant argues that the jury was prevented from following the court's instructions.

This assignment of error is not well taken.

ISSUE: WHETHER REASONABLE RINDS COULD DIFFER UPON THE EVIDENCE

In a motion for judgment notwithstanding the verdict, the trial court judge must construe the evidence most strongly in favor of the non-novant and if upon all- the evidence there is substantial evidence to support the non-movant's position upon which reasonable minds may differ, the motion must be denied. The trial judge does not determine the weight of the evidence or the credibility of the witnesses and although he examines the materiality of the evidence he does not look at the conclusions to be drawn. Cardinal v. Family Foot Care Center, Inc. (1988), 40 Ohio App. 3d 181.

In the case sub judice, at issue was not only the question whether the appellant had damaged the windows but also the issue of damages. Thus when construing the evidence in favor of appellee, there was substantial evidence to support appellee's position upon which reasonable minds could reach different conclusions. The motion was properly denied.

Assignment of error two is overruled.

III. APPELLANT'S ASSIGNMENT OF ERROR NO. III

Appellant's third assignment of error states:

"THE TRIAL COURT SHOULD HAVE GRANTED A NEW TRIAL BECAUSE THE VERDICT WAS EXCESSIVE AND CONTRARY TO LAW."

Appellant, in his third assignment of error argues that the trial court should have granted a new trial. Specifically, the appellant argues that the verdict was excessive and contrary to law.

This assignment of error is not well taken.

A.ISSUE: WHETHER THE JUDGMENT IS CONTRARY TO THE WEIGHT OF THE EVIDENCE

In a claim that the judgment is contrary to the weight of the evidence, a reviewing court can reverse only if the verdict is so manifestly contrary to the natural and reasonable inferences to be drawn from the evidence as to produce a result in complete violation of substantial justice. Hardiman v. Zep Mfg." Co. (1984), 14 Ohio App. 3d 222.

In the case sub judice, when construing the evidence in favor of appellee, there was substantial evidence to support appellee's case against appellant. Upon review of the record, there is no indication that the jury did not follow the court's instructions regarding damages. The trial court instructed the jury that the measure of damages for injury to the building was the cost of repairing the damage, which could in no event exceed the diminution in market value of the property before and after the loss. (Tr. 1176-1177.) This court reasons that the jury returned a verdict that was based upon the evidence submitted at trial.

B. WHETHER THE $300,000 AWARD WAS EXCESSIVE, NOT SUSTAINED BY THE EVIDENCE, AND CONTRARY TO LAW

Appellant proposes that a new trial should have been granted, or alternatively, that the jury's verdict should have been reduced to $150,000 by the trial court. This contention is not supported by the record.

It is well established that a new trial should not be ordered unless the damages awarded are so excessive or inadequate that it appears that the jury's award was based on passion or prejudice. Litchfield v. Morris (Franklin Cty. 1985), 25 Ohio App. 3d 42. Where a trial court finds that the verdict of a jury is excessive but not due to passion and prejudice it may, with the consent of the plaintiff, order a remittitur as an alternative to ordering a new trial. Spearman v. Meyers (Hancock Cty." 1968), 15 Ohio App. 2d 9. However, where the amount of the remittitur can only be reached by speculation and by substituting the judgment of the jury, entry of a remittitur is not proper. Powell v. Montgomery (Scioto Cty. 1971), 27 Ohio App. 2d 112.

The case, herein, was submitted to the jury on the issue of damages. Appellant argues that the jury verdict on the issue of damages could only be sustained by reason of the appellee's expert witness testimony. There is substantial evidence to support the contention that the jury considered all the evidence to reach a reasonable judgment.

Both appellant's expert witness and appellee's expert witness testified as to their opinion on the amount of damage. The range of damages presented to the jury was between $150,000 and $725,000. Based on the evidence, the jury verdict of $300,000 was within the range of reasonableness, and consistent with the evidence presented, i.e., whether the windows were damaged by appellant's cleaning process. The verdict was not excessive, and was supported by competent, credible evidence. A trial court abuses its discretion when it grants a motion for a new trial after a jury verdict, where substantial evidence supports the verdict and there is minuscule or no evidence in the record to support a contrary verdict. Pearson v. Cleveland Acceptance Corp. (1969), 17 Ohio App. 2d 239. Accordingly, the trial court properly denied appellant's motion for a new trial.

IV. APPELLANT'S ASSIGNMENT OF ERROR NO. IV

The appellant in his fourth assignment of error states:

"THE TRIAL COURT ERRED AS A MATTER OF LAW WHEN IT GRANTED PLAINTIFF'S MOTION FOR PREJUDGEMENT INTEREST.

"A. O.R.C. 1343.03 PERMITS THE AWARD OF PREJUDGMENT INTEREST ONLY IN TORT ACTIONS, NOT IN CONTRACT ACTIONS.

"B. THERE WAS NO EVIDENCE OF BAD FAITH CONDUCT ON THE PART OF DEFENSE COUNSEL IN THE CONDUCT OF THE DEFENSE OR IN EVALUATION OF THE CASE FOR SETTLEMENT PURPOSES."

Appellant in his fourth assignment of error argues that the trial court erred as a matter of law when it granted appellee's motion for prejudgment interest. Specifically, appellant argues that R.C. 1343.03(C) is inapplicable in contract cases, and that there was no evidence of bad faith conduct on the part of defense counsel.

This assignment of error is well-taken.

ISSUE: R.C. 1343.03(A) APPLIES TO CONTRACTS

R.C. 1343.03(A) provides, in pertinent part, as follows:

"* * * When money becomes due and payable upon any * * * instrument of writing, * * * upon all verbal contracts, * * * the creditor is entitled to interest at the rate of ten per cent (sic) per annum. * * *"

Case law interpreting this statute clearly indicates that in breach of contract cases, where the damages

resulting from the breached contract are readily ascertainable, the judgment is to accrue interest from the date on which the debt was due and payable. Horning-Wright Company v. Great American Insurance Company (Summit Cty. 1985), 27 Ohio App. 2d 261; Tony Zumbo & Son Construction Company v. Ohio Department of Transportation (Franklin Cty. 1984), 22 Ohio App. 3d 141; Shaker Savinqs Association v. Greenwood Village Inc, (Summit Cty. 1982), 7 Ohio App. 3d 141; and Braverman v. Spriggs (Franklin Cty. 1980), 68 Ohio App. 2d 58.

Appellee, in the case sub judice, was not entitled to prejudgment interest under this statute because the amount of the debt owed to the plaintiff prior to judgment was not a sum certain, i.e. it was an unliquidated claim prior to judgment. See Braverman v. Spriggs (1980), 68 Ohio App. 2d 58, 60; Fein v. Mancino (Aug. 17, 1971), Cuyahoga App. No. 31514, unreported; Parks v. Tollis Building Co. (Dec. 23, 1971), Cuyahoga App. No. 30826, unreported.

"* * * Where the amount owing under a contract is clear, interest runs on the debt from the time it was due and payable, even though liability for the debt is disputed. Braverman v. Spriggs (1980), 68 Ohio App. 2d 58 [22 O.O.3d 47]. On the other hand, where the amount of the claim is unclear and uncertain, it is unliquidated and interest does not commence until the claim becomes liquidated as to amount."

Tony Zumbo & Son Constr. Co. v. Dept. of Transportation, supra.

Applying the foregoing rule to the case at bar, prejudgment interest should not have been granted to appellee. The amount of the claim, in the herein case, was not clear and easily discernible.

"* * * In cases where the dispute is over liability itself and the amount of such potential liability is not in dispute or is readily ascertainable, the court should grant or instruct the jury to grant prejudgment interest if the plaintiff prevails on the liability issues. Clevenger, supra; Braverman v. Spriggs (1980), 68 Ohio App. 2d 58 [22 0.0. 3d 47]; Nursing Staff of Cincinnati, Inc. v. Sherman (1984), 13 Ohio App. 3d 328, 330-331."

Herein, the issue of liability and damages was submitted to the jury for determination. The jury returned a judgment in the amount of $300,000. This amount was not certain and clear before judgment, nor readily ascertainable. Therefore, interest was not applicable.

V. APPELLEE-CROSS-APPELLANT'S CROSS-ASSIGNMENT OF ERROR I

"THE TRIAL COURT ERRED BY NOT DESIGNATING THAT THE AWARD OF PRE-JUDGMENT INTEREST IS TO BE COMPOUNDED ANNUALLY."

Appellee, in his cross-assignment of error one argues that the trial court erred in its award of prejudgment interest. Specifically, appellee argues that prejudgment interest is to be compounded annually.

This cross-assignment of error is not well taken.

ISSUE: WHETHER PREJUDGMENT INTEREST IS APPLICABLE TO THE WITHIN CASE

The issue of prejudgment interest has been disposed of in appellant's assignment of error four. This court reversed the trial court's determination that prejudgment interest was due and owing appellee. See Tony Zumbo Son Constr. Co. v. Dept. of Transportation (1986), 22 Ohio App. 3d 141; Braverman v. Spriggs (1980), 68 Ohio App. 2d. However, the Supreme Court has held specifically that it is error to treat assignments of error as moot after having decided a case on another issue. Criss v. Springfield (1989), 43 Ohio St. 3d 83. Accordingly, we will state reasons for disposing of this assignment of error.

Appellee's argument that prejudgment interest is to be compounded is against the established application. Compound interest generally is not allowable on a judgment. Dezen v. Slatcoff (Fla. 1953), 65 So. 2d 484; Blakeslee's Storage Warehouses v. Chicago (1938), 369 Ill 480, 17 N.E.2d 1. Interest contained in the statement "with interest at the rate * * * per annum" generally means interest from date at a simple rate per annum until paid. Gruhler v. HossaPaus (Montgomery Cty. 1963), 28 Ohio Ops. 2d 477, 93 Ohio L. Abs. 71,

195 N.E.2d 387. Simple interest is to be used unless there is a specific agreement to compound interest or a statutory provision which authorizes otherwise. State ex rel. Elyria v. Trubey (Lorain Cty. 1984), 20 Ohio App. 3d 8; State ex rel. Crockett v. Robinson (1981), 67 Ohio St. 2d 363. Accordingly, appellee's cross-assignment of error one is without merit.

VI. APPELLEE-CROSS-APPELLANT'S CROSS-ASSIGNMENT OF ERROR

II Appellee's second cross-assignment of error states:

"THE TRIAL COURT ERRED BY NOT AWARDING PLAINTIFF REIMBURSEMENT OF ALL ITS LITIGATION EXPENSES AS COST."

Appellee, in his second assignment of error, argues that the trial court erred by not awarding all of its litigation expenses as costs. Specifically, appellee argues that the entire portion of costs sought should have been granted.This assignment of error is not well taken.

ISSUE: WHETHER TRIAL JUDGE ABUSED ITS DISCRETION

The awarding of costs are within the discretion of the court, the exercise of such discretion will not be reviewed except for an abuse of discretion or manifest error. Bobo v. Richmond (1874), 25 Ohio St. 115, 123.

Civil R. 54(D) states that "except when express provision therefor is made either in a statute or in these rules, costs shall be allowed to the prevailing party unless the court otherwise directs. The rule is not a grant of absolute right for court costs to be allowed to the prevailing party." Gravill v. Fuerst (1986), 24 Ohio St. 3d 12.

In the herein case, the record does not indicate that the judge abused his discretion in the allowance of costs. Accordingly, cross-assignment of error two is overruled.

For the foregoing reasons, the trial court is affirmed in part, reversed in part and remanded.

This cause is affirmed in part, reversed in part and remanded for further proceedings consistent with the opinion herein.

BLANCHE KRUPANSKY, C.J., and THOMAS J. PARRINO, J. (Retired Judge of the Eighth Appellate District, sitting by assignment), CONCURS.

Footnotes:

1. "If the damage is of a temporary nature, and the damage in this case is obviously of a temporary nature, and it is of such character that the property can be restored to its original condition, that is, the condition before the damage, then the owner may recover the reasonable cost of the repairs necessary to restore it to its original condition unless it should appear that such costs do not reflect the fair market value immediately before and after the damage, in which case the difference in such value is the amount recoverable." (Tr. 1176-1177.)