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**In the Supreme Court of Ohio**

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**MARCIA A. MAYER, et al.,**

Plaintiffs-Appellees,

v.

**MARIO MEDANCIC, et al.,**

Defendants-Appellants.

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CERTIFIED CONFLICT AND DISCRETIONARY APPEAL FROM THE  
COURT OF APPEALS, ELEVENTH APPELLATE DISTRICT  
GEAUGA COUNTY, OHIO  
CASE No 2008G2826, 2008G2827 & 2008G2828

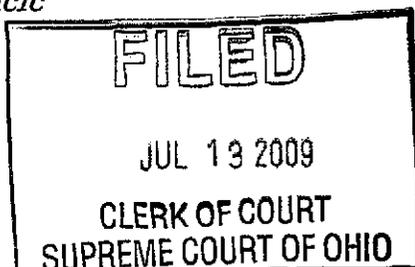
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**MERIT BRIEF OF APPELLEES,  
MARCIA A. MAYER AND ROBERT MAYER**

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JOEL A. NASH (#0061081)  
4325 Mayfield Road  
Cleveland, OH 44121  
Tel: (216) 691-3000  
Fax: (216) 291-1207  
E-mail: jnash25@aol.com

*Counsel for Defendants-Appellants,  
Mario Medancic, Karoline Medancic,  
Marija Medancic, and Mlanden  
Medancic*



TIMOTHY T. BRICK\* (#0040526)  
*\*Counsel of Record*

TIMOTHY J. FITZGERALD (#0042734)  
CATHERINE F. PETERS (#0078044)

GALLAGHER SHARP  
Bulkley Building, Sixth Floor  
1501 Euclid Avenue  
Cleveland, OH 44115-2108

Tel: (216) 241-5310  
Fax: (216) 241-1608  
E-mail: tbrick@gallaghersharp.com  
tfitzgerald@gallaghersharp.com  
cpeters@gallaghersharp.com

*Counsel for Plaintiffs-Appellees,  
Marcia A. Mayer and Robert Mayer*

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*I.*  
**INTRODUCTION AND SUMMARY OF THE ARGUMENT**

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In 1995 and 1996, Appellants Mario, Marija, Mladen and Karoline Medancic and A-Custom Builders, Inc. (collectively “the Medancics”) gave the Appellees Marcia and Robert Mayer (collectively “the Mayers”) three separate promissory notes totaling \$124,500.00. The first note, dated July 3, 1995, was given by Appellants Mario and Marija Medancic in the amount of \$20,000.00. Interest on the \$20,000.00 was 13 percent “per annum” with both principal and interest due and payable on or before November 1, 1995. The second note, dated December 11, 1995, was given by Appellants Mladen and Karoline Medancic in the total amount of \$67,000.00. Interest on the second note was set at 10 percent “per annum.” Interest on \$37,000.00 of this total began to run on November 3, 1995<sup>1</sup> with both the \$37,000.00 principal and interest being due and payable on or before November 1, 1997. Interest on the remaining \$30,000.00 began to run on November 3, 1996<sup>2</sup> with both the \$30,000.00 principal and interest also due and payable on or before November 1, 1997. The third note, dated January 8, 1996, was given by Appellant A-Custom Builders, Inc. in the total amount of \$37,500.00. Interest on the third note was 12 percent “per annum” with the principal and interest also being due and payable on or before November 1, 1997.<sup>3</sup>

**Since entering into the Promissory Notes more than thirteen years ago in**

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<sup>1</sup> This was the date of the transfer of the land being purchased.

<sup>2</sup> This was one year from the date of the transfer of title to the land being purchased.

<sup>3</sup> The three promissory notes (referred to herein collectively as “the Promissory Notes”) are produced in the Supplement to Merit Brief of Appellants.

1995 and 1996, the Mayers have not been paid the principal or the interest that has accrued and is due and owing from the Medancics.

This case presents the single issue of whether the interest on the Promissory Notes should be calculated using simple interest or compound interest. The Mayers contend that the parties' intent and the terms of the Promissory Notes allow for the interest to be compounded annually at the rates set forth in the Promissory Notes. The Medancics contend that the interest on the Promissory Notes accrued at simple interest. If interest is compounded – as the Mayers contend it should be – the total amount that is owed on the Promissory Notes (principal and interest) as of the date of filing this brief is approximately \$522,000.00. If the Promissory Notes accrue only simple interest – as the Medancics are arguing – the total amount now due is approximately \$310,000.00.

The purpose for awarding interest is to compensate the creditor for the loss of use of the money and for the delay in payment or a failure to pay when payment is due. Interest is payment by the debtor for the use of the money. Interest is not a punishment of the debtor. In addition to recognizing the general purpose for awarding interest, this Court's case law has recognized that awarding interest "serves ultimately to make the aggrieved party whole." *Royal Elec. Constr. Corp. v. Ohio State Univ.* (1995), 73 Ohio St.3d 110, 117. Awarding interest on interest, *i.e.*, compound interest, is appropriate under this Court's jurisprudence when the debtor has defaulted on the payment of interest when that interest becomes due. Thus, the Eleventh Appellate District's reliance upon *State, ex rel. Bruml v. Brooklyn* (1943), 141 Ohio St. 593 in reversing the trial court's award of simple interest and

ordering that interest be compounded was entirely correct. The unrefuted evidence and the Promissory Notes themselves establish that upon the Medancics' default of payment of principle and interest when due on November 1, 1995 and November 1, 1997, compound interest was to be awarded.

Case law from Ohio and other jurisdictions does not mandate simple interest in all circumstances and certainly not in this case. This Court has signaled its willingness to move away from "the medieval notion that interest is evil." *Royal Elec. Constr. Corp.*, 73 Ohio St.3d at 117. To the extent that compound interest has been disfavored by courts in cases dating back to the early part of the last century (or before), this case allows the Court to acknowledge the realization that compound interest is the norm in modern day financial and business transactions. It should no longer be viewed as "evil."

Here, in order for the Mayers to be made "whole," they are entitled to compound interest. The Medancics have had the Mayers' money for thirteen years or more without payment of what is owed being made. The Eleventh Appellate District's decision allowing compound interest in this case should be affirmed.

## *II.* STATEMENT OF THE CASE AND OPINIONS BELOW

In 1992, the Mayers entered into an agreement with the Medancics to sell them two parcels of property in Geauga County, Ohio.<sup>4</sup> In order to finance the purchase, the Medancics executed a series of promissory notes in favor of the Mayers. The first note, executed on July 3, 1995, was in the amount of \$20,000.00 payable on

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<sup>4</sup> Much of the factual background can be gleaned from the appellate court opinions from the four appeals that have been taken in this case. See Appendix pages A1-A8, A18-A62.

November 1, 1995 at 13% interest per annum. The second note, executed on December 11, 1995, was in the amount of \$67,000.00 payable on November 1, 1997 at 10% interest per annum. Both promissory notes were secured by a mortgage deed. A third promissory note was executed in favor of the Mayers by A-Custom Builders (a company owned by the Medancics) on January 8, 1996 in the amount of \$37,500.00, payable November 1, 1997 at 12% interest per annum.

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

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

After the April 19, 2006 judgment entry, additional issues remained in dispute before the trial court. The parties ultimately filed an agreed judgment entry on

March 4, 2008, which noted that the Mayers disputed the trial court's April 19, 2006 ruling ordering payment of simple interest and further ordered that the April 19, 2006 judgment entry be reissued with the Civ. R. 54(B) language making it a final appealable order. The April 19, 2006 judgment entry was reissued the same day and captioned "Nunc Pro Tunc Judgment Entry." (Apx. p. A63-A65)

On April 2, 2008, the Mayers timely filed their appeal asserting the following assignment of error: "The trial court erred in ordering the interest on the three Promissory Notes to be calculated as simple interest instead of compound interest." (Apx. p. A4). On October 28, 2008, the Eleventh District Court of Appeals issued its decision on the appeal. After determining that the court did have appellate jurisdiction, the Eleventh District Court of Appeals reversed the trial court's decision to award simple interest holding that under Ohio law, compound interest is permissible where there is default of payment of interest under a contract where payment of interest is specified at an annual rate. (Apx. p. A7-A8)

The Medancics filed an application for reconsideration and a motion to certify an inter-district conflict. On December 12, 2008, the Court of Appeals denied the application for reconsideration finding that none of the cases cited by the Medancics required a different result because "[e]ach of the cases is distinguishable." (Apx. p. A10). On January 6, 2009, the Court of Appeals did an about-face and certified to this Court an inter-district conflict between its opinion and *Thirty Four Corp. v. Sixty Seven Corp.* (1993), 91 Ohio App.3d 818, an opinion from the Tenth Appellate District, a case the Court of Appeals found "distinguishable" only weeks earlier.<sup>5</sup>

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<sup>5</sup> Denying reconsideration, the Eleventh Appellate District decided not to follow the (continued...)

(Apx. p. A14-A17)

On March 25, 2009, this Court certified the inter-district conflict that had been recognized by the Eleventh Appellate District and also allowed the discretionary appeal filed by the Medancics on their Proposition of Law No. I only, thereby accepting jurisdiction of this case. 121 Ohio St.3d 1422, 1424, 2009-Ohio-1296.

### *III.* LAW AND ARGUMENT

**Certified Conflict Question:** 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?

**Counter-Proposition of Law:** Where there is a contract that calls for the annual payment of interest at a specified rate and there is a default on payment of such interest it is appropriate to award interest upon the interest that is due. *State, ex rel. Bruml v. Brooklyn* (1943), 141 Ohio St. 593.

**A. Interest Must Serve to “Make the Aggrieved Party Whole.”**

Generally, the defined purpose for the recovery of interest upon money that is due and owing is as follows:

compensation for the forbearance of money; as damages for its unlawful detention; as compensation paid for the use of money; as payment on compensation for the loss of use of money; as compensation allowed for a delay in payment or a failure to pay when payment is due; or as an exaction for past due obligations.

47 CORPUS JURIS SECUNDUM (2005) 20, Interest & Usury, Section 1 (footnotes omitted).

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<sup>5</sup>(...continued)

opinion in *Thirty Four Corp.* because that opinion did not take into account this Court’s decision in *Bruml* because it “seems not to have been argued.” (Apx. p. A12)

This Court's recent case law has supported steadfastly the purpose and public policy reasons justifying the recovery of interest. See, e.g., *Moskovitz v. Mt. Sinai Med. Ctr.*, 69 Ohio St.3d 638, 656-657, 1994-Ohio-324. Recognizing that an award of interest has the laudable purpose of compensating a creditor for the debtor's use of money which rightfully belongs to the creditor, this Court in *Hartman v. Duffey*, 95 Ohio St.3d 456, 2002-Ohio-2486 stated that interest "is allowed, not only on account of the loss which a creditor may be supposed to have sustained by being deprived of the use of his money, but on account of the gain being made from its use by the debtor." Id. at ¶12, quoting *Landis v. Grange Mut. Ins. Co.* (1998), 82 Ohio St.3d 339, 342. Ultimately, any award of interest is intended "to make the aggrieved party whole," not to punish the party found owing the money. *Royal Elec. Constr. Corp.*, 73 Ohio St.3d at 117. Here, in order to make the Mayers "whole" for the Medancics failure to make any payment on the principal and interest owing on the three promissory notes for over a decade, compound interest should be assessed. Ohio law permits it and equity demands it.

The Mayers will acknowledge the past tendency of courts generally to prefer simple interest over compound interest. See, 44B AMERICAN JURISPRUDENCE 2D (2007) 76, Interest and Usury, Section 54. However, there are and should be exceptions made under particular circumstances where it would be unjust and inequitable to award simple interest rather than compound interest when money has been wrongfully withheld from the party to whom it is rightfully owed. See, e.g., *Cement Div., Nat. Gypsum Co. v. City of Milwaukee* (C.A.7, 1998), 144 F.3d 1111, 1116 ("It is, of course, settled in the case law that compounding of

prejudgment interest is acceptable.” (citations omitted)); *People ex rel. Hartigan v. Illinois Commerce Comm.* (1992), 148 Ill.2d 348, 170 Ill. Dec. 386, 592 N.E.2d 1066, 1092-1093; *Ex Parte Brown* (Ala. 1990), 562 So.2d 485, 491; *In re McLoon Oil Co.* (Me. 1989), 565 A.2d 997, 1007.

The Mayers’ case before the Court is just such a case where compound interest is called for. See, *Webb v. GAF Corp.* (N.D.N.Y. 1996), 949 F.Supp. 102, 110 (because plaintiffs were “without the use of their funds for as long as twelve years, only compound interest will compensate them adequately.”) So that they are fully compensated and made whole for the principal and interest wrongfully withheld by the Medancics for over a decade on the Promissory Notes, interest should be compounded annually. *Valentine Concrete, Inc. v. Ohio Dept. of Adm. Serv.* (1991), 62 Ohio Misc.2d 626, 629. Thus, the Eleventh Appellate District’s decision should be affirmed.

**B. An Award of Interest on Interest Is Appropriate on the Promissory Notes Evidencing the Debt Owed by the Medancics to the Mayers.**

Interest on interest, or compound interest, allows for the accrued interest to be added to the principal sum and the whole is then treated as a new principal amount for the calculation of the interest for the next period.<sup>6</sup> 47 CORPUS JURIS SECUNDUM (2005) 21, Interest & Usury, Section 2 (footnotes omitted); see also, 44B AMERICAN JURISPRUDENCE 2D (2007) 76, Interest and Usury, Section 54. Ohio has long recognized that parties may contractually agree that interest is to be

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<sup>6</sup> Simple interest, by contrast, does not involve adding the accrued and unpaid interest onto the principal before computing the interest for the next term. *Viock v. Stowe-Woodward Co.* (1989), 59 Ohio App.3d 3, 7.

assessed upon interest (*i.e.*, compound interest) that is due and owing upon money loaned. *Mueller v. McGregor* (1876), 28 Ohio St. 265, 273.

Here, the unrefuted evidence before the trial court established that interest on the three Promissory Notes was intended to be compound interest, not simple interest. (Aff. of R. Mayer at ¶18, attached to Brief of Plaintiffs on Interest Issues, filed on 2/17/06) The Medancics presented no evidence to challenge Robert Mayer's affidavit. The terms of the Promissory Notes stating that interest is to be calculated at the specified rates "annually" also supports the award of compound interest to the Mayers. It is not necessary that the note expressly use the word "compound" in order for there to be an award of compound interest when the evidence establishes that the parties' intent and expectation were that interest on interest would be apply. *First City Securities Inc. v. Shaltiel* (C.A.7 1995), 44 F.3d 529, 530-531 (applying Illinois law); *Mastro v. Witt* (C.A.9 1994), 39 F.3d 238, 244.

In its Opinion reversing the trial court's decision awarding the Mayers simple interest on the amounts owed to them by the Medancics, the Eleventh District Court of Appeals noted in rendering the decision to allow the compound interest that it applied the rule set forth by the Supreme Court of Ohio in *State, ex rel. Bruml v. Brooklyn* (1943), 141 Ohio St. 593, 599, which "remains good law," in holding that the Mayers were entitled to interest on the interest – *i.e.*, compound interest. (Apx. p. A7) In *Bruml*, this Court allowed the collection of interest upon interest (*i.e.*, compound interest) owed on municipal bonds and determined "[w]here a bond of a municipality provides for the payment of interest at a specified rate, payable semiannually, and there is a default in the payment of such interest,

interest on such defaulted interest should be allowed and computed at the legal rate.” *Id.*, paragraph two of the syllabus.

Except for the fact that this case concerns promissory notes and not a municipal bond, the circumstances are virtually the same. As the Court of Appeals noted, the three notes between the Medancics and the Mayers provide for payment of interest at a specific rate and the Medancics are in default in payment of that interest “for years.” (Apx. p. 7) Thus, compound interest or interest upon the interest on the Promissory Notes, which is what the Court of Appeals awarded the Mayers, is permissible. *See, Bruml.*

There is little difference between the facts and circumstances of this case and what happened in *Bruml*. An illustration of how that is can best be understood by considering that, under the first note given on July 3, 1995, “both principal and all interest” were due and payable on November 1, 1995. On that date, the Mayers were owed the principal sum of \$20,000.00 and \$861.92 in interest. That amount of interest, like the interest installment in *Bruml*, became due and was payable on November 1, 1995. But, nothing was paid to the Mayers on November 1, 1995, just like the bondholder in *Bruml*. As in *Bruml* – and as the Eleventh Appellate District Court has allowed – interest began to accrue on that \$861.92 at 13 percent per annum. A year later, on November 1, 1996, still nothing had been paid the Mayers on either the principal or the first year’s interest, and additional interest on the \$20,000.00 principal for the second year in the amount of \$2,600.00 had accrued. But still, the Mayers were paid nothing. The same is true for every November 1 of each succeeding year for the last twelve years – no payment of principal or accrued

interest. As of the date of filing this Brief, the total interest on the principal alone on the first note now equals more than \$36,400.00. And yet the Mayers have not been paid.

The same is true with the other two notes. On the second note dated December 11, 1995, the interest on the principal as of the date of filing this Brief now totals more than \$88,700.00. And on the third note of January 8, 1996, the interest on the principal totals more than \$60,700.00.

When this scenario is taken into consideration, it is clear why the Medancics are arguing so vehemently for simple interest which, as will be demonstrated below, really means no interest at all in this case. If the Medancics' argument is adopted by this Court, it will result in the Medancics getting away with an interest free loan over the past dozen years of over \$185,000.00. Not only were the Mayers deprived of the accrued interest over these past dozen plus years, but the Medancics have had full use and control of funds that rightfully were and are owed to the Mayers. By not paying these funds, the Medancics have had the ability to invest and earn a return on this money. If compound interest is found not to apply here, the Medancics will achieve a significant, unintended and unjustified windfall. If the Mayers are to be made whole, as this Court has said interest is intended to accomplish, they should be entitled to interest on the interim interest that has accrued over the past dozen years but has not been paid by the Medancics. That is precisely what this Court's *Bruml* opinion allows.

The Medancics argue erroneously that *Bruml* is inapplicable here<sup>7</sup> and has

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<sup>7</sup> The Medancics have not and do not argue here for the overruling of *Bruml*. Nor  
(continued...)

nothing to do with compound interest. The Medancics are wrong – *Bruml* is directly on point. The interest awarded in *Bruml* (and by the Court of Appeals to the Mayers) is the definition of compound interest. Compound interest is interest paid on both the principal and the previously accumulated interest. The interest awarded in *Bruml*, regardless of whether the phrase “compound interest” was used in the opinion, is the same as the interest awarded to the Mayers.

The three notes between the Medancics and the Mayers provide for payment of interest at a specific rate and the Medancics are in default in payment of that interest. Under *Bruml*, which is applicable to this case, compound interest or interest upon the interest on the note is permissible. The decision of the Court of Appeals was correct and is consistent with Ohio law.

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

**C. Ohio’s Case Law Does Not Prohibit the Award of Interest on the Interest That Has Accrued and Has Been Unpaid for More than a Decade.**

Ohio courts do recognize that, in order to make the aggrieved party whole,

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<sup>7</sup>(...continued)

would they be able to establish grounds for doing so under *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849. See, e.g., *Gliozzo v. Univ. Urologists of Cleveland, Inc.*, 114 Ohio St.3d 141, 2007-Ohio-3762, ¶14; *Shay v. Shay*, 113 Ohio St.3d 172, 2007-Ohio-1384, ¶27; *Mid-American Fire & Cas. Co. v. Heasley*, 113 Ohio St.3d 133, 2007-Ohio-1248, ¶14.

awarding interest upon the interest owed on an underlying debt can be appropriate. Cf., *Lehrner v. Safeco Ins./Am. States Ins. Co.*, 171 Ohio App.3d 570, 2007-Ohio-795, at ¶82; *Nakoff v. Fairview Gen. Hosp.* (1997), 118 Ohio App.3d 786, 788. This is so because the accrued interest itself becomes part of the underlying debt and interest should be awarded on that interest. Here, as interest accrued on the Promissory Notes year after year, that interest should be treated as part of the total debt owed by the Medancics to the Mayers and interest should be awarded on the new principal amount that includes the accrued interest.

The cases cited by the Medancics in their Merit Brief do not prohibit or preclude an award of compound interest here in favor of the Mayers. At best, those cases simply reiterate a general but outdated preference for simple interest.

*1. There is no conflict with Thirty Four Corp. v. Sixty Seven Corp.*

The case certified as being in conflict with the Eleventh Appellate District's decision in the case at bar, *Thirty Four Corp. v. Sixty Seven Corp.*, stands for the general proposition that, in the past, simple interest has been applied to promissory notes *in the absence of an agreement that interest is to be compounded*. Id. at 825. The *Thirty Four* court rejected the argument that interest on the note should be compounded because "there was no evidence presented that the note in question was anything other than a six-percent simple interest loan." Id. But in the case at bar, there was such evidence presented establishing that the interest on the note was to be compounded<sup>8</sup> and that evidence was unrefuted by the Medancics. The holding in *Thirty Four* should be limited to cases where there is "no evidence

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<sup>8</sup> See, Aff. of R. Mayer at ¶18, attached to Brief of Plaintiffs on Interest Issues, filed on 2/17/06.

presented that the note in question was anything other than a six-percent *simple interest loan*.” Id. (emphasis added).

Moreover, the legal analysis by the court in *Thirty Four* is flawed because it did not discuss *Brum* or its impact upon the facts present in *Thirty Four*. Because the applicability of *Brum* was not addressed by the court, *Thirty Four* did not concern – because it seems it was not argued by the parties – whether it was permissible to award interest upon defaulted interest due on a note.

Finally, *Thirty Four* does not preclude the award of compound interest here because it recognizes that “principles of equity [can] require that interest be compounded” when the case reveals that the debtor “acted in bad faith concerning payment of its debt.” Id., at 825 Here, it is clear that the Medancics have engaged in such bad faith conduct. They have not paid the principal or accrued interest owed to the Mayers for more than a dozen years. “[P]rinciples of equity” do justify and warrant the imposition of compound interest in this case.

***2. Appellants’ other Ohio case law is inapplicable and does not prohibit compound interest under the facts here.***

There is just a passing reference at page 4 of the Merit Brief of Appellants to this Court’s decision in *State ex rel. Crockett v. Robinson* (1981), 67 Ohio St.2d 363. That is because a reading of the *Crockett* opinion quickly reveals that it has no application here. *Crockett* was not a promissory note case, indeed there was no agreement or writing involved in the case at all. The *Crockett* case did not involve an issue whether simple or compound interest should be imposed on a back pay award to a reinstated municipal employee. Compound interest is not mentioned

anywhere in the opinion. Instead, the *Crockett* Court merely upheld the lower court's award of simple interest with very little discussion or analysis. *Id.* at 368.

Appellants' reliance on *State, ex rel. Elyria v. Trubey* (1984), 20 Ohio App.3d 8 is also erroneous. In *Trubey*, the city of Elyria obtained a writ of mandamus to recover for overpayments it had made to Lorain County with regard to the operation of the Elyria Municipal Court. The writ however, failed to set forth a specific rate *for post-judgment interest*. The trial court found that the statutory rate found in R.C. 1343.03 should apply and the court of appeals agreed. The court of appeals did find that the trial court erred in applying compound interest because, under the general rule, "[s]imple interest is to be used *unless there is a specific agreement to compound interest* or a statutory provision which authorizes otherwise." *Id.* at 9. Here, the interest was specified in each of the Promissory Notes and the Medancics have been in default on the interest they owe on the notes for several years. In this case, the evidence before the trial court does establish that the intent was for compound interest. The Eleventh Appellate District, in accordance with *Bruml*, was correct to permit interest to be charged on the interest owed. *Trubey* does not alter that outcome.

An outcome different from that of the Eleventh Appellate District is not called for here by the appellate opinion in *Berdyck v. Shinde* (1998), 128 Ohio App.3d 68. *Berdyck* was a medical malpractice tort case, not a promissory note. In fact, the *Berdyck* court made sure to point out that "[i]n the present case, there was no agreement among the parties to compound interest \* \* \*." *Id.* at 87. The issue was whether prejudgment interest should be awarded on the jury's verdict in favor of

the plaintiff for the defendant hospital's failure to make a good faith effort at settlement before trial. The statutory provision under consideration in the *Berdyck* case was R.C. 1343.03(C), which has absolutely no application here. To the extent that there is any discussion in the *Berdyck* opinion regarding simple versus compound interest, it is and should be limited to the specific statutory provision under consideration, R.C. 1343.03(C).<sup>9</sup>

The case of *In re Testamentary Trust of Hamm* (1997), 124 Ohio App.3d 683 was not a case involving an award of interest on back pay. It was an action brought in probate court to impose a surcharge against a former trustee and his surety based upon the former trustee's failure to comply with his fiduciary obligations and for his negligent or illegal management of the trust funds. The court held that "interest in these cases is simple, rather than compound, *unless there is a showing of intentional misconduct or bad faith.*" *Id.* at 692 (citations omitted). Further, *Hamm* is distinguishable because the issue of interest was governed by R.C. 2109.42 which authorizes the probate court to require a negligent trustee to account to the trust for interest lost due to the trustee's negligence thus allowing the surcharge to include losses to the trust for unreasonable investments, including lost principle and lost interest. *Id.* at 693.

The case of *Fifth Third Mtg. Co. v. Goodman Realty Corp.*, Hancock App. No. 5-08-30, 2009-Ohio-81 is also distinguishable from the case at bar. The note at

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<sup>9</sup> The plaintiff had argued that public policy reasons supported an award of compound interest and the *Berdyck* court left open the possibility that compound interest might apply. However, it was not willing to so hold because "[its] research discloses that the Ohio Supreme Court has not addressed this issue and that, possibly, no appellate court, including our own, has determined whether any other rate, including compound interest, is applicable to prejudgment interest awarded under R.C. 1343.03(C)." *Id.* at 88 (citation omitted).

issue in the *Fifth Third Mtg.* case failed to specify an interest rate that would apply. The note contained a blank where the interest rate should have been filled in, but the rate was omitted and the blank contained only a dash with the debtor's initials. *Id.*, at ¶2. Consequently, the trial court relied upon the statutory rate of ten percent per annum from former R.C. 1343.03. *Id.*, at ¶10. As the trial court explained, simple interest was used because “the note itself on which Goodman Realty relies does not specify an interest rate, so any ‘compounding’ would be meaningless on 0% interest.” *Id.*, at ¶10. The court of appeals agreed, holding that because “the note did not provide an interest rate, and without a rate, there was no agreement to compound interest.” *Id.* at ¶26.

Appellants reliance on *Viock v. Stowe-Woodward Co. and Bank One, Steubenville, NA v. Buckeye Union Ins. Co.* (1996), 114 Ohio App.3d 248 is misplaced. *Viock* and *Bank One* both concern the calculation of post-judgment interest under R.C. 1343.03. As the Eleventh Appellate District noted, R.C. 1343.02 applies to the interest that is owed to the Mayers. (Apx. p. A11-A12) *Viock* was an employer intentional tort suit and involved the question when does the post-judgment interest accrue. As to whether post-judgment is simple interest or compound interest, the *Viock* court noted that the calculation of interest under the statute – in other words, in cases not involving an agreement for interest – is to be done using simple interest. 59 Ohio App.3d at 7. *Bank One* is also a case distinguishable from the case at bar. The issue before the *Bank One* court, like *Viock*, involved strictly statutory interest under R.C. 1343.03(A) as “there was no specific agreement for compound interest.” 114 Ohio App.3d at 256.

The Medancics' reliance on *Lehrner v. Safeco Ins./Am. States Ins. Co.* and *Nakoff v. Fairview Gen. Hosp.* is also misplaced as those cases actually support the Mayers' position in this case. In *Lehrner*, the plaintiff received a favorable jury verdict based upon injuries sustained in an automobile accident and was awarded as the final judgment the amount of the verdict in addition to prejudgment interest. The trial court combined these two figures and then awarded post-judgment interest on this sum. The issue was whether the trial court had impermissibly awarded compound interest. The Court of Appeals disagreed and upheld the trial court's decision finding that compound interest had not been impermissibly awarded since prejudgment interest is a part of the debt owed. 171 Ohio App.3d 570, 2007-Ohio-795, at ¶ 82. *Nakoff*, a medical negligence case, held the same. 118 Ohio App.3d at 788. Here, the accumulated interest likewise merged with the underlying principal owed on the Promissory Notes and became part of the debt owed to the Mayers.

None of the cases cited by the Medancics in their brief counter the Eleventh Appellate District's decision here allowing the imposition of compound interest based upon *Bruml*. The award of compound interest to the Mayers was appropriate and the opinion of the Eleventh Appellate District should be affirmed.

**D. The Case Authorities Relied On by the Medancics from Other Jurisdictions are Outdated and Inapplicable Here.**

At pages 5 to 6 of their Merit Brief, the Medancics rely on a litany of cases from other jurisdictions, many of which are antiquated and are distinguishable because they are predicated upon the statutes of the respective states. The cases cited by

the Medancics simply recognize that compound interest has not been favored in the common law. But those cases are out-of-touch with the recognition that “[c]ompound interest is a real-world fact.” *Webb*, 949 F.Supp. at 110. Those cases fail to acknowledge the modern day realization that “[c]ompounding is the norm in financial transactions.” *First City Securities, Inc.*, 44 F.3d at 530. More recently, this Court has found itself rejecting the approach taken by “[t]he majority of American jurisdictions” and instead being “more persuaded by those states that have moved away from the medieval notion that interest is evil.” *Royal Elec. Constr. Corp.*, 73 Ohio St.3d at 117.

A century or more ago, compound interest may have been viewed by courts as something “evil,” but this case presents the Court with the opportunity to abandon such a “medieval notion” – as it did in *Royal Elec. Constr. Corp.* – and embrace the more modern reality, in step with the financial world today, that compound interest should be allowed because it “serves ultimately to make the aggrieved party whole.” *Id.* (citations omitted); *Webb*, 949 F.Supp. at 110.

#### *IV.* CONCLUSION

WHEREFORE, Plaintiffs-Appellees, Marcia A. Mayer and Robert Mayer respectfully request that the Supreme Court of Ohio affirm the judgment of the Eleventh District Court of Appeals. Since it is necessary to calculate the amount due to the Mayers, this matter should be remanded to the trial court in order for it to recalculate the amount owed to the Mayers utilizing compound interest, not simple interest, at the rates specified in the Promissory Notes.

Date: July 13, 2009.

Respectfully submitted,



TIMOTHY T. BRICK\* (#0040526)

*\*Counsel of Record*

TIMOTHY J. FITZGERALD (#0042734)

CATHERINE F. PETERS (#0078044)

GALLAGHER SHARP

Bulkley Building, Sixth Floor

1501 Euclid Avenue

Cleveland, OH 44115-2108

Tel: (216) 241-5310

Fax: (216) 241-1608

E-mail: tbrick@gallaghersharp.com

tfitzgerald@gallaghersharp.com

cpeters@gallaghersharp.com

*Counsel for Plaintiffs-Appellees,*

*Marcia A. Mayer and Robert Mayer*

**PROOF OF SERVICE**

A copy of the foregoing *Merit Brief of Appellees Marcia A. Mayer and Robert Mayer* was sent by regular U.S. Mail, postage pre-paid, this 13th day of July, 2009 to the following:

Joel A. Nash, Esq.  
4325 Mayfield Road  
Cleveland, OH 44121

*Counsel for Defendants-Appellants,  
Mario Medancic, Karoline Medancic,  
Marija Medancic, and Mlanden Medancic*

  
TIMOTHY J. FITZGERALD (#0042734)

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## APPENDIX

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**THE COURT OF APPEALS  
ELEVENTH APPELLATE DISTRICT  
GEAUGA COUNTY, OHIO**

MARCIA A. MAYER, et al.,	:	<b>OPINION</b>
Plaintiffs-Appellants,	:	<b>CASE NOS. 2008-G-2826</b>
- vs -	:	<b>2008-G-2827</b>
	:	<b>2008-G-2828</b>
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

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

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."<sup>1</sup>

{¶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

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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.

{¶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.<sup>2</sup> 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.<sup>3</sup>

{¶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

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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. GRENDALL, P.J.,

CYNTHIA WESTCOTT RICE, J.,

concur.

STATE OF OHIO

COUNTY OF GEAUGA

MARCIA A. MAYER, et al.,

**FILED**  
IN COURT OF APPEALS  
SS.

DEC 12 2008

DENISE M. KAMINSKI  
CLERK OF COURTS

GEAUGA COUNTY

IN THE COURT OF APPEALS

ELEVENTH DISTRICT

Plaintiffs-Appellants,

- vs -

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

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

Defendants-Appellees.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

rate of interest. Id. at 599.

The application for reconsideration is denied.

  
JUDGE COLLEEN MARY O'TOOLE

FOR THE COURT

12/647<sup>s</sup>

A13

STATE OF OHIO

COUNTY OF GEAUGA

MARCIA A. MAYER, et al.,

**FILED**  
IN COURT OF APPEALS

JAN 06 2009

DENISE M. KAMINSKI  
CLERK OF COURTS  
GEAUGA COUNTY

IN THE COURT OF APPEALS

ELEVENTH DISTRICT

Plaintiffs-Appellants,

- vs -

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

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

Defendants-Appellees.

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.*

12/6/08

(1989), 59 Ohio App.3d 3; and, *State, ex rel. Elyria v. Trubey* (1984), 20 Ohio App.3d 8.<sup>1</sup>

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

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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, Steubenville, 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.

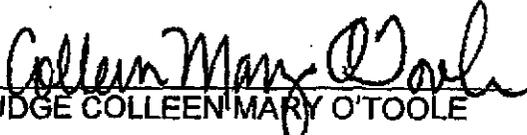
Consequently, we find our decision in *Mayer v. Medancic*, 11th Dist. Nos. 2008-G-2826, 2008-G-2827, and 2008-G-2828, 2008-Ohio-5531, conflicts with that of the Tenth Appellate District *Thirty Four Corp. v. Sixty Seven Corp.* (1993), 91 Ohio App.3d 818. And therefore certify the following question to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

12/16/09

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

The motion to certify is granted.

  
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JUDGE COLLEEN MARY O'TOOLE

DIANE V. GRENDALL, P.J.,

CYNTHIA WESTCOTT RICE, J.,

concur.

12/16/80

A17

**THE COURT OF APPEALS  
ELEVENTH APPELLATE DISTRICT  
GEAUGA COUNTY, OHIO**

MARCIA A. MAYER, et al.,	:	<b>OPINION</b>
Plaintiffs-Appellees,	:	
- vs -	:	<b>CASE NO. 2004-G-2563</b>
A-CUSTOM BUILDERS, INC., et al.,	:	April 29, 2005
Defendants-Appellants.	:	

Civil Appeal from the Court of Common Pleas, Case No. 98 F 000851.

Judgment: Affirmed.

*Paul T. Murphy*, 6690 Beta Drive, #106, Mayfield Village, OH 44143 (For Plaintiffs-Appellees).

*Joel A. Nash*, 4325 Mayfield Road, Cleveland, OH 44121 (For Defendant-Appellant).

COLLEEN M. O'TOOLE, J.,

{¶1} In this appeal, appellants, A-Custom Builders, Inc., Mario Medancic, Marija Medancic, Mladen Medancic, and Karoline Medancic, appeal from a February 19, 2004 judgment entry of the Geauga County Court of Common Pleas. For the reasons that follow, we affirm.

{¶2} This matter has an extended procedural history. On August 31, 1992, appellants ("buyers") and appellees ("sellers"), Robert Mayer, Marcia Mayer, William

Mayer, and Mary Beth Mayer, entered into a purchase agreement for real estate. Pursuant to the purchase agreement, sellers were to receive \$930,000 from buyers in consideration of two parcels of land labeled as 3a and 5a.<sup>1</sup> Parcel 3a was a sub-lot consisting of 1.5 acres of land, and parcel 5a was composed of 164 acres of unsubdivided developmental land.

{¶3} The purchase agreement set forth a payment schedule which required buyers to make payments on specific dates. Following sellers' receipt of a \$150,000 down payment, parcel 3a was transferred to buyers. Buyer, Mario Medancic, subsequently constructed his home upon the sub-lot, parcel 3a. Buyers then paid \$25,000 toward the first scheduled payment of \$50,000. However, buyers experienced financial difficulties and made no further payments. As a result of buyers' inability to pay, the parties executed a new purchase agreement on June 20, 1996. The new purchase agreement terminated the original purchase agreement and required buyers to pay \$865,000 in consideration for the parcels of land.

{¶4} When buyers failed to comply with the new purchase agreement's payment schedule, sellers filed three separate foreclosure complaints in the Geauga County Court of Common Pleas. All three complaints sought monetary damages and foreclosure of mortgage. In response to sellers' complaints, buyers counterclaimed against sellers for breach of contract. The trial court ultimately consolidated these claims.

{¶5} Following a bench trial, the court issued two separate judgment entries. The judgment entry disposing of buyers' counterclaim was modified by the trial court in

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1. Included in the purchase agreement were other various pieces of property that were to be transferred to buyers. These pieces of property, however, were separate transactions that were not part of the

a nunc pro tunc judgment entry on October 3, 2000. The October 3, 2000 judgment entry rescinded the portion of the purchase agreement *for unsubdivided developmental land* and ordered sellers to reimburse buyers for any money paid for such land. The trial court stated:

{¶6} “Accordingly, the agreements, *to the extent that they represent purchase of unsubdivided acreage for development*, should be rescinded, and the monies paid therefor *in the sum of \$148,000* (\$175,000 [\$150,000 down payment plus the \$25,000 partial payment] plus \$3,000 paid less \$30,000 [for Marion (sic) Medancic’s residence] refunded to A-Custom Builders, Inc., plus interest at ten percent (sic) (10%) per year from the date of judgment.” (Emphasis added.)

{¶7} Buyers previously appealed the October 3, 2000 judgment entry in *Mayer v. Medancic* (Dec. 21, 2001), 11th Dist. Nos. 2000-G-2311, 2000-G-2312, and 2000-G-2313, 2001 WL 1647119. The pertinent assignment of error stated:

{¶8} “The Court erred in subtracting \$30,000.00 from the \$178,000.00 due [buyers] from [sellers].” *Id.* at 3.

{¶9} In that appeal, buyers failed to submit a transcript of the trial court proceedings with this court and offered no other evidence demonstrating a mathematical error. Although buyers offered no such evidence, this court, in the interest of justice, reviewed the merits of their claim. *Id.* at 5. Upon review, we found that the trial court properly rescinded those portions of the purchase agreement regarding the unsubdivided developmental land of parcel 5a and appropriately ordered sellers to reimburse any money paid by buyers for such land. Nevertheless, we explained, “for reasons that are not reflected in the [October 3, 2000] judgment entry,

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\$930,000 purchase which is relevant to this appeal.

the \$178,000 paid by [buyers] was reduced by \$30,000, for a final total of \$148,000. Presumably, the \$30,000 represents the amount paid by [buyers] to [sellers] for a sublot, while the \$178,000 represents the amount paid by buyers to sellers for certain unsubdivided acreage.

{¶10} “Because the foregoing analysis engages in a certain amount of speculation on our part, we choose to refrain from entering judgment on this issue. Instead, we remand this issue to enable the trial court to clarify and specify why it subtracted \$30,000 from \$178,000, and/or recalculate this award on the counterclaim for breach of contract.” *Id.* at 6.

{¶11} Following our decision, the trial court issued a new judgment entry on March 21, 2002. The March 21, 2002 judgment entry added \$30,000 to the \$148,000 reimbursement total of the October 3, 2000 judgment entry, for the sum of \$178,000. The trial court gave no explanation as to why this addition was made.<sup>2</sup>

{¶12} Sellers filed a notice of appeal from the March 21, 2002 judgment entry, arguing that the trial court erred in adding \$30,000 to the \$148,000 total. After examining the record, we concluded that the court’s addition of \$30,000 was apparently against the manifest weight of the evidence. *Mayer v. Medancic*, 11th Dist. Nos. 2002-G-2431, 2002-G-2432, and 2002-G-2433, 2005-Ohio-5355, at ¶43 (“*Mayer II*”). However, we expressly determined that, because the trial court was in a better position to allocate the reimbursement, and because the trial court was unable to review the transcript on our previous remand, this matter should be remanded again for the trial

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2. The only insight made by the trial court as to why it made this addition was “that a mathematical error was made in the foregoing judgment entry.”

court to examine the transcript and determine the reimbursement amount in light of the transcript. *Id.* at ¶¶44-45.

{¶13} On February 19, 2004, the court issued a judgment entry which recalculated its previous order of March 21, 2002, and determined that “[sellers] shall pay [buyers] the sum of \$148,000.” The \$148,000 sum was the result of the court again subtracting \$30,000 from the \$178,000 total. In doing so, the trial court stated that it agreed with this court’s analysis of the facts in *Mayer II*, wherein we determined that without a subtraction of \$30,000, buyers would be reimbursed for parcel 3a and retain ownership of this parcel for no consideration.

{¶14} From this judgment, buyers filed a timely notice of appeal and now set forth the following assignment of error for our consideration:

{¶15} “The Trial Court erred in awarding damages in Journal Entry on Amended Counterclaim dated February 19, 2004 by reducing its order so that [sellers] repay [buyers] \$148,000.00 plus the supervision fee of \$25,000 instead of the previously ordered \$178,000.00 plus the supervision fee of \$25,000.00.”

{¶16} Buyers’ sole assignment of error argues that the trial court miscalculated by subtracting \$30,000 from the \$178,000 total. Specifically, buyers maintain that this subtraction resulted in a double payment for parcel 3a. In short, buyers contend that the court’s calculation was against the manifest weight of the evidence. We disagree.

{¶17} Whether a lower court’s judgment is against the manifest weight of the evidence is a factual issue. *Buck v. Canacci* (Nov. 21, 1997), 11th Dist. No. 96-L-185, 1997 Ohio App. LEXIS 5236, at 4. Accordingly, because the trier of fact is in the best position to view the witnesses and their demeanor, this court is mindful that we must

indulge every reasonable presumption in favor of the lower court's judgment and findings of fact. *Shemo v. Mayfield Hts.*, 88 Ohio St.3d 7, 2000-Ohio 258.

{¶18} It is well established that "[j]udgments supported by some competent credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence." *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, syllabus. "[A]n appellate court may not simply substitute its judgment for that of the trial court so long as there is some competent, credible evidence to support the lower court's findings." *State ex rel. Celebrezze v. Environmental Enterprises, Inc.* (1990), 53 Ohio St.3d 147, 154. Thus, in the event that the evidence is reasonably susceptible to more than one interpretation, this court must construe it consistently with the lower court's judgment. *Karches v. Cincinnati* (1998), 38 Ohio St.3d 12, 19.

{¶19} At the outset, we note that buyers fail to set forth any additional evidence from the record that would contradict our factual analysis provided in *Mayer II*. A careful examination of the record also fails to produce contradictory evidence. Instead, buyers set forth an appropriate argument regarding an alleged mathematical miscalculation. But as will be shown, this argument is not well-taken.

{¶20} In *Mayer II*, we noted that there was no evidence of a separate payment of \$30,000 for parcel 3a. *Id.* at ¶17. Numerous checks, signed by buyers and made payable to sellers, were formally admitted at trial; however, the checks' proceeds were not applied toward a payment for parcel 3a. *Id.* at ¶20. Rather, these proceeds were used to pay for expenses such as legal costs, property taxes, soil tests, surveying, landscaping, and in consideration of separate parcels of developed land unrelated to

either parcel 3a or parcel 5a. As a result, we concluded, “[b]uyers fail to set forth any evidence that they paid \$30,000 *in addition* to the \$150,000 down payment and partial payments of \$25,000 and \$3,000.” (Emphasis sic.) Id. at ¶21.

{¶21} Testimony provided during the trial further revealed that parcel 3a was transferred in consideration for the \$150,000 down payment. Buyer, Mladen Medancic, testified as follows on redirect examination:

{¶22} “Q. Did Mr. Mayer [seller] go ahead and proceed with his end of the bargain as soon as you had that \$150,000 [down payment]?”

{¶23} “A. Yes we gave him collateral.

{¶24} “Q. And what did he do to perform his end?”

{¶25} “A. He transferred the lot [parcel 3a] to my dad’s [Mario Medancic’s] house immediately \*\*\*.”

{¶26} Likewise, seller, Robert Mayer, testified that buyers made the \$150,000 down payment, and that following the payment he transferred parcel 3a to buyer, Mario Medancic:

{¶27} “Q. [on cross-examination of Robert Mayer]: Okay so the \$40,000 check that Mladen didn’t have here, you admit that you received?”

{¶28} “\*\*\*

{¶29} “A. Finally, we received to [sic] \$150,000 [down payment] yes.

{¶30} “\*\*\*

{¶31} “Q. One of the first things you did after this first contract was signed was to turn over a lot for Mario to build a house on, correct?”

{¶32} “A. That turned out to be part of the final agreement, that’s correct. Part of the agreement in purchasing the property was – that made up the \$930,000 correct.”

{¶33} To reiterate, the foregoing testimony demonstrates that parcel 3a was transferred to buyers in consideration for a portion of the \$150,000 down payment.

{¶34} That being said, the trial court’s October 3, 2000 and February 19, 2004 judgment entries establish that only those portions of the purchase agreement regarding the unsubdivided developmental land of parcel 5a was to be rescinded. Accordingly, sellers retained ownership of parcel 5a, and buyers were to be reimbursed only for the money applied toward parcel 5a. The court did not rescind the portion of the agreement regarding the parcel 3a sub-lot, and buyer, Mario Medancic, maintained ownership of parcel 3a. Therefore, the trial court’s judgment entries of October 3, 2000 and February 19, 2004, properly subtracted \$30,000 to account for the transfer of parcel 3a to buyer, Mario Medancic. “Without this subtraction, buyers would be reimbursed for parcel 3a and retain ownership of this sub-lot for no consideration.” *Id.* at ¶35.

{¶35} In conclusion, the record demonstrates the following: (1) parcel 3a and parcel 5a were transferred to buyers in consideration for the \$150,000 down payment; (2) the transfer of parcel 3a was not rescinded by the trial court; and (3) there was no evidence of an additional \$30,000 payment made by buyers for parcel 3a. Buyers fail to present any evidence of record to oppose the foregoing facts, and our own thorough review of the record fails to reveal any contradictory evidence.

{¶36} Accordingly, the trial court’s February 19, 2004 judgment entry properly subtracted \$30,000 from the total of \$178,000 for the sum of \$148,000. The court’s

calculation was not against the manifest weight of the evidence. Thus, buyers' sole assignment of error is without merit, and we hereby affirm the judgment of the trial court.

DONALD R. FORD., P.J.

WILLIAM M. O'NEILL, J.,

concur.

**THE COURT OF APPEALS  
ELEVENTH APPELLATE DISTRICT  
GEAUGA COUNTY, OHIO**

MARCIA A. MAYER, et al.,	:	<b>OPINION</b>
Plaintiffs/Appellants,	:	
- vs -	:	<b>CASE NOS. 2002-G-2431</b>
	:	<b>2002-G-2432</b>
	:	<b>and 2002-G-2433</b>
MARIO MEDANCIC, et al.,	:	
Defendants/Appellees.	:	

Civil Appeals 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*, 6690 Beta Drive, #106, Mayfield Village, OH 44143 (For Plaintiffs-Appellants).

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

JUDITH A. CHRISTLEY, J.

{¶1} In this appeal, appellants, Robert Mayer, Marcia Mayer, William Mayer, and Mary Beth Mayer, appeal from a March 21, 2002 judgment entry of the Geauga County Court of Common Pleas.

{¶2} The record discloses the following facts. On August 31, 1992, appellants (“sellers”) and appellees, A-Custom Builders, Inc., Mario Medancic, Marija Medancic,

Mladen Medancic, and Karoline Medancic (“buyers”), entered into a purchase agreement for real estate. Pursuant to the purchase agreement, sellers were to receive \$930,000 from buyers in consideration of two parcels of land labeled as 3a and 5a.<sup>1</sup> Parcel 3a was a sub-lot consisting of 1.5 acres of land, and parcel 5a was composed of 164 acres of unsubdivided developmental land.

{¶3} The purchase agreement set forth a payment schedule which required buyers to make payments on specific dates. Following sellers’ receipt of a \$150,000 down payment, parcel 3a was transferred to buyers. Buyer, Mario Medancic, subsequently constructed his home upon the sub-lot, parcel 3a. Buyers then paid \$25,000 toward the first scheduled payment of \$50,000. However, buyers experienced financial difficulties and made no further payments. As a result of buyers’ inability to pay, the parties entered into a new purchase agreement on June 20, 1996. The new purchase agreement terminated the original purchase agreement and required buyers to pay \$865,000 in consideration of the land.

{¶4} When buyers failed to comply with the new purchase agreement’s payment schedule, sellers filed three separate foreclosure complaints in the Geauga County Court of Common Pleas. All three complaints sought monetary damages and foreclosure of mortgage. In response to sellers’ complaints, buyers counterclaimed against sellers for breach of contract. The trial court ultimately consolidated these claims.

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1. Included in the purchase agreement were other various pieces of property that were to be transferred to buyers. These pieces of property, however, were separate transactions that were not part of the \$930,000 purchase which is relevant to this appeal.

{¶5} Following a bench trial, the trial court issued two separate judgment entries. The judgment entry disposing of buyers' counterclaim was modified by the trial court in a nunc pro tunc judgment entry on October 3, 2000. The October 3, 2000 judgment entry rescinded the portion of the purchase agreement for unsubdivided developmental land and ordered sellers to reimburse buyers for any monies paid for such land. The trial court stated:

{¶6} "Accordingly, the agreements, to the extent that they represent purchase of unsubdivided acreage for development, should be rescinded, and the monies paid therefor *in the sum of \$148,000 (175,000 plus \$3,000 paid less \$30,000 [for Marion (sic) Medancic's residence]* refunded to A-Custom Builders, Inc., plus interest at ten percent (sic) (10%) per year from the date of judgment." (Emphasis added.)

{¶7} Buyers previously appealed the October 3, 2000 judgment entry in *Mayer v. Medancic* (Dec. 21, 2001), 11th Dist. Nos. 2000-G-2311, 2000-G-2312, and 2000-G-2313, 2001 WL 1647119. The pertinent assignment of error stated:

{¶8} "The Court erred in subtracting \$30,000.00 from the \$178,000.00 due [buyers] from [sellers]." *Id.* at 3.

{¶9} Buyers failed to submit a transcript of the trial court proceedings with this court, and offered no other evidence demonstrating a mathematical error. Although buyers offered no such evidence, this court, in the interest of justice, reviewed the merits of their claim. *Id.* at 5. Upon review, we found that the trial court properly rescinded those portions of the purchase agreement regarding the unsubdivided developmental land, and appropriately ordered reimbursement of any monies paid by

buyers for such land. Nevertheless, we explained, “for reasons that are not reflected in the [October 3, 2000] judgment entry, the \$178,000 paid by [buyers] was reduced by \$30,000, for a final total of \$148,000. Presumably, the \$30,000 represents the amount paid by [buyers] to [sellers] for a sub-lot, while the \$178,000 represents the amount paid by buyers to sellers for certain unsubdivided acreage.

{¶10} “Because the foregoing analysis engages in a certain amount of speculation on our part, we choose to refrain from entering judgment on this issue. Instead, we remand this issue to enable the trial court to clarify and specify why it subtracted \$30,000 from \$178,000, and/or recalculate this award on the counterclaim for breach of contract.” *Id.*

{¶11} Following our decision, the trial court issued a new judgment entry on March 21, 2002. The March 21, 2002 judgment entry added \$30,000 to the \$148,000 total of the October 3, 2000 judgment entry. The trial court gave no explanation as to why this addition was made.<sup>2</sup>

{¶12} From the March 21, 2002 judgment entry, sellers filed a notice of appeal with this court advancing one assignment of error for our consideration:

{¶13} “The trial court erred in ordering Plaintiffs to pay to Defendant A-Custom Builders the sum of \$178,000.”

{¶14} Sellers maintain that the manifest weight of the evidence demonstrates that they did not receive \$30,000 in consideration of parcel 3a, or an additional \$3,000 in consideration of parcel 5a. Thus, sellers conclude that the \$178,000 reimbursement

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2. The only insight made by the trial court as to why it made this addition was “that a mathematical error was made in the foregoing judgment entry.”

sum of the March 21, 2002 judgment entry is incorrect and should be amended so the reimbursement amount totals \$145,000.

{¶15} We find sellers' argument regarding the \$30,000 addition to be well-taken. For the following reasons we reverse the March 21, 2002 judgment entry, and remand this matter to the trial court to reconsider its reimbursement amount in light of the transcript and this opinion.

{¶16} As an initial matter, we note that a transcript of the trial proceedings was not before the trial court to assist in its recalculation of the October 3, 2000 judgment entry. Usually, on remand the trial court is supplied with a copy of the transcript that was submitted with the appellate court. However, because buyers failed to submit a transcript with this court on the original appeal, the trial court was not provided one upon remand.<sup>3</sup> Therefore, the trial court did not have the benefit of reviewing the transcript to aid in its determination of the March 21, 2002 judgment entry.

{¶17} In the instant appeal, sellers properly submitted a transcript with this court. After reviewing the transcript, we were unable to find any evidence of a \$30,000 payment, for parcel 3a, made by buyers in addition to the paid total of \$178,000. Furthermore, evidence adduced at trial confirms that the \$30,000 purchase price of parcel 3a was included in the \$150,000 down payment. Therefore, we find the trial court's addition of \$30,000 in its March 21, 2002 judgment entry to be against the manifest weight of the evidence. However, we will forego entering judgment in this respect, and will instead remand this matter so the trial court has the opportunity to

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3. While neither party is under a duty to submit a transcript with the trial court on remand, it is evident that the transcript contains evidence that would have been of assistance to the trial court.

reconsider its reimbursement amount and clarify its findings in light of the transcript and this opinion.

{¶18} Prior to discussing our review of appellants' assignment of error, we will set forth the appropriate standard of review. Whether a lower court's judgment is against the manifest weight of the evidence is a factual issue. *Buck v. Canacci* (Nov. 21, 1997), 11th Dist. No. 96-L-185, 1997 Ohio App. LEXIS 5236, at 5-6. Accordingly, since the trier of fact is in the best position to view the witnesses and their demeanor, this court is mindful that we must indulge every reasonable presumption in favor of the lower court's judgment and findings of fact. *Shemo v. Mayfield Hts.*, 88 Ohio St.3d 7, 2000-Ohio 258.

{¶19} It is well established that "[j]udgments supported by some competent credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence." *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, syllabus. In short, "an appellate court may not simply substitute its judgment for that of the trial court so long as there is some competent, credible evidence to support the lower court's findings." *State ex rel. Celebrezze v. Environmental Enterprises, Inc.* (1990), 53 Ohio St.3d 147, 154. Thus, in the event that the evidence is reasonably susceptible to more than one interpretation, this court must construe it consistently with the lower court's judgment. *Karches v. Cincinnati* (1998), 38 Ohio St.3d 12, 19.

{¶20} As stated previously, after reviewing the transcript, we are unable to find any competent, credible evidence that buyers paid an additional \$30,000 to sellers in

consideration of parcel 3a. Although numerous checks, signed by buyers and made payable to sellers, were properly submitted as exhibits, none of the checks' proceeds appear to be utilized as payment for parcel 3a. Instead, the proceeds apparently were used to pay a variety of expenses such as legal costs, property taxes, soil tests, surveying, landscaping, and in consideration of separate parcels of developed land.

{¶21} Buyers fail to set forth any evidence that they paid \$30,000 *in addition to* the \$150,000 down payment and partial payments of \$25,000 and \$3,000. To the contrary, the evidence confirms that buyers were aware that parcel 3a was transferred in consideration of the \$150,000 down payment:

{¶22} "Q. [on redirect examination of (buyer) Mladen Medancic]: The \$150,000 [down payment], you mentioned that there's a \$40,000 check that's not here.

{¶23} "A. Yes.

{¶24} "Q. Did Mr. Mayer [seller] go ahead and proceed with his end of the bargain as soon as you had that \$150,000?

{¶25} "A. Yes we gave him collateral.

{¶26} "Q. And what did he do to perform his end?

{¶27} "A. He transferred the lot [parcel 3a] to my dad's [Mario Medancic's] house immediately \*\*\*."

{¶28} Seller, Robert Mayer, testified that buyers made the \$150,000 down payment, and that following the payment he transferred parcel 3a to buyer, Mario Medancic:

{¶29} “Q. [on cross-examination of Robert Mayer]: Okay so the \$40,000 check that Mladen didn't have here, you admit that you received?

{¶30} “\*\*\*

{¶31} “A. Finally, we received to (sic) \$150,000 yes.

{¶32} “\*\*\*

{¶33} “Q. One of the first things you did after this first contract was signed was to turn over a lot for Mario to build a house on, correct?

{¶34} “A. That turned out to be part of the final agreement, that's correct. Part of the agreement in purchasing the property was – that made up the \$930,000 correct.”

{¶35} The trial court's October 3, 2000 judgment entry made clear that only those portions of the purchase agreement regarding the unsubdivided developmental land of parcel 5a was to be rescinded. Accordingly, seller retained ownership of parcel 5a, while buyers were to be reimbursed for any monies applied toward parcel 5a. The portion of the purchase agreement regarding the parcel 3a sub-lot, however, was not rescinded, and buyer, Mario Medancic, maintained ownership of parcel 3a. Therefore, when the trial court determined the amount to be reimbursed to buyers in its October 3, 2000 judgment entry it appropriately subtracted \$30,000, for parcel 3a, from the \$178,000 total paid by buyers to sellers.<sup>4</sup> Without this subtraction, buyers would be reimbursed for parcel 3a and retain ownership of this sub-lot for no consideration.

{¶36} Because the portion of the purchase agreement regarding parcel 3a was not rescinded, and there is no competent, credible evidence of a separate \$30,000

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4. This is further exemplified by the October 3, 2000 judgment entry which specifically stated that the \$30,000 subtraction was for “Marion (sic) Medancic's residence.”

payment in consideration of parcel 3a, the \$178,000 total of the March 21, 2002 judgment entry presumably should be reduced by \$30,000. The trial court's March 21, 2002 judgment entry is therefore against the manifest weight of the evidence. This portion of sellers' assignment of error is well-taken.

{¶37} We now turn our attention to sellers' argument that the reimbursement amount should be further reduced by \$3,000. In the October 3, 2000 judgment entry, the trial court added \$3,000 to the \$150,000 down payment and \$25,000 partial payment made by buyers. The trial court explained that "[s]ubsequent to the execution of the 1996 contract [buyers] \*\*\* paid [sellers] an additional \$3,000 for unsubdivided acreage." Sellers argue that they never received an additional \$3,000 from buyers.

{¶38} The record discloses that there was confusion as to what the proceeds from various checks, made payable to sellers, were actually applied toward.

{¶39} "Q. [on direct examination of Mladen Medancic] I would like to go through the checks one by one and explain what those checks are. \*\*\*

{¶40} "A. For any bills that we owed him [Robert Mayer]. He applied it to whatever, sometimes he needed money for taxes. Sometimes he needed money for whatever, we just gave him the checks, tried to keep it monthly the best that we could."

{¶41} Two separate checks were submitted as exhibits with the trial court. Each check was in the amount of \$3,000, and was signed by buyers and made payable to seller, Robert Mayer. The first check was dated March 12, 1996, and stated in the memo section that it was partly for legal expenses and partly for land. The second check was dated April 2, 1996, and stated in the memo section that it was partly for

taxes and partly for land. On direct examination, buyer, Mladen Medancic, further testified that he believed portions of both checks were to be applied as payment for the unsubdivided developmental land of parcel 5a. Sellers failed to provide any evidence establishing that these checks' proceeds were used for other miscellaneous expenses, rather than parcel 5a.

{¶42} Here, there is competent and credible evidence that buyers made a \$3,000 payment for the unsubdivided developmental land of parcel 5a. Thus, this portion of sellers' assignment of error is not well-taken.

{¶43} We have been unable to detect any competent, credible evidence that buyers are entitled to the additional \$30,000 reimbursement of the March 21, 2002 judgment entry. However, we are mindful that the trial court is in a better position to make such a determination, and was previously unable to rely upon a review of the transcript to aid in its determination.

{¶44} We are also inclined to note that there seems to be some confusion as to the parties named in the trial court's judgment entries. The record demonstrates that buyers, A-Custom Builder's and the Medancics, were named as defendants in two separate complaints filed by sellers.<sup>5</sup> In response, A-Custom Builders and the Medancics filed separate and identical answers and counterclaims. Subsequently, this matter was consolidated. Despite the consolidation of this matter, the trial court's October 3, 2000 judgment entry, and its March 21, 2002 judgment entry, only orders sellers to reimburse A-Custom Builders. Due to this discrepancy, we request that the

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5. The Medancics are the sole owners of A-Custom Builders and acted as guarantors of the land purchase agreement.

trial court clarify whether its order of reimbursement includes the Medancics, or whether it relates solely to A-Custom Builders.

{¶45} The trial court's March 21, 2002 judgment entry is reversed and this matter is remanded to the trial court to reconsider its position regarding the \$30,000 addition in light of the transcript and to clarify its findings. Furthermore, the trial court is to clarify whether its order of reimbursement pertains solely to A-Custom Builders.

DIANE V. GRENDALL and CYNTHIA WESTCOTT RICE, JJ., concur.

[Cite as *Mayer v. Medancic*, 2001-Ohio-8784.]

**COURT OF APPEALS  
ELEVENTH DISTRICT  
GEAUGA COUNTY, OHIO**

**JUDGES**

MARCIA A. MAYER, et al.,  
Plaintiffs-Appellees,

HON. DONALD R. FORD, P.J.,  
HON. JUDITH A. CHRISTLEY, J.,  
HON. DIANE V. GRENDALL, J.

— vs —

MLADEN MEDANCIC, et al.,  
Defendants-Appellants.

CASE NOS. 2000-G-2311  
2000-G-2312  
and 2000-G-2313

**OPINION**

CHARACTER OF PROCEEDINGS: Civil Appeal from the  
Court of Common Pleas  
Case Nos. 98 F 000850  
98 F 000851  
98 F 000515

JUDGMENT: Affirmed in part; reversed in part, and remanded

ATTY. PAUL T. MURPHY  
CARBONE AND MURPHY CO., L.P.A.  
6690 Beta Drive, #106  
Mayfield Village, OH 44143

(For Plaintiffs-Appellees)

ATTY. JOEL NASH  
4325 Mayfield Road  
Cleveland, OH 44121

(For Defendants-Appellants)

CHRISTLEY, J.

In these consolidated cases, appellants/cross-appellees, Mario, Marija, Mladen, and Karoline Medancic and A-Custom Builders, Inc. ("A-Custom Builders") appeal from the judgments of the Geauga County Court of Common Pleas following a bench trial.<sup>1</sup>

The following facts are relevant to a determination of this appeal. On July 15, 1998, appellees/cross-appellants, Marcia A. and Robert C. Mayer, filed a foreclosure complaint alleging that A-Custom Builders, by and through its officers, executed a promissory note on January 8, 1996, which was secured by a mortgage deed.<sup>2</sup> Although A-Custom Builders promised to pay appellees the sum of \$37,500 by November 1, 1997, appellees claimed that the payment was never made, and that the mortgage was in default.

A similar complaint for foreclosure was filed on November 23, 1998.<sup>3</sup> In this complaint, appellees alleged that on December 11, 1995, Mladen and Karoline Medancic executed a promissory note promising to pay appellees \$67,000 by November 1, 1997. This promissory note was also secured by a mortgage deed. Appellees further claimed that Mario and Marija Medancic unconditionally guaranteed the payment on the note. Because the promissory note had not been paid, appellees claimed that the mortgage was

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<sup>1</sup>. For ease of discussion, appellants/cross-appellees will be referred to as appellants while appellees/cross-appellants will be referred to as appellees. However, when necessary, the parties will be referred to by their respective names.

<sup>2</sup>. This complaint was filed in trial court case number 98 F 000515. According to the answer filed in trial court case number 98 F 00851 and 98 F 000850, Mario and Mladen Medancic are principal shareholders and officers of A-Custom Builders.

in default.

Likewise, on November 23, 1998, appellees filed a third foreclosure complaint alleging that Mario and Marija Medancic had executed a promissory note on July 3, 1995, promising to pay appellees the sum of \$20,000 by November 1, 1995.<sup>4</sup> Pursuant to the complaint, this promissory note was secured by a mortgage deed, and Mladen and Karoline Medancic unconditionally guaranteed its payment. As in the other complaints, appellees alleged lack of payment and default on the mortgage deed.<sup>5</sup>

In response to these complaints, appellants filed answers, along with a counterclaim for breach of contract involving written agreements to purchase certain real property from appellees, which were executed in August 1993 and June 1996.<sup>6</sup>

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<sup>3</sup>. This complaint was filed in trial court case number 98 F 00850.

<sup>4</sup>. This complaint was filed in trial court case number 98 F 000851.

<sup>5</sup>. As an aside, we note that in each complaint, appellees list, as defendants, numerous creditors that had a claim and/or interest to the premises referred to in the mortgage deeds. As the proceedings continued, these defendants were either dismissed from the case or filed cross-claims against appellants.

<sup>6</sup>. With respect the counterclaim, it was pointed out during oral arguments that mutual mistake was never raised in the pleading by the parties. Normally, the failure to plead an affirmative defense would result in waiver of that defense. However, Civ.R. 15(B) provides that issues not raised in the pleadings, to wit: an affirmative defense, will be treated as if they had been raised when those issues are tried by the express or implied consent of the parties. *McCabe/Marra Co. v. Dover* (1995), 100 Ohio App.3d 139, 148, citing *Hoover v. Sumlin* (1984), 12 Ohio St.3d 1, 4; *State ex rel. Evans v. Bainbridge Twp. Trustees* (1983), 5 Ohio St.3d 41; *Cooper v. Grace Baptist Church of Columbus, Ohio, Inc.* (1992), 81 Ohio App.3d 728. Thus, “[the] failure to amend the pleadings shall not affect the result of trial of such issues.” *Patterson v. Blanton* (1996), 109 Ohio App.3d 349, 356. In light of the foregoing, it is possible that the unpled issue of mutual mistake

Eventually all three cases were consolidated by the trial court for purposes of adjudication. After this matter came on for a bench trial on December 6 and/or 7, 1999, the trial court issued two judgment entries on September 5, 2000.<sup>7</sup>

Insofar as appellees' foreclosure claims were concerned, the trial court found in their favor and ordered appellees to recover the following amounts on the promissory notes: \$37,500, with interest, from A-Custom Builders; \$67,000, with interest, from Karoline, Mario, and Marija Medancic; \$20,000, with interest, from Mario, Marija and Karoline Medancic. Additionally, appellees were entitled to a judgment of foreclosure against the above named appellants if the money judgment was not paid.

With respect to the counterclaim for breach of contract, the trial court made the following findings of fact:

"The defendant Medancic Builders entered into a valid

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was tried by express or implied consent of the parties during the bench trial. However, appellate review of this matter is hampered as a transcript of the bench trial is not contained in the appellate record. Consequently, without a transcript, this court is unable to properly address the following issues: (1) whether mutual mistake was properly pled to the trial court; and (2) whether an implied amendment of the pleadings occurred under Civ.R. 15(B) during the bench trial. Because the transcript has been omitted from the record on appeal, this court "has no choice but to presume the validity of the lower court's proceedings, and affirm." *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, 199. Accordingly, we will presume that mutual mistake was properly pled to the trial court.

<sup>7</sup> It is unclear from the trial court's docket statement whether a one or two day trial took place. Appellants and appellees contend in their respective briefs that a trial in this matter lasted for two days.

contract on August 31, 1993, to purchase certain parcels of land from plaintiffs [Mayers].

“The 1993 contract was replaced by a new contract on June 20, 1996, for the sale and purchase of certain parcels of land by and between Marcia A. Mayer and A-Custom Builders, Inc., with Mario Medancic, Maria Medancic, Mladen Medancic and Karoline D. Medancic as guarantors for A-Customer Builders, Inc.

“Prior to the execution of the June 20, 1996 contract, the Medancics, d.b.a. Medancic Builders, paid plaintiffs the sum of \$175,000.00 for the acreage which was not subdivided and \$30,000.00 for an additional subplot which was ultimately transferred to Mario and Maria Medancic. Subsequent to the execution of the 1996 contract, defendant A-Custom Builders, Inc., and/or its agents paid plaintiffs an additional \$3,000.00 for unsubdivided acreage.

“Defendant A-Custom Builders, Inc., and its guarantors were in default of their obligation of payment under the August 3, 1993 and June 20, 1996 contracts for the acreage that was not already subdivided into buildable lots.

“\*\*\*

“The agreement for the unsubdivided acreage clearly contemplated subdivision of the land followed by residential development. Due to a mutual mistake of fact, i.e., the ‘wetlands’ condition of a significant part of the acreage, the contemplated subdivision and development was not possible. Accordingly, the agreements, to the extent that they represent [the] purchase of unsubdivided acreage for development, should be rescinded, and the monies paid therefor in the sum of \$148,000 (\$175,000 plus \$3,000 paid less \$30,000 (for Marion [*sic*] Medancic’s residence) refunded to A-Custom Builders, Inc., plus interest at ten percent (10%) per year from the date of judgment.”

In summation, the trial court rescinded those portions of the 1993 and 1996 contracts

representing the purchase of unsubdivided acreage for development on the basis of mutual mistake concerning the wetlands condition on the acreage. As a result, appellees were ordered to refund \$148,000 to A-Custom Builders.

Subsequently, on October 3, 2000, a *nunc pro tunc* order on the counterclaim was issued by the trial court to make minor corrections to the September 5, 2000 judgment entry. For instance, in the September 5, 2000 judgment entry, the figures of \$3,000 and \$30,000 were transposed, and this was corrected by the *nunc pro tunc* order.

It is from these judgments that appellants filed notices of appeal and now present the following assignments of error for our consideration:<sup>8</sup>

“[1.] Having rescinded the Agreement of 1993 and ordering Appellees to return funds paid to them thereunder by appellants, the Court erred in not ordering the funds returned with interest from the date of payment rather than the date of judgment.

“[2.] The Court erred in failing to order a set-off of funds it found due appellees and funds it found due appellants instead of ordering a sale of appellant’s property since the funds due the appellants from appellees was [*sic.*] greater than the funds due on the foreclosed mortgage.

“[3.] The Court erred in granting judgment to appellees and ordering foreclosure of appellants’ property when appellees were holding appellants’ funds exceeding the amount due on said mortgages.

“[4.] The court erred in subtracting \$30,000.00 from the \$178,000.00 due appellants from appellees.”

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<sup>8</sup> Appellees filed a cross appeal in this matter, and it will be addressed later in this opinion.

Appellants' first assignment of error concerns the decision of the trial court on the counterclaim wherein the court ordered appellees to refund \$148,000 to A-Custom Builders. Here, appellants contend that this order of repayment should bear interest from the date of payment rather than from the date of judgment. According to appellants, the amount due was *clear*, based on certain cancelled checks made payable to appellees, which were *admitted into evidence during the bench trial*. Thus, appellants maintain that because the amount due was ascertainable, they are entitled to interest from the date of payment.

The claim for prejudgment interest with respect to appellant's counterclaim for breach of contract is governed by R.C. 1343.03(A). *Chester v. Custom Countertop & Kitchen, Inc.* (Dec. 17, 1999), Trumbull App. No. 98-T-0193, unreported, 1999 WL 1299301, at 3. R.C. 1343.03(A) states in part:

“[W]hen money becomes due and payable \*\*\* 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 \*\*\* a contract \*\*\*, the creditor is entitled to interest at the rate of ten per cent per annum \*\*\*.”

Further, “[u]nder R.C. 1343.03(A), a trial court does not have discretion in awarding prejudgment interest.” *Slack v. Cropper* (2001), 143 Ohio App.3d 74, 85. When considering the issue of when prejudgment interest is to be awarded, the Supreme Court of Ohio announced the following standard:

“[I]n determining whether to award prejudgment interest

pursuant to \*\*\* [R.C] 1343.03(A), a court need only ask one question: *Has the aggrieved party been fully compensated?*” (Emphasis added.) *Royal Elec. Constr. Corp. v. Ohio State Univ.* (1995), 73 Ohio St.3d 110, 116.

Thus, pursuant to *Royal Elec.*, prejudgment interest involving breach of contract claims is to be awarded in order “to make the aggrieved party whole.” *Id.* at 117. In order to make the aggrieved party whole, the party is compensated “for the period of time between accrual of the claim and judgment, *regardless* of whether the judgment is based on a claim which was liquidated or unliquidated and even if the sum due was not capable of ascertainment until determined by the court.” (Emphasis added.) *Id.*<sup>9</sup>

In analyzing the trial court’s decision to award prejudgment interest from the date of judgment, which was rendered pursuant to a bench trial, this court would normally examine the transcript of the proceeding. However, appellants have failed to provide this court with such a transcript or other acceptable alternative such as a statement of evidence pursuant to App.R. 9(C), or presenting an agreed statement of the case pursuant to App.R. 9(D).

It is well-settled that appellants, as the party challenging the trial court’s decision, has the duty to file the transcript so to ensure that an appellate court can properly evaluate the lower court’s decision. *Knapp* at 199. See, also, App.R. 9(B). Consequently, appellants’ failure to file the transcript prevents this court from addressing the first assignment of

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<sup>9</sup> Accordingly, appellants’ assertion that they are entitled to prejudgment interest from the date of payment as this was when the amount was ascertainable has been rejected

error because a review of this matter depends upon an evaluation of the evidence admitted at trial to determine whether the aggrieved party, to wit: A-Custom Builders, has been fully compensated and made whole.

“When portions of the transcript necessary for resolution of assigned errors are omitted from the record, the reviewing court has nothing to pass upon and thus, as to those assigned errors, the court has no choice but to presume the validity of the lower court’s proceedings, and affirm.” *Knapp* at 199. Hence, in the absence of a transcript, an appellate court must presume regularity in the trial court’s proceedings and accept its judgment. *Knapp* at 199; *Wozniak v. Wozniak* (1993), 90 Ohio App.3d 400, 409. For these reasons, appellants’ first assignment of error is without merit.

Because assignments of error two and three are interrelated in that they challenge the trial court’s order of foreclosure, we will consolidate these assignments of error for purposes of analysis and resolution.<sup>10</sup>

Under the second and third assignments of error, appellants suggest that rather than order a foreclosure and sale of their properties, the trial court should have set off A-Custom Builders’ judgment of \$148,000 on their breach of contract counterclaim against appellees’ judgment of \$124,500 on their promissory notes. According to appellants, it was inequitable for the trial court to order the sale of their property if the sum of \$124,500

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by the Supreme Court in *Royal Elec.*

<sup>10</sup> Unlike in the first assignment of error, a transcript of the bench trial is not necessary for review of the second and third assignments of error as we are reviewing the

was not paid to appellees because appellees owed appellants \$148,000.<sup>11</sup>

“A trial court’s authority to set off one judgment against another involving the same parties is a well-established equitable principle.” *Krause v. Krause* (1987), 35 Ohio App.3d 18, 19, citing *Barbour v. National Exchange Bank* (1893), 50 Ohio St. 90, 98. Such a decision will not be disturbed on appeal absent an abuse of discretion. *Diehl v. Friester* (1882), 37 Ohio St. 473, paragraph two of the syllabus; *Krause* at paragraph two of the syllabus; *Thomas v. Papadelis* (1984), 16 Ohio App.3d 359, paragraph three of the syllabus. When applying the abuse of discretion standard, an appellate court may not substitute its judgment for that of the trial court. *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621.

Upon consideration, we determine that it was not inequitable for the trial court to order the foreclosure and sale of appellants’ properties if appellants did not pay the amounts due under the promissory notes within three days.<sup>12</sup> Rather, it was within the

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legal conclusions of the trial court.

<sup>11</sup>. Appellees contend that appellants’ argument for set off is improper because appellants never appealed the order of foreclosure and sale. However, a review of the three notices of appeal show that while appellants failed to attach a copy of the foreclosure judgment to two of the notices, the notices themselves, in fact, refer to the foreclosure order. Moreover, the record indicates that appellants attempted to amend their notices of appeal so that the proper foreclosure judgment accompanied each notice. We further note that the attachment of a copy of the appealed judgment to the notice of appeal is a procedural rather than a jurisdictional requirement. Because the notices of appeal refer to the foreclosure order and were timely filed, we conclude that this court has jurisdiction over this matter. Any error made by appellants in filing and attempting to amend their notices does not affect our ability to review the merits of this appeal.

trial court's discretion to order the foreclosure and sale of appellants' properties rather than order a set off.

In the instant cause, the promissory notes were secured by certain mortgage deeds executed by appellants. Thus, when appellants defaulted on the promissory notes, appellees, as secured creditors, had a right to a particular remedy, namely foreclose on three separate mortgages on property owned by appellants. *Baker & Sons Equip. Co. v. GSO Equip. Leasing, Inc.* (1993), 87 Ohio App.3d 644, 648. "The right of setting off judgments \*\*\* is permitted *only where it will infringe on no other right of equal grade.*" (Emphasis added.) 64 Ohio Jurisprudence 3d (1985), Judgments, Section 771. See, also, *Diehl, supra; Thomas* at 361. As such, a set off in the instant matter would infringe on appellees' rights as creditors to seek foreclosure. For these reasons, appellants' second and third assignments of error are without merit.

In the fourth assignment of error, appellants challenge the trial court's calculation of their monetary judgment on their counterclaim. According to appellants, the trial court committed a mathematical error when it calculated the amount ordered to be refunded by appellees. Specifically, appellants suggest that the trial court mistakenly subtracted \$30,000 from \$178,000 to arrive at \$148,000.

In this assignment of error, appellants make no attempt to provide any factual reasons

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<sup>12</sup>. Additionally, appellants were ordered to pay certain cross-claimants a total of \$21,698 or face foreclosure on their properties. This amount was calculated pursuant to the figures provided by the trial court in the September 5, 2000 judgment entry of

in support of their contention. Rather, appellants merely argue that it is “*clear* that the court mistakenly subtracted \$30,000.00 from \$178,000.00 instead of \$208,000.00 \*\*\*.” (Emphasis added.) App.R. 12(A)(2) permits this court to disregard issues not argued in the brief.<sup>13</sup> However, in the interests of justice, we will review the merits of appellants’ claim that the trial court committed a mathematical error when it calculated their monetary judgment.

A review of the *nunc pro tunc* judgment entry indicates that the August 1993 contract to purchase certain real property from appellees for subdivision and residential development was substituted by the June 1996 contract. The trial court further found that A-Custom Builders and/or the Medancics individually paid appellees \$175,000 and \$3,000 for certain *unsubdivided acreage*, totaling \$178,000, while an additional \$30,000 was paid for a *sublot*.

As to the validity of the contracts, the trial court made the following determination:

“The agreements for the unsubdivided acreage clearly contemplated subdivision of the land followed by residential development. Due to a mutual mistake of fact, i.e., the ‘wetlands’ condition of a significant part of the acreage, the

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foreclosure and sale in trial court case number 98 F 000850.

<sup>13</sup>. App.R. 12(A)(2) reads as follows:

“The court may disregard an assignment of error presented for review if the party raising it fails to identify in the record the error on which the assignment of error is based or fails to argue the assignment separately in the brief, as required under App.R. 16(A).”

contemplated subdivision and development was not possible. *Accordingly, the agreements, to the extent that they represent [the] purchase of unsubdivided acreage for development, should be rescinded, and the monies paid therefor in the sum of \$148,000 (\$175,000 plus \$3,000 paid less \$30,000 [for Marion [sic] Medancic's residence] refunded to A-Custom Builders, Inc., plus interest at ten percent (10%) per year from the date of judgment.*" (Emphasis added.)

It is evident from the above portion of the trial court's judgment entry that the court rescinded those portions of the contracts that dealt with the unsubdivided property and refunded the monies paid by appellants for such property. Pursuant to the figures provided in the judgment entry, A-Custom Builders and/or the Medancics individually paid \$178,000 (\$175,000 + \$3,000) for the unsubdivided property.

However, for reasons that are not reflected in the *nunc pro tunc* judgment entry, the \$178,000 paid by appellants was reduced by \$30,000, for a final total of \$148,000. Presumably, the \$30,000 represents the amount paid by appellants to appellees for a subplot, while the \$178,000 represents the amount paid by appellants to appellees for certain unsubdivided acreage.

Because the foregoing analysis engages in a certain amount of speculation on our part, we choose to refrain from entering judgment on this issue. Instead, we remand this issue to enable the trial court to clarify and specify why it subtracted \$30,000 from \$178,000, and/or recalculate this award on the counterclaim for breach of contract. Accordingly, appellants' fourth assignment of error is well-taken to the limited extent indicated.

Having disposed of the direct appeal, now, we turn to appellees' cross-appeal wherein they submit the following assignments of error:

"[1.] The trial court erred in denying Plaintiffs' Motion to have Request for Admissions not responded to deemed admitted.

"[2.] The trial court erred in rescinding the 1993 Agreement and the 1996 Agreement, and ordering \$148,000 paid pursuant thereto returned to Defendants.

"[3.] The trial court erred in finding that Defendants were due a \$25,000 Supervision Fee pursuant to the 1996 Agreement.

"[4.] The trial court erred in denying Plaintiff's [sic] Motion for Summary Judgment."

In the first assignment of error on cross-appeal, appellees contend that the trial court improperly denied their motion to have requests for admissions not answered to be deemed admitted.

Given that appellants failed to respond to discovery requests containing numerous requests for admissions, appellees filed a motion on November 30, 1999, to have the requests for admissions not answered by appellants deemed admitted. Appellants never filed a rebuttal or response to this motion. For reasons that are not reflected in the record before this court, the trial court denied this motion on December 6, 2000, the day of the bench trial.<sup>14</sup>

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<sup>14</sup>. According to appellees, the motion was denied without an opinion on the day of the trial. A review of the record confirms that the trial court never issued a judgment

However, a transcript of the bench trial wherein the trial court allegedly denied appellees' motion was not provided by appellees to this court. Consequently, appellate review of this matter is hampered.

Pursuant to *Knapp, supra*, and App.R. 9(B) and (C), appellees, as the party claiming error with the trial court's decision, bore the burden of having to file the transcript with this court. While appellees urge that a transcript is unnecessary to demonstrate the trial court's error, this court cannot determine whether the trial court had adequate reasons to rule as it did or whether appellants were provided an opportunity on the day of trial to present arguments on their behalf. Absent a transcript, this court must presume regularity in the trial court proceedings and affirm the judgment. *Knapp* at 199; *Wozniak* at 409.

Even if we assume *arguendo* that the trial court abused its discretion in denying appellees' motion, we would still be inclined to conclude that appellees suffered no prejudice therefrom.

Civ.R. 36(A) dictates that when a request for admission is filed, the opposing party *must* timely respond either by objection or answer:

*"The matter is admitted unless, within a period designated in the request, not less than twenty-eight days after service thereof or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by his attorney. If objection is made, the reasons therefor shall be stated. The answer shall specifically deny the*

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entry formally denying appellees' motion.

matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter.” (Emphasis added.)

“Failure to respond at all to the requests will result in the requests becoming admissions.” *Cleveland Trust Co v. Willis* (1985), 20 Ohio St.3d 66,67. See, also, *Klesch v. Reid* (1994), 95 Ohio App.3d 664, 674; *State Farm Fire & Cas. Ins. Co. v. Kall* (Mar. 31, 2000), Geauga App. No. 98-G-2203, unreported, 2000 WL 522524, at 6. Moreover, “[a] request for admission can be used to establish a fact, even if it goes to the heart of the case.” *Cleveland Trust* at 67.

In the instant matter, appellants were served with the following requests for admissions:

“[1]. Admit that Medancing Builders, Inc., is an Ohio Corporation, the ownership of which is identical to Defendant.

“[2.] Admit that the document attached hereto and made a part hereof as Exhibit A, \*\*\* and titled PURCHASE AGREEMENT, is a true copy of the first agreement entered into between Plaintiff and others and Medancing Builders, Inc., and others on August 31, 1993.

“[3.] Admit that Defendant’s Counterclaim against Plaintiff for breach of contract is based in part on the terms of attached Exhibit A.

“[4.] Admit that the document attached hereto and made a part hereof as Exhibit B, \*\*\* and entitled AGREEMENT, is a true copy of the second agreement entered into between Plaintiff and others and Defendant and others on or about June 20, 1996.

“[5.] Admit that Defendant’s Counterclaim against Plaintiffs for breach of contract is based in part on the terms of attached Exhibit B.

“[6.] Admit that the AGREEMENT attached hereto as Exhibit B specifically provides by its terms that it cancels the PURCHASE AGREEMENT attached hereto as Exhibit A, and renders that PURCHASE AGREEMENT terminated, cancelled and of no effect.

“[7.] Admit that the AGREEMENT attached hereto as Exhibit B does not provide for the sale of any of the real property which are the subject of the three foreclosure actions in these consolidated cases.

“[8.] Admit that there are no other written agreements between Plaintiffs and Defendant except for Exhibits A and B.

“[9.] Admit that Exhibit A attached to the Complaint in Case No[s]. 98 F000515 [98 F000850 and 98 F000851] is a true copy of a Promissory Note dated January 8, 1995 [December 11, 1995 and July 3, 1995] and executed \*\*\* [by] Defendant.

“[10.] Admit that Exhibit B attached to the Complaint in Case No. 98 F000515 [98 F000850 and 98 F000851] is a true copy of a Mortgage Deed dated January 8, 1995 [November 18, 1995 and July 3, 1995] and executed \*\*\* [by] Defendant.”

Despite appellees’ arguments, a review of the judgment entries reveals that the trial court eventually accepted the above admissions. For instance, the *nunc pro tunc* judgment entry indicates that appellants’ counterclaim arose from the August 31, 1993 and June 20, 1996 contracts, and that “[t]he [August 31] 1993 contract was replaced by a new contract on June 20, 1996 \*\*\*. Further, “the parcels of land which are the subject of the plaintiffs’

foreclosure action are not part of the acreage that was to be subdivided pursuant to either contract.”

As for the requests for admissions that addressed the promissory notes, the trial court eventually ruled in appellees’ favor as to each note and ordered appellants to pay the amounts due with interest or face foreclosure.

Appellees, however, allege that once the existence and accuracy of the 1993 and 1996 agreements was admitted to by appellants, then the trial court would have had no basis to order rescission of either agreement and order the return of any funds paid by appellants. This is simply not true. A close review of the request for admissions shows that appellees merely asked appellants to admit to the following: (1) the copies submitted were true copies of the 1993 and 1996 agreements; (2) that these documents were the basis of appellants’ counterclaims; and (3) that the 1996 agreement cancelled the 1993 agreement. Appellees *never* requested appellants to admit that the 1993 and 1996 documents were *legally binding contracts*. Rather, the request was one for authentication and intent.

In summation, the admissions requested by appellees were eventually accepted by the trial court, and appellees suffered no prejudice when the court denied their motion. For these reasons, appellees’ first assignment of error on cross appeal is without merit.

To facilitate review, we will consolidate the second and third assignments of error. In the second assignment of error, appellees challenge the trial court’s decision to rescind the agreements on the basis of mutual mistake of fact and order the repayment of \$148,000.

Likewise, in the third assignment of error, appellees maintain that the evidence and facts do not support the trial court's decision to award appellants a \$25,000 supervision fee pursuant to the 1996 contract for the construction of a residence on a subplot when the court simultaneously found that "the contemplated subdivision \*\*\* was not possible."

As mentioned earlier in this opinion, a transcript of the bench trial was not filed with this court. In determining whether a mutual mistake of fact was made between the parties, questions of fact are, indeed, involved. Appellees' central argument here is that the facts and evidence do not support the trial court's finding of mutual mistake. However, without a transcript, this court cannot examine such an argument.

Similarly, a review of whether it was appropriate for the trial court to award appellants a \$25,000 supervision fee involves questions of fact. Again, this argument cannot be evaluated without a transcript of the bench trial. Therefore, because portions of the transcript necessary for resolution of these assigned errors have been omitted from the record on appeal, this court "has no choice but to presume the validity of the lower court's proceedings, and affirm." *Knapp* at 199.

Appellees, however, suggest that the trial court's decision to rescind the contracts was contrary to law. This contention is based on appellees' belief that the trial court attempted to equate the doctrine of mutual mistake with the doctrine of impossibility of performance as grounds for rescission of the contracts. Apparently, appellees are referring to the following emphasized portion of the *nunc pro tunc* judgment entry:

“The agreements for the unsubdivided acreage clearly contemplated subdivision of the land followed by residential development. *Due to a mutual mistake of fact, i.e., the ‘wetlands’ condition of a significant part of the acreage, the contemplated subdivision and development was not possible.* Accordingly, the agreements, to the extent that they represent [the] purchase of unsubdivided acreage for development, should be rescinded[.]” (Emphasis added.)

In light of the limited appellate record available to this court, we determine that the trial court was not attempting to liken the doctrine of impossibility of performance with the doctrine of mutual mistake. The *nunc pro tunc* judgment entry indicates that the 1996 agreement was rescinded due to a mutual mistake of fact because the extent of the wetland conditions was presumably unknown to the parties, and, as a result, frustrated the parties’ intent to subdivide and residentially develop the area.<sup>15</sup> Accordingly, appellees’ second and third assignments of error are without merit.

The final assignment of error on cross appeal takes issue with the denial of appellees’ motion for summary judgment with respect to their claim on the promissory note in the amount of \$37,500.<sup>16</sup>

A review of the record shows that even though the trial court denied their motion for summary judgment, appellees ultimately received the relief sought against appellants, to

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<sup>15</sup>. Generally speaking, a contract may be rescinded when there is a mutual mistake as to a material part of the contract. *Reilley v. Richards* (1994), 69 Ohio St.3d 352, 353. “Thus, the intention of the parties must have been frustrated by the mutual mistake.” *Id.* at 353.

<sup>16</sup>. This motion was filed in trial court case number 98 F 000515.

wit: payment on the promissory note in the amount \$37,500 with interest at the rate of twelve percent per annum from January 5, 1996, with an order of foreclosure if appellants failed to make this payment. Accordingly, appellees' fourth assignment of error is rendered moot.

Based on the foregoing analysis, the trial court's September 5, 2000 judgment entry of foreclosure and sale is affirmed. However, the October 3, 2000 *nunc pro tunc* judgment entry on the counterclaim is affirmed in part, reversed in part, and the matter is remanded for proceedings consistent with this opinion. Specifically, the matter is

remanded for clarification and/or recalculation of the trial court's \$148,000 judgment in favor of A-Custom Builders on their breach of contract counterclaim. We further note that the stay previously granted by the trial court should remain in effect pending the decision of the trial court on remand.

JUDGE JUDITH A. CHRISTLEY

FORD, P.J., concurs,

GRENDALL, J., dissents with Dissenting Opinion.

[Cite as *Mayer v. Medancic*, 2001-Ohio-8782.]

**COURT OF APPEALS  
ELEVENTH DISTRICT  
GEAUGA COUNTY, OHIO**

JUDGES

MARCIA A. MAYER, et al.,  
Plaintiffs-Appellees,

HON. DONALD R. FORD, P.J.,  
HON. JUDITH A. CHRISTLEY, J.,  
HON. DIANE V. GRENDELL, J.

- vs -

MLADEN MEDANCIC, et al.,  
Defendants-Appellants,

CASE NOS. 2000-G-2311,  
2000-G-2312,  
and 2000-G-2313

JAMES CONRAD, ADMINISTRATOR,  
BUREAU OF WORKERS'  
COMPENSATION,

Appellant.

DISSENTING OPINION

GRENDELL, J.

While I agree with several portions of the majority's decision, I must respectfully dissent for the following reasons. I disagree with the majority's ruling on appellants' second assignment of error (the trial court's error in ordering a set-off) and third assignment of error (the trial court's ordering foreclosure).

On its face, ordering the sale of appellants' property to pay \$124,500 to appellees when appellees owe appellants a \$148,000 judgment from the same court is inequitable and contrary to basic principles of judicial economy. Under the circumstances, the trial court's failure to order a set-off and ordering foreclosure constitute abuses of discretion.

For these reasons, as well as for clarification of the mathematical issue raised by appellants' fourth assignment of error, I would reverse and remand this case.

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JUDGE DIANE V. GRENDALL

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

DENISE L. KAMINSKI  
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  
Defendants. : JUDGMENT ENTRY

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, nowhere 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, 8<sup>TH</sup> 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

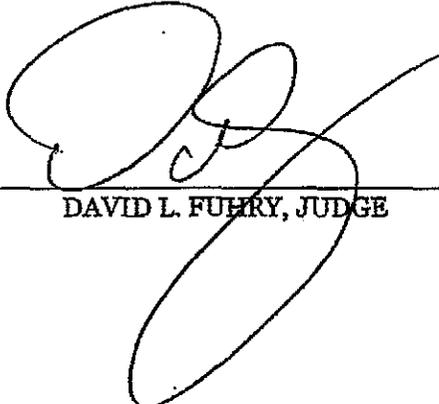
surprising since the parties have been contesting this matter for about eight years, and there are volumes of files and papers in the Court's file.

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.



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DAVID L. FUHRLY, JUDGE

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

### **R.C. 1343.02 Written stipulations for payment of interest.**

Upon 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.

Effective Date: 07-01-1962

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### **R.C. 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.

Effective Date: 06-02-2004