

IN THE SUPREME COURT OF OHIO
CASE NOS 2009 - 0170 and 2008-2363

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

FILED
AUG 03 2009
CLERK OF COURT
SUPREME COURT OF OHIO

REPLY BRIEF OF APPELLANTS

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REPLY BRIEF OF APPELLANTS

This case is not about the importance of interest to make a creditor whole or the appropriateness of compound interest to punish a bad-faith debtor as appellees seem to suggest in their merit brief while avoiding the question certified to this court: is the awarding of compound interest appropriate in the absence of a contractual or statutory provision for compound interest?

Appellants argue it is not, and none of the cases cited by Appellees are relevant to that issue.

There is nothing in the record of this case suggesting that Appellants are bad-faith debtors.

As the 11th District Court of Appeals has stated in its opinion herein, this case has “a tortuous history” and has been to that court four (4) times since the trial court granted judgment in this case on May 18, 2000. Judgments were granted to Appellants totaling \$148,000.00 while Appellees were granted judgments totaling only \$124,500.00. None of those judgments have been paid by either party.

Disputes over those judgments resulting in appellate and further trial court proceedings have delayed payment, not bad faith.

During the entire time of litigation in this matter, court-ordered stays of proceedings have been in effect. None of the parties could enforce their judgments. The status quo was maintained.

There was no wrongful withholding of payments.

Indeed, Appellants attempted to resolve this matter by tendering an official check in the amount of \$276,326.99 to counsel for Appellees on January 19, 2007, but that check was not accepted because simple interest (pursuant to the April 19, 2006 court order), not compound interest, was used in calculating the amount due.

Thereafter, Appellants filed their motion requesting the trial court to resolve that dispute. The trial court determined that simple interest was appropriate, as it had already ruled in its entry of April 19, 2006 and then issued its nunc pro tunc entry of March 4, 2008 from which Appellees appealed.

Appellees in their Merit Brief state that the 11th District Court of Appeals overruled Appellants' objections to that court's jurisdiction. They argued that an appeal in 2008 from a nunc pro tunc entry is beyond the appeal period as it relates back to the original entry of 2006.

This Eighth District Court of Appeals ruled in *Gold Touch Inc. v. TJS Lab, Inc.* (1998), 130 Ohio App. 3d 106. that a court cannot extend the appeal period by issuing a nunc pro tunc entry.

The Court added that the use of a nunc pro tunc order does not extend the normal 30-day appeal period where no substantial changes were made to the final order.

The 11th District, however, stated that the 2008 entry was not a true Nunc Pro Tunc entry, and accepted the appeal, stating that the entry did not correct the 2006 entry but modified it.

However, Appellants contend it did not modify the 2006 entry, it merely added the Rule 54 (B) language to permit Appellees to file their appeal.

Appellees attached to their Notice of Appeal a copy of an Agreed Entry in which the parties resolved their disputes except for the issue of simple versus compound interest.

CASES CITED AND RELIED ON BY APPELLEES:

Lehrner v. Safeco Inc./Am States Ins. Co., 171 Ohio App.3d 570, 2007-Ohio 795

Appellees erroneously claim that *Lehrner* supports their position in this matter rather than that of Appellants. But *Lehrner* held that prejudgment interest merged with the judgment and is subject to post-judgment interest at a simple, not compound, rate.

Appellees also cite *Nakoff v. Fairview Gen. Hosp.* (1997), 118 Ohio App.3d 786 which adds that where periodic payments of interest are not made as promised (pursuant to a contractual provision), interest upon interest is computed, but such interest is not compound interest.

In *State ex rel Bruml v. Brooklyn* (1943), 141 Ohio St. 593, periodic payment of interest each six (6) months were not made and such payments were added to the principal, the total being subject to post judgment interest, not compound interest.

Although *Bruml* did not use the term compound interest, the 11th District Court of Appeals did, in the case at bar.

Lehrner and *Nakoff* support *Bruml* but not the case at bar, which does not involve promised periodic payments of interest to be added to principal subject to post-judgment interest.

The bonds in *Bruml* promised periodic payments of interest. The notes in the instant case did not.

The *Lehrner* court specifically held that awarding post judgment interest upon prejudgment interest which merges with the judgment, or principal, is not compound interest but simple interest.

Bruml does not apply to the case at bar which did not involve periodic payments of interest which merged with principal subject to post-judgment interest.

Other cases cited by Appellees that involved prejudgment interest merging with the principal or judgment subject to post-judgment interest do not apply to the case at bar and do not support the 11th District's opinion herein.

Similarly, cases cited by Appellee holding that interest is to make the parties whole is not questioned by Appellants and have no application to this matter.

Valentine Concrete, Inc. V. Ohio Dept. of Adm. Serv. (1991), 62 Ohio Misc.2d 626

Appellees argue that compound interest is appropriate if the parties intend that interest is to be compounded. In support of this argument they refer to an affidavit signed by one of the appellees six years after the trial of this matter which was attached to their brief in support of compound interest filed on February 17, 2006. None of the appellants had signed this affidavit. The trial court, in its opinion dated April 19, 2006, rejected the affidavit as being self-serving, saying "The Court finds that Plaintiff's affidavit that compound interest was implied or intended is not sufficient to overcome the plain meaning provided in the language of the notes."

That Affidavit does not support Appellees' argument that all parties intended interest on the notes in this case to be compounded. *First City Securities Inc. V. Shaltiel* (C.A.7 1995), 44 F.3d 529. *Mastro v. Witt* (C.A.9 1994), 39 F.3d 238.

Other cases cited by Appellees held compound interest was appropriate to punish wrongful delay in payment of debt, or where parties had agreed to compound interest or when prejudgment interest merges with principal or judgment becoming subject to simple post-judgment interest.

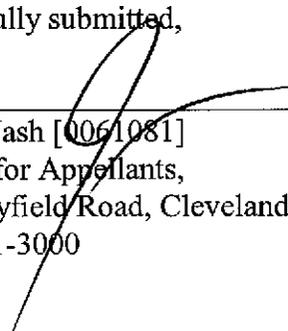
None of those cases is applicable to the issue of awarding compound interest on a promissory note absent a contractual or statutory provision for compound interest, as the 11th District court of appeals did in this case.

Appellants maintain that compound interest in the case now before this court is inappropriate as the promissory notes in this case contain no contractual provision for compound interest, the parties did not intend that interest should be compounded nor did Appellants wrongfully withhold payment.

Viock et al v. Stowe-Woodward Co., 59 Ohio App 3d 3; 563 N.E.2d 1069, cited by both parties herein, cited *State ex rel Elyria v. Trubey (1984)*, 20 Ohio App 3d 8, 9;20 OBR 8, 484 N.E.2d 169, as follows: The general rule concerning calculation of post-judgment interest is “that when no specific provision for interest is noted, then simple interest is to be awarded.

The decision of the 11th District Court of appeals should be reversed.

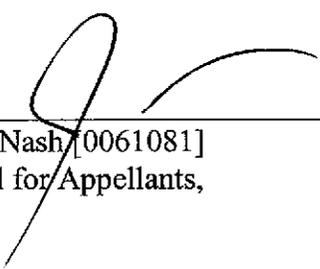
Respectfully submitted,



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CERTIFICATE OF SERVICE

A copy of the foregoing has been served on Timothy T. Brick and Catherine Peters, Counsel for Plaintiffs-Appellees, Marcia A. Mayer and Robert Mayer at GALLAGHER SHARP, Bulkley Building, Sixth Floor, 1501 Euclid Avenue, Cleveland, OH 44115-2108 by regular mail on July 30th, 2009.



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