[Cite as *Hance v. Allstate Ins. Co.*, 2009-Ohio-2809.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

CLERMONT COUNTY

PAMELA HANCE,	:	
Plaintiff-Appellant,	:	CASE NO. CA2008-10-094
	:	O P I N I O N
- vs -		6/15/2009
	:	
ALLSTATE INSURANCE COMPANY,	:	
Defendant-Appellee.	:	

CIVIL APPEAL FROM CLERMONT COUNTY COURT OF COMMON PLEAS
Case No. 2004-CVC-822

O'Connor, Acciani & Levy, LLC, Henry D. Acciani, 2200 Kroger Building, 1014 Vine Street, Cincinnati, OH 45202, for plaintiff-appellant

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POWELL, J.

{¶1} Plaintiff-appellant, Pamela Hance (Hance), appeals the Clermont County Court of Common Pleas' denial of her motion for prejudgment interest against defendant-appellee Allstate Insurance Company (Allstate). We affirm the trial court's decision.

{¶2} On October 24, 1997, Hance was injured in an automobile accident caused by Marian Perkins (Perkins). Both Hance and Perkins were insured by Allstate. Perkins' policy had a $25,000 liability limit, while Hance's policy carried an underinsured motorist coverage of $100,000. Hance filed a complaint against Perkins for negligence and against Allstate for her underinsured motorist benefits, breach of contract, and a breach of duty to act in good faith. Hance, with Allstates' permission, settled her claim against Perkins for $20,000. The issue of damages recoverable under Hance's underinsured motorist policy went to trial, and a jury returned a $170,231.33 verdict for Hance. After the verdict, Hance moved for prejudgment interest pursuant to R.C. 1343.03(C). Hance also requested a hearing, and filed a notice to depose Allstate in order to obtain discovery in support of her motion for prejudgment interest. The trial court denied Hance's motion for prejudgment interest and, based on policy limitations and setoff for Perkins' policy, entered judgment against Allstate for $75,000.[1] Allstate tendered a check for $75,000 to Hance. The bad faith claim against Allstate was subsequently settled by the parties for $20,000. Hance filed an appeal raising a single assignment of error.

{¶3} "THE TRIAL COURT ERRED IN DENYING PLAINTIFF'S MOTION FOR PRE[]JUDGMENT INTEREST."

{¶4} Within her assignment of error regarding the trial court's denial of her motion for prejudgment interest, Hance raises two sub-issues. First, Hance asserts that R.C. 1343.03(C) applies to her case, thus she argues the trial court erred in relying on R.C. 1343.03(A) in rendering its decision. Second, Hance contends that the interest she

1. Hance's underinsured motorist policy limit was $100,000, less Perkins' $25,000 policy limit, leaving a $75,000 balance owed by Allstate.

believes she is owed should have begun accruing as of the date of her accident.

{¶5} The right to recover interest is governed by R.C. 1343.03. We note that within the statute, interest is neither defined nor identified as prejudgment or postjudgment interest; however, R.C. 1343.03 has been applied in granting both types of interest. See, e.g., *Landis v. Grange Mut. Ins. Co.,* 82 Ohio St.3d 339, 342, 1998-Ohio-387; *Maynard v. Eaton Corp.*, 119 Ohio St.3d 443, 2008-Ohio-4542. Thus, whether the interest sought or granted is prejudgment or postjudgment will necessarily be classified by the date from which the interest is calculated.

{¶6} Which subsection of R.C. 1343.03 is applicable to a given case depends on whether the cause of action lies in contract or tort. *Lehrner v. Safeco Ins./Am. States Ins. Co.*, 171 Ohio App.3d 570, 2007-Ohio-795, ¶72. R.C. 1343.03(A) states in pertinent part, "when money becomes due and payable upon any * * * instrument of writing * * * and upon all judgments * * * 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." Alternatively, R.C. 1343.03(C)(1) states in part, "[i]f, upon motion of any party to a civil action that is based on tortious conduct, that has not been settled by agreement of the parties, and in which the court has rendered a judgment, decree, or order for the payment of money, the court determines at a hearing held subsequent to the verdict or decision in the action that the party required to pay the money failed to make a good faith effort to settle the case and that the party to whom the money is to be paid did not fail to make a good faith effort to settle the case, interest on the judgment, decree, or order shall be computed * * *."

{¶7} Based on the wording of the statute, it is understandable that one who is the victim of a tort via a vehicular accident would believe that R.C. 1343.03(C) rather than R.C. 1343.03(A) applies to the cause of action. See *Martin v. Cincinnati Ins. Co.*, Logan App. No. 08-98-31, 1999-Ohio-779, 4-5 (finding "the statutory language of R.C. 1343.03(C), * * * appear[s] facially to apply to *all* civil actions based upon tortious conduct" (Emphasis sic.)). However, this court has held that R.C. 1343.03(A) is the interest provision related to contract claims.[2] *Lee v. Motorists Mut. Ins. Co.* (Aug. 15, 1994), Butler App. No. CA94-02-027, at 5, citing *Laubscher v. Branthoover* (1991), 68 Ohio App.3d 375, 383. See, also, *Wagner v. Midwestern Indemn. Co.* (1998), 83 Ohio St.3d 287, 293, fn. 2. R.C. 1343.03(C), in turn, is applicable to those tort cases where there is an issue regarding lack of good faith on the part of one of the parties in failing to settle a tort claim. The policy between Hance and Allstate is a contract, therefore R.C. 1343.03(A) clearly applies. Furthermore, we are guided by past case law, and our own precedent, in declining to find R.C. 1343.03(C) applicable to Hance's case.

{¶8} In *Hofle v. General Motors Corp.*, Warren App. No. CA2002-06-062, 2002-Ohio-7152, this court stated, "[i]t is well-established that an action by an insured against his or her insurance carrier for payment of [underinsured motorist] benefits is a cause of action sounding in contract, rather than tort, even though it is tortious conduct that triggers applicable contractual provisions." Id. at ¶8, citing *Landis*, 82 Ohio St.3d at 341. This is based on the fact that the underinsured motorist benefit claim arises out of the insurance contract between the parties. *Landis* at 341.

2. We note that the plain language within this portion of the statute clearly states R.C. 1343.03(A) is applicable to torts because it says money may be due and payable on "judgments * * * for the payment of money arising out of tortious conduct." However, this section is applicable to postjudgment, rather than prejudgment interest.

{¶9} In her first argument regarding the application of R.C. 1343.03(C), rather than R.C. 1343.03(A), to her uninsured motorist claim, Hance relies on *Miller v. Gunckle,* 96 Ohio St.3d 359, 2002-Ohio-4932.

{¶10} We are mindful that the Supreme Court in *Miller*, which overruled this court's decision to limit prejudgment interest to policy maximums, cited to R.C. 1343.03(C) in holding that "an insurer is liable for an entire award up to the insured's policy limit plus any prejudgment interest awarded on that policy limit." Id. at ¶31. However, we believe the Supreme Court never intended to suggest that R.C. 1343.03(C), rather than R.C. 1343.03(A), applied to underinsured motorist claims as this would effectively overrule its decision in *Landis*.

{¶11} In this finding, we are in complete agreement with the Second District Court of Appeals when it stated, in reference to an identical argument, that, "[t]he [*Miller*] majority's citation to R.C. 1343.03(C) is puzzling, given that the parties, the court of appeals, and even the dissent, consistent with *Landis,* reviewed and discussed the case in the context of R.C. 1343.03(A)." *Lehrner v. Safeco Ins./Am. States Ins. Co.*, 171 Ohio App.3d 570, 2007-Ohio-795, ¶73. Therefore, although *Miller* is a more recent decision than *Landis*, we believe that its holding is dicta to the extent that the decision was not premised on application of a particular subsection of R.C. 1343.03 to underinsured motorist claims, but instead was based upon policy considerations behind prejudgment interest awards. See *Miller*, 96 Ohio St.3d at ¶27-29. See, also, *Lehrner* at ¶73 (finding the *Miller* holding dicta for substantially similar reasoning).

{¶12} Therefore, the trial court was entirely correct in relying on R.C. 1343.03(A) when rendering its decision regarding interest on Hance's underinsured motorist claims.

As such, we may dispense with Hance's additional arguments regarding good faith in settling the case because they are only applicable to interest claims under R.C. 1343.03(C). Accord, *Landis*, 82 Ohio St.3d at 341. Because we find R.C. 1343.03(A) applies, we must now determine whether the trial court erred in denying Hance's motion for prejudgment interest.

{¶13} Courts of this state have been inconsistent in identifying an appellate court's standard of review in cases involving application of R.C. 1343.03. Some courts have determined that interest granted pursuant to R.C. 1343.03(A) is mandatory, therefore the trial court does not have discretion in deciding whether to make the award.[3] See, e.g., *Slack v. Cropper,* 143 Ohio App.3d 74, 85, 2001-Ohio-8894; *Norfolk S. Ry. Co. v. Toledo Edison Co.*, Lucas App. No. L-06-1268, 2008-Ohio-1572, ¶80; *Hawkins v. Anchors*, Portage App. Nos. 2002-P-0098, 2002-P-0101, 2002-P-0102, 2004-Ohio-3341, ¶63. Other courts, including this one, have indicated that the decision whether to award or deny interest is discretionary. See, e.g., *Disbennet v. Utica Nat. Ins. Group*, Fayette App. No. CA2002-04-009, 2003-Ohio-2013, ¶23, citing *Cox v. Oliver Machinery Co.* (1987), 41 Ohio App.3d 28, 37; *Jones v. Progressive Preferred Ins. Co.*, 169 Ohio App.3d 291, 2006-Ohio-5420, ¶17, citing *Landis* at 342; *Stoebermann v. Beacon Journal Publishing Co.*, 177 Ohio App.3d 360, 2008-Ohio-3769, ¶33, citing *Tummino v. Gerber* (1997), 121 Ohio App.3d 518, 520.

{¶14} In *Royal Elec. Constr. Corp. v. Ohio State Univ.*, 73 Ohio St.3d 110, 1995-

3. As explained above, R.C. 1343.03(C) is inapplicable to this case, however, we find it noteworthy that interest is also mandatory in these cases so long as the party seeking prejudgment interest establishes the four requisites required by the statute. *Moskovitz v. Mt. Sinai Med. Ctr.*, 69 Ohio St.3d 638, 658, 1994-Ohio-324. The only discretion the trial court may exercise in these cases is determining whether there was a lack of good faith. Id.

Ohio-131, the Supreme Court stated, "in determining whether to award prejudgment interest pursuant to * * * 1343.03(A), a court need only ask one question: Has the aggrieved party been fully compensated?"[4] Id. at 116. Although this statement suggests there is discretion in making the award, the same court stated earlier in the opinion that the decision to allow prejudgment interest was not discretionary because of the mandatory nature of the statute. Id. at 115. Although the *Royal Elec.* court was referencing a statute allowing prejudgment interest in breach of contract actions against the state, the language is equally mandatory in R.C. 1343.03(A) as it specifically states, "the creditor is entitled to interest." Accord, *Dwyer Elec., Inc. v. Confederated Builders, Inc.* (Oct. 29, 1998), Crawford App. No. 3-98-18, 1998 WL 767442, at *3.

{¶15} Furthermore, the cases we have cited above, which have allowed discretion in whether to allow prejudgment interest, have often cited to cases involving application of R.C. 1343.03(C), which arguably allows more discretion because two of the four factors require a good faith analysis by the trial court. See *Dwyer Elec*. at *2; *Moskovitz v. Mt. Sinai Med. Ctr.*, 69 Ohio St.3d 638, 658, 1994-Ohio-324. See, also, *Disbennet*, 2003-Ohio-2013 at ¶23 (citing to *Cox*, 41 Ohio App.3d at 37, a case dealing with application of R.C. 1343.03(C)). Meanwhile, other cases have misconstrued previous case law in fashioning their abuse of discretion standard of review in these cases. See *Jones*, 169 Ohio App.3d at ¶17 (citing *Landis* at 342 for the proposition that a decision whether to grant prejudgment interest is discretionary whereas *Landis* was

4. In *Dwyer Elec., Inc. v. Confederated Builders, Inc.* (Oct. 29, 1998), Crawford App. No. 3-98-18, 1998 WL 767442, the Third District Court of Appeals found, "the question posed by the Supreme Court in the midst of its analysis [is] more of an elocutionary device which leads the reader to the ultimate holding in the case. The question: Has the aggrieved party been fully compensated? is followed by the court's finding that in order to be fully compensated, a party should receive interest for the lapse of time between the accrual of the claim and judgment. Thus, the court is merely inquiring whether there has been compliance with R.C. 1343.03(A)." Id. at *3, (Internal citations omitted). See, also, *Zunshine v. Cott*, Franklin App. No.

merely referring to a court's discretion *when* to grant prejudgment interest.

{¶16} Therefore, after careful review of these cases and the language in R.C. 1343.03(A), we hold that granting interest pursuant to the statute is a mandatory, rather than a discretionary, decision by the trial court.[5] However, this holding should not be interpreted to mean that we believe there was any intent by the legislature in enacting R.C. 1343.03(A) to require that "prejudgment" interest be compulsory in every claim involving an underinsured motorist policy.

{¶17} This does not mean that a trial court is divested of all discretion in a R.C. 1343.03(A) claim. Instead, this discretion is confined to a determination of when money becomes "due and payable." *Royal Elec.* at 115; *Dwyer Elec*. at *4.

{¶18} "In *Landis,* the Ohio Supreme Court expounded on the wide discretion granted to a trial court in determining the 'due and payable' date when awarding prejudgment interest under R.C. 1343.03(A). The court stated that '[w]hether the prejudgment interest in this case should be calculated from the date coverage was demanded or denied, from the date of the accident, from the date at which arbitration of damages would have ended if [the insurer] had not denied benefits, or some other time based on when [the insurer] should have paid [the insured] is for the trial court to determine.'" *Purvis v. State Farm Mut. Auto. Ins. Co.*, Warren App. Nos. CA2002-06-064, CA2002-07-068, 2003-Ohio-714, ¶11, quoting *Landis* at 342. We further note that

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06AP-868, 2007-Ohio-1475, ¶27.

5. **{¶a}** Several courts have held that when a plaintiff receives a judgment pursuant to a contract claim, the trial court is obligated to award prejudgment interest under R.C. 1343.03(A). See, e.g., *Martin v. Cincinnati Ins. Co.*, Logan App. No. 8-98-31, 1999-Ohio-779, ¶23, 25, appeal not allowed, 86 Ohio St.3d 1493; *Stoner v. Allstate Ins. Co.,* Morrow App. No. 05 CA 16, 2006-Ohio-3998, ¶18; *Parrish v. Coles,* Franklin App. Nos. 06-AP-696, 06AP-620, 2007-Ohio-3229, ¶68, appeal not allowed, 117 Ohio St.3d 1438, 2008-Ohio-1279.

{¶b} We do not limit our holding this narrowly because the statute clearly indicates that a creditor is entitled to interest when money becomes "due and payable" based on bonds, bills, notes, written

the insurer in *Landis* denied coverage altogether, while here, Allstate always acknowledged coverage, but could not reach agreement with Hance on the extent of her damages.

{¶19} In rendering its decision denying interest, the trial court acknowledged the discretion it had pursuant to *Landis* in choosing the "event or condition" that determines when interest is "due and payable." In particular the trial court stated that it "may review the facts of the case and determine the date on when the amount of the judgment became 'due and payable' for the purposes of the statute." In finding the amounts owed by Allstate were not "due and payable" until after the jury's verdict, the trial court relied on the parties' contractual agreement and *Eagle Am. Inc. Co. v. Frencho* (1996), 111 Ohio App. 3d 213; and *Kellog v. Doe* (Feb. 26, 1998), Cuyahoga App. No. 72619, 1998 WL 83204, which both held amounts owed by an insurance company did not become due and payable until after a verdict or judgment was rendered.

{¶20} As noted above, an insurance policy is a contract between the insurer and the insured. *Nationwide Mut. Ins. Co. v. Marsh* (1984), 15 Ohio St.3d 107, 109. "The words and phrases contained in an insurance policy must be given their plain and ordinary meaning unless there is something in the contract that would indicate a contrary intention." *McKeehan v. Am. Family Life Assur. Co. of Columbus,* 156 Ohio App.3d 254, 2004-Ohio-764, ¶4, citing *Olmstead v. Lumbermens Mut. Ins. Co.* (1970), 22 Ohio St.2d 212, 216. Courts may not alter the clear and unambiguous language of an insurance policy in order to reach a particular result which was not intended by the parties to the contract. See *Gomolka v. State Automobile Mut. Ins. Co.* (1982), 70 Ohio St.2d 166, 168.

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instruments, accounts, settlements, contracts, judgments, decrees, and orders. R.C. 1343.03(A).

{¶21} The trial court specifically directed its attention to a section of the contract which states:

{¶22} "If we cannot agree with the insured person or additional insured person that such person is legally entitled to recover damages from the owner or operator of an uninsured auto or on the amount of damages, then upon the mutual consent of Allstate and the insured person or additional insured person, the disagreement may be settled by arbitration. We and the insured person or additional insured person must mutually agree to arbitrate the disagreements. If we and the insured person or additional insured person do not agree to arbitrate, then the disagreement will be resolved in a court of competent jurisdiction."

{¶23} In reviewing this provision, the trial court found that the language clearly stated that Allstate became bound to pay Hance once a judgment had been rendered against the insurance company. The trial court also noted the similarities in the "if we cannot agree" provision in this case, and the contract provisions contained in the contracts at issue in *Eagle Am.* and *Kellog*. In both *Eagle Am.* and *Kellog* the contracts required the parties to agree to the amount of damages prior to the insurer paying the claim. After reviewing the evidence, the trial court found that because Hance and Allstate were disputing the extent of Hance's injuries and the amount she was due, Hance's award only became due and payable upon judgment, so no prejudgment interest was due.

{¶24} Upon review we cannot say the trial court abused its discretion in making this determination that the money owed Hance was "due and payable" upon judgment. The trial court clearly acknowledged its discretion in this matter, analyzed the facts of

this case, and construed the applicable provision of the contract to this case. In so holding we find ourselves in disagreement with both the Second and Fifth Appellate Districts which found interest was owed prior to judgment, despite contract provisions which suggested otherwise.

{¶25} In *Mundy v. Roy*, Clark App. No. 2005-CA-28, 2006-Ohio-993, the Second District Court of Appeals found that the jury verdict did not create the contractual obligation by the insurance company to compensate its insured pursuant to an underinsured motorist claim; it merely confirmed the fact that the insurance company had always owed the money to the insured pursuant to their contract. Id. at ¶32. In reaching this decision the *Mundy* court dealt with an identical contract provision, as the insurer in that case was Allstate. The Second District found the provision was merely a "forum selection clause" which could not "reasonably be construed to relieve Allstate of its obligation to pay prejudgment interest on the jury's verdict against it." Id. The Mundy court further added, "[w]e do not agree that Allstate owed Mundy nothing, for prejudgment interest purposes, merely because the parties disputed the amount of his damages and contractually had agreed to have the dispute resolved through arbitration or litigation." Id.

{¶26} In *Jewett v. Owners Ins. Co.*, Licking App. No. 01 CA 38, 2002-Ohio-1282, the Fifth District Court of Appeals found, after disagreeing with *Eagle Am.* and *Kellog* in light of *Landis*, "the fact that the amount of money appellees were entitled to was not determined until arbitration, in 1999, does not effect [sic] their right to recover prejudgment interest and does not preclude them from recovering prejudgment interest from any date prior to the date of arbitration." Id. at ¶44. The provision at issue in

Jewett was a requirement that the parties submit to arbitration in lieu of reaching an agreement.

{¶27} We are not vested with any authority to make a new contract for the parties. Where the terms of the contract are clear, we are merely tasked with applying those terms. Although we are aware there is no reference to interest or judgment within the provision, it is clear that the language states that there must be an agreement, arbitration or judgment to establish the insured is legally entitled to an award. In this case, the judgment obligated Allstate to pay Hance and as such, she was not entitled to interest. Therefore, because we may not substitute our judgment for the trial court, and because we find the trial court did not abuse its discretion, we overrule Hance's assignment of error.

{¶28} Judgment affirmed.

BRESSLER, P.J., concur.

WALSH, J., concurs in part and dissents in part.

WALSH, J., concurring in part and dissenting in part.

{¶29} Appellant's single assignment of error raises two issues. Appellant first argues that R.C. 1343.03(C) applies to this case. The trial court and the majority have correctly determined that the appropriate statute is R.C. 1343.03(A), and I concur with that portion of the decision. However, I dissent from the majority's determination that the trial court did not abuse its discretion when it failed to award prejudgment interest.

{¶30} The majority relies on certain contract terms in Hance's underinsured motorist policy to support its decision. Those terms appear in Hance's Allstate policy in

part 3, Uninsured Motorist Insurance Coverage SS at a paragraph entitled, IF WE CANNOT AGREE, at page 15 of the policy.

{¶31} The subject language starts: "If we cannot agree with the insured * * * that such person is legally entitled to recover damages from the owner or operator of an uninsured[6] auto *or* on the amount of damages * * *," with the remainder of the paragraph identifying the legal forum in which the parties are required to proceed on the failure to agree. (Emphasis added.)

{¶32} The trial court and the majority have inferred from the fact that the policy language says that if the parties cannot agree, as in this case, to the amount of damages, an implication arises that any damages are not "due and payable," as referred to by R.C. 1343.03(A), until judgment is rendered as to the amount due. The trial court and the majority rely on that inference and implication to deny prejudgment interest. Such analysis essentially prohibits ever awarding prejudgment interest on these facts.

{¶33} The two provisions at the beginning, separated by the disjunctive "or" (whether appellant is legally entitled to damages or the amount of said damages), describe the issues to be decided in the absence of a settlement agreement; they are separate concepts and are the objects of the forum selection clauses. The language used, "the amount of said damages," does not support a determination that prejudgment interest is not payable until, as in this case, Hance's damages are determined.

{¶34} There is no reference to prejudgment interest in the paragraph on which the trial court and the majority rely. In order to reach the conclusion of both the trial

6. Underinsured motorist is included in the definition of uninsured motorists, paragraph 5, page 12 of Hance's Allstate policy.

court and the majority that prejudgment interest is not payable until the amount due is determined either by arbitration or court judgment would require the process of hypallage, the semantic shift by which the attributes of the true subject are transferred to another subject. In other words, the conclusion is reached by implication.

{¶35} The policy language invoked by the facts of this case does not support any such implication or inference. While the policy language is cleverly written, it is referring, in this case, not to whether Allstate owes money to Hance, but how much. There are two subjects in the initial part of the policy language. The first "If we cannot agree with the insured * * * that such person is legally entitled to recover damages * * * " means Allstate denies contract coverage, and the matter then goes to arbitration or trial on the coverage issue, and if coverage, then damages. The second subject "If we cannot agree with the insured * * * on the amount of damages * * *" means Allstate agrees that it is responsible for coverage under the contract, but disagrees on the damage amount, the matter goes to arbitration or trial for determination of damages.

{¶36} In this case, Allstate insured both the tortfeasor and Hance under separate policies. Allstate settled Hance's claim against Perkins and paid Hance $20,000 on a policy with a $25,000 policy limit. This leaves only the issue of the amount of damages to be determined by an arbitrator or court trial under Hance's underinsured motorist coverage. The damages issue was submitted to the jury and the jury awarded Hance $170,000.[7]

{¶37} There is no legal or logical reason to require Hance to wait until the outcome of the damages issue is resolved before becoming entitled to prejudgment

7. The jury award language indicates that it determined the amount of damages sustained by Hance which were not attributable to Allstate's claim of a pre-existing degenerative condition.

interest on her judgment, if she receives an award of damages in excess of the settlement with Perkins. Under the facts of this case, Allstate has already shown that Hance "is legally entitled to recover damages," under its policy issued to Hance, and the only question is how much.

{¶38} Therefore, the trial court and the majority have misapplied the hypallage process by applying the inference from the "legally entitled to recover damages" phrase to the "amount of damages" phrase to arrive at the decision on prejudgment interest.

{¶39} Tort liability having been settled as it has in this case, damages became due and payable on the UIM coverage at some point prior to trial and the only issue left was the amount of damages, which was determined by jury verdict. That is the case for Hance and that is what was in the contemplation of the Ohio Supreme Court in *Royal Elec.Constr. Corp. v. Ohio State Univ.*, 73 Ohio St.3d 110, 1995-Ohio-131.

{¶40} I would reverse the trial court's decision and remand the matter to the trial court for a decision on prejudgment interest in light of the statute, R.C. 1343.03(A), and the controlling case law. Consequently, I must respectfully concur in part and dissent in part from the majority's decision.

Walsh, J., retired, of the Twelfth Appellate District, sitting by assignment of the Chief Justice, pursuant to Section 6(C), Article IV of the Ohio Constitution.