

**GRANT and Opinion Filed December 27, 2018**



**In The  
Court of Appeals  
Fifth District of Texas at Dallas**

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**No. 05-18-00175-CV**

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**TOP CAT READY MIX, LLC, Appellant**

**V.**

**ALLIANCE TRUCKING, L.P. AND TXI OPERATIONS, LP D/B/A MARTIN  
MARIETTA, Appellees**

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**On Appeal from the 191st Judicial District Court  
Dallas County, Texas  
Trial Court Cause No. DC-15-07419**

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**MEMORANDUM OPINION ON MOTION TO REVIEW TRIAL  
COURT'S ORDER SETTING AMOUNT OF SUPERSEDEAS  
SECURITY**

Before Chief Justice Wright, Justice Evans, and Justice Brown  
Opinion by Justice Evans

At issue in this motion to review supersedeas security is whether “contractual interest” on late payments is “compensatory damages” for purposes of Texas Civil Practice and Remedies Code section 52.006 and Texas Rule of Appellate Procedure 24.2(a)(1), which govern the suspension of enforcement of money judgments pending appeal. *See* TEX. CIV. PRAC. & REM. CODE § 52.006; TEX. R. APP. P. 24.2(a)(1). The trial court characterized the late-payment interest awarded as “contractual pre-judgment interest”<sup>1</sup> and, in setting the amount of security Top Cat Ready Mix, LLC had to post to suspend the judgment against it, did not include it as

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<sup>1</sup> The record reflects the parties used the term “pre-judgment interest” themselves at times when referencing the late-payment interest. In their filings with this Court, the parties also, at times, use that term.

“compensatory damages.” Alliance Trucking, L.P. asserts the trial court erred. We agree and increase the amount of security accordingly.

## **BACKGROUND**

The underlying appeal follows a May 10, 2017 summary judgment in favor of Alliance on its sworn account claim. As reflected in the record, Top Cat contracted with Alliance to “source and deliver” materials needed to make concrete. Alliance made “dozens of deliveries” but was not paid in full. Under the terms of each invoice Alliance sent Top Cat, interest “accrue[d] at the rate of 1.5% per month starting 60 days from INVOICE DATE.” At the time Alliance filed for summary judgment, late-payment interest totaled \$194,233.32 and continued to accrue at “\$155.39 per day.”

Based on the summary judgment evidence presented, the trial court awarded Alliance \$315,087.21 in “actual damages;” \$198,739.63 in “contractual pre-judgment interest;”<sup>2</sup> \$70,000 in attorney’s fees; post-judgment interest on actual damages at an annual “contractual rate of 18%;” and, post-judgment interest on all other damages at “the rate of 5% per annum.” Top Cat subsequently superseded the judgment pending its appeal by posting a cash deposit in the amount of \$371,802.90, the apparent sum of the “actual damages” awarded and interest for the estimated duration of the appeal. Urging the supersedeas amount should be increased to include the “contractual pre-judgment interest” awarded, Alliance moved to reconsider. Alliance filed the motion at issue when the trial court denied the relief requested.

## **APPLICABLE LAW**

Civil Practice and Remedies Code section 52.006(a) and appellate rule 24.2(a)(1) provide that a judgment debtor may supersede execution of a money judgment by filing security in an

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<sup>2</sup> This amount represents the \$194,233.32 accrued as of the date Alliance filed for summary judgment plus \$155.39 per day for twenty-nine days, the period between the filing of the summary judgment motion and the date of judgment. Top Cat did not dispute either the accrued or the daily accrual amounts owed in its response to Alliance’s summary judgment motion.

amount equal to the sum of (1) compensatory damages and costs awarded in the judgment and (2) interest on the compensatory damages awarded for the estimated duration of the appeal. *See TEX. CIV. PRAC. & REM. CODE § 52.006(a); TEX. R. APP. P. 24.2(a)(1); In re Longview Energy Co.*, 464 S.W.3d 353, 361 n.36 (Tex. 2015). Neither the rule nor the statute defines “compensatory damages.” However, Black’s Law Dictionary defines it as “damages sufficient in amount to indemnify the injured person for the loss suffered.” BLACK’S LAW DICTIONARY 445 (9<sup>th</sup> ed. 2009). The phrase is “interchangeable with ‘actual damages’” which means “[a]n amount awarded to a complainant to compensate for a proven injury or loss; damages that repay actual losses.” *Id.* In a suit on sworn account, “actual damages” is the unpaid amount for delivered goods or services performed. *See Ellis v. Reliant Energy Retail Serv., L.L.C.*, 418 S.W.3d 235, 246 (Tex. App.—Houston [14<sup>th</sup> Dist.] 2013, no pet.).

The Texas Supreme Court has addressed whether pre-judgment interest qualifies as compensatory damages in dicta in *In re Nalle Plastics Family Limited Partnership*, 406 S.W.3d 168 (Tex. 2013). In determining whether attorney’s fees for the prosecution or defense of a claim qualify as compensatory damages, the court noted:

Not every amount, even if compensatory, can be considered damages. Like attorney’s fees, court costs make a claimant whole, as does pre-judgment interest. Yet it is clear that neither costs nor interest qualify as compensatory damages. Otherwise, there would be no need to list those amounts separately in the supersedeas bond statute.

*In re Nalle*, 406 S.W.3d at 173.

Pre-judgment interest and contractual interest, however, are not the same. *See TEX. FIN. CODE ANN. § 301.002(a) (1) (“‘contract interest’ means interest that an obligor has promised or agreed to pay to a creditor under a written contract of the parties. The term does not include judgment interest.”), (a) (7) (“‘judgment interest’ means interest on a money judgment, whether the interest accrues before, on, or after the date the judgment is rendered.”).* The award of pre-

judgment interest is discretionary whereas contractual interest “becomes part of the debt [] and is recoverable as of right.” *See Redfield v. Ystalyfera Iron Co.*, 110 U.S. 174, 176 (1884); *Wilmer-Hutchins Indep. Sch. Dist. v. Smiley*, 97 S.W.3d 702, 706 (Tex. App.—Dallas 2003, pet. denied); *see also First Nat'l Bank v. J.I. Campbell Co.*, 114 S.W. 887, 890 (Tex. Civ. App.—San Antonio 1908, no writ) (“Under all of the authorities, the interest contracted for is a part of the debt, as much so as the principal.”).

## **STANDARD OF REVIEW**

We review a trial court’s determination of the amount of security required, to the extent it turns on a question of fact, for abuse of discretion. *See Imagine Auto. Grp., Inc. v. Boardwalk Motor Cars, LLC*, 356 S.W.3d 716, 718 (Tex. App.—Dallas 2011, no pet.). However, when the trial court’s ruling turns on a question of law, we review it de novo. *Id.*

## **DISCUSSION**

In its motion, Alliance contends the “contractual pre-judgment interest” awarded constitutes compensatory damages that must be superseded “under both the doctrine of ‘interest follows principal’ and . . . because it is contract damages.” Top Cat relies on the above-quoted language from *In re Nalle* that pre-judgment interest does not qualify as compensatory damages.

*In re Nalle* is inapplicable to the facts before us. Although the “contractual interest” awarded is characterized as “pre-judgment interest,” the record is clear, and the parties do not dispute, that the interest awarded was for late payments. While pre-judgment interest might not be compensatory damages, “contractual interest” is “a part of the debt, as much so as the principal.” *See Campbell*, 114 S.W. at 890.

The trial court mischaracterized the “contractual interest” as “pre-judgment interest” and erred in excluding the amount awarded from the amount of security needed to supersede the judgment. *See In re Nalle*, 406 S.W.3d at 175 (“While attorney’s fees incurred in prosecuting this

claim are not compensatory damages, the fees comprising the breach-of-contract damages are. If the *underlying* suit concerns a claim for attorney's fees as an element of damages, as . . . here, then those fees may properly be included in a judge or jury's compensatory damages award."). Accordingly, we grant Alliance's motion and increase the supersedeas amount by \$198,739.63, the amount of "contractual pre-judgment interest" awarded, plus interest on that amount for the estimated duration of the appeal. *See In re Longview Energy*, 464 S.W.3d at 361 n.36.

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/David Evans/  
DAVID EVANS  
JUSTICE

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