

THATCHER V. SOWARDS - SCIOTO APP. NO. 98CA2613

Harsha, J., Dissenting:

I agree with the majority opinion regarding the First Assignment of Error but I do not believe that the Second Assignment of Error is properly before this Court.

The trial court awarded the funds in controversy to appellee without addressing the appropriateness of attorney fees since that request was relevant only if the trial court found in favor of appellant. In Egan v. National Distillers & Chemical Corp. (1986), 25 Ohio St.3d 176, syllabus, the Supreme Court held that "[w]here the grant of summary judgment favorable to a defendant neither considers nor awards damages, an issue pertaining to damage setoffs raised by the defendant-appellant for the first time on appeal to the Supreme Court will not be entertained because it is not a justiciable issue." While the parties raised the issue of attorney fees in the trial court, Egan's holding that an issue must be decided by the trial court before an appellate court grants review is applicable in this case. See also Murphy v. City of Reynoldsburg (1992), 65 O.St.3d 356.

Given that the trial court has not been afforded the opportunity to consider the issue of attorney fees, I do not believe that it is appropriate for this court to consider the Second Assignment of Error. Id.

Therefore, I would remand the matter to the trial court for a complete determination on the issue of attorney's fees.