**[Cite as *TCF Natl. Bank v. Brooks*, 2010-Ohio-1401.]**

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

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| | | JUDGES: |
| TCF NATIONAL BANK FBO ACON FINANCIAL, LLC | : | Hon. W. Scott Gwin, P.J. |
| | : | Hon. Julie A. Edwards, J. |
| | : | Hon. Patricia A. Delaney, J. |
| Plaintiff-Appellant | : | |
| | : | |
| -vs- | : | Case No. 2009-CA-00104 |
| | : | |
| RICHARD MICKY BROOKS, ET AL | : | |
| | : | O P I N I O N |
| Defendants-Appellees | | |

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| CHARACTER OF PROCEEDING: | Civil appeal from the Stark County Court of Common Pleas, Case No. 2008CVO5138 |
| JUDGMENT: | Reversed and Remanded |
| DATE OF JUDGMENT ENTRY: | March 30, 2010 |

APPEARANCES:

For Plaintiff-Appellant

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For Defendant-Appellee

*Gwin, P.J.*

**{¶1}** This case comes for review on the trial court's ruling upon the unopposed Motion for Attorney Fees for appellant TCF National Bank, FBO Aeon Financial, LLC (hereinafter, "Appellant").

**{¶2}** Appellant purchased a tax lien certificate from the Stark County Treasurer on a property located in Stark County, Ohio. Subsequently, appellant filed a Complaint for Foreclosure, pursuant to R.C. 5721.30 to 5721.46. Appellant's counsel filed a motion for private attorney's fees with a supporting affidavit attached. The motion requested $2,500.00 in attorney fees, to be taxed as a cost of the private foreclosure action, and requested a hearing.

**{¶3}** In its Decree for Foreclosure, the trial court awarded $1,230.61 in principal on Certificate Number 0218854-07 plus interest at 12.75% per year from October 27, 2007 through October 27, 2008; interest at 18% from October 28, 2008, and costs; $422.56 in principal on Certificate Number 0218854-08 plus interest at 18% per year from September 25, 2007, and costs; $395.00 for title costs; Court costs; and attorney fees of four hundred fifty dollars ($450.00).

**{¶4}** Appellant has appealed only the trial court determination of the amount of attorney fees.[1] Specifically, appellant argues that the statutory scheme presented by Ohio Revised Code Sections 5721.30 to 5721.46 creates a rebuttable presumption of reasonableness for attorney fees sought that do not exceed $2,500. If a party meets its burden of proof, and no opposing party comes forth with evidence to rebut the

[1] Appellee did not file a brief in this matter. Pursuant to App.R. 18(C), in determining the appeal, we may accept appellant's statement of the facts and issues as correct, and reverse the judgment if appellant's brief reasonably appears to sustain such action. See *State v. Rohrig* (Apr. 2, 2001), Fairfield App. No. 00 CA 39, and *Chowdhury v. Fitzgerald* (Mar. 27, 1997), Guernsey App. No. 96 CA 43. Therefore, we presume the validity of appellant's statement of facts and issues.

presumption, a trial court may not limit recoupment of those fees if the amount sought is not in excess of $2,500. Appellant contends that, in those cases where fees sought are not in excess of the $2,500, court approval is not required because there is already a legislative presumption of reasonableness. Therefore, court review is limited only to cases where an opposing party is challenging reasonableness.

**{¶5}** For the reasons that follow, we disagree; however, we reverse and remand the case because it is not possible to determine what factors the trial court considered or the weight, if any, it placed on those factors. When making a fee award pursuant to R.C. 5721.30 to 5721.46, the trial court must state the basis for the fee determination. Absent such a statement, it is not possible for an appellate court to conduct a meaningful review.

STATEMENT OF THE FACTS AND CASE

**{¶6}** Appellant filed a complaint in foreclosure on real estate owned by appellee, Richard Micky Brooks, and his unknown spouse. Appellees failed to answer or defend the suit. Consequently, on February 27, 2009, the trial court granted appellant's motion for default judgment against appellees. Appellant filed a motion for attorney fees on February 23, 2009 requesting the amount of $2,500 pursuant to R.C. 5721.39(A)(5), supported by a payoff statement and affidavit in support thereof, the Foreclosure and Bankruptcy Fee Schedule and counsel for the appellant’s own affidavit in support of the award. In his affidavit, counsel averred the following,

**{¶7}** “It is significant to note that this arrangement is reflective of the usual and customary billing rate and terms that Schwartz & Associates, LLP charges to all of its tax lien clients in Ohio and elsewhere, and that Schwartz and Associates, LLP

specializes exclusively in real estate matters related to municipal tax liens and tax lien foreclosure litigation nationwide, and that but for the aforesaid fee structure, Schwartz & Associates, LLP would not have undertaken such representation on behalf of the Plaintiff; herein.

**{¶8}** "Based on my education and experience, in the areas of real estate, business, and foreclosure law it is my opinion, to a reasonable degree of professional certainty, that the fee charged in this case is fair and reasonable.

**{¶9}** "This opinion is based upon the following, to wit: my own personal knowledge and familiarity with this case and these proceedings; the fees customarily charged for similar legal services; the time and labor incurred in this case; the amount in controversy being title to real estate; the specialized subject matter of this action; the results obtained; the time limitations imposed by the client, the court, and by the circumstances; the non-contingent nature of the representation; the experience and expertise of this firm, Schwartz & Associates, LLP in this area of law, and in particular, tax lien foreclosure matters both in Ohio and nationwide, the nature and length of the professional relationship; the undertaking of the representation and the expectations of Plaintiff's counsel regarding the amount of the compensation relative to the time, expense and resources involved; the fact that the flat fee is fixed, and incurred incrementally, in logical stages, as work progresses and that it is non-contingent such that it is owed by Plaintiff irrespective of the outcome of the case or whether the Sheriff's Sale generates sufficient bids." (Affidavit of John S. Pucin, Esq. in support of Motion for Attorney Fees, filed February 23, 2009 at ¶ 8-10). [Hereinafter cited at "Affidavit"].

**{¶10}** Appellees did not respond to this motion. On February 27, 2009, the trial court granted appellant's motion for default judgment. On April 2, 2009, the trial court issued an order and decree of foreclosure. Of relevance to this appeal, the trial court ordered attorney fees in the amount of four hundred fifty dollars. ((Order and Decree of Foreclosure (Tax Certificate Foreclosure), filed April 2, 2009 at ¶ 10).

**{¶11}** Appellant now appeals from the judgment awarding attorney fees, arguing the following assignment of error:

**{¶12}** "I. THE TRIAL COURT ERRED AS A MATTER OF LAW IN REDUCING APPELLANT'S STATUTORILY RECOVERABLE ATTORNEY FEES, BELOW THE $2,500 AMOUNT APPELLANT'S INCURRED AND REQUESTED, BECAUSE THE COURT FAILED TO ACCORD AEON THE BENEFIT OF THE STATUTORY PRESUMPTION OF REASONABLENESS CREATED BY THE OHIO LEGISLATURE, IN R.C. SECTION 5721.371, IN FAVOR OF A TAX CERTIFICATE HOLDER FOR ATTORNEY FEES INCURRED IN TAX CERTIFICATE FORECLOSURE CASES WHERE SUCH FEES DO NOT EXCEED $2,500."

I.

**{¶13}** At the outset, we note there is nothing within the record of this case that tells us how the trial court answered the question of whether attorney fees of up to $2,500 as set forth in R.C. 5721.371 are presumptively reasonable for a tax certificate foreclosure matter and, absent a challenge by an opposing party, are entitled to deference by the court. In other words, the trial court may have rejected this argument and determined that it had sole discretion to determine the reasonable amount of attorney fees. However, it is equally possible from the record before this Court, that the

trial court accepted appellant's argument that $2,500 was presumed reasonable, but also found that, even though no other party challenged the reasonableness of the amount requested by the appellant, the court retained discretion to adjust the amount based on the factors set forth in *Bittner v. Tri-County Toyota, Inc.* (1991), 58 Ohio St.3d 143, 569 N.E.2d 464.

**{¶14}** Appellant dissects its sole assignment of error into a number of sub-parts or "issues." Specifically, in the case at bar, appellant posits in its brief as follows,

**{¶15}** "D. A movant meets its burden of proof for recoupment of its attorney fees under the statute by affirmatively establishing (by Affidavit or otherwise) that such fees were incurred and are reasonable.

**{¶16}** "E. Where movant does not seek recoupment of fees in excess of the statutory amount and no party disputes reasonableness, a court exceeds its permissible authority under the statute by ordering payment of an amount less than the amount incurred."[2]

**{¶17}** Thus, we find that both the "reasonableness" of the amount of appellant's request for attorney fees in the trial court, as well as the trial court's discretion to decide the amount of attorney fees that were warranted in this case are raised by appellant in this Court.

**{¶18}** The dissent unfairly limits the appellant's argument to whether the statute creates a presumptive amount of attorney fees in a tax certificate foreclose case. Whether the statute creates a presumption that $2,500.00 is the reasonable amount of attorney fees does not end the inquiry. Rather, necessary to the resolution of appellant's assignment of error is whether the trial court has discretion, on a case by

[2] Appellant's Brief at i-ii; 1-2; 22-24.

case basis according to the factors identified in *Tri-County*, to adjust the amount awarded as attorney fees when no one challenges the reasonableness of the amount submitted.

**{¶19}** At the heart of this litigation is the question of whether Ohio law gives a trial court discretion to determine the reasonableness of attorney fees in its judgment of tax certificate foreclosure cases filed pursuant to R.C. 5721.37 et seq. We believe that it does.

**{¶20}** In *Alyeska Pipeline Service Co. v. Wilderness Society*(1975), 421 U.S. 240, 95 S.Ct. 1612, the Court reaffirmed the "American Rule" that each party in a lawsuit ordinarily shall bear its own attorney's fees unless there is express statutory authorization to the contrary. Of relevance to the case at bar, the Ohio Legislature has provided for the recovery of attorney fees for prosecuting tax certificate foreclosures. R.C. 5721.39 provides, in pertinent part:

**{¶21}** "(A) In its judgment of foreclosure rendered in actions filed pursuant to section 5721.37 of the Revised Code, the court or board of revision *shall enter a finding* that includes all of the following with respect to the certificate parcel:

**{¶22}** " * * *

**{¶23}** "(5) Fees and costs incurred in the foreclosure proceeding instituted against the parcel, including, *without limitation,* the fees and costs of the prosecuting attorney represented by the fee paid under division (B)(3) of section 5721.37 of the Revised Code, plus interest as provided in division (D)(2)(d) of this section, or *the fees and costs of the private attorney representing the certificate holder,* and charges paid or

incurred in procuring title searches and abstracting services relative to the subject premises." (Emphasis added.)

**{¶24}** R.C. 5721.371 provides the trial court's guidance in determining the fees counsel may recover in a tax certificate foreclosure case. The statute provides,

**{¶25}** "Private attorney's fees payable with respect to an action under sections 5721.30 to 5721.46 of the Revised Code are subject to the following conditions:

**{¶26}** "(A) The fees must be reasonable.

**{¶27}** "(B) Fees exceeding two thousand five hundred dollars shall be paid only if authorized by a court order.

**{¶28}** "(C) The terms of a sale negotiated under section 5721.33 of the Revised Code may include the amount to be paid in private attorney's fees, subject to division (B) of this section."

**{¶29}** In the case at bar, appellant argues, in essence, because fee applications in the amount of $2,500 or less do not require a court order, thus, in both practice and effect, the Ohio Legislature has determined that attorney fees of up to $2,500 are presumptively reasonable for a tax certificate foreclosure matter; and, absent challenge by an opposing party, are entitled to deference by the court. [Appellant's Brief at 12-14]. Curiously, this seems to contradict the requirement in R.C. 5721.39(A), which requires a trial court to make a determination of reasonableness before awarding the fees and costs of the private attorney representing the certificate holder.

**{¶30}** We find nothing within the statutes that set a presumptive amount for recoverable attorney fees, nor anything that obviates the trial court's discretion in

making the award. Surely, without an order from the trial court, attorney fees could not be assessed or recovered. The Supreme Court of Ohio has held:

**{¶31}** "It is well settled that where a court is empowered to award attorney fees by statute, the amount of such fees is within the sound discretion of the trial court. Unless the amount of fees determined is so high or so low as to shock the conscience, an appellate court will not interfere." *Bittner v. Tri-County Toyota, Inc.* (1991), 58 Ohio St.3d 143, 146, 569 N.E.2d 464, quoting *Brooks v. Hurst Buick-Pontiac-Olds-GMC, Inc.* (1985), 23 Ohio App.3d 85, 91, 491 N.E.2d 345. "There are over 100 separate statutes providing for the award of attorney's fees; and although these provisions cover a wide variety of contexts and causes of action, the benchmark for the awards under nearly all of these statutes is that the attorney's fee must be 'reasonable'." *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air* (1986), 478 U.S. 546, 562, 106 S.Ct. 3088, 3096.

**{¶32}** "A request for attorney's fees should not result in a second major litigation. Ideally, of course, litigants will settle the amount of a fee. Where settlement is not possible, the fee applicant bears the burden of establishing entitlement to an award and documenting the appropriate hours expended and hourly rates. The applicant should exercise 'billing judgment' with respect to hours worked, see *supra,* at 1939-1940, and should maintain billing time records in a manner that will enable a reviewing court to identify distinct claims". *Hensley v. Eckerhart* (1983) 461 U.S. 424, 437, 103 S.Ct. 1933, 1941. [Footnotes omitted].

**{¶33}** "The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a

reasonable hourly rate. This calculation provides an objective basis on which to make an initial estimate of the value of a lawyer's services." *Hensley v. Eckerhart* (1983), 461 U.S. 424, 433, 103 S.Ct. 1933, 1939. See, also *Bittner v. Tri-County Toyota, Inc.,* supra, 58 Ohio St.3d at 145; 569 N.E.2d at 466.

**{¶34}** To establish the number of hours reasonably expended, the party requesting the award of attorney fees "should submit evidence supporting the hours worked ...." *Hensley,* 461 U.S. at 433, 103 S.Ct. at 1939. The number of hours should be reduced to exclude "hours that are excessive, redundant, or otherwise unnecessary" in order to reflect the number of hours that would properly be billed to the client. *Id.* at 434, 103 S.Ct. at 1939-40. A reasonable hourly rate is defined as "the 'prevailing market rate in the relevant community.'" *Blum v. Stenson* (1984), 465 U.S. 886, 895, 104 S.Ct. 1541, 1547.

**{¶35}** The party requesting an award of attorney fees bears the burden "to produce satisfactory evidence--in addition to the attorney's own affidavit--that the requested rate [is] in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation." *Blum v. Stenson,* supra 465 U.S. at 895 n. 11, 104 S.Ct. at 1547 n. 11,

**{¶36}** Once the trial court calculates the "Lodestar figure," it could modify the calculation by applying the factors listed in DR 2-106(B)[3], *Landmark Disposal Ltd. v. Byler Flea Market*, Stark App. No.2005CA00294, 2006-Ohio-3935, paragraph 14, citing *Bittner v. Tri-County Toyota, Inc.* (1991), 58 Ohio St.3d 143, 145, 569 N.E.2d 464. [Hereinafter "*Landmark Disposal I*"].

[3] Now Prof. Cond. Rule 1.5

**{¶37}** To enable an appellate court to conduct a meaningful review, "the trial court must state the basis for the fee determination." *Bittner,* 58 Ohio St.3d at 146. In *Bittner,* the court held:

**{¶38}** " * * * the trial court should first calculate the number of hours reasonably expended on the case times an hourly fee, and then may modify that calculation by application of the factors listed in DR 2-106(B). These factors are: the time and labor involved in maintaining the litigation; the novelty and difficulty of the questions involved; the professional skill required to perform the necessary legal services; the attorney's inability to accept other cases; the fee customarily charged; the amount involved and the results obtained; any necessary time limitations; the nature and length of the attorney/client relationship; the experience, reputation, and ability of the attorney; and whether the fee is fixed or contingent. All factors may not be applicable in all cases and the trial court has the discretion to determine which factors to apply, and in what manner that application will affect the initial calculation." *Bittner,* 58 Ohio St.3d at 145-146.

**{¶39}** In this case, as in ***Bittner,*** the trial court did not award appellants the full amount of attorney fees requested and did not state what factors it took into consideration. Without such a statement from the trial court, it is not possible for an appellate court to conduct a meaningful review. Accordingly, we find that the matter must be remanded to the trial court.

**{¶40}** The trial court must specify which factors contained in Prof. Cond. Rule 1.5 the trial court considered, if any, when determining the amount of appellant's award of attorney fees. Because we find that there are insufficient findings made to conduct a meaningful review on appeal, appellant's assignment of error is sustained.

**{¶41}** For the foregoing reasons, we reverse the judgment of the Stark County Court of Common Pleas and this case is remanded for proceedings in accordance with our opinion and the law.

By Gwin, P.J., and

Delaney, J., concur;

Edwards, J., dissents

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HON. W. SCOTT GWIN

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HON. JULIE A. EDWARDS

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HON. PATRICIA A. DELANEY

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*Edwards, J. dissenting*

**{¶42}** I agree with the majority as to its analysis of the meaning of the language contained in R.C. 5721.371, but I disagree with the majority as to its decision to remand this matter for a hearing.

**{¶43}** Appellant argues, in the statement of the assignment of error and argument set forth in support, that it should have been awarded its $2,500 in requested attorney fees because there is a statutory presumption in R.C. 5721.371 that attorney's fees which do not exceed $2,500 are reasonable. The majority has decided, and I concur, that there is no statutory presumption that attorney's fees which do not exceed $2,500 are reasonable. Therefore, the assignment of error should be overruled, and the decision of the trial court should be affirmed.

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Judge Julie A. Edwards

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO

FIFTH APPELLATE DISTRICT

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|---|---|---|
| TCF NATIONAL BANK<br>FBO ACON FINANCIAL, LLC | : | |
| Plaintiff-Appellant | : | |
| -vs- | : | JUDGMENT ENTRY |
| RICHARD MICKY BROOKS, ET AL | : | |
| Defendant-Appellee | : | CASE NO. 2009-CA-00104 |

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Stark County Court of Common Pleas and remand the cause to the trial court for disposition consistent with this opinion. Costs to appellant.

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HON. W. SCOTT GWIN

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HON. JULIE A. EDWARDS

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HON. PATRICIA A. DELANEY