

[Cite as *Gallo v. Am. Isuzu Motors, Inc.*, 2005-Ohio-4826.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 85552

BRIAN GALLO,	:	
	:	
Plaintiff-Appellant	:	JOURNAL ENTRY
	:	and
vs.	:	OPINION
	:	
AMERICAN ISUZU MOTORS, INC.,	:	
	:	
Defendant-Appellee	:	

DATE OF ANNOUNCEMENT	:	
OF DECISION	:	SEPTEMBER 15, 2005

CHARACTER OF PROCEEDING:	:	Civil appeal from
	:	Common Pleas Court
	:	Case No. 468076

JUDGMENT	:	AFFIRMED.
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DATE OF JOURNALIZATION	:	
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APPEARANCES:

For plaintiff-appellant:	David B. Levin, Esq.
	Mitchel E. Luxenburg, Esq.
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For defendant-appellee:	Michael P. Gilbride, Esq.
	Brian D. Sullivan, Esq.
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MICHAEL J. CORRIGAN, J.:

{¶1} The sole issue in this appeal is whether the court abused its discretion by denying attorney fees to a successful plaintiff in a Magnuson-Moss car warranty case. Plaintiff Brian Gallo brought suit against defendant American Isuzu Motors after Isuzu failed to repair the vehicle to his satisfaction. Although a jury rejected some of his claims, it did award Gallo \$1,000 for a breach of an implied warranty. Gallo then filed a motion for attorney fees. A visiting judge ruled on the motion and denied it without opinion. Gallo appeals from that ruling.

{¶2} Gallo is correct when he points out that, while purely discretionary under Magnuson-Moss, attorney fees are favored as a means of promoting resort to the act; that is, attorney fees are used as the incentive for litigants to bring suit, or more to the point, as an incentive to take the cases. See *Windrod v. Ford Motor Company* (1988), 53 Ohio App.3d 94, 96.

{¶3} Nevertheless, an award of attorney fees under Magnuson-Moss is discretionary and we see nothing in this record to show that the court acted arbitrarily, unconscionably or unreasonably. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. Gallo makes out a good case in support of attorney fees, but we cannot substitute our discretion for that of the court. See *Berk v. Matthews* (1990), 53 Ohio St.3d 161, 170. As Isuzu points out, Gallo offered an expert who gave an opinion that Isuzu's breach of warranty had diminished the value of the vehicle by \$5,000.

Despite his own expert's findings, Gallo refused to settle for less than \$9,000 plus attorney fees. The court could have looked at this information and concluded that Gallo's demand was unreasonable.

{¶ 4} Moreover, the jury only awarded damages of \$1,000. While Gallo is again correct in saying that an attorney fee award is not required to be proportionate to a damage award, see *Luft v. Perry County Lumber & Supply Co.*, Franklin App. No. 02AP-559, 2003-Ohio-2305, at ¶42, there is nothing about the denial of an attorney fee award here that sounds arbitrary. As Isuzu points out, the court could reasonably look at the settlement discussions as indicating bad faith, and base its decision on that fact alone.

Judgment affirmed.

It is ordered that appellee recover of appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MICHAEL J. CORRIGAN  
JUDGE

ANTHONY O. CALABRESE, JR., J., CONCURS.

SEAN C. GALLAGHER, P.J., DISSENTS WITH  
SEPARATE OPINION.

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R.22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).

COURT OF APPEALS OF OHIO EIGHTH DISTRICT

COUNTY OF CUYAHOGA

No. 85552

BRIAN GALLO,	:	
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Plaintiff-Appellant	:	DISSENTING
	:	
vs.	:	OPINION
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AMERICAN ISUZU MOTORS, INC.,	:	
	:	
	:	
Defendant-Appellee	:	
	:	
DATE: <u>SEPTEMBER 15, 2005</u>		

SEAN C. GALLAGHER, P.J., DISSENTING:

{¶ 5} I respectfully dissent from the majority's opinion, as I believe the trial court abused its discretion by failing to set forth the factors it considered in denying the motion for attorney fees.

{¶ 6} I agree with the majority that an award of attorney fees is discretionary and that a trial court is not required in all instances to state its reasons for the denial of fees. However, it is unclear what factors the court considered in finding an award of attorney fees to be improper. When a trial court finds attorney fees appropriate, that court must determine the amount of a "reasonable" fee to award. See *Bittner v. Tri-County Toyota, Inc.* (1991), 58 Ohio St.3d 143, 144-155; *Winrod v. Ford Motor Company* (1988), 53 Ohio App.3d 94, 97; 15 U.S.C. 2310(d)(2). Logic dictates that when denying a motion for attorney fees, the converse is also true and the trial court should be required to state its reasons on the record. Absent a basis for the fee determination, this court cannot conduct a meaningful review. See *Bittner* (1991), 58 Ohio St.3d 143, 146.

{¶ 7} Moreover, where facts related to the breach of implied warranty have been proven at trial, the trial court should provide some analysis for the denial of attorney fees; otherwise, an appeal of the denial is virtually impossible. No person could raise a viable claim for relief under such circumstances because no factors would exist to either apply the applicable case law or statutory authority.

{¶ 8} Although I do not mandate findings and reasons in all instances, there are circumstances, such as here, where the only means to properly review the denial of attorney fees is with a complete understanding of the trial court's analysis. Accordingly,

I find that the trial court abused its discretion when it failed to supply its reasoning behind the denial of attorney fees.

{¶ 9} For the foregoing reasons, I would reverse the decision of the trial court.