

[Cite as *Jakubs v. Borally*, 2015-Ohio-2696.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
No. 101756

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**ROSE MARIE JAKUBS, ET AL.**

PLAINTIFFS-APPELLANTS

vs.

**FRANK J. BORALLY, JR., ET AL.**

DEFENDANTS-APPELLEES

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**JUDGMENT:**  
REVERSED AND REMANDED

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Civil Appeal from the  
Cuyahoga County Court of Common Pleas  
Probate Division  
Case No. 2011 ADV 168032

**BEFORE:** S. Gallagher, J., Kilbane, P.J., and Boyle, J.

**RELEASED AND JOURNALIZED:** July 2, 2015

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SEAN C. GALLAGHER, J.:

{¶1} Plaintiff-appellant David Grano, Executor of the Estate of Arlene K. Borally, appeals the judgment of the trial court, claiming the trial court abused its discretion by failing to award appellant attorney fees, costs, and expert witness fees against defendant-appellee, Frank J. Borally, Jr. Upon review, we reverse this aspect of the trial court's judgment and remand the matter for the trial court to conduct an evidentiary hearing to determine whether such relief is warranted in the matter.

{¶2} Arlene K. Borally and her sister, Rose Marie Jakubs, filed a complaint for breach of fiduciary duty, accounting, replacement of trustee, and equitable relief. The plaintiffs sought to have appellee, who is their brother, held accountable for breaching his fiduciary duties as trustee of their father's trust, "the A-R Trust," under which the sisters were beneficiaries. Among the relief requested was the award of costs and attorney fees.

{¶3} During the course of proceedings, plaintiff Rose Marie Jakubs voluntarily withdrew her claims. Arlene K. Borally died, resulting in the substitution of David Grano, Executor of the Estate of Arlene Borally, as the plaintiff. Original defendants Georgianne Borally and Linda Laro were dismissed from the case. The trial court found there was no evidence presented at trial against defendants B & G Catering and Banquet Service, Inc., Borally Enterprises Ltd., Partnership, and Borally Enterprises Ltd., L.L.C., which would make them liable to the plaintiff for damages, and dismissed these defendants from the action. Appellant herein was the only remaining plaintiff in the action, and Frank Borally, Jr., was the only remaining defendant.

{¶4} Also during the proceedings, the court appointed Apple Growth Partners as a joint expert, and ordered each party to pay a \$2,500 retainer to the expert. The court reserved jurisdiction to “apportion any additional fees between the parties as the Court deems fair and equitable, without a hearing.” This journal entry was signed by counsel for both parties. Prior to trial, the court issued a judgment entry finding that the costs of the court-appointed joint expert were to be paid equally by the parties and ordering defendant-appellee to pay his share of the expert costs to date.

{¶5} At trial, plaintiff’s counsel requested attorney fees and costs during opening and closing statements. Although plaintiff’s counsel did not request a separate evidentiary hearing, it is apparent that counsel anticipated a separate evidentiary hearing would be afforded if judgment were rendered in plaintiff’s favor.<sup>1</sup>

{¶6} Following the bench trial, the court issued its judgment entry on July 10, 2014. The trial court found defendant-appellee had committed major breaches of fiduciary duty as trustee to the financial detriment of Arlene Borally. The court awarded appellant \$40,368.00 for the damages sustained by Arlene Borally, as a beneficiary of the A-R Trust, as a direct result of appellee’s breach of fiduciary duties.

{¶7} Rather than making appropriate considerations to determine if an award of attorney fees and costs was warranted, the trial court summarily found appellant had “offered no evidence regarding the amount of attorney fees incurred in the matter, or the

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<sup>1</sup> We note that a party may wait until after judgment has been rendered in its favor to move for an award of attorney fees. *See IBEW, Local Union No. 8 v. Vaughn Industries, L.L.C.*, 116 Ohio St.3d 335, 2007-Ohio-6439, 879 N.E.2d 187, ¶ 17.

reasonableness of the same.” The court also determined, without explanation, that “it would be fair and equitable for each party to pay his or her own attorney fees incurred in this matter[.]” Further, the court ordered appellant to pay the balance due to the court-appointed joint expert, and ordered appellee to reimburse appellant for one-half of that amount (\$1,312.50). Finally, the court ordered costs to be equally paid by the parties.

{¶8} Appellant timely filed this appeal. Appellant raises three assignments of error, all of which relate to the trial court’s failure to award attorney fees, costs, and expert fees to the plaintiff.

{¶9} When considering an award of attorney fees, Ohio follows the “American Rule,” under which a prevailing party in a civil action may not generally recover attorney fees. *Wilborn v. Bank One Corp.*, 121 Ohio St.3d 546, 2009-Ohio-306, 906 N.E.2d 396, ¶ 7. However, attorney fees may be awarded when a statute or an enforceable contract specifically provides for an award of attorney fees, or when the prevailing party demonstrates the losing party acted in bad faith. *Id.*

{¶10} In the case before us, attorney fees, as well as costs and expenses, are allowed by statute. Specifically, R.C. 5810.04 provides authority to award costs, expenses, and reasonable attorney fees in judicial proceedings involving the administration of a trust:

In a judicial proceeding involving the administration of a trust, including a trust that contains a spendthrift provision, the court, as justice and equity

may require, may award costs, expenses, and reasonable attorney's fees to any party, to be paid by another party, from the trust that is the subject of the controversy, or from a party's interest in the trust that is the subject of the controversy.

The official comment to R.C. 5810.04 states in relevant part:

[The statutory section] codifies the court's historic authority to award costs and fees, including reasonable attorney's fees, in judicial proceedings grounded in equity. \* \* \* Generally, litigation expenses were at common law chargeable against another party only in the case of egregious conduct such as bad faith or fraud. \* \* \* The court may award a beneficiary litigation costs if the litigation is deemed beneficial to the trust. Sometimes, litigation brought by a beneficiary involves an allegation that the trustee has committed a breach of trust.

{¶11} Additionally, attorney fees have been awarded for a breach of fiduciary duty when there is a finding of bad faith. *See Cartwright v. Batner*, 2014-Ohio-2995, 15 N.E.3d 401, ¶ 104-106 (2d Dist.); *Ivancic v. Enos*, 2012-Ohio-3639, 978 N.E.2d 927, ¶ 73-75 (11th Dist.); *see also Golden v. Waiwood*, 8th Dist. Cuyahoga No. 68833, 1996 Ohio App. LEXIS 2358 (June 6, 1996).

{¶12} We review an award under R.C. 5810.04 for an abuse of discretion. *See Wills v. Kolis*, 8th Dist. Cuyahoga No. 93900, 2010-Ohio-4351, ¶ 52. An abuse of discretion implies a decision that is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983). In *Wills*, where the trial court erroneously determined attorney fees were not authorized, the matter was remanded to the trial court to determine if such an award was warranted in the case. *Wills* at ¶ 51-57.

{¶13} Civ.R. 54(D) provides that, in general, costs shall be allowed to the prevailing party. A court’s assessment of costs under Civ.R. 54(D) is also reviewed for an abuse of discretion. *State ex rel. Frailey v. Wolfe*, 92 Ohio St.3d 320, 321, 750 N.E.2d 164 (2001).

{¶14} Absent statutory directive, expert witness fees are not recoverable as costs. *Moore v. Gen. Motors Corp., Terex Div.*, 18 Ohio St.3d 259, 260, 480 N.E.2d 1101 (1985); *Naples v. Kinczel*, 8th Dist. Cuyahoga No. 89138, 2007-Ohio-4851, ¶ 11. R.C. 5810.01(B)(10) authorizes a trial court to order “any other appropriate relief” for a breach of trust by a trustee.

{¶15} The trial court found that appellee had committed significant breaches of fiduciary duty as trustee to the financial detriment of Arlene Borally. After detailing these breaches in its opinion, the court found that appellee failed to “administer the A-R Trust in good faith, in accordance with its terms and purposes, in the best interest of the A-R Trust beneficiary, Arlene Borally, and in accordance with those obligations and requirements set forth in O.R.C. 5808.01 et seq.” More specifically, the court found that “[o]n two (2) critical occasions \* \* \* [appellee] \* \* \* [placed] the best interests of himself and his children, and not the trust beneficiaries, first, unfortunately to the financial detriment of Arlene Borally and in direct violation of his fiduciary obligations under the Ohio Trust Code.”

{¶16} Despite these findings, the trial court summarily denied the plaintiff any attorney fees, upon finding no evidence of the amount of attorney fees, or the

reasonableness of the same had been presented, and that “in any event, \* \* \* it would be fair and equitable for each party to pay his or her own attorney fees \* \* \*.” Further, the court effectively ordered the parties to split the expert witness fees and instructed the parties to equally pay costs.

{¶17} We recognize that appellant did not request an evidentiary hearing. However, appellant made requests for attorney fees and costs at trial, and upon this record, the trial court should have engaged in a meaningful review of whether such an award was warranted. Further, under the circumstances herein, the parties should have been permitted to address whether such an award would be “fair and equitable” in the matter.

{¶18} The trial court’s findings demonstrate that appellee engaged in egregious conduct, acted in bad faith, and breached his fiduciary duties, to the detriment of appellant. Further, it appears the necessity of the court-appointed joint expert arose from appellee’s breaches of his fiduciary duties and his failure to account and keep adequate records. Under these circumstances, the trial court should have conducted an evidentiary hearing to determine if the requested relief was warranted.

{¶19} Accordingly, we reverse the trial court’s judgment with respect to the award of attorney fees, costs, and expert witness fees. We remand the matter to the trial court with instructions to conduct an evidentiary hearing to determine if such an award is warranted.

{¶20} Judgment reversed; case remanded.

This cause is reversed and remanded to the lower court for further proceedings consistent with this opinion.

It is ordered that appellant recover of said appellee 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, probate division, 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.

SEAN C. GALLAGHER, JUDGE

MARY EILEEN KILBANE, P.J., and  
MARY J. BOYLE, J., CONCUR