

STATE OF OHIO)
)ss:
COUNTY OF LORAIN)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

PAUL P. LAFARCIOLA, et al.

C.A. No. 08CA009471

Appellants

v.

LORNE J. ELBERT, et al.

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF LORAIN, OHIO
CASE No. 93CV111401

Appellees

DECISION AND JOURNAL ENTRY

Dated: September 8, 2009

CARR, Judge.

{¶1} Appellants, Paul and Beth LaFarciola, appeal the judgment of the Lorain County Court of Common Pleas. This Court affirms.

I.

{¶2} In November of 1993, Paul and Beth LaFarciola (hereinafter collectively referred to as “LaFarciola”) brought suit against Appellees, Lorne J. Elbert, Jr., and the businesses he controls, College Green, Inc., Elbert Excavating, and Elbert Building Company, Inc. (hereinafter collectively referred to as “Elbert”). The action stemmed from damage caused to LaFarciola’s home, real property, trees, and other structures that resulted from construction and excavation on an adjoining parcel.

{¶3} On March 24, 1998, after a jury trial, the jury returned a verdict in favor of LaFarciola in the amounts of (i) \$27,500 in compensatory damages; (ii) \$2,697.32 in statutory damages, which the trial court trebled to \$8,091.96 pursuant to R.C. 901.51; and (iii) \$75,000 in

punitive damages for Elbert's intentional and reckless torts. The jury also specifically awarded LaFarciola attorney fees and expenses for the action. After conducting a contested evidentiary hearing on the amount and reasonableness of attorney fees, the trial court found the sum of \$99,818.60 in attorney fees and related litigation expenses to be "fair, reasonable, necessary and appropriate for the litigation of this case" through March 31, 1998. On May 15, 1998, the trial court entered judgment against Elbert in the amounts awarded by the jury, plus attorney fees and expenses, for a total judgment in accordance with the jury's verdict of \$210,410.56, plus post-judgment interest.

{¶4} On June 12, 1998, Elbert appealed the case to this Court. On October 19, 1998, Elbert filed a motion to stay the execution of judgment pending appeal. LaFarciola subsequently requested that a bond be set at no less than \$300,000. On October 22, 1998, the trial court ordered Elbert to either post a supersedeas bond in the amount of \$300,000 or, in the alternative, to deposit \$300,000 with the Clerk of Courts, pursuant to R.C. 2505.11. Subsequently, the trial court by its October 28, 1998, judgment entry noted that on October 22, Elbert paid and satisfied the judgment in the amount of \$223,035.19, the amount of the original judgment, plus post-judgment interest. LaFarciola then filed a motion to dismiss the pending appeal on the basis that such satisfaction of judgment rendered the appeal moot. On December 8, 1999, this Court held that Elbert voluntarily satisfied the judgment of the trial court and dismissed the appeal. Elbert then filed an appeal to the Supreme Court of Ohio to which LaFarciola responded. By entry dated April 26, 2000, the Supreme Court of Ohio declined to exercise jurisdiction over the case and returned it to the trial court.

{¶5} On June 26, 2000, LaFarciola filed a supplemental submission of attorney fees, costs and litigation expenses, pursuant to the jury verdict, for additional fees, costs and expenses

he incurred from April 1, 1998, through June 25, 2000. The supplemental attorney fees sought totaled \$70,507.50 for 444.6 hours at hourly rates ranging from \$125 to \$200. The additional litigation costs and expenses requested in the supplemental filing totaled \$3,618.63. After several requests for extensions of time, Elbert filed his opposition to the supplemental submission on December 17, 2001.

{¶6} Thereafter, the matter lay dormant without hearing or ruling from the trial court for more than six years. The judge assigned to the case retired effective December 31, 2007, and a new judge took over the docket. On August 29, 2008, the trial court transferred the case to the administrative judge for reassignment “due to a potential conflict of interest,” noting that “Plaintiff’s Supplemental Submission of Attorneys’ Fees, Costs and Litigation Expenses filed on June 26, 2000 has never been ruled upon.” On September 10, 2008, the administrative judge transferred the case to his own docket. On that same day, the judge entered a judgment entry stating, “Plaintiff’s Supplemental Request for Award of Attorney Fees, Costs and Litigation Expenses is denied.”

{¶7} It is that judgment entry from which LaFarciola appeals. LaFarciola raises two assignments of error. This Court has consolidated the assignments of error to facilitate review.

II.

ASSIGNMENT OF ERROR I

“WHERE A JURY PROPERLY RETURNS ITS VERDICT INCLUDING AN AWARD OF REASONABLE ATTORNEYS’ FEES AND COSTS, AND WHERE THE JUDGMENT ENTERED UPON SUCH VERDICT IS UPHELD ON APPEAL, THE TRIAL COURT ON REMAND ERRED AS A MATTER OF LAW IN SUMMARILY DENYING A REQUEST FOR SUPPLEMENTAL ATTORNEYS’ FEES AND LITIGATION EXPENSES, AND IS INSTEAD REQUIRED, IN LIGHT OF THE JURY AWARD, TO EVALUATE WHAT ADDITIONAL AMOUNT OF FEES AND EXPENSES MAY BE REASONABLE, NECESSARY AND APPROPRIATE TO ACHIEVE THE

RESULTS IN THE CASE AND TO PROTECT AND EFFECTUATE THE JUDGMENT RENDERED.”

ASSIGNMENT OF ERROR II

“THE TRIAL COURT ABUSED ITS DISCRETION IN SUMMARILY DENYING APPELLANTS’ SUPPLEMENTAL REQUEST FOR ADDITIONAL ATTORNEYS’ FEES AND LITIGATION EXPENSES AFTER THE SAME WERE AWARDED BY THE JURY VERDICT AT THE CONCLUSION OF TRIAL, WITHOUT REASON OR EXPLANATION OF THE FACTORS IT CONSIDERED IN REACHING THAT CONCLUSION.”

{¶8} In support of his first assignment of error, LaFarciola contends that once a jury finds that an award of attorney fees and expenses is fair and reasonable in light of an award of punitive damages, a trial court must consider whether supplemental appellate attorney fees may also be fair and reasonable pursuant to the original jury award. It follows, LaFarciola argues, that the trial court’s decision to deny the supplemental award of attorney fees and expenses constituted error as a matter of law. This Court disagrees.

{¶9} A trial court’s determination in regard to an award of attorney fees is generally reviewed under the abuse of discretion standard. *Jarvis v. Stone*, 9th Dist. No. 23904, 2008-Ohio-3313, at ¶33. However, the issue of whether a trial court has the authority to award attorney fees presents a question of law. This Court reviews questions of law under the de novo standard of review. *Eagle v. Fred Martin Motor Co.*, 157 Ohio App.3d 150, 2004-Ohio-829, at ¶11. When reviewing a matter de novo, this Court does not give deference to the trial court’s decision. *Id.*

{¶10} Generally, under the “American rule,” an aggrieved party may not recover attorney fees as part of the cost of litigation in the absence of statutory authorization. *Alyeska Pipeline Serv. Co. v. Wilderness Soc.* (1975), 421 U.S. 240; *Sorin v. Bd. of Edn. of Warrensville Hts. School Dist.* (1976), 46 Ohio St.2d 177. However, in Ohio, it is an established principle of

law that if punitive damages are awarded, the aggrieved party may also recover reasonable attorney fees. *Roberts v. Mason* (1859), 10 Ohio St. 277, paragraphs one and two of the syllabus; *Peckham Iron Co. v. Harper* (1884), 41 Ohio St. 100, 102; *Columbus Finance, Inc. v. Howard* (1975), 42 Ohio St.2d 178, 183; *Apel v. Katz* (1998), 83 Ohio St.3d 11, 14; *Zappitelli v. Miller*, 114 Ohio St.3d 102, 2007-Ohio-3251, at ¶6. The primary issue in this case is whether an award of attorney fees pursuant to an award of punitive damages opens the door for a supplemental award of appellate attorney fees if the prevailing party at the trial court level must defend the judgment on appeal.

{¶11} Ohio appellate courts have held that a trial court award of appellate attorney fees may be appropriate when the cause of action is brought under certain remedial statutes. In *Klein v. Moutz*, 118 Ohio St.3d 256, 2008-Ohio-2329, the Supreme Court of Ohio held that a trial court has the authority to award appellate attorney fees under Ohio's Landlord-Tenant Act, R.C. 5321.16. The high court had previously ordered a trial court on remand to award reasonable attorney fees incurred on appeal by a consumer defending a judgment under Ohio's Lemon Law, R.C. 1345.71. *Royster v. Toyota Motor Sales, U.S.A., Inc.* (2001), 92 Ohio St.3d 327, 332. The Second District has upheld trial court awards of attorney fees under the Consumer Sales Practices Act, R.C. Chapter 1345, when consumers incurred attorney fees while defending a judgment on appeal. *Tanner v. Tom Harrigan Chrysler Plymouth, Inc.* (1991), 82 Ohio App.3d 764; *Sprovach v. Bob Ross Buick, Inc.* (1993), 90 Ohio App.3d 117, 122. In *Gibney v. Toledo Bd. of Edn.* (1991), 73 Ohio App.3d 99, the Sixth District upheld the trial court's award to the prevailing party of attorney fees incurred at the appellate level while litigating civil rights claims, pursuant to the Civil Rights Attorney's Fees Awards Act, Section 1988, Title 42, U.S.Code.

{¶12} Unlike the aforementioned cases, the initial award of attorney fees in this case stemmed from an award of punitive damages and not a specific provision in a remedial statute. Three judges from this Court when sitting for the Fifth District recently addressed the question of whether an award of attorney fees pursuant to an award of punitive damages in a common law cause of action can serve as the basis for a trial court award of appellate attorney fees. In *Jay v. Massachusetts Casualty Insurance, Co.*, 5th Dist. No. 2009CA00056, 2009-Ohio-4519, the court held that absent a statutory grant of authority, a trial court is without jurisdiction to award appellate attorney fees. Furthermore, the court stated that it could find no legal precedent to support the proposition that appellate attorney fees could be awarded pursuant to an award of punitive damages. *Jay* at ¶13.

{¶13} This Court is inclined to follow the reasoning of *Jay*. Here, LaFarciola argues he is entitled to appellate attorney fees in light of the jury verdict which awarded attorney fees pursuant to the award of punitive damages. We find no controlling legal authority to support this proposition. “It is well established that a ‘trial court los[es] its jurisdiction when [an] appeal [is] taken, and, absent a remand, it d[oes] not regain jurisdiction subsequent to the Court of Appeals’ decision.” *Jay* at ¶10, quoting *State ex rel. Special Prosecutors v. Judges, Court of Common Pleas* (1978), 55 Ohio St.2d 94, 97. Here, in the absence of a procedural rule, a specific statutory provision, or a remand which would have given the trial court jurisdiction over this case, the trial court did not have the authority to consider whether LaFarciola was entitled to appellate attorney fees.

{¶14} Furthermore, the “American rule” does not permit a prevailing party to recover attorney fees in the absence of statutory authorization. *Sorin*, 46 Ohio St.2d at 179. While Ohio courts have traditionally recognized an exception that allows an aggrieved party to recover

attorney fees for work performed at the trial court level pursuant to an award of punitive damages, this Court declines to extend that exception to allow a prevailing party to recover attorney fees for work performed at the appellate level. As the Supreme Court of Ohio acknowledged in *Sorin*, a move away from a deeply rooted policy regarding the awarding of attorney fees is best left as a matter of legislative concern. *Id.* at 179-180.

{¶15} Therefore, because the trial court did not have the authority to supplement the amount of attorney fees awarded to LaFarciola for the work done on appeal, it did not err in summarily denying LaFarciola's motion. LaFarciola's first assignment of error is overruled. Because our resolution of the first assignment of error is dispositive of this appeal, this Court declines to address LaFarciola's second assignment of error as it is rendered moot. See App.R. 12(A)(1)(c).

III.

{¶16} LaFarciola's first assignment of error is overruled. This Court declines to address the second assignment of error. The judgment of the Lorain County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the

period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellants.

DONNA J. CARR
FOR THE COURT

MOORE, P. J.
DICKINSON, J.
CONCUR

APPEARANCES:

ERIC H. ZAGRANS, Attorney at Law, for Appellants.

MICHAEL J. GODLES, Attorney at Law, for Appellees.