Supreme Court of Ohio Clerk of Court - Filed June 01, 2021 - Case No. 2020-1247

**IN THE SUPREME COURT OF OHIO**

**CASE NO. 2020-1247**

**CHRISTINA CRUZ and HEIDI KAISER,**
**Plaintiff-Appellants,**

**-vs-**

**ENGLISH NANNY & GOVERNESS SCHOOL, SHEILAGH ROTH, and BRADFORD GAYLORD,**
**Defendant-Appellees.**

**ON APPEAL FROM THE EIGHTH DISTRICT COURT OF APPEALS**
**CASE NO. 108767**

# BRIEF OF *AMICI CURIAE*, OHIO ASSOCIATION FOR JUSTICE, CLEVELAND ACADEMY OF TRIAL ATTORNEYS, and OHIO EMPLOYMENT LAWYERS' ASSOCIATION IN SUPPORT OF PLAINTIFF-APPELLANTS

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## ***AMICI CURIAE'S*** STATEMENT OF INTEREST

The Ohio Association for Justice ("OAJ") is devoted to strengthening the civil justice system so that deserving individuals may have justice and wrongdoers are held accountable. The OAJ comprises approximately one thousand five hundred attorneys practicing in such specialty areas as personal injury, general negligence, medical negligence, products liability, consumer law, insurance law, employment law, and civil rights law. These lawyers seek to preserve the rights of private litigants and to promote public confidence in the legal system.

The Cleveland Academy of Trial Attorneys ("CATA") is dedicated to helping trial lawyers better represent their clients. CATA's membership consists of several hundred attorneys, each of whom represents countless injured citizens in all areas of personal injury law. CATA seeks to protect meaningful access to the civil justice system for all Ohio citizens and preserve their constitutional, statutory, and common law rights under Ohio law.

The Ohio Employment Lawyers' Association ("OELA") is a state-wide professional membership organization of lawyers who represent employees in labor, employment, and civil-rights disputes. OELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace. OELA advocates for employee rights and workplace fairness while promoting the highest standards of professionalism, ethics, and judicial integrity.

The OAJ, CATA, and OELA (collectively "*Amici*") submit this brief out of concern that categorically precluding a court's authority to award attorney fees will abridge Ohioans' access to this State's civil justice system and undermine its citizens' confidence in that system. The individuals and families represented by members of the *Amici* often

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depend upon the court's ability to award attorneys' fees, especially where the tortfeasor drives up the cost of achieving any resolution. Indeed, without the prospect of such additional compensation, the attorneys who comprise the membership of *Amici* will be financially unable to fully pursue or defend many legitimate appeals on behalf of deserving clients. It will be highly unlikely, moreover, that specialized appellate counsel can be retained if their fees cannot be recovered. The Eighth District's carve-out of appellate work from a punitive award of attorney fees is thus not only counter-intuitive, but it imposes further burdens upon the prevailing plaintiff who has been victimized by malicious wrongdoing. With no potential downside, every defendant who is penalized for malicious misconduct will have a strong incentive to further prolong the day of reckoning with two or three years of appellate review.

## STATEMENT OF THE CASE AND FACTS

The *Amici* adopt and incorporate the statement of the case and facts offered in the Merit Brief of Plaintiff-Appellants, Christina Cruz and Heidi Kaiser filed June 1, 2021. Of particular note, the *Amici* wish to highlight Plaintiff Cruz's testimony that before she finally connected with the "young," "crazy," and "passionate" attorney who won her compensation at trial, she was "pretty down and out assuming it would be difficult to even pursue her case" after finding that "most of the lawyers" with whom she consulted "were only concerned with getting their $350 an hour." *Exhibit MMMM-1, p. 1; Transcript of Proceedings filed January 8, 2016 ("Tr."), Vol. VI, pp. 1275-1277.*

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## ARGUMENT

On February 2, 2021, this Court accepted a single proposition of law for review:

> Parties who are awarded their reasonable attorney fees as part of a punitive damages award at trial may, in the presiding court's discretion, recover fees reasonably incurred over the

entire course of the lawsuit, including at the appellate level

*Plaintiff-Appellants' Memorandum in Support of Jurisdiction filed October 13, 2020, p. 5; 02/02/2020 Case Announcements,* 2021-Ohio-254, p. 2. For the following reasons, this Court should adopt this proposition of law and reverse the decision of the Eighth District Court of Appeals in *Cruz v. English Nanny & Governess School*, 8th Dist. Cuyahoga No. 108767, 2020-Ohio-4216.

## I. APPELLATE FEES WOULD HAVE BEEN INCLUDED IN AN AWARD OF ATTORNEY FEES AT COMMON LAW

To answer whether a trial court possesses discretion to include appellate fees as part of a jury's fee award, this Court should consider the source of the authority to award fees in the first place. Ohio's General Assembly has not passed a statute empowering or precluding a trial court from awarding legal fees to a prevailing party that has been awarded punitive damages. Rather, this power developed within the common law.

From the earliest times, this Court has recognized that "in cases where the act complained of is tainted by fraud, or involves an ingredient of malice, or insult, the jury, which has power to punish, has necessarily the right to include the consideration of proper and reasonable counsel fees in their estimate of damages." *Roberts v. Mason*, 10 Ohio St. 277, 282 (1859); *Peckham Iron Co. v. Harper*, 41 Ohio St. 100, 109 (1884); *see* Sedgwick, *Treatise on the Measure of Damages* 98 (2d Ed.1852) ("it may, on principle, I think, be considered clear that in cases proper for the infliction of exemplary or vindictive damages, the jury in estimating those damages, have a right to take into their consideration the probable expense of the litigation"). For this reason, attorney fees may be awarded whenever a punitive verdict is returned. *Phoenix Lighting Group, L.L.C. v. Genlyte Thomas Group, L.L.C.*, 160 Ohio St.3d 32, 2020-Ohio-1056, 153 N.E.3d 30, ¶ 9.

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The Revised Code does not alter this long-standing rule, as only the standards for an initial award of punitive damages have been codified:

> (C) Subject to division (E) of this section, punitive or exemplary damages are not recoverable from a defendant in question in a tort action unless both of the following apply:
>
> (1) The actions or omissions of that defendant demonstrate malice or aggravated or egregious fraud, or that defendant as principal or master knowingly authorized, participated in, or ratified actions or omissions of an agent or servant that so demonstrate.
>
> (2) The trier of fact has returned a verdict or has made a determination pursuant to division (B)(2) or (3) of this section of the total compensatory damages recoverable by the plaintiff from that defendant.

*R.C. 2315.21(C).* The only references to attorney fees in all of Chapter 2315 exclude such expenses from the definition of "Economic Loss" and make clear that they "shall not be considered for purposes of determining the cap on punitive damages." R.C. 2315.18(A)(2)(c) and 2315.21(D)(2)(c). There has thus been no statutory modification, and attorney fees may be awarded consistent with the common law when punitive damages are assessed.

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Although an award of attorney fees ancillary to a punitive verdict has been regarded as compensatory, *Roberts*, 10 Ohio St. 277, paragraph two of the syllabus; *Neal-Pettit v. Lahman*, 125 Ohio St.3d 327, 2010-Ohio-1829, 928 N.E.2d 421, ¶ 14; *Zappitelli v. Miller*, 114 Ohio St.3d 102, 2007-Ohio-3251, 868 N.E.2d 968, ¶ 6, it is important to consider *what* exactly such an award compensates for. In a few of the decisions relied upon by this Court in *Roberts*, 10 Ohio St. at 282, the Supreme Courts of Alabama and Connecticut blessed such a recovery when the fees had been incurred in prior

proceedings. *Marshall v. Betner*, 17 Ala. 832 (1850); *Noyes v. Ward*, 19 Conn. 250 (1848). The Alabama Court considered whether "counsel fees" expended in an earlier suit for a writ of attachment could be recovered if it was proven that the former proceeding was "wrongfully and vexatiously" prosecuted. *Marshall*, 17 Ala. at 835. Answering this question affirmatively, the Court noted "the justice and good sense of the rule which requires a party, who wantonly and maliciously abuses the process of the court, or sues out an attachment for the purpose of vexing and harrassing the defendant without probable cause therefor, to make good his losses and to furnish complete reparation and indemnity for the injury his malice has occasioned." (Emphasis added.) *Id*. at 837.

In *Noyes*, the Connecticut Court considered whether it was appropriate for a jury to award "the expenses of the former trial, in which a verdict failed to be rendered, in consequence of the death of a juror" when the facts of the case "would justify, if not require, *vindictive* damages." (Emphasis sic.) *Noyes*, 19 Conn. at 260. Duplicate proceedings "occurred by the providence of God, and not by any fault of the plaintiff." *Id.* The Court relied on its prior decision in *Linsley v. Bushnell*, 15 Conn. 225 (1842), and held: "It is common, in actions of this kind, for the jury to consider the expense to which the injured party is subjected in obtaining redress." (Emphasis added.) *Noyes*, 19 Conn. at 260, 264. In *Linsley*, there had been testimony sufficient to prove malice by the tortfeasor, who caused a wagon accident by leaving a cart full of wood in the middle of a road for several days. *Linsley*, 15 Conn. at 228-229, 233-234. The court had reviewed the trial court's charge to jurors that "they had a right to take into consideration the necessary trouble and expenses of the plaintiff in the prosecution of the action." *Linsley*, 15 Conn. at 226. The Court affirmed this charge, explaining:

There is no principle better established, and no practice more

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> universal, than that vindictive damages, or smart money, may be, and is, awarded, by the verdicts of juries, in cases of wanton or malicious injuries, and whether the form of the action be trespass or case. We refer to the authorities before cited, and also to *Denison v. Hyde*, 6 *Conn. Rep.* 578. *Woert v. Jenkins*, 14 *Johns. Rep.* 352. *Merills v. Tariff Manufacturing Company*, 10 *Conn. Rep.* 384. *Edwards v. Beach*, 3 *Day*, 447. In this last case, *Daggett*, in argument for the defendant, admits, that where an important right is in question, in an action of trespass, "the court have given damages to indemnify the party for the expense of establishing it." The argument in opposition to the doctrine of the charge, is substantially founded upon the assumed principle, that the defendant cannot be subjected in a greater sum in damages than the plaintiff has actually sustained. But every case in which the recovery of vindictive damages has been justified, stands opposed to this argument. And we cannot comprehend the force of the reasoning, which will admit the right of a plaintiff to recover, as vindictive damages, beyond the amount of injury confessedly incurred, and in case of an act and injury equally wanton and wilfully committed or permitted, will deny to him a right to recover an actual indemnity for the expense to which the defendant's misconduct has subjected him. (Emphasis added.)

*Linsley*, 15 Conn. at 236-237.

These are the doctrinal roots of the rule adopted in Ohio in *Roberts*, 10 Ohio St. at 282. Each of these authorities establish that a plaintiff who has proved actual malice is entitled to an award of attorney fees because the tortfeasor's malice *caused* the legal proceedings to be necessary. *See Marshall*, 17 Ala. at 837; *Noyes*, 19 Conn. at 260; *Linsley*, 15 Conn. at 236-237. The rule was not limited to the immediate trial proceedings that had concluded, as counsel fees necessitated by prior proceedings were recoverable. *Marshall*, 17 Ala. at 835; *Noyes*, 19 Conn. at 260.

This Court applied these principles in *Finney v. Smith*, 31 Ohio St. 529 (1877), not long after *Roberts* was decided. The tortfeasor in *Finney* was alleged to have published "certain false, scandalous, malicious, and defamatory matter" regarding the alcohol sales

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practices of an "apothecary, druggist, and grocery-keeper." *Finney*, 31 Ohio St. at 530. The trial court had charged the jurors that the plaintiff was "entitled to recover such damages as he has directly sustained; and, in estimating compensatory damages, you may take into consideration and include reasonable fees of counsel employed by the plaintiff in the prosecution of his action." (Emphasis added.) *Id.* at 531. But the defendant appealed this element of the jury instructions, and the "district court reversed the judgment of the court of common pleas, solely on the ground that the latter court erred in instructing the jury that in estimating compensatory damages, the reasonable fees of counsel employed by the plaintiff in prosecuting his action, might be taken into consideration." *Id.* Despite conflicts in older caselaw, this Court determined: "This is, however, no longer, if it ever was, an open question in this state." *Id.* at 532. Referencing its prior decision in "*Stevens and Wife v. Handly*, Wright 121," this Court explained:

> [W]e have no doubt that when the court spoke of 'all the expenses,' the counsel fees of the injured party in the suit were intended to be included, though they are not in terms mentioned; indeed it must be so, for the court speaks of 'costs' and 'loss of time' as matters to be compensated, in addition to 'all the expenses'-'such as will make them whole.' The injured party would not be made whole as to all expenses, unless his counsel fees were covered and included. (Emphasis added.)

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*Finney*, 31 Ohio St. at 532. In support of this rule, the Court relied upon a recently published edition of a treatise, which explained:

> '[A]lthough in this (Ohio) and some other states counsel fees are permitted to be considered by the jury in fixing the damages—and, indeed, can practically hardly be excluded from their consideration where, in actions of tort, the law does not furnish an exact measure—it is difficult to see why such expenses should be allowed under the head of exemplary damages. The plaintiff's counsel fees are an expense incurred by him, and their reimbursement to him brings the measure of damages back toward the standard of compensation. It is an item of compensation, indeed, not usually allowed on what

> still seems to be the theory of the law, that every man can be his own advocate; but, nevertheless, it is really compensation. . . . The allowance of counsel fees, or their supposed equivalent, in this class of cases, must be regarded as the result of an instinct or inclination on the part of the bench to return to the standard of compensation.' (Emphasis added.)

*Id.* at 534, quoting Sedgwick, *Treatise on the Measure of Damages* 111 (6th Ed.1874)

From these authorities, it is plain that the common law would permit recovery of fees incurred on appeal from a jury verdict finding malice and awarding punitive damages and recovery of attorney fees. The prevailing plaintiff has no choice but to defend an appeal of a punitive recovery, and such additional proceedings therefore arise from malicious conduct just as much as any underlying trial. In some extreme circumstances, the review proceedings will take longer and require more effort than the lower court litigation itself. Where a defendant tortfeasor appeals from such a verdict, it is that defendant's decision not to accept the jury's findings that necessitate the further proceedings. In this way, appellate fees result from a defendant's malice just as much as fees spent on trial counsel.

The Eighth District Court of Appeals did not appear to consider the logical underpinnings of the common law when deciding the matter *sub judice*. *Cruz*, 2020-Ohio-4216, at ¶ 51-59. The decision held instead that "a trial court lacks jurisdiction to award attorney fees expended on appeal while defending a judgment" and that this Court "carved out an exception to this general rule and held that an aggrieved party may recover appellate attorney fees when his cause of action involves certain remedial statutes." *Id.* at 52, citing *Klein v. Moutz*, 118 Ohio St.3d 256, 2008-Ohio-2329, 888 N.E.2d 404. The lower court relied upon *Jay v. Massachusetts Cas. Ins. Co.*, 5th Dist. Stark No. 2009CA00056, 2009-Ohio-4519, in support of the rule that the trial court lacks authority

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to make an award of appellate fees. *Cruz*, 2020-Ohio-4216, at ¶ 52. But in *Jay*, the Fifth District Court of Appeals simply observed: "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*, 2009-Ohio-4519, at ¶ 10, quoting *State ex rel. Special Prosecutors v. Judges, Court of Common Pleas*, 55 Ohio St.2d 94, 98, 378 N.E.2d 162 (1978). Unlike in *Jay*, the trial court in this case had been provided with subject matter jurisdiction by virtue of the remand that had been ordered. *See Jay*, 2009-Ohio-4519, at ¶ 10; *Cruz*, 2020-Ohio-4216, at ¶ 16-17. When appellate fees are recoverable, there is no rule preventing an appellate court from remanding the matter to make a determination on the proper amount. The *Jay* case simply stands for the proposition that if the appellate court does not remand, the trial court is devoid of subject matter jurisdiction over the concluded proceedings. *Accord State ex rel. O'Malley v. Russo*, 156 Ohio St.3d 548, 2019-Ohio-1698, 130 N.E.3d 256, ¶ 23.

The lower court's interpretation of *Klein*, 118 Ohio St.3d 256, 2008-Ohio-2329, 888 N.E.2d 404, is likewise too broad. The *Klein* Court acknowledged that the scope of its decision was limited:

> There is no question that a trial court has authority under R.C. 5321.16(C) to award attorney fees incurred at trial. We must now determine whether a trial court may also be a proper forum in which a tenant may seek to recover attorney fees incurred at the appellate level.

*Id.* at ¶ 8. Conflicting decisions had been issued from the Sixth and Ninth District Courts of Appeal concerning whether the trial court or the appellate court should make such a decision. *Id.* at ¶ 1-6. Because none of the language in R.C. 5321.16(C) answered this question, the Court held that either court possessed the authority to make an award of appellate fees, although the "trial court is in a better position to determine a fee award,

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for it may hold a hearing, take testimony, create a record, and otherwise evaluate the numerous factors associated with calculating an attorney-fee award." *Id.* at ¶ 10-17.

There was no holding in *Klein* that attorney fees expended on appeal may only be recovered if a statute authorized the assessment. *Klein*, 118 Ohio St.3d 256, 2008-Ohio-2329, 888 N.E.2d 404, at ¶ 1-19. Indeed, it would have been *obiter dicta* to adopt such a rule in a case where fees *were* explicitly authorized by statute. The far more important principle to draw from *Klein* is that the primary reason supporting the common law rule permitting recovery of attorney fees on account of malice *also* justified the passage of R.C. 5321.16(C):

> R.C. 5321.16(C) sets forth the tenant's remedies for a landlord's violation of the statute. "A commonly accepted view of the purpose underlying this statute is that attorney fees are provided for in order to ensure the return of wrongfully withheld security deposits at no cost to tenants." *Christe*, 88 Ohio St.3d at 378, 726 N.E.2d 497.

*Id.* at ¶ 10. Likewise, under the common law: " 'The plaintiff's counsel fees are an expense incurred by him, and their reimbursement to him brings the measure of damages back toward the standard of compensation.' " *Finney*, 31 Ohio St. at 534, quoting Sedgwick at 111 (6th Ed.1874). Because the same interests supporting the statute also support a common-law award of attorney fees, *Klein* is actually a strong authority in support of a ruling that recovery of appellate fees are permitted under the common law.

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## II. DISALLOWING ATTORNEY FEE AWARDS FOR APPELLATE PROCEEDINGS UNDER THE COMMON LAW WOULD CREATE A NICHE EXCEPTION

There is no dispute that when attorney fees are awarded pursuant to certain statutes, fees earned on the appellate level during the litigation may be included in the amount recovered. *See Klein*, 118 Ohio St.3d 256, 2008-Ohio-2329, 888 N.E.2d 404; *see also LaFarciola v. Elbert*, 9th Dist. Lorain No. 08CA009471, 2009-Ohio-4615, ¶ 11. In

*Klein*, this Court noted a plethora of judgments by Ohio courts authorizing the assessment of attorney fees earned on appeal under remedial statutes. *Klein* at ¶ 15. Citing *Klein* and other authorities, the Ninth District Court of Appeals has acknowledged: "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." *LaFarciola*, 2009-Ohio-4615, at ¶ 11.

The same is true in federal court: "Where a statute provides for an award of attorney's fees to a prevailing party, 'reasonable appellate fees may [also] be awarded to [the] prevailing part[y].' " *Dowling v. Litton Loan Servicing LP,* 320 Fed.Appx. 442, 450 (6th Cir.2009), quoting *Riley v. Kurtz*, 361 F.3d 906, 915 (6th Cir.2004). According to the United States District Court for the Southern District of Michigan, "cases from this circuit and others uniformly hold that a lawyer should receive a fee for preparing and successfully litigating a request for attorney's fees pursuant to a fee-shifting statute. * * * This includes the legal time spent prosecuting and defending appeals of those attorney's fees." (Emphasis added.) *Tyson v. Sterling Rental, Inc.,* S.D.Mich. No. 13-CV-13490, 2019 WL 3554713, *4 (Apr. 17, 2019); *see Weisenberger v. Huecker,* 593 F.2d 49, 54 (6th Cir.1979); *Prandini v. Natl. Tea Co.*, 585 F.2d 47, 53-54 (3d Cir.1978).

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Like these statutory bases for attorney fees, a contractual basis for awarding attorney fees may also include fees earned on the appellate level. *Calypso Asset Mgt., LLC v. 180 Indus., LLC*, 10th Dist. Franklin Nos. 20AP-122 and 20AP-124, 2021-Ohio-1171, ¶ 4, 14, citing *Bittner v. Tri-Cty. Toyota, Inc.*, 58 Ohio St.3d 143, 146, 569 N.E.2d 464 (1991). For instance, the Tenth District Court of Appeals recently found that the trial court abused its discretion by excluding hours spent on appellate work from an award of attorneys' fees granted pursuant to a provision in a settlement agreement. *E.g., Calypso*,

2021-Ohio-1171, at ¶ 32.

Since fees earned on appeal may be included in awards under every other category of action, it follows that they should be included under the common law. To find otherwise would create a niche exception to the general rule. Such an arbitrary carve-out would conflict with the very purpose of permitting a jury to award attorneys' fees, which is to make the successful plaintiff whole.

## III. AN EXCEPTION FORECLOSING RECOVERY OF ATTORNEY FEES EARNED ON APPEAL UNDERMINES THE PURPOSE OF AWARDING ATTORNEY FEES

The attorneys' fees awarded in this case were included by the jury in conjunction with their award of punitive damages. In addition to making victims of malice whole, this Court has explained that "the requirement that a party pay attorney fees under these circumstances is a punitive (and thus equitable) remedy that flows from a jury finding of malice and the award of punitive damages." *Digital & Analog Design Corp. v. N. Supply Co.,* 63 Ohio St.3d 657, 662, 590 N.E.2d 737 (1992); *see Neal-Pettit*, 125 Ohio St.3d 327, 2010-Ohio-1829, 928 N.E.2d 421, at ¶ 16 (noting that while the punitive award is distinct from the award of attorney fees, the latter stems from the former). The purpose of a punitive award is "to punish the guilty party and deter tortious conduct by others." *Id.* at 660 citing *Detling v. Chockley*, 70 Ohio St.2d 134, 136, 436 N.E.2d 208 (1982).

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Logic dictates that if it is equitable to make an award of attorney fees generated during trial court litigation, the same fundamental principles of fairness demand a similar award for fees incurred during necessary appellate proceedings. Only a tortured view of equity would support the conclusion that a malicious tortfeasor should be responsible for the injured party's fees at the trial court level but may roll the dice on appeal without risking any additional responsibility to reimburse the tort victim for a successful defense

of the punitive verdict. If equity requires malicious actors to make their victims whole by paying their attorneys' bills, then all reasonable fees borne by the injured party through the complete proceeding should be recovered.

Another purpose of awarding attorneys' fees to a prevailing party has been " 'the encouragement of attorneys to represent indigent clients and to act as private attorneys general in vindicating congressional policies.' " *Turner v. Progressive Corp.*, 140 Ohio App.3d 112, 118, 746 N.E.2d 702 (8th Dist.2000), quoting *Gagne v. Maher*, 594 F.2d 336, 344 (2d Cir.1979). Pursuant to this laudable objective, the Eighth District Court of Appeals once considered a statutory award of attorney fees and held: "Counsel is also entitled to fees for his representation during the appellate process." *Id.,* citing *Simmons v. BVM, Inc.*, 8th Dist. Cuyahoga No. 68502, 1995 WL 517032 (Aug. 31, 1995), *Finch v. Vernon*, 877 F.2d 1497, 1508 (11th Cir.1989), *Toussaint v. McCarthy*, 826 F.2d 901, 904 (9th Cir.1987), and *Lowry v. Whitaker Cable Corp.*, 472 F.2d 1210 (8th Cir.1973). The unanimous panel reasoned that if " 'an attorney is required to expend time' " litigating an appeal, " 'yet may not be compensated for that time, the attorney's effective rate for all the hours expended on the case' " would be diluted, undermining the fundamental purpose of awarding attorney fees. *Turner* at 118, quoting *Gagne*, at 344.

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While there is no similar statutory language altering the common law in this area, the same logic applies. The record in this case shows that Plaintiffs could not afford to retain an attorney at an hourly rate. It was only by agreeing to a contingency fee that they were able to obtain counsel. The incentive and, in some cases, sheer economic feasibility for members of the bar, including the membership of *Amici*, to represent injured Ohioans is founded in the ability to request attorneys' fees given the nature of the plaintiffs' claims. Indeed, that is just what happened in this case. This litigation was impossible to initiate

until the Plaintiffs found an attorney willing to take accept the risks and potential rewards. *Exhibit MMMM-1, p. 1; Tr., Vol. VI, pp. 1275-1277.* If appellate fees cannot be recovered on the same terms as trial fees, the possibility of an appeal will weigh only as a risk in this calculus, which will unfairly benefit the malicious tortfeasor community and burden victims of actionable wrongs.

There is no concrete or doctrinally sound basis for precluding recovery of costs and fees incurred on appellate portions of the litigation occurring after a jury awards attorney fees. Instead, it is a *lack* of statutory language barring such a recovery that brings this appeal before the Court. *See R.C. 2315.18(A)(2)(c) and 2315.21(C)(1) and (D)(2)(c).* However, the Legislature should not be expected to prescribe the remedies available under each and every cause of action under Ohio law. Silence in the Revised Code simply permits the common law to govern.

Moreover, while the elected representatives of the people have not spoken on this issue, the people themselves have. Ohio juries, including the one in this case, have awarded and continue to award attorney fees, demonstrating that Ohio citizens believe that once actual malice has been established, such additional compensation is just. Ohio Courts then enforce these verdicts, including fees earned on the appellate level, showing that they too find merit in these awards. *E.g., Calypso*, 2021-Ohio-1171, at ¶ 32. Precluding a recovery of appellate fees undermines the jury's understandable intent to make the plaintiff whole and preempts the trial court's discretion to value and enforce the full amount awarded.

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## CONCLUSION

For all of the foregoing reasons, this Court should reverse the decision of the Eighth District Court of Appeals in *Cruz*, 2020-Ohio-4216, and adopt a rule permitting recovery of attorney fees incurred on appeal from a punitive verdict.

Respectfully Submitted,

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## CERTIFICATE OF SERVICE

I certify that a copy of the foregoing **Amicus Brief** has been served by e-mail on June 1, 2021, upon:

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