IN THE SUPREME COURT OF OHIO

CHRISTINA CRUZ, *et al.*,	)	CASE NO. 2020-1247
	)	
Appellants,	)	On Appeal from the Cuyahoga
	)	County Court of Appeals
VS.	)	Eighth Appellate District
	)	
ENGLISH NANNY & GOVERNESS SCHOOL, *et al*.,	)	Court of Appeals Case No. CA-19-108767
	)	
Appellees.	)	
	)	

APPELLEES' REPLY BRIEF

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I. **Statement of Facts**.

Appellees hereby present an abbreviated summary of facts relevant to the Proposition of Law *sub judice* as well as a rejoinder to the more sensational accusations of Appellant's Merit Brief.

On June 7, 2019, the trial court, acting on remand from the original appeal to the Ohio Court of Appeals of the Eighth Appellate District in *Cruz v. English Nanny & Governess School, Inc.*, 2017-Ohio-4176, 92 N.E.3d 143 (8th Dist.2017) ("*Cruz I,")* awarded Appellants over one hundred thousand dollars in appellate attorney's fees for work performed by counsel following the June 2015 jury verdict. The trial court awarded the fees despite counsel for appellants prosecuting the within matter pursuant to a contingency fee agreement, in which they agreed to be compensated solely from the proceeds of the trial court's judgment, and appellants themselves were never responsible for "out of pocket" attorney's fees. Appellants' common law tort claims, moreover, lacked any statutory basis for the award of attorney's fees. Appellees therefore immediately appealed the trial court's award of appellate attorney's fees to the Court of Appeals for the Eighth Appellate District (hereinafter the "Eighth District.")

On August 27, 2020, the Eighth District issued its decision in *Cruz v. English Nanny & Governess School,* 8th Dist. Cuyahoga No. 108767, 2020-Ohio-4216 ("*Cruz II")* vacating the trial court's appellate attorney's fee award. The Eighth District Court based its ruling on the sound principles that "[i]n general, a trial court ***lacks jurisdiction*** to award attorney fees expended on appeal while defending a judgment." *Cruz II* at ¶52, *citing Jay v. Massachusetts Cas. Ins. Co.*, 2009-Ohio-4519, 853 N.E.2d 1235 (5th Dist.), ¶13 (emphasis added). The Eighth District also recognized that this honorable Court "has carved out an exception to this general rule and held that an aggrieved party may recover appellate attorney fees when his cause of

action involved certain remedial statutes." *Id., citing Klein v. Moutz,* 118 Ohio St.3d 256, 2008-Ohio-2329, 888 N.E.2d 404.

The remainder of the Eighth District's judgment in *Cruz II* consisted of a persuasive analysis of why this Court's exception to the rule against appellate attorney's fees in *Klein* was plainly inapplicable to the instant matter. The Eighth District noted that the *Klein* decision centered upon the statutory language of O.R.C. Section 5321.16(C), which explicitly provided for the award of attorney's fees to successful plaintiffs. Moreover, the statute's provision for attorney's fee awards squared with the General Assembly's evident public policy goal of fully compensating tenants for prosecuting claims for the return of security deposits. *Id.* at ¶54 ("an important objective of R.C. 5321.16 is to ensure that an aggrieved tenant bears no expense in the recovery of a wrongfully withheld deposit.") This Court furthermore advanced the *Klein* exception to the rule against appellate attorney's fee awards to cases involving other remedial statutes, but not common law tort claims. *Id*.

The Eighth District proceeded to analyze *Klein* in tandem with the Fifth and Ninth District Courts of Appeals. In *Jay, supra,* the Ninth District Court of Appeals declined to award appellate attorney's fees to plaintiffs who had prevailed upon non-statutory tort actions. The *Jay* court, the Eighth District noted with approval, stated that "[a] thorough reading of *Klein* reveals that the Supreme Court's decision to permit a trial court to determine appellate fees was meant to be read in harmony with *statutory* provisions that permit such an award." *Cruz II,* at ¶55, *citing Jay, supra,* at ¶15 (emphasis in original). Less than one month later, the Ninth District reached the identical conclusion in *Lafarciola v. Elbert,* 2009-Ohio-4615, 727 N.E.2d 599 (9th Dist.). Like *Jay,* the plaintiff in *Lafarciola* sought to recover appellate attorney's fees in defense of a judgment a common law tort judgment that included punitive damages. The Eighth District cited

Lafarciola for the proposition that courts have generally "decline[d] to extend the exception to allow a prevailing party to recover fees for work performed at the appellate level. As the Supreme Court of Ohio acknowledged . . . a move away from a deeply rooted policy regarding the awarding of attorney fees is best left as a matter of ***legislative*** concern." *Cruz II,* at 57, *citing Lafarciola* at ¶14.

Significantly, *Jay* and *Lafarciola* were decided by different appellate Districts within one (1) month of each other, and together less than two (2) years after this honorable Court made clear in Klein that appellate attorney's fees are awardable ***only*** in cases when expressly authorized by remedial statute. The Eighth District therefore relied on well-established precedent in vacating appellants' appellate attorney's fees over one (1) decade after the *Jay and Lafarciola* decisions were rendered. While Appellants and *amici* devote vast sections of their Briefs disputing the rationale of those decisions, they are unable to direct this Court' attention to any case law that reads *Klein* other than according to its plain meaning. No such precedent exists, as this Court long since settled the matter in *Klein*.

Appellees also dispute the more lurid elements of appellants' *Statement of Facts* in their Merit Brief. While the substance of appellants' underlying tort claims are not directly relevant to the legal issue of the validity of the appellate attorney's fee award, appellees cannot leave undisturbed appellants' characterization of their operations as a "politely masked human trafficking operation." *See* page 10 of appellants' merit brief. This is an absurd mischaracterization of Appellees' quarter-century old business and a distortion of the evidence adduced at the trial of this matter. Appellees are confident that centuries of precedent denying appellate attorney's fees to plaintiffs in the absence of statutory authorization is wholly dispositive of the Proposition of Law at issue, but appellants' framing of their causes of action in

this case—as well as what the evidence purported to demonstrate—cannot be left unaddressed prior to this Court's consideration of this appeal.

The nexus of appellants' intentional infliction of emotional distress and wrongful discharge in violation of public policy claims centered upon appellee Cruz's lurid accusation that a well-respected Pennsylvania attorney and businessman ("V. W.") sexually assaulted his minor daughter in Cruz's presence. Extraordinary claims ordinarily demand extraordinary proof, but the ***only*** evidence that such a crime occurred arose from Cruz's self-serving description of the event. Appellants also failed to produce ***any*** evidence at trial that V.W. was arrested or charged for the purported incident or that V.W.'s daughter was permanently removed from his care. Perhaps because there was no independent evidence substantiating what Cruz claimed she witnessed in V.W.'s home, appellants based their tort claims against appellees—who were hundreds of miles away from where the incident when it supposedly occurred and merely referred Cruz to V.W. for an interview—on generalized "public policy" grounds that sexual abuse be reported to authorities. Here again, however, appellants failed to produce a compelling public policy argument. Neither appellants nor appellees were mandated reporters of suspected child abuse under Ohio ***or*** Pennsylvania law.

Nonetheless, evidence produced at trial demonstrated that appellees had in fact trained graduates of their nanny school to report child abuse immediately. T. 1216:13-15.[1] Despite such instruction, Cruz waited ***over one month*** to file a written report of the alleged abuse to Pennsylvania child welfare authorities. In the interim—and far from attempting to "suppress" Cruz's account--appellees directed her to discuss the alleged abuse with Shari Nacson, a licensed

[1] Although Ohio law does not mandate nannies, governesses or similar caretakers of children to report suspected child abuse, appellee Roth in fact lobbied the Ohio Department of Health in August 2010 for O.R.C. Section 2151.421, Ohio's child abuse reporting statute, to include nannies in the mandatory reporting category. T. 273: 8-10.

independent social worker, with whom appellees contracted to teach child abuse reporting laws. Nacson relied entirely on Cruz's hearsay-based description of what she believed she witnessed in Pennsylvania and "assisted" Cruz with the written report ultimately submitted to Pennsylvania authorities. Disturbingly, Nacson testified at trial that she modified Cruz's depiction of events in V.W.'s home. Nacson admitted that she "suggested places where [Cruz] might be able to ***add detail***. And that's common in instances like this, just to try and ***fill in a memory***." T. 538:10-12.[2]

Thus, the jury in the within matter was presented with evidence of a wealthy father, V.W., who allegedly committed a monstrous act of child sexual abuse against his own daughter in a county hundreds of miles away from Ohio. Appellees were of course unable to present any evidence that the forum state of Pennsylvania ever took any formal action against V.W. or that child welfare authorities ever separated V.W. from his daughter. Perhaps because V.W. had substantial resources to defend his name and reputation over an event that occurred wholly outside Ohio, appellees were effectively cast as stand-ins for the true "villain" of Cruz's version of events an entire state away. While the validity of the underlying facts to the within matter are not subject to review in the instant appeal, appellees nonetheless direct this Court's attention to the tenuousness of the "evidence" supporting Cruz's child abuse allegations. Without such proof, appellants' arguments that appellate attorney's fees are necessary to advance the "public policy" or reporting child abuse ring hollow, particularly considering that appellants have not identified any ***statutory*** basis for the award of such fees in this case.

[2] Nacson further testified that she and Cruz exchanged multiple drafts of the report that was ultimately submitted to Pennsylvania authorities, with Nacson admitting that she modified its contents ("[m]aybe it went back and forth maybe three or four times. I know all of the emails have been submitted, so I think we can check, but off the top of my head, I would think it was probably three or four times.") T. 540:11-20.

II. Argument and Law.

A. Introduction.

For centuries, courts in Ohio and throughout the country have adhered to the "American Rule" limiting judicial awards of attorney's fees to discrete, exceptional circumstances with well-established public policy justifications. Generally, a party is responsible for its own attorney's fees absent legislative enactment or private agreement between parties. Additionally, attorney's fees may also accompany awards of punitive damages. It is this final exception that appellants and amicus curiae are requesting this honorable Court to bootstrap into a broad exception expanding awards to *appellate* attorney's fees incurred defending such punitive damages based on purported "common sense" principles (see p. 1 of Appellant's Merit Brief) and a misreading of this Court's precedent. Unfortunately for appellants and amicus curiae, there is literally no precedent for awarding appellate attorney's fees in the absence of express statutory authorization. In fact, decades of well-established case law in Ohio and elsewhere militates precisely ***against*** this conclusion. A careful reading of that case law—as well as underlying public policy—indicates that Appellants arguments for appellate attorney's fees in support of common law tort claims should be directed to the Ohio General Assembly rather than this honorable Court.

B. In *Klein v. Moutz*, this Court's rationale for a trial court's authority to grant appellate attorney's fees to plaintiffs under Ohio's Landlord Tenant Act was based *entirely* on the statutory language at issue in that case and cannot be extrapolated to justify the award of appellate fees in the underlying tort case, which was not brought pursuant to any remedial statute.

In *Klein v. Moutz,* 118 Ohio St.3d 256, 2008-Ohio-2329, 848 N.E.2d 404, this Court authorized trial courts to award appellate attorney's fees to plaintiffs presenting meritorious claims under Ohio's Landlord Tenant Act. The entirety of this Court's rationale was based on

the ***statutory*** language at issue in that case, namely O.R.C. Section 5321.16(C), which provides that when a landlord fails to comply with certain statutory obligations, "the tenant may recover the property and money due him, together with damages in an amount equal to the amount wrongfully withheld, and reasonable attorney's fees." *Id*. at ¶7. Indeed, this Court's syllabus distills the statutory basis of its decision in a single sentence: "[b]oth trial and appellate courts have authority to determine and tax costs ***under 5321.16(C)*** for attorney's fees incurred at the appellate level." *Id.* at *Syllabus of the Court*. (Emphasis added). The Court's reliance on the Landlord Tenant Act is evident throughout the judgment. *See, e.g., Klein* at ¶13 ("R.C. 5321.16 is a ***remedial statute*** intended to compensate the tenant for a wrongfully withheld deposit at no expense to the tenant . . . [t]herefore, we hold that a trial court has the ***authority under R.C. 5321.16(C)*** to tax as costs the attorney fees incurred at the appellate level.") (Emphasis added.) This Court further emphasized the statutory basis for its decision by citing to cases awarding appellate attorney's fees under similar remedial statutes: "[t]his holding is also consistent with judgments by appellate courts authorizing trial courts to assess attorney fees incurred on appeal to a prevailing plaintiff under ***other remedial statutes***." *Id.* at ¶15.[3] (Emphasis added). Finally, this Court emphasized that its decision "further[ed] an ***important objective of the statute***, i.e., to ensure that the tenant incurs no expense when seeking return of the deposit wrongfully withheld." *Id*. at ¶17. (Emphasis added).

Ohio appellate courts, including the Eighth District below, have readily applied this straightforward, common sense rationale to appellate attorney's fee cases ***not*** involving remedial statutes. In *Jay v. Massachusetts Casualty Ins. Co.*¸2009-Ohio-4519, 853 N.E.2d 1235 (5th

[3] This Court cited *Tanner v. Tom Harrigan Chrysler Plymouth, Inc.* 82 Ohio App.3d 764, 613 N.E.2d 649 (2nd Dist. 1991), which concerned appellate attorney's fees under O.R.C. Section 1345.09(F); *Gibney v. Toledo Bd. Of Edn.* 73 Ohio App.3d 99, 596 N.E.2d 591 (6th Dist.1991), which involved 42 U.S.C. Section 1983; and *Royster v. Toyota Motor Sales, U.S.A, Inc.* 92 Ohio St.3d 327, 332, 750 N.E.2d 531 (2001), which concerned O.R.C. Section 1345.71.

Dist.), the Fifth District Court of Appeals vacated a trial court's award of appellate attorney's fees in an appeal involving a common law bad faith judgment against a defendant insurance company. The Fifth District focused on the *Klein* Court's reliance on the Landlord Tenant Act's provision for attorney fees, *supra*, in the following passage:

> [T]he cause of action in *Klein* was based on a remedial statute, which is not the case here. A thorough reading of *Klein* reveals that the Supreme Court's decision to permit a trial court to determine appellate fees was meant to be read in harmony with *statutory provisions* that permit such an award; it was not meant to be liberally construed so as to apply to *any* determination of appellate fees and costs, as [plaintiff] argues, nor was it intended to create a new road of jurisdiction back to the trial court where one had not previously existed for appellants acting under a common law cause of action. Specifically, the *Klein* Court stressed that permitting a trial court to award attorney fees for causes of action brought under a remedial statute 'furthers an important objective of the statute,' that is, ensuring that a prevailing party need not incur the expense of defending the judgment on appeal . . . [t]hus, the Court expressly relied on the terms of the statute in making its decision." *Id.* at ¶11 (emphasis in original; internal citations omitted).

The Ninth District Court of Appeals was presented with similar facts in *Lafarciola v. Elbert*, 2009-Ohio-4615, 727 N.E.2d 599 (9th Dist.). In that case, the Ninth District reversed a trial court's award of appellate attorney's fees in favor of a plaintiff who prevailed on intentional and reckless torts in a residential construction case. Like this Court in *Klein*, the Fifth District in *Jay*, and the Eighth District below in the instant matter, the Ninth District determined that the lack of a remedial statute was dispositive of the question of awarding appellate attorney's fees. Significantly, the *Lafarciola* court acknowledged the line of cases cited by Appellants (and *amicus curiae)* in their Merit Brief recognizing that pre-verdict attorney's fees may be awarded in cases involving punitive damages. *See, e.g., Roberts v. Mason* 10 Ohio St. 277 (1859). Nonetheless, the Ninth District persuasively reasoned that the *Roberts* line of cases did ***not*** apply to cases that did not involve an independent remedial statute like the Landlord Tenant Act. Citing to the Fifth District in *Jay, supra*, the Ninth District determined that "absent a ***statutory***

grant of authority, a trial court is without jurisdiction to award appellate attorney fees. Furthermore, the [*Jay*] 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." (Emphasis added; internal citations omitted).

In Section C of part III of their Merit Brief, Appellants acknowledge that the *Klein* Court based its award of appellate attorney's fees on Ohio's Landlord Tenant Act, O.R.C. 5321.16(C). *Appellant's Merit Brief* at 18. Appellants make the meritless argument that the *Klein* court did not "limit its analysis to cases under the statute." *Id.* The correct analysis is that the *Klein* Court's decision extended only to cases involving ***other*** remedial statutes, such as Ohio's Consumer Sales Practices Act ("the [*Klein*] Court emphasized its holding's 'consistency with judgments by appellate courts authorizing trial courts to assess attorney's fees incurred on appeal to a prevailing plaintiff under other remedial statutes.") *Id.* Thus, the Appellants, like the Fifth District Court in *Jay* and the Ninth District Court in *LaFarciola* do not present this Court with ***any*** precedent in this state for the award of appellate attorney's fees in cases other than those concerning remedial statutes. As Appellants have not met this substantial (and, under *Klein*, dispositive) burden, this honorable Court should affirm the Eighth District's well-reasoned decision below and hold that the trial court was without authority to award appellate attorney's fees in this matter.

C. <u>This Court's decision in *Klein v. Moutz* is grounded in centuries of precedent from Courts in Ohio and throughout the United States recognizing that the American Rule prohibiting attorney fee awards in all but the most exceptional cases stands for the proposition that legislatures—and not Courts—are best equipped to determine when public policy demands the award of attorney's fees in private actions.</u>

This Court's insistence in *Klein* on a statutory basis for extending the punitive damages exception to the American Rule to the award of appellate attorney's fees is based on centuries of

precedent in Ohio and throughout the United States that it is the ***legislature***—and not the judiciary—that is best equipped to weigh the public policy considerations inherent in creating exceptions to the well-established "American Rule" that parties are responsible for their own attorney's fees.

This Court has long recognized that the General Assembly is best equipped to craft specific exceptions to the American Rule rather than permit trial courts to award attorney's fees in all civil actions. This Court's seminal pronouncement of that principle is found in *Sorin v. Board of Edn. of Warrensville Heights School Dist.* 46 Ohio St.2d 177, 347 N.E.2d 527 (1976). In *Sorin*, the Common Pleas Court ruled that the defendant school board's dismissal of plaintiff, its former Superintendent, was invalid on, among others, due process grounds.[4] The Common Pleas Court also awarded plaintiff attorney's fees for the proceedings. This Court vacated the trial court's attorney's fee award because it lacked a statutory basis. Like the *Klein* Court, the *Sorin* majority cited to several statutory actions in which the General Assembly had awarded fees pursuant to specific authorizing language. ("The General Assembly has expressly provided for the recovery of attorney fees, as part of the costs of litigation, with respect to certain statutory actions. *See, e.g.,* R.C. 163.21, 309.13, 733.61, 1313.51, 5519.02. *See, also,* Billington v. Cotner (1974) 37 Ohio St.2d 17, 305 N.E.2d 805; State ex rel. White v. Cleveland (1973) 34 Ohio St.2d 37, 295 N.E.2d 665.") *Id.* at 180.

[4]In *Sorin*, plaintiff Superintendent's cause of action was litigated at the Common Pleas level even though it was in essence an appeal of an administrative hearing that lasted over five months. The Court reviewed 11,000 pages of testimony and 367 physical exhibits. 46 Ohio St.2d at 178. As this Court recognized in its review of plaintiff's motion for attorney's fees incurred in the proceedings before the Common Pleas Court, the trial court acted as an appellate body: "[o]n March 13, 1974, the Court of Common Pleas issued a memorandum of opinion *reversing* the decision of the board of education." (Emphasis added).

The most instructive application of the *Sorin* decision to the instant matter is this Court's rationale for supporting the American Rule. This Court charged parties seeking attorney's fees to direct their request to the General Assembly rather than the Courts of this state:

> [Plaintiff] recognizes the general 'American Rule' does ***not*** permit the prevailing party to recover attorney fees ***in the absence of statutory authorization***, as part of the costs of litigation. See Alyeska Pipeline Service Co. v. Wilderness Society (1975) 421 U.S. 240, 95 S.Ct. 1612; F.D. Rich Co. v. Industrial Lumber Co. (1974) 417 U.S. 116, 126, 94 S.Ct. 2157 . . . The rationale behind the creation and perpetuation of the aforesaid rule is that the ***subject of costs is one entirely of statutory allowance and control***. State ex rel. Michaels v. Morse, 165 Ohio St. [599, 607], 138 N.E.2d [660, 666]. We are well aware that the 'American rule' has been criticized in recent years, but in our view any departure from such a deeply rooted policy as the exclusion of attorney fees as costs is a ***matter of legislative concern***." *Id*. at 179-180 (certain citations and footnotes omitted, emphasis added).

The *Sorin* Court not only expressed this Court's disapproval regarding awards of attorney's fees not grounded in statutory authority, it also framed the issue in the larger, Constitutional separation of powers context. So well-established was the proposition that exceptions to the American Rule require a basis in statutory authority that the plaintiff in the *Sorin* case did not even attempt to base his request for attorney's fees on the due process claim in which he prevailed before the Common Pleas Court. Rather, the *Sorin* plaintiff based his right to recover attorney's fees in O.R.C. Section 3319.16, which provided the *procedural* mechanism for the appeal of the Board of Education's decision to the Common Pleas Court. The *Sorin* court rejected this argument, noting that Section 3319.16 contained no statutory language authorizing the recovery of attorney's fees. In the instant matter, appellants have even less statutory ground upon which to stand. Neither appellants nor the various amici curiae before this Court have even ***identified*** a provision in the Ohio Revised Code that supported their cause of action against appellees. Indeed, no such provision exists, and their request for attorney's fees should be dismissed on the same rationale relied upon by the *Sorin* plaintiff. Thus, not only does the

proposition of law advanced by appellants and *amici* fail due to lack of statutory support, it also runs afoul of this Court's respect for the authority and competence of the General Assembly in fashioning exceptions to the American Rule.

This Court is not alone in its insistence on a statutory basis for attorney fee awards. Twelve months before *Sorin* was decided in 1976, the United States Supreme Court in *Alyeska Pipeline Service Co. v. The Wilderness Society* 421 U.S. 240, 95 S.Ct. 1612, 44 L.ed.2d 141 (1975) issued a strikingly similar decision counseling against judicial exceptions to the American Rule. In that case, a coalition of environmental groups sued the United States Department of the Interior and several private entities to halt the construction of a trans-Alaskan pipeline. The plaintiffs obtained an injunction against the project in the Court of Appeals for the District of Columbia Circuit under the Mineral Leasing Act and sought an award of attorney's fees for their efforts before the federal District and Circuit courts. The D.C. Circuit awarded plaintiffs attorney's fees on grounds that they "acted to vindicate important statutory rights of all citizens . . . [and] ensured that the governmental system, functioned properly." 421 U.S. at 245 (internal citations and punctuation omitted.) The United States Supreme Court reversed, stating in its syllabus that:

> Under the 'America [*sic*] Rule' that attorneys' fees are not ordinarily recoverable by the prevailing litigant in federal litigation in the absence of statutory authorization, [plaintiffs] . . . cannot recover attorneys' fees from [defendants] based on the private attorney general approach erroneously approved by the Court of Appeals, ***since only Congress, not the courts, can authorize such an exception to the American rule***.

421 U.S. at 240 (internal punctuation omitted; emphasis added).

The United States Supreme Court noted that its decision was based upon centuries of undisturbed precedent:

> In the United States, the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser. We are asked to fashion a far-reaching exception to this 'American Rule'; but having considered its origin and

> development, we are convinced that it would be ***inappropriate for the Judiciary, without legislative guidance***, to reallocate the burdens of litigation in the manner and to the extent urged by [plaintiffs].

421 U.S. at 247. In fact, the *Alyeska Pipeline Co.* Court traced its rationale back all the way to back to the 18th century:

> In 1796, this Court appears to have ruled that the ***Judiciary itself would not create a general rule, independent of any statute***, allowing awards of attorney's fees in federal courts. In Arcambel v. Wiseman, 3 U.S. (3 Dall.) 306, 1 L.Ed. 613, the inclusion of attorneys' fees as damages was overturned on the ground that the general practice of the United States is in opposition (sic) to it; and even if that practice were not strictly correct in principle, it is entitled to the respect of the court, till it is changed, or modified ***by statute***. 421 U.S. at 249-50 (internal footnotes and punctuation omitted, emphasis added).

Finally, the United States Supreme Court reviewed the history of Congressional grants of attorney fee awards and concluded that such awards were, in fact, exceptional:

> Congress has not . . . extended any roving authority to the Judiciary to allow counsel fees as costs or otherwise whenever the court might deem them warranted. What Congress has done, however, while fully recognizing and accepting the general [i.e., American] rule, is to make ***specific and explicit provisions for the allowance of attorneys' fees under selected statues*** granting or protecting various rights. 421 U.S. at 260 (emphasis added).

While the Supreme Court of the United States in *Alyeska Pipeline* based its ruling on separation of powers principles at the federal level, its reasoning was adopted by this honorable Court just one year later in *Sorin, supra,* and has remained the law in Ohio for nearly half a century. Like the Eighth District Court below and the Fifth and Ninth District Courts in *Jay* and *LaFarciola,* federal courts in Ohio interpreting this state's case law on attorney's fees have consistently denied requests for appellate fees in non-statutory cases identical to the instant matter. In *Shinman v. Int'l Union of Operating Engineers, Local 18* 744 F.2d 1226 (6th Cir.1984), the Sixth Circuit Court of Appeals reviewed a case where the plaintiff won a verdict based on claims of common law assault and battery and other torts. Defendant appealed the verdict, and the Sixth Circuit affirmed. On

remand, the plaintiff in *Shinman*, like appellants in the instant matter, requested an award of attorney's fees incurred during the appeal. The District Court awarded the appellate fees, but in a subsequent appeal, the Sixth Circuit vacated the award. Applying Ohio law, the Sixth Circuit acknowledged the *Roberts v. Mason* line of cases cited by appellants and *amici* in their respective briefs. ("Ohio law allows attorney fees to successful plaintiffs in assault and battery cases, or in any case in which punitive damages are allowable. *E.g., Roberts v. Mason*, 10 Ohio St. 277 (1859); *Columbus Finance, Inc. v. Howard*, 42 Ohio St.2d 178, 327 N.E.2d 654 (1975); *Langhorst v. Reithmiller*, 52 Ohio App.2d 137, 368 N.E.2d 328 (1977).") *Shinman, supra,* at 1237. Notably, however, the court in *Shinman* noted an "***absence of any Ohio decision awarding fees incurred on appeal***." *Id.* at 1238 (emphasis added). The Sixth Circuit in *Shinman* thus concluded that "we are reluctant to expand the Ohio rule allowing fees in certain tort cases ***beyond the circumstances considered by Ohio precedent***." *Id*. (Emphasis added).

> Notably, the court in *Shinman* relied heavily on this Court's *Sorin* decision, stating:
>
> Ohio generally follows the American Rule disallowing attorney fees. *Sorin v. Board of Education*, 46 Ohio St.2d 177, 179, 347 N.E.2d 177 (1976). In *Sorin*, the Ohio Supreme Court expressed reluctance to expand the Ohio tort rule to include statutory violation cases because any departure from such a deeply-rooted policy as the exclusion of attorney fees as costs is a matter of legislative concern. 744 F.2d at 1238.

Thus, the Sixth Circuit in *Shinman* acknowledged the principle in *Sorin* that only the General Assembly—and not the Courts—can create exceptions to the American rule and award attorney appellate fees in the absence of statutory authorization. It must also be emphasized that the *Shinman* case featured circumstances identical to the instant case in that a plaintiff who had defended its judgment on appeal was requesting attorney's fees in the absence of an authorizing statute. The state of Ohio law—and the primacy of *Sorin*—has not changed since *Shinman* was

decided in 1984, so the result in that case—a denial of appellate attorney's fees—is the inevitable result in the case now before this Court.

The Sixth Circuit revisited *Shinman* more recently in *Braun v. Ultimate Jetcharters, LLC*, Sixth Circuit Case Numbers 13-4145/14-3816/15-3462, PACER Document No. 54-2, September 16, 2016) (attached), another case analogous to the within matter. In *Braun*, the plaintiff sought to recover appellate attorney's fees incurred in the defense of a retaliatory discharge judgment. The Sixth Circuit denied plaintiff's request. Defendants in that matter cited to the well-established rule in *Shinman* that appellate attorney fees may not be awarded in the absence of legislative authority. Plaintiff countered that "Ohio law today has evolved well past its status in 1984 when *Shinman* was handed down." *Id.* at 2. The Sixth Circuit disagreed, noting that the Ohio cases in which plaintiff relied in fact "involved fees awarded pursuant to fee-shifting ***statutes***." *Id. (Emphasis added).* Plaintiff even cited *Klein, supra*, but the Sixth Circuit likewise found that case inapplicable to plaintiff's circumstances: "*Klein* does not stand for the proposition that any Plaintiff who succeeds on a claim brought under a remedial statute is necessarily entitled to reimbursement for fees accrued while defending her favorable judgment on appeal." Significantly, the Sixth Circuit further noted that "we disagree with Plaintiff that Ohio common law has evolved to allow the recovery of fees accrued on appeal where fees were awarded in the trial court pursuant to a ***punitive damages award***." *Braun* decision at 3. (Emphasis added). The Sixth Circuit further noted that

> [T]he court in *LaFarciola* explicitly discussed *Klein* and the other cases cited by Plaintiff, concluding that those cases were distinguishable because they involved awards of appellate fees pursuant to fee-shifting statutes that contained no limiting language. Ultimately, the court concluded that a move away from a deeply rooted policy against fee-shifting is best left as a matter of legislative concern. *Braun* decision at 3. (Internal punctuation and citations omitted).

Id. (Internal punctuation and citations omitted). Thus, this Court's ruling in *Klein* denying appellate attorney's fees in cases where they are not supported by statutory authority has been consistently applied by state and federal Courts within Ohio for well over a decade. Its application to the instant case is clear, and this Court should deny appellants' proposition of law that appellate fees be applied to all cases in which punitive damages have been awarded.

D. The public policy justifications appellants and *amici* advance in support of their proposition of law that trial courts should be permitted to grant appellate attorney's fees in common law tort cases where punitive damages have been awarded are not supported by the judicial precedent in this state or elsewhere in the United States because the American Rule requires a statutory basis for such fee awards.

Appellants and *amici* advance public policy arguments in support of creating an exception to the American Rule to expand awards of appellate attorney fees to all cases where punitive damages have been awarded. Just as there is no precedent in this Court (or in the Supreme Court of the United States) for such a proposition, centuries of case law support following the American Rule against fee-shifting in all but the most exceptional cases and overrides the weak public policy justifications for the propositions of law advanced in appellants and *amici*. Moreover, public policy cannot authorize this Court to enter the legislative province of determining what litigants may recover their costs and attorney's fees.

Appellants and amici advance two primary public policy justifications for awarding appellate attorney fees in cases where the punitive damages exception to the American Rule applies. First, to compensate the plaintiff for her losses and, second, to deter malicious conduct from tortfeasors.

Regarding the first justification, both appellants and amici cite extensively to *Finney v. Smith*, 31 Ohio St.529 (1877), where this Court stated that the punitive damages exception to the

American Rule for awarding attorney's fees compensated plaintiffs for the financial loss of out-of-pocket attorney's fees. *Id.* at 532 ("The injured party would not be made whole as to all expenses, unless his counsel fees were covered and included.") Appellants and *amici* in fact make numerous references in their Briefs before this Honorable Court about the necessity of awarding attorney's fees to "compensate" plaintiffs for financial losses incurred from an opposing party's tortious conduct.[5]

That principle does not obtain here as appellants concede elsewhere in their Briefs that the plaintiffs in the instant matter have been represented throughout this matter on a ***contingency*** fee basis and have not, in fact, ***incurred any attorney's fees***. In Section D of Part I of Appellants' Merit Brief, appellants state that plaintiff Cruz did not engage attorneys who "were only concerned with getting their $350 an hour." *Appellants' Merit Brief* at 11. *See also Amici Brief* at 2. Rather, appellants Cruz and Kaiser engaged their counsel on a thirty-three percent contingency fee agreement, shifting the risk of an adverse verdict from their responsibility to entirely their counsel. As a result, awarding "attorney's fees" to appellants in this case—and in most others--would result in a pure windfall for appellants, who never incurred any out-of-pocket financial costs. Appellants' circumstances, having incurred no attorney's fees, nor any obligation for such fees, do not advance the notion that attorney's fee awards are necessary to make common law tort plaintiffs whole, most of whom are often represented on a contingent basis at both trial and appeal. Therefore, these parties are not representative of plaintiffs who need to be compensated for their

[5] *See, e.g.,* Part A of Section III of Appellants' Merit Brief which argues that "[i]t is well established that where punitive damages are awarded in a lawsuit, [attorney's] fees may also be awarded in an amount . . . to compensate the plaintiff for his attorney fees." Elsewhere, appellants quote the Fifth Circuit in *Jay, supra*, that in *Klein*, this Court "stressed that permitting a trial court to award attorney fees for causes of action brought under a remedial statute furthers an important objective of the statute, that is, ensuring that a prevailing party need not incur the expense of defending the judgment on appeal." Likewise, *amici* cite to *Finney, supra*, and Sedgewick's *Treatise on the Measure of Damages* for the proposition that attorney fee awards compensate plaintiffs for out-of-pocket attorney's fees: "[t]he 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."

losses due to attorney's fees. If the American Rule precludes attorney's fees for an aggrieved party who hires a lawyer on a contract claim or motor vehicle damage claim, why should these plaintiffs be excluded and allowed an attorney fee recovery?

Appellants and *amici*'s second justification for awarding appellate attorney's fees in common law tort cases is that such sanctions would deter tortious conduct elsewhere. *Amici* characterize appellees' decision to appeal the trial court's initial verdict in this matter—a right to which they were entitled by the Constitution, statutes, and rules of this state—as a further act of aggression against appellants: "[w]here a defendant tortfeasor appeals a verdict [containing punitive damages], 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." *Amici Brief* at 8. This is an absurd distortion of the law and the appellate process. Moreover, it is entirely inconsistent with appellants' extensive appeals throughout this matter, including the one before this Court. Not only does it confuse appellees' purportedly tortious conduct that predates this action with the defense of their rights before duly constituted tribunals of this state, it also fundamentally misunderstands the American Rule and its protection of the rights of all persons to zealously litigate their rights before the courts of this country. In a country where any party that does not prevail has to pay the other's attorney's fees, the courts are essentially closed to all but those who can afford to hire lawyers without concern for the result.

The United States Court of Appeals for the Sixth Circuit proffers an excellent analysis of the American Rule and its protection of a party's rights to litigate their rights and claims without fear of onerous fee-shifting judgments in *Shinman v Int'l Union*, *supra*. In that case, the plaintiffs sought an award of appellate attorney's fees for the malicious acts of defendants, common law

assault and battery. Plaintiffs also couched their request for appellate attorney's fees under the United States Supreme Court's rationale for awarding attorney's fees for bad faith conduct in the litigation process itself. *See, e.g., Newman v. Piggie Park Enterprises* 390 U.S. 400, 88 S.Ct. 964 (1968) ("a federal court may award counsel fees to a successful plaintiff where a defense has been maintained in bad faith, vexatiously, wantonly, or for oppressive reasons.") The *Shinman* Court countered that the defendants in that matter had litigated that matter entirely in good faith. 744 F.2d at 1230 ("In the present case, the only bad faith found to exist was that inherent in the acts giving rise to the substantive claim.") The Sixth Circuit, in other words, maintained the vital distinction between sanctioning parties for purportedly malicious activity outside Court and defending themselves against accusations of the same within the legal process.

The *Shinman* Court's recognition of a party's right to zealously defend itself even when that party has (arguably) acted maliciously outside the courtroom is based on the public policy supporting the American Rule. The Sixth Circuit noted:

> To allow an award of attorney fees based on bad faith in the act underlying the substantive claim would not be consistent with the rationale behind the American Rule regarding attorney fees. By refusing to penalize a litigant whose judgment concerning the merits of his position turns out to be in error, ***the American Rule protects the right to go to court and litigate a non-frivolous claim or defense*** . . . Attorney fees incurred while curing the original wrong are not compensable because the represent the cost of maintaining open access to an equitable system of justice. 744 F.2d at 1231.

The *Shinman* Court also quoted with approval the United States Supreme Court in *Fleischmann Distilling Corp. v. Maier Brewing Co,* 386 U.S. 714, 718, 87 S.Ct. 1404, for the proposition that the American Rule provides an equal playing field for all potential litigants to pursue their rights without fear of catastrophic fee-shifting losses:

> The American Rule's failure to fully compensate an injured party is justified by the rationale that since litigation is at best uncertain one should not be penalized for merely defending or prosecuting a lawsuit, and that the poor might be unjustly

> discouraged from instituting actions to vindicate their rights if the penalty for losing included the fees of their opponents' counsel. 744 F.2d at 1229.

Thus, appellants' and *amici's* insistence that awarding attorney appellate fees will somehow deter malicious actors from engaging in tortious conduct outside Court runs firmly against the principle outlined in the American Rule that all parties—regardless of their financial means—have the right to fully litigate their rights without fear of incurring the burden of paying their opponents' attorney's fees.

Awarding appellate attorney's fees to "punish" wrongdoers and "deter" future tortious conduct has also been rejected by the United States Supreme Court under the guise of the "private attorney general" concept. In *Alyeska Pipeline Co. v. The Wilderness Society*, *supra*, the D.C. Circuit had justified its award of attorney's fees to plaintiffs in part on the "private attorney general" concept. 421 U.S. at 246.[6] The Supreme Court, however, firmly rejected this approach in the context of common law tort actions not supported by underlying statutory authority. The Supreme Court noted that the "private attorney general" concept had some support when Congress enacted explicitly remedial statutes like antitrust and civil rights laws. 421 U.S. at 263.[7] Without such statutes, however, the private attorney general concept loses all its salience:

> [C]ongressional utilization of the private attorney-general concept can in no sense be construed as a grant of authority to the Judiciary to jettison the traditional rule against non[-]statutory allowances to the prevailing party and to award attorneys' fees whenever the courts deem the public policy furthered by a particular statute important enough to warrant the award.

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[6] "[Defendants], the Court of Appeals held, could fairly be required to pay one-half of the full award to which [plaintiffs] were entitled for having performed the functions of a private attorney general. Observing that 'the fee should represent the reasonable value of the services rendered, taking into account all the surrounding circumstances, including, but not limited to, the time and labor required on the case, the benefit to the public, the skill demanded by the novelty and complexity of the issues, and the incentive factor."

[7] "It is true that under some, if not most, of the statutes providing for the allowance of reasonable fees, Congress has opted to rely heavily on private enforcement to implement public policy and to allow counsel fees so as to encourage private litigation. Fee shifting in connection with treble-damages awards under the antitrust laws is a prime example . . . and we have noted that Title II of the Civil Rights Act of 1964 was intended not simply to penalize litigants who deliberately advance arguments they know to be untenable but, more broadly, to encourage individuals injured by racial discrimination."

Id. As the Court put it even more succinctly later in *Alyeska*,

> ***The rule . . . adopted by the Court of Appeals would make major inroads on a policy matter that Congress has reserved for itself*** . . . courts are not free to fashion drastic new rules with respect to the allowance of attorney's fees to the prevailing party in federal litigation or to pick and choose among plaintiffs and the statutes under which they sue and to award fees in some cases but not in others, depending upon the courts' assessment of the importance of public policies involved in particular cases.

Id. at 269. Thus, persuasive federal authority in *Alyeska Pipeline*—the rationale of which was adopted by this honorable Court just one year later in *Sorin*—counsels against indiscriminate awards of attorney's fees to advance purported public policy goals that have not been enshrined by the legislature in formal remedial statutes. As appellants in this matter have not advanced ***any*** statutory basis supporting the award of appellate attorney's fees, this Court must reject their public policy argument that such fees are necessary to deter the conduct for which appellees are allegedly responsible.

CONCLUSION

An award of appellate attorney's fees for a common law tort claim contravenes the long-standing "American Rule" that parties are responsible for their own fees absent a statutory basis or contract provision. This Court, the United States Supreme Court, and Courts around the country have long held that attorney's fees are to be awarded under only exceptional and discrete circumstances. No such circumstances exist here. Appellants are simply the latest in a long succession of litigants who have argued for attorney's fees in cases where there is no statutory authority for the same. This Court's decision in *Klein*, moreover, is unambiguous. Appellate attorney's fees may be awarded ***only*** in cases concerning statutes that already authorize such fees. Appellants and *amici* have singularly failed to identify such a statute at any point in this litigation and the Court therefore reject their Proposition of Law that the trial court in the within matter has

any authority to award attorney's fees for post-verdict work. The Eighth District's ruling abrogating the appellate attorney's fees the trial court awarded to appellants should therefore be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing *Appellees' Reply Brief* was served upon the following counsel for parties and *amici* by electronic mail at the email addresses indicted *infra* on this 21st day of July, 2021:

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Nos. 13-4145/14-3816/15-3462

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CARRIE BRAUN,

Plaintiff-Appellee/Cross-Appellant (13-4145 & 14-3816),
Plaintiff-Appellee (15-3462),

v.

ULTIMATE JETCHARTERS, LLC,

Defendant-Appellant/Cross-Appellee (13-4145 & 14-3816),
Defendant-Appellant (15-3462).

FILED
Sep 12, 2016
DEBORAH S. HUNT, Clerk

O R D E R

Before: DAUGHTREY, CLAY, and STRANCH, Circuit Judges.

Plaintiff Carrie Braun moves this Court for an award of attorney fees accrued in relation to this appeal. Plaintiff filed suit in federal district court, asserting, *inter alia*, a claim for retaliatory discharge in violation of Ohio's Title VII analogue, Ohio Rev. Code § 4112.02(I), arising from the termination of her employment by Defendant Ultimate Jetcharters, LLC ("UJC"). That claim proceeded to trial and the jury found in favor of Plaintiff, awarding her compensatory and punitive damages. The district court thereafter granted in part Plaintiff's motion for attorney fees pursuant to an Ohio common law rule allowing "[a]ttorney fees [to] be awarded as an element of compensatory damages where the jury finds that punitive damages are warranted." *Zoppo v. Homestead Ins. Co.*, 644 N.E.2d 397, 402 (Ohio 1994). Defendants appealed, and on July 8, 2016, we affirmed the district court's judgment in full. On July 20, 2016, Plaintiff filed the present motion, arguing that because the district court awarded fees below, she is likewise entitled to fees accrued while defending this appeal.

UJC has filed a response to Plaintiff's motion, arguing that the Ohio common law rule used to award fees below does not apply to fees accrued on appeal. In support of that position, UJC relies on this Court's en banc opinion in *Shimman v. Int'l Union of Operating Engineers, Local 18*, 744 F.2d 1226, 1238 (6th Cir. 1984), in which we held that "[i]n the absence of any Ohio decision awarding fees incurred on appeal" pursuant to Ohio's common law fee-shifting rule, "we are reluctant to expand the Ohio rule . . . beyond the circumstances considered by Ohio precedent."

Plaintiff thereafter filed a reply brief, arguing that "Ohio law today has evolved well past its status in 1984," when *Shimman* was handed down. (A. 86 at p. 4.) She cites several cases released after 1984 in which Ohio courts awarded fees accrued on appeal. Notably, all the cases to which Plaintiff cites involved fees awarded pursuant to fee-shifting statutes; none of those cases involved an award of fees on appeal pursuant to the common law rule that the district court used to award fees in this case. Plaintiff also notes that she prevailed under a remedial statute, and she thereafter quotes *Klein v. Moutz*, 888 N.E.2d 404 (Ohio 2008), for the proposition that the Ohio Supreme Court has approved of "judgments by appellate courts authorizing trial courts to assess attorney fees incurred on appeal to a prevailing plaintiff under other remedial statutes." *Id.* at 407. However, this quote from *Klein* is taken out of context. In *Klein*, the Ohio Supreme Court merely addressed "the proper forum in which a party may seek attorney fees for [an] appeal" in cases where appellate fees are appropriately awarded under a fee-shifting statute that contains "no limiting language . . . preclud[ing] a trial court from considering fees incurred at the appellate level." *See id.* In other words, *Klein* does not stand for the proposition that any Plaintiff who succeeds on a claim brought under a remedial statute is necessarily entitled to reimbursement for fees accrued while defending her favorable judgment on appeal.

Moreover, we disagree with Plaintiff that Ohio common law has evolved to allow the recovery of fees accrued on appeal where fees were awarded in the trial court pursuant to a punitive damages award. To the contrary, in *LaFarciola v. Elbert*, 2009-Ohio-4615, 2009 WL 2858059, at ¶ 14 (Ohio Ct. App. 2009), the Ohio Court of Appeals held:

> While Ohio courts have traditionally recognized an exception [to the general presumption against fee shifting] 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.

In so holding, the court in *LaFarciola* explicitly discussed *Klein* and the other cases cited by Plaintiff, concluding that those cases were distinguishable because they involved awards of appellate fees pursuant to fee-shifting statutes that contained no limiting language. *See id.* at ¶¶ 11–12. Ultimately, the court concluded that "a move away from a deeply rooted policy" against fee-shifting "is best left as a matter of legislative concern." *Id.* at ¶ 14 (citing *Sorin v. Bd. of Ed. of Warrensville Heights Sch. Dist.*, 347 N.E.2d 527, 529 (Ohio 1976)).

Given both the Ohio courts' and our own en banc court's reluctance to extend Ohio's common law exception to the general presumption against fee shifting, we decline to make such an extension at this time. Plaintiff's motion for attorney fees is **DENIED**.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk