

STATE OF OHIO            )  
                                  )ss:  
COUNTY OF STARK        )

IN THE COURT OF APPEALS  
FIFTH JUDICIAL DISTRICT

DAVID E. JAY  
  
Appellant

C. A. No.     2009CA00056

v.

MASSACHUSETTS CASUALTY  
INSURANCE CO., et al.  
  
Appellees

APPEAL FROM JUDGMENT  
ENTERED IN THE  
COURT OF COMMON PLEAS  
COUNTY OF STARK, OHIO  
CASE No.     2004CV00843

DECISION AND JOURNAL ENTRY

**Filed: August 31, 2009**

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WHITMORE, Judge.

{¶1} Plaintiff-Appellant, David Jay, appeals from the decision of the Stark County Court of Common Pleas that it was without jurisdiction to consider his motion for appellate fees and costs. This Court affirms.

I

{¶2} The action underlying this appeal dates back to 2001, when Jay first filed suit against Massachusetts Casualty Insurance Company, n/k/a Centre Life Insurance Company (“MCIC”) alleging breach of contract, bad faith, and conspiracy to defraud. After a voluntary dismissal and re-filing of the action, the assignment of three different visiting judges, and a mistrial in between, in 2006, a jury found in Jay’s favor, awarding him \$429,400 in compensatory damages on his breach of contract claim; \$1,130,000 in compensatory damages on his bad faith claim; and \$3,000,000 in punitive damages, in addition to pre-judgment interest and attorney fees. Jay’s verdict and damages were affirmed on appeal, with the exception of the rate

at which pre-judgment interest was to accrue. *Jay v. Mass. Cas. Ins. Co.*, 5th Dist. Nos. 2006CA00201, 2006CA00229, & 2007CA00243, 2008-Ohio-846 (assigning the accurate pre-judgment interest rate under a prior version of R.C. 1343.03(A)). Shortly after the Supreme Court's decision on August 6, 2008, declining jurisdiction on the case, MCIC paid Jay the previously stated amounts, in addition to \$422,552 in attorney fees, \$244,991.94 in pre-judgment interest, and \$914,755.81 in post-judgment interest. *Jay v. Mass. Cas. Ins. Co.*, 119 Ohio St.3d 1409, 2008-Ohio-3880. There remained, however, a dispute as to the date upon which post-judgment interest began to run, which the parties unsuccessfully mediated in October 2008. In November 2008, however, MCIC paid Jay "an additional \$17,823.46 to avoid the dispute [] over the calculation[.]"

{¶3} In November 2008, MCIC filed a motion for an order confirming satisfaction of judgment. Jay filed a memorandum in response in which he noted that he had no objection to such an order. Jay conditioned his approval of any satisfaction order by pointing to an earlier communication between the parties in which MCIC had "agree[d] that the filing of a complete Satisfaction has no impact on [Jay's] to-be-filed request for the payment of fees/costs incurred or paid after April 20, 2006[.]" Given this condition, Jay attached a proposed satisfaction order for the court to enter, which contained an exception for "the future determination as to an award of appellate fees and costs" Jay incurred in responding to MCIC's appeal. In January 2009, Jay filed his motion requesting appellate fees and costs with the trial court.

{¶4} On February 2, 2009, the trial court entered its own order confirming satisfaction of judgments for money damages in which it determined that MCIC had "satisfied the judgments for money damages in this action." In a separate order entered that same day, the trial court dismissed Jay's motion for appellate fees and costs for lack of subject matter jurisdiction. Jay

now appeals the trial court's decision to dismiss his motion, asserting one assignment of error for our review.

## II

### Assignment of Error

“THE TRIAL COURT ERRED WHEN IT DETERMINED THAT IT HAD NO JURISDICTION TO AWARD POST-TRIAL APPELLATE FEES AND COSTS TO JAY.”

{¶5} In his sole assignment of error, Jay argues that the trial court erred when it determined that it was without jurisdiction to hear his motion and award him appellate fees and costs incurred post-trial. Jay maintains that under *Yee v. Erie Cty. Sheriff's Dept.* (1990), 51 Ohio St.3d 43, a trial court retains jurisdiction over issues not inconsistent with the appellate court's jurisdiction, which permits the trial court to hear and decide his motion. He further asserts that under *Klein v. Moutz*, 118 Ohio St.3d 256, 2008-Ohio-2329, both the trial court and the appellate court have the authority to determine and award appellate costs and fees following an appeal. Thus, the trial court had jurisdiction to act on his motion. We disagree.

{¶6} “[T]he issue of a court's jurisdiction \*\*\* presents an issue of law.” *Dazey v. Pollock*, 5th Dist. No. 2006CA00064, 2006-Ohio-4850, at ¶9. Accordingly, we “review[] such legal determinations de novo without any deference to the conclusion of the trial court.” *Id.*

{¶7} Initially, we note that Jay's reliance on *Yee*, is misplaced, as that case addresses situations where a motion is filed in the trial court when an appeal is simultaneously pending before the reviewing court, which is not the case here. *Daloia v. Franciscan Health Sys. of Cent. Ohio, Inc.* (1997), 79 Ohio St.3d 98, 101, fn.5 (citing to *Yee* and explaining that “when an appeal is pending before a court of appeals, the trial court is divested of jurisdiction except to take action in aid of the appeal [and may not act] inconsistent with the reviewing court's jurisdiction

to reverse, modify, or affirm the judgment”) (Emphasis added and internal quotations and citations omitted.). When Jay filed his motion for appellate fees with the trial court in February 2009, there was no pending appeal which could have potentially divested the trial court of jurisdiction to rule on his motion, as was the case in *Yee*. *Yee*, 51 Ohio St.3d at 44 (framing the issue before the Court to be whether “*the pendency of an interlocutory appeal* deprive[s] a trial court of jurisdiction to rule on motions pending before it, which motions are not the subject of the appeal”) (Emphasis added.) Rather, Jay’s appeal to the Fifth District had concluded nearly eleven months earlier.

{¶8} Next, we consider Jay’s assertion that the Supreme Court’s determination in *Klein v. Moutz* provides a trial court with subject matter jurisdiction to consider a request from the successful party to an appeal to later seek an award of appellate attorney fees. In *Klein*, plaintiffs-tenants brought an action under the Landlord-Tenant Act alleging defendant-landlord had failed to timely return their security deposit in violation of R.C. 5321.16(C). The trial court awarded tenants damages under the statute, but denied tenants’ request for attorney fees. On appeal, the appellate court reversed the trial court’s decision denying attorney fees and remanded the case for determination of a reasonable award. On remand, the trial court awarded tenants trial-level attorney fees but denied tenants’ request for appellate attorney fees. The trial court’s decision was affirmed on appeal, which was later certified as a conflict to the Supreme Court, noting that the Ninth District’s decision prohibiting a trial court from determining appellate attorney fees was in conflict with the Sixth District’s position on the same matter.

{¶9} The Supreme Court concluded that:

“The trial court is in a better position to determine a fee award, for it may hold a hearing, take testimony, create a record, and otherwise evaluate the numerous factors associated with calculating an attorney-fee award. There is no limiting language *in the statute* that precludes a trial court from considering fees incurred

at the appellate level. Therefore, we hold that a trial court has the authority under [the Landlord-Tenant Act] to tax as costs the attorney fees incurred at the appellate level.” (Emphasis added.) *Klein* at ¶13.

The Supreme Court further noted that its decision aligned with judgments other appellate courts had made, permitting trial courts to assess and award appellate attorney fees under “other remedial statutes” such as the Consumer Sales Practice Act, Ohio’s Lemon Law, and civil rights actions brought under Section 1983, Title 42 of the U.S. Code. *Id.* at ¶15. Additionally, the Court considered “[t]his practical approach” as satisfying the objectives of the Landlord-Tenant Act by “ensur[ing] that the tenant incurs no expense” for litigation for wrongful conduct of their landlord. *Id.* at ¶17.

{¶10} We note two important distinctions that distinguish Jay’s case from *Klein*. First, the appellate court in *Klein* had properly remanded the case for determination of fees (although it later incorrectly determined that the trial court could not award appellate fees). 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.” *State ex rel. Special Prosecutors v. Judges, Court of Common Pleas* (1978), 55 Ohio St.2d 94, 98. See, also, *Labate Chrysler, Jeep, Dodge, Inc. v. Fifth Third Bank*, 7th Dist No. 05 CO 57, 2006-Ohio-3480, at ¶12 (relying on *Special Prosecutors* but noting, however, that “collateral issues like contempt, appointment of a receiver, and injunction” could still be addressed by the trial court). Although App.R. 27 permits an appellate court to remand a case to “the court \*\*\* below for specific or general execution \*\*\* or \*\*\* for further proceedings[.]” the appellate court did not do so when deciding MCIC’s appeal. Instead, the court entered its own final order on the one issue it reversed on appeal (the proper rate of pre-judgment interest) rather than remanding the case to the trial court to do so.

{¶11} Second, the 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 Jay 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 “further an important objective of the statute,” that is, ensuring that a prevailing party need not incur the expense defending the judgment on appeal. *Klein* at ¶17. Furthermore, the Court based its conclusion in part on the absence of anything in the Landlord-Tenant Act “limit[ing] assessment of costs \*\*\* to a trial court.” *Id.* at ¶16. Thus, the Court expressly relied on the terms of the statute in making its decision. The Court reiterated that its decision was rooted in the statute when it expressed the need to act consistently with other appellate decisions “authorizing trial courts to assess attorney fees incurred on appeal to a prevailing plaintiff *under other remedial statutes.*” (Emphasis added.) *Id.* at ¶15.

{¶12} Finally, we note that even the portions of *Klein* that speak to the efficiencies gained by permitting a trial court to make a determination of appellate attorney fees, do so in the context of the case being remanded to the trial court to do so. *Id.* at ¶14-17 (agreeing with the Sixth District’s reasoning “that the trial court, *on remand to assess costs*, can easily determine, either by hearing or by reviewing affidavits, the reasonableness of fees \*\*\* [and] is in the best position to make such an award” and subsequently noting that “*if [a] case is being remanded to the trial court* \*\*\* it may be more efficient for the lower court to assess attorney fees for the

entire case \*\*\* [which provides for] flexibility to efficiently and expeditiously bring the case to its conclusion.”) (Emphasis added.)

{¶13} We recognize that portions of the analysis in *Klein* which speak to the cost savings and judicial efficiencies that are achieved by permitting trial courts to award appellate attorney fees could transcend the realm of remedial statutes and be equally applicable to common law causes of action. Because neither the Supreme Court nor the Fifth District has indicated a desire to do so, however, we decline to extend *Klein*'s holding beyond the assessment of fees under a remedial statute where the trial court has remanded the case for such consideration. *Klein* at ¶12-18; *Brown v. Guarantee Title & Trust/ARTA* (Oct. 13, 1998), 5th Dist. No. 98CA10, at \*3 (concluding that the insured was not entitled to appellate attorney fees to defend her judgment against the insurer on appeal and noting that such an award would mean “the end to this litigation [would be] no where in sight”).

{¶14} Based on the foregoing, the trial court did not err as a matter of law in dismissing Jay's motion for lack of jurisdiction. Accordingly, his sole assignment of error is without merit.

### III

{¶15} Jay's sole assignment of error is overruled. The judgment of the Stark County Court of Common Pleas is affirmed.

Judgment affirmed.

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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 Stark, 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 Appellant.

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BETH WHITMORE  
FOR THE COURT

CARR, P. J  
DICKINSON, J.  
CONCUR

APPEARANCES:

MICHAEL A. ROBERTS, JOHN B. PINNEY, and KATHERINE M. LASHER, Attorneys at Law, for Appellant.

ANDREW S. POLLIS, Attorney at Law, for Appellee.

WILLIAM R. ELLIS, Attorney at Law, for Appellee.

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