

IN THE SUPREME COURT OF OHIO

CASE NO. 06-540

NINA ZAPPITELLI, et al.
Plaintiffs-Appellees

-vs-

KAREN J. MILLER, et al.
Defendants-Appellants.

ON APPEAL FROM THE EIGHTH DISTRICT COURT OF APPEALS

APPELLANTS' REPLY BRIEF

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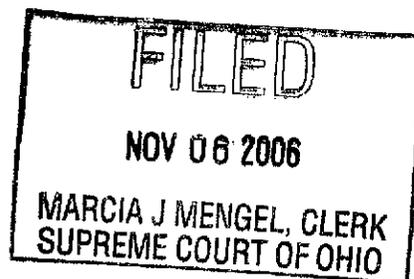


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I. ARGUMENT

At trial, the Zappitellis proffered a jury instruction that, in accord with established Ohio law, tied an award of attorneys fees to an award of punitive damages. Likewise, the Zappitellis proffered a Jury Interrogatory that asked, “**if you have awarded punitive damages ... do you find that attorney’s fees should be awarded to Plaintiffs...?**” After the Court delivered a jury charge that precisely reiterated the charge the Zappitellis requested, and after the Court provided the jury with the Interrogatory requested by the Zappitellis, Counsel for the Zappitellis again reiterated his position that that attorneys fees could only be awarded in connection with punitive damages. Notably, counsel did not argue that attorneys’ fees could be awarded as part of the compensatory damage award:

I obviously wanted the Court to answer the question by stating that damages are in the province of the jury, as to what they determine those damages are, and that **punitive damages and attorney fees are awarded as part of the punitive damages award.**”

(Tr. pp. 1101; Supp. p. 126).

On three separate occasions, counsel for the Zappitellis specifically stated that attorneys’ fees could only be awarded in conjunction with punitive damages. It was not until the filing of their Brief on appeal that the Zappitellis changed their view on the law and insisted **for the first time** that the Court should have **ignored counsel’s own Jury Instruction, Jury Interrogatory, and comments regarding the jury question, and instructed the jury that attorneys’ fees could be awarded even in the absence of a punitive damage award.**

Now, on appeal to the Supreme Court, the Zappitellis raise for the first time another round of reasons for awarding attorneys' fees, none of which were raised with the trial court. None of these grounds for an award of attorneys' fees were raised in front of the Court of Appeals.

Chief among these newly minted grounds for attorneys' fees is the argument that a finding of "bad faith" justified an award of attorneys' fees. There is no jury finding that the Millers acted in bad faith to hang this argument on; the Zappitellis never proffered a jury instruction on bad faith to place the issue before the jury, never requested an instruction that attorneys' fees could be awarded in cases involving bad faith, never requested a jury interrogatory to determine whether the jury found bad faith, and never raised an assignment of error in the Court of Appeals below regarding an award of attorneys' fees for bad faith.

PROPOSITION OF LAW NO. 1: *An award of attorney fees in a fraud action stems from a finding of malice and an award of punitive damages. Attorney fees may not be awarded as compensatory damages without a finding that the plaintiff is entitled to punitive damages. Zoppo v. Homestead Ins. Co. (1994), 71 Ohio St. 3d 552, approved and followed.*

As Appellants stated in their Merit Brief, the Court of Appeals decision was apparently based upon an interpretation of *Roberts v. Mason* (1859), 10 Ohio St. 277 that is contrary to this Court's case law interpreting that case. The *Roberts* Court held that, in cases involving "the ingredients of fraud, malice, or insult" a jury could go beyond compensatory damages and award punitive damages **and** attorneys' fees. Later Court decisions make it clear that an award of attorneys' fees **requires a jury finding that the plaintiff is entitled to punitive damages.** *Zoppo v. Homestead Ins. Co.* (1994), 71 Ohio St. 3d 552, *Digital & Analog Design Corp. v. North Supply Co.* (1992), 63 Ohio St. 3d

657, *Columbus Finance, Inc. v. Howard* (1975), 42 Ohio St. 2d 148. Appellees' reading of *Roberts* is in direct conflict with these cases.

Moreover, Appellees ignore the plain reading of *Roberts*, which places the word "the ingredients of fraud" in a list with insult and malice, the *Roberts* Court was clearly speaking of a mental element, and not the tort of fraud. Malice and insult are not torts; by enumerating fraud with these mental elements the Court was clearly using "fraud" also as a mental element, and not as denoting the tort of fraud.

Appellees make no attempt to distinguish the recent Supreme Court cases on the issue of attorneys' fees, instead simply reiterate the claim that the *Roberts* case should be read as allowing for attorneys' fees for any case involving the tort of fraud. The Zappitellis do not even attempt to explain the later Supreme Court decisions that recognize that *Roberts* requires a finding that a plaintiff is entitled to punitive damages in order for attorneys' fees to be awarded.

The *Zoppo* line of cases sets forth the law in Ohio. Attorneys' fees can only be awarded as damages where punitive damages are also proper. The Trial Court properly informed the jury that there could be no award of attorneys' fees without a finding that punitive damages are appropriate.

Appellees cite a West Virginia case, *Midkiff v. Huntington National Bank West Virginia* (1998), 204 W. Va. 18, which notes that under West Virginia law, there is a difference between the finding necessary for an award of punitive damages and the finding supporting an award of attorneys' fees. However, that dichotomy conflicts with Ohio case law. The rule on attorneys' fees in Ohio is set forth in *Zoppo*: there must be an award of punitive damages before there can be an award of attorneys' fees.

Of equal import, Appellees fail to understand what the *Midkiff* court held. The court recognized that the award of attorneys' fees is "permissive, not mandatory," *Midkiff*, 204 W. Va., at 20. A jury instruction on punitive damages alone, in West Virginia, is not sufficient for an award of attorneys' fees. The Court noted:

While we agree that there are similarities between the criteria for punitive damages and the criteria for an award of attorney's fees, **they are two separate and distinct issues that must be addressed separately.**

Midkiff, 204 W. Va., at 20, emphasis added.

Even if *Midkiff* was the law in the State of Ohio, which it is not, the Appellees would not prevail because Appellees never requested, a separate charge and jury finding on the issue of attorneys' fees. The correct Ohio jury instruction **proffered by Appellees, and delivered by the Trial Court**, made an award of attorneys' fees dependent on the punitive damages finding, and did not treat the two issues as "two separate and distinct issues **that must be addressed separately.**" When the jury inquired about the possibility of an award of attorneys' fees separate from an award of punitive damages, Appellees did not request that the Court instruct the jury on the "separate and distinct" issue of attorneys' fees.

The jury did not make a separate finding necessary to award attorneys' fees, and was never asked to do so. If the rule of law in *Midkoff* was the rule in Ohio, Appellees would still not be entitled to attorneys' fees.

A. New Issues Raised by Appellees

Appellees make several new arguments before this Court regarding attorneys' fees. As none of these were raised by Appellees prior to the filing of their Merit Brief in this Court, there is no reason for the Court to even consider them. This Court should

ignore arguments not presented to the trial court or to the Court of Appeals. *State v. Mauer* (1984), 15 Ohio St. 3d 239. The Appellees' arguments should be rejected on that basis alone.

1. There is no "interests of justice" exception to the American Rule.

Ohio has long held that the "American Rule" applies in Ohio. Under the American Rule, each party is to bear its own attorneys' fees absent a statutory or contractual provision allowing for an award of attorneys' fees, or a finding that punitive damages are appropriate. *Digital & Analog Design Corp. v. North Supply Co.* (1992), 63 Ohio St. 3d 657. Appellees argue that the "American Rule" should be eliminated and replaced with an essentially standardless "interests of justice" rule. The factual basis that Appellees raise to support their claim for attorneys' fees is that they have incurred "substantial legal expenses." (Brief of Appellees, p. 9). Since every party to a lawsuit incurs legal expenses, making that the basis for an exception to the American Rule would essentially eliminate the rule.

This Court's long standing adherence to the American Rule, recognized not only in *Zoppo* and *Digital & Analog* but in every Ohio case cited by Appellees, should continue. There is no "interests of justice" rule in Ohio. Absent a statutory mandate, attorneys' fees in Ohio can only be awarded where there is conduct that justifies an award of punitive damages.

2. "Bad faith" does not set out an exception to the American Rule separate from the *Zoppo* rule that a finding that punitive damages are appropriate is required to support an award of attorneys' fees.

Appellees also argue that attorneys' fees can be awarded for "bad faith," citing *Vance v. Roedersheimer* (1992), 64 Ohio St. 3d 552. Appellees' argument makes two

major errors. First, it assumes that *Vance* and the cases it cites are a separate rule from the rule cited in *Zoppo*, which is not correct.

The use of the phrase “bad faith” in *Vance* does not set up a second exception to the American Rule. *Vance* relied upon this Court’s holding in *Sorin v. Bd. of Edn.* (1976), 46 Ohio St. 2d 177, which based its decision on the same language in *Roberts* that the *Zoppo* Court relied upon in determining that attorneys’ fees could only be awarded where punitive damages were appropriate. Lower Courts applying the two lines of cases have recognized that they, in fact, announce the same standard. *Weber v. Obuch*, 2005 Ohio 6993, *Weisel v. Laskovski*, 2005 Ohio 1115.

Nothing in *Sorin* and *Vance* alter the rule that *Digital Analog* and *Zoppo* recognize. Indeed, *Sorin* makes it clear that the “bad faith” necessary to support an award of attorneys’ fees involves the same conduct that justifies punitive damages. *Sorin*, 46 Ohio St. 2d, at 181. Since *Zoppo* makes it clear that attorneys’ fees are only awarded where punitive damages are appropriate, the absence of an award of punitive damages here is determinative of Appellees’ request for attorneys’ fees, and the Court properly answered the jury’s question by restating Appellees’ jury instruction.

Appellees ignore a second important aspect of *Vance*. The dictum in *Vance* stated that attorneys’ fees can be awarded “upon a **finding** of conduct which amounts to bad faith.” *Vance*, 64 Ohio St. 3d at 556. There was no **finding** by the jury of bad faith conduct by the Appellants. Appellees never requested an instruction on bad faith from the Court. Even if a finding of “bad faith” alone could justify an award of attorneys’ fees, and it does not, **there is no such finding by the jury here**. There is simply no basis for an award of attorneys’ fees under *Vance*.

3. “Fraud” does not imply bad faith for the purposes of an award of attorneys’ fees.

Appellees argue instead that any finding of liability for fraud entails a finding of bad faith. What Appellees are essentially arguing is that attorneys’ fees are an item of damage for **any** claim of fraud, **without any further finding by the jury**. There is no basis for this in Ohio law. Appellees cite no case law for this proposition. Appellees cite no case in which a finding of liability for fraud alone entailed an award of attorneys’ fees.

Instead, Appellees base their argument on *Gaines v. Preterm-Cleveland, Inc.* (1987), 33 Ohio St. 3d 54, which sets out the elements of fraud. **Bad faith is not an element of fraud** under *Gaines*. While Appellees may find it “illogical” to argue that the tort of fraud does not involve “bad faith,” it is not an element of the tort and a finding of liability for fraud does not equate with a finding of bad faith.

This is clear from the case law Appellees cite. “Bad faith” in the context of the *Sorin* and *Vance* line of cases involves “actions where the losing party has acted in bad faith, vexatiously, wantonly, obdurately, or for oppressive reasons.” *Sorin*, 46 Ohio St. 2d, at 181. This standard implies more than a simple “absence of good faith” urged by Appellees. (Brief of Appellees, p. 14).

This standard clearly implies something beyond the mere tort itself in order to support an attorneys’ fee award. It requires a finding that punitive damages are appropriate. A finding that a losing party has acted “in bad faith, vexatiously, wantonly, obdurately, or for oppressive reasons” would be a necessary precondition to an award of either attorneys’ fees and punitive damages. The jury found that punitive damages were not appropriate, and Appellees never requested that the jury make a separate finding of

bad faith. There is simply no basis for an award of attorneys' fees based upon alleged "bad faith" here.

4. The American Rule applies to contract actions.

The American Rule applies to contract actions as well as torts. See, *Sorin*, 46 Ohio St. 2d at 177. Indeed, *Sorin* rejected an award of attorneys' fees for a breach of contract, without a finding that a party acted "in bad faith, vexatiously, wantonly, obdurately, or for oppressive reasons." Despite this, Appellees ask that this Court find that attorneys' fees may be awarded solely on the basis that a party has brought litigation to enforce a contract. This is not an exception to the American Rule, it is a wholesale negation of it.

The basis for the argument derives from a line of cases, such as *S & D Mech. Contr. V. Enting Water Cond.* (1991), 71 Ohio App. 3d 228, which hold that where a breach of contract results in litigation being brought **by a third party**, attorneys' fees expended in defending the **third party's lawsuit** are recoverable as a measure of contract damage. That does not support an award for attorneys' fees expended in pursuit of contract litigation against a party to the contract.

Appellees also cite a case involving a breach of a settlement agreement, *Shanker v. Columbus Warehouse Limited Partnership* (2000), Franklin App. No. 99 AP-772. Of course, while it is a contract, a settlement agreement is different from a sale of real estate because **the cessation of attorneys' fees is part of the bargain in the contract**, and thus the attorneys' fees flow directly from the breach of the contract. That is not the case with a regular purchase agreement, such as the one at issue here.

There is no difference between the attorneys' fees incurred by Appellees here and the attorneys' fees incurred by any other litigant to a contract case. All litigation brought for a breach of contract involves the expenditure of attorneys' fees in precisely the same way that Appellees have expended fees here. To allow attorneys' fees to be awarded solely because a party has brought litigation for breach of contract will, essentially, erase the American Rule because it would apply to **all** contract actions.

The American Rule is still alive in the State of Ohio. Appellees' attempts to erase it should be rejected.

PROPOSITION OF LAW NO. 2: *Where a purchaser of real estate accepts the property in its "as is" physical condition, a purchaser alleging a defect in the property can only bring an action for active fraud on the part of the purchaser. He cannot maintain a cause of action for negligence, breach of contract, or passive fraud.*

PROPOSITION OF LAW NO. 3: *Where a purchaser of real estate is placed on notice of a defect in the property, and accepts the property in its "as is" present physical condition, the purchaser is under a duty to determine the condition of the property for himself. He cannot justifiably rely upon statements made in the Residential Property Disclosure Form.*

PROPOSITION OF LAW NO. 4: *Where a plaintiff pursues three theories of liability for the same injury, the plaintiff is entitled to only one recovery of damages and it is error for the Court to award duplicative damages for each theory of liability.*

Appellees do not offer any counter argument to these Propositions of Law urged by Appellants.

II. CONCLUSION

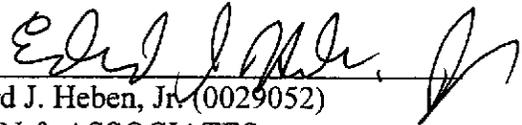
The Trial Court erroneously denied the Defendants' Motion for Directed Verdict and allowed Plaintiffs' claims for negligence and breach of contract to go to the jury despite the fact that the Zappitellis had purchased the house in its "as is present physical condition." The Trial Court also erred when it denied Defendants' Motion for Directed

Verdict and allowed Plaintiffs' claim for fraud, despite the absence of any justifiable reliance. Finally, the Court of Appeals erred when it upheld the Trial Court's decision to allow the Plaintiffs to be compensated three times for the same injury.

The Court of Appeals, rather than reversing these errors, itself erred by upholding the trial court. The Court of Appeals further erred by holding that attorney fees were appropriate despite the jury's decision that punitive damages should not be awarded, and despite any jury finding to support the award of attorney fees.

Therefore, Appellants respectfully request that this Court reverse the decision by the Court of Appeals upholding the denial of the Motion for Directed Verdict, allowing duplicative damages, and awarding attorneys fees.

Respectfully submitted,



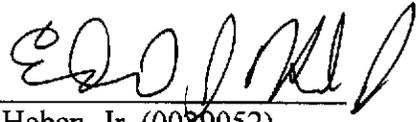
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CERTIFICATE OF SERVICE

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