

IN THE SUPREME COURT OF OHIO

07 - 1551

EVELYN KLEIN, *et al*,  
Appellants,

vs.

ALVIN MOUTZ,  
Appellee,

On Appeal from the  
Summit County Court of Appeals,  
Ninth Appellate District

Court of Appeals  
Case No.: CA-23473

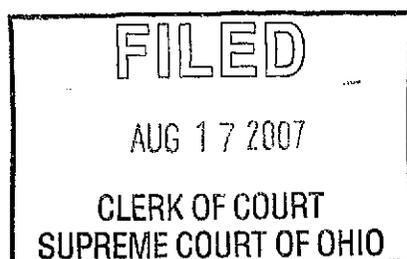
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**NOTICE OF CERTIFIED CONFLICT  
BY APPELLANTS, EVELYN KLEIN AND HARRY KLEIN**

---

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Notice of Certified Conflict by Appellants, Evelyn Klein and Harry Klein

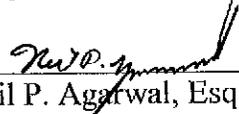
Appellants, Evelyn Klein and Harry Klein, hereby give notice of a certified conflict to the Supreme Court of Ohio from the judgment of the Summit County Court of Appeals, Ninth Appellate District. The August 9, 2007 Journal Entry certifying the conflict is attached and marked as Exhibit 1. The Ninth District Court's opinion in *Klein v. Moutz*, (June 27, 2007), 9<sup>th</sup> Dist., No. 23473, 2007-Ohio-3242 (Unreported), is attached and marked as Exhibit 2. The case in conflict is *Breault v. Williamsburg Estates* (Nov. 21, 1986), 6<sup>th</sup> Dist., No. L-86-116, 1986 WL 13169 (Unreported), and is attached and marked as Exhibit 3.

Pursuant to Art. IV, §3(B)(4) of the Ohio Constitution, the Ninth Appellate District has certified a conflict as to the following issue:

**Whether a trial court has the authority to tax costs under R.C. 5321.16 which were incurred at the appellate level.**

Wherefore, Appellants respectfully request this Court to determine that a conflict exists, and order briefing in this matter to resolve said conflict.

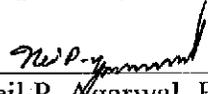
Respectfully Submitted,

  
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**CERTIFICATE OF SERVICE**

I, Neil P. Agarwal, Attorney-At-Law, certify that a true and correct copy of the foregoing was sent by First Class United States Mail to Appellee's attorney, Frank E. Steel, Esq., 11 South Forge Street, Akron, Ohio 44304, on August 15, 2007.

Respectfully Submitted,

  
\_\_\_\_\_  
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STATE OF OHIO )  
COUNTY OF SUMMIT )

COURT OF APPEALS  
DANIEL M. HERRIGAN  
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IN THE COURT OF APPEALS  
NINTH JUDICIAL DISTRICT

EVELYN KLEIN, et al.

SUMMIT COUNTY  
CLERK OF COURTS

C.A. No. 23473

Appellants

v.

ALVIN MOUTZ

Appellee

JOURNAL ENTRY

Appellant has moved, pursuant to App.R. 25, to certify a conflict between the judgment in this case, which was journalized on June 27, 2007, and the judgment of the Sixth District Court of Appeals in *Breault v. Williamsburg Estates* (Nov. 21, 1986), 6th Dist. No. L-86-116. Appellee has not responded to the motion.

Article IV, Section 3(B)(4) of the Ohio Constitution requires this Court to certify the record of the case to the Ohio Supreme Court whenever the "judgment \*\*\* is in conflict with the judgment pronounced upon the same question by any other court of appeals in the state[.]" "[T]he alleged conflict must be on a rule of law -- not facts." *Whitelock v. Gilbane Bldg. Co.* (1993), 66 Ohio St. 3d 594, 596.

Appellant has proposed that a conflict exists among the districts on the following issue:

1. Whether a trial court has the authority to tax costs under R.C. 5321.16 which were incurred at the appellate level.

We find that our decision is in conflict with the judgment of the Sixth District Court of Appeals in *Breault*, supra. In *Breault*, the Sixth District held as follows:

“I do not mean to suggest that the appellate court would be without authority to award attorney's fees upon a proper request. App.R. 24 would clearly allow this court to assess costs including attorney fees if appropriate. However, no such request was made in this court; it was made in the trial court. I endorse that procedure.” *Id.*

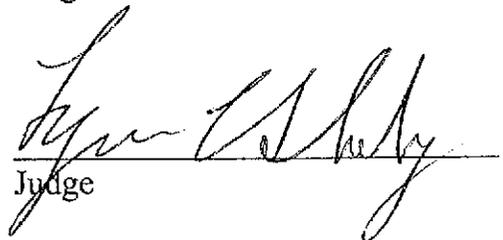
In contrast, in the instant matter, this Court held:

“To the extent that the Ohio Supreme Court has held that attorney’s fees in this context are costs, a party must seek their recovery from the appropriate appellate court. As such, we agree with the trial court that it lacked the authority to award costs that were incurred before this Court.” *Klein v. Moutz*, 9th Dist. No. 23473, 2007-Ohio-3242, at ¶5.

Accordingly, we find that a conflict exists. Appellant’s motion to certify a conflict is granted.



Judge



Judge

Westlaw.

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Klein v. Moutz  
Ohio App. 9 Dist., 2007.

CHECK OHIO SUPREME COURT RULES FOR  
REPORTING OF OPINIONS AND WEIGHT OF  
LEGAL AUTHORITY.

Court of Appeals of Ohio, Ninth District, Summit  
County.

Evelyn KLEIN, et al., Appellants

v.

Alvin MOUTZ, Appellee.

No. 23473.

Decided June 27, 2007.

Appeal from Judgment Entered in the Akron  
Municipal Court County of Summit, Ohio, Case No.  
06 CV 00009.

Neil P. Agarwal, Attorney at Law, for appellants.  
Frank E. Steel, Attorney at Law, for appellee.

*DECISION AND JOURNAL ENTRY*

\*1 This cause was heard upon the record in the trial  
court. Each error assigned has been reviewed and  
the following disposition is made:

CARR, Judge.

{¶ 1} Appellants, Evelyn and Harry Klein, appeal  
from the judgment of the Akron Municipal Court  
which awarded them attorney's fees in the amount  
of \$1,725. This Court affirms.

I.

{¶ 2} On September 26, 2006, this Court decided  
the first appeal in this matter. See *Klein v. Moutz*,  
9th Dist. No. 23132, 2006-Ohio-4974. In that  
decision, this Court noted that the award of attorney  
fees to a successful party is mandatory under R.C.  
5321.16(C). *Id.* at ¶ 10. Following remand,

appellants submitted an application in support of an  
award of attorney's fees. In that application,  
appellants sought an award of fees incurred in the  
trial court and on appeal to this Court. The trial  
court granted the motion in part and awarded fees in  
the amount of \$1,725. The trial court, however,  
refused to award appellants any attorney's fees  
incurred during the appeal of this matter. Appellants  
have timely appealed the trial court's judgment,  
raising three assignments of error. For ease of  
consideration, this Court has consolidated  
appellants' assignments of error.

II.

*ASSIGNMENT OF ERROR I*

"THE TRIAL COURT COMMITTED  
REVERSIBLE ERROR WHEN IT DETERMINED  
THAT APPELLANTS WERE NOT ENTITLED  
TO ATTORNEY FEES FOR SUCCESSFULLY  
WINNING A PRIOR APPEAL IN KLEIN V.  
MOUTZ, 9TH DIST. NO. 23132,  
2006-OHIO-4974, BECAUSE THEIR  
ATTORNEY COULD HAVE RAISED THE  
ISSUE OF ATTORNEY FEES AT THE TRIAL  
LEVEL IN A LESS COSTLY MANNER  
THROUGH A MOTION UNDER OHIO CIV.R.  
60(B)."

*ASSIGNMENT OF ERROR II*

"THE TRIAL COURT COMMITTED  
REVERSIBLE ERROR WHEN IT DETERMINED  
THAT APPELLANTS WERE NOT ENTITLED  
TO ATTORNEY FEES FOR SUCCESSFULLY  
WINNING A PRIOR APPEAL IN KLEIN V.  
MOUTZ, 9TH DIST. NO. 23132,  
2006-OHIO-4974, BECAUSE OHIO R.C. §  
5321.16(C) DOES NOT APPLY TO PETITIONS  
FOR APPELLATE FEES."

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### ASSIGNMENT OF ERROR III

"THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT DETERMINED THAT APPELLANTS WERE NOT ENTITLED TO ATTORNEY FEES FOR SUCCESSFULLY WINNING A PRIOR APPEAL IN KLEIN V. MOUTZ, 9TH DIST. NO. 23132, 2006-OHIO-4974, BECAUSE THE AWARDING OF SUCH AN AMOUNT WOULD BE UNREASONABLE WHEN COMPARED TO THE ORIGINAL AMOUNT OF DAMAGES."

{¶ 3} In each of their assignments of error, appellants have argued that the trial court erred when it refused to award them attorney's fees related to the first appeal of this matter. This Court disagrees.

{¶ 4} In *Christe v. GMS Mgmt. Co., Inc.* (Jan. 20, 1999), 9th Dist. No. 18992, this Court upheld a trial court ruling which had supplemented attorney's fees under R.C. 5321.16 to include the costs of a successful appeal. This result was achieved in the trial court through the filing of a Civ.R. 60(B) motion to vacate. This Court's decision relied upon a finding that the fees awarded under R.C. 5321.16 were termed "damages" and upon a finding that the trial court could vacate its damage award to accurately reflect all damages. The Ohio Supreme Court, however, expressly overruled this Court's decision. See *Christe v. GMS Mgmt. Co., Inc.* (2000), 88 Ohio St.3d 376. In its decision, the Ohio Supreme Court determined that the attorney's fees awarded under R.C. 5321.16 were properly termed "costs." *Id.* at 378. The Court defined costs as "encompassing statutory fees to which officers, witnesses, jurors and others are entitled for their services in an action \* \* \* and which the statutes authorize to be taxed and included in the judgment." (Citations and quotations omitted.) *Id.*

\*2 {¶ 5} In her concurring opinion, Justice Lundberg Stratton noted as follows:  
"I believe that the majority's holding fails to address the inevitable question of in which forum a tenant may seek to recover attorney fees. For the following reasons, I believe that a tenant may not only petition the trial court, but may also petition the respective

courts of appeals for attorney fees in these cases. \* \* \* By doing so we leave uncertain whether the Christes are left now with no recovery for their attorney fees for the appeal or whether they may yet apply to the appropriate appellate court for attorney fees." (Emphasis added.) *Id.* at 379-80 (Lundberg Stratton, J., concurring).

We agree with the logic espoused by the above concurring opinion. To the extent that the Ohio Supreme Court has held that attorney's fees in this context are costs, a party must seek their recovery from the appropriate appellate court. As such, we agree with the trial court that it lacked the authority to award costs that were incurred before this Court.

{¶ 6} Our analysis is strengthened by analogous case law in the federal courts. Generally, a district court lacks the authority to award appellate costs which are not specifically mentioned in Fed .R.App.P. 39(e). *Whitfield v. Scully* (C.A.2, 2001), 241 F.3d 264, 275. Fed.R.App.P. 39(e) details specific costs that a district court may tax that in fact occurred at the appellate level. Ohio has no equivalent rule in its appellate procedure. App.R. 24 permits this Court to award "fees allowed by law." App.R. 24, however, does not grant the trial court authority to award appellate costs in any manner.

{¶ 7} Accordingly, we find that the costs incurred in an appellate proceeding may only be recovered through petition to the court in which those costs were incurred. This Court notes as well that this is the course of action that was followed by the tenants involved in *Christe* after the case was remanded by the Ohio Supreme Court. Moreover, this Court awarded appellate attorney's fees in that matter. See *Christe*, 9th Dist. No. 18992.

{¶ 8} The trial court, therefore, properly concluded that it lacked authority under R.C. 5312.16 to award the costs of an appeal that occurred before this Court. Appellants' assignments of error are overruled.

### III.

{¶ 9} Appellants' assignments of error are

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overruled. The judgment of the Akron Municipal Court is affirmed.

Judgment affirmed.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Akron Municipal Court, County of Summit, 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.

\*3 Costs taxed to appellant.

SLABY, P.J., and DICKINSON, J., concur.  
Ohio App. 9 Dist., 2007.  
Klein v. Moutz  
Slip Copy, 2007 WL 1828036 (Ohio App. 9 Dist.),  
2007 -Ohio- 3242

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EXHIBIT 2

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**(Cite as: Not Reported in N.E.2d)**

Breault v. Williamsburg Estates  
 Ohio App., 1986.

Only the Westlaw citation is currently available.  
 CHECK OHIO SUPREME COURT RULES FOR  
 REPORTING OF OPINIONS AND WEIGHT OF  
 LEGAL AUTHORITY.

Court of Appeals of Ohio, Sixth District, Lucas  
 County.

Sandra BREAULT, Plaintiff-Appellee,

v.

WILLIAMSBURG ESTATES,

Defendant-Appellant.

No. L-86-116.

Nov. 21, 1986.

R.C. 5321.16(C) authorizes a tenant to collect attorney's fees for the successful defense of an appeal which is instituted by a landlord following a tenant's original successful action to recover a wrongfully withheld security deposit. Attorney's fees are properly assessed as costs by the trial court upon proper application. *Berlinger v. Suburban Apt. Mgmt. Co.* (1982), 7 Ohio App.3d 122, followed and extended to the facts of this case. The intent and purpose of the Ohio Landlords and Tenants Act, R.C. 5321.01, *et seq.* is to insure the return of a security deposit at no cost to the tenant in cases where the security deposit has been wrongfully withheld. *Sherwin v. Cabana Club Apartments* (1980), 70 Ohio App.2d 11, followed.

Douglas A. Wilkins, for defendant-appellant.  
 Raymond L. Beebe, for plaintiff-appellee.

#### OPINION

HANDWORK, Judge.

\*1 This case is an appeal from a judgment of the Toledo Municipal Court. On March 17, 1986, the trial judge awarded an additional \$969 in attorney's fees to appellee, tenant, against appellant, landlord. Said sum represented the costs incurred by appellee

for attorney's fees as a consequence of successfully defending the appeal of her original judgment in the Toledo Municipal Court.

Historically, the case was initiated on September 16, 1983, when appellee, then plaintiff, sought damages for the wrongful retention of her security deposit by appellant, then defendant. She was successful in the Toledo Municipal Court, and recovered a judgment for twice the wrongfully held amount, which judgment included an amount for attorney fees. On the initial appeal of this case, this court affirmed the judgment and remanded the case to the Toledo Municipal Court for assessment of costs. See *Breault v. Williamsburg Estates* (Jan. 10, 1986), Lucas App. No. L-85-209, unreported. Thereafter, appellee filed a supplemental affidavit for attorney's fees. Appellant filed a motion to quash the supplemental affidavit; appellee opposed said motion. Ultimately, the Toledo Municipal Court granted appellee's motion for supplemental attorney fees on March 17, 1986. It is from that order that appellant has filed a timely notice of appeal setting forth the following assignment of error:

"THE LOWER COURT ERRED IN GRANTING APPELLEE SUPPLEMENTAL ATTORNEY FEES, ASSESSED AS 'COSTS,' FOR SERVICES RENDERED BY APPELLEE'S COUNSEL DURING THE APPEAL FROM THE ORIGINAL JUDGMENT OF THE TRIAL COURT TO THIS SAME INTERMEDIATE COURT."

This court has fully reviewed the record of this case and the law which applies. I find that the trial court has rendered a very thoughtful decision when reaching its final judgment in this case. I choose to adopt the rationale of the lower court as stated in its decision and reprint the decision of the lower court in its entirety, adopting the same as my own. The lower court's decision reads as follows:

"On May 3, 1985, this Court entered Judgment for

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Plaintiff, Sandra J. Breault and against Defendant, Williamsburg Estates pursuant to O.R.C. 5321.16(C). The total award was \$1,076.00, including Attorney fees.

"Thereafter, Defendant instituted [*sic*] an Appeal to the Court of Appeals for Ohio, Sixth District. The Court of Appeals upheld this Court's decision and referred the matter back for the assessment of costs against Defendant.

"In response, Plaintiff's Attorney filed with this Court a Motion for Supplemental Attorney Fees as Cost Assessment, which incorporated an earlier Affidavit.

"Defendant's Attorney filed with this Court a Motion to Quash Supplemental Affidavit and a Brief in Support.

"Under Ohio Law, it is clear that the prevailing Party may not recover Attorney fees absent statutory authorization ... *Jelen v. Price* 9 Ohio App.3d 174, 458 N.E.2d 1267 (App.1983); *Baugh v. Carver* 3 Ohio App.3d 139, 444 N.E.2d 58 (App.1981); *Sorin v. Board of Education of Warrensville Heights* 46 Ohio St.2d 177, 75 O.O.2d 244 [*sic*] (1976).

\*2 "In the instant case, there is no doubt that the award of Attorney fees at the trial level is proper, as Plaintiff's action was brought under a section of the Ohio Revised Code that provides for Attorney fees: O.R.C. 5321.16.

"However, the question still remains whether or not reasonable Attorney fees incurred by Plaintiff, while defending Defendant's Appeal, may be taxed as costs against the Defendant pursuant to O.R.C. 5321.16(C).

"The Court of Appeals for Cuyahoga County has held that Attorney fees awarded pursuant to O.R.C. Chapter 5321 are to be taxed as costs. *Berlinger v. Suburban Apartment Management Co.* 7 Ohio App.3d 122, 7 O.B.R. 155 (App.1982); *Drake v. Menczer* 67 Ohio App.2d 122, 21 O.O.3d 429 (App.1980).

"Furthermore, the term 'costs' has been defined as 'statutory fees to which Officers, Witnesses, Jurors and Others are entitled for their services in an action and which *statutes authorize to be taxed and included in Judgment.*' *Centennial Insurance Co. v. Liberty Mutual* 69 Ohio St.2d 50, 23 O.O.3d 88 (1982); *Benda v. Fang* [*sic*] 10 Ohio St.2d 259, 39 O.O.2d 410 (1967) (emphasis added). This definition seems to clearly encompass attorney fees awarded pursuant to statutory authority.

"Also, in deciding whether to award Attorney fees for time spent at the Appellate level, it is necessary to consider the purpose of O.R.C. Chapter 5321 and its provisions for Attorney fees.

"At least one Ohio Court has articulated that the award '[\* \* \*]' acts as an additional sanction against a person who violates the more important provisions of the Act [\* \* \* and] serves as encouragement to the private bar to provide representation to tenants who normally could not afford [to hire] an attorney.' *Drake* [v. *Menczer* (1980), 67 Ohio App.2d 122, 123] 21 O.O.3d 429, 430.

"More specifically, O.R.C. 5321.16(C) has been described as having been '[\* \* \*]' designed to ensure the return of a security deposit *at no cost to the tenant* in cases where the security deposit has been wrongfully withheld.' *Sherwin v. Cabana Club Apartments* 23 [*sic*] O.O.3d 11, 14; 70 Ohio App.2d 11, 17 (emphasis added).

"This Court agrees with the above reasoning and is convinced that to deny the Plaintiff her Attorney fees expended in successfully defending a trial Court award pursuant to O.R.C. 5321.16(C) would entirely negate the goals of O.R.C. Chapter 5321 in general, and O.R.C. 5321.16(C) in particular.

"Next, it must be determined whether the Attorney fees requested are reasonable. The Party seeking Attorney fees has the burden of demonstrating their reasonable value. *Swanson v. Swanson* 48 Ohio App.2d 85, 2 O.O.3d 65; *Drake* supra. Plaintiff's Attorney satisfied that burden when he filed with the Court a detailed Affidavit ... See Judge Krenzler's concurring opinion in *Drake* 67 Ohio

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App.2d at 125 [*sic*].

"In addition, DR2-106 of the Code of Professional Responsibility must be considered. The Code lists eight factors to be considered regarding reasonable Attorney fees:

\*3 "(1)-The time and labor required, the novelty [*sic*] and difficulty of the questions involved, and the skill requisite to perform the legal service properly.

"(2)-The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.

"(3)-The fee customarily charged in the locality for similar services.

"(4)-The amount involved and the results obtained.

"(5)-The time limitations imposed by the client or by the circumstances.

"(6)-The nature and length of the Professional relationship with the client.

"(7)-The experience, reputation, and ability of the lawyer or lawyers performing the service.

"(8)-Whether the fee is fixed or contingent.

"Upon consideration of both DR2-106 and the Affidavit of Plaintiff's Attorney, this Court finds the \$969.00 amount requested to be reasonable. In particular, this Court finds Defendant's assertion that because Plaintiff is an employee of her Attorney, it is therefore 'doubtful' that the requested amount is reasonable, to be groundless.

"In conclusion, the Court finds that an Appellee who successfully defends a trial Court Judgment pursuant to O.R.C. 5321.16 in the Court of Appeals is entitled to Attorney fees incurred in that Appeal, that the amount sought in the instant case [*sic*] is reasonable, and that the amount may be assessed as costs against the Defendant/Appellant.

"Therefore, Plaintiff's Motion # 86-272 for

Supplemental Attorney fees is granted. This case is referred to the Civil Clerk of The Toledo Municipal Court for assessment of costs against Defendant, Williamsburg Estates, including \$969.00 in Attorney Fees.

"s/Thaddeus N. Walinski, Judge."

For the reasons stated above in the trial court's decision, as adopted by this court, I find the appellant's assignment of error not well-taken. In so doing, I believe that the above-stated rationale deals directly and fully with the assignment of error. However, I note that appellant has divided the single assignment of error into four subparts, all of which are not specifically addressed by the trial court opinion. I will deal with them in order. The first subpart is as follows:

"A. Supplemental fees are not Authorized by Section 5321.16(c) [*sic*] of the Ohio Revised Code."

This subpart is dealt with by the decision which I have adopted. The case of *Sherwin v. Cabana Club Apartments*, (1980), 70 Ohio App.2d 11, clearly states the intent of the legislature as perceived by the courts. Specifically, the legislature's intent is to allow the tenant to recover a wrongfully withheld security deposit at "no cost." If the landlord chooses to appeal an adverse ruling of a trial court, he does so at his risk with regard to the award of further fees incurred by the tenant to defend the appeal. To rule otherwise would be to subvert the clear purpose and intent of the law.

"B. By upholding the lower court's judgment for Supplemental fees, a dangerous precedent is established discouraging the filing of appeals from Section 5321.16(c) [*sic*] cases by landlords."

\*4 This court believes it is only reinforcing already established precedent in this decision; to wit, that a tenant has the right to the return of an unlawfully withheld security deposit without having to incur expenses for an attorney. See *Sherwin v. Cabana Club Apartments*, *supra*.

"C. By granting Appellee Supplemental fees, the

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 (Cite as: Not Reported in N.E.2d)

lower court's total award for fees to Appellee is over eight times the value of monies wrongfully withheld and is, therefore, unlawful.”

This court supports the well-reasoned rationale of the trial court in its finding that the attorney's fees for defending the appeal were reasonable. While appellant's argument, that the total fees incurred by appellee at the trial and appeal stages of this proceeding are disproportionate and therefore unreasonable in comparison to the recovery for the withheld security deposit, is interesting and logically compelling at first blush, this question, of necessity, must be dealt with on a piecemeal basis. It must first be determined if the fees at the trial level were reasonable and then the question of reasonableness must again be addressed at the appellate level. The procedure employed in this case was proper.

Additionally, the final subpart of appellant's argument reads as follows:

“D. The lower court is without jurisdiction to award Supplemental fees.”

In response to appellant's argument, I find that the trial court, on remand, had authority to award fees in the manner utilized in this case. See *Drake v. Menczer* (1980), 67 Ohio App.2d 122, where the court stated at pages 125-126:

“We, therefore, conclude that the legislature intended that any attorney's fees awarded by a court under R.C. 5321.02 are to be taxed as costs. Thus, the entitlement to and amount of those fees lies within the sound discretion of the trial judge. See *Cassaro v. Cassaro* (1976), 50 Ohio App.2d 368, 373-374; *Swanson v. Swanson* (1976), 48 Ohio App.2d 85, 90. \* \* \* ”

While I recognize that the *Drake* court was dealing with fees incurred at the trial level, and additionally with the award of fees as allowed by a different section of the Landlords and Tenants Act, I see no reason that the logic expressed therein cannot apply to fees requested for defending an appeal. The trial court, on remand to assess costs, can easily determine, either in a hearing or by reviewing

affidavits, the reasonableness of fees to be awarded. The trial court, having final authority to assess costs, is in the best position to make such an award. I reject the appellant's argument that App.R. 23 alone governs this court's ability to allow or to approve the allowance of fees for defending an appeal. In fact, App.R. 23 applies only upon a finding that the appeal is frivolous. No such finding was made in this court, nor was it requested. I do not mean to suggest that the appellate court would be without authority to award attorney's fees upon a proper request. App.R. 24 would clearly allow this court to assess costs including attorney fees if appropriate. However, no such request was made in this court; it was made in the trial court. I endorse that procedure. For all of the above reasons, I affirm the judgment of the trial court.

\*5 On consideration whereof, the court finds substantial justice has been done the party complaining, and judgment of the Toledo Municipal Court is affirmed. This cause is remanded to said court for execution of judgment and assessment of costs. Costs assessed against appellant.

*JUDGMENT AFFIRMED.*

RESNICK and WILEY, JJ., concur.

Judge FRANK W. WILEY, retired, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.

#### JOURNAL ENTRY

Finding appellant's sole assignment of error and all of its subparts not well-taken, judgment of the Toledo Municipal Court is affirmed at appellant's costs and cause is remanded to said court for execution of judgment and assessment of costs. See Opinion by Handwork, J., on file.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. See also Supp.R. 4, amended 1/1/80.

HANDWORK, RESNICK and WILEY, JJ., concur.  
 Judge FRANK W. WILEY, retired, sitting by assignment of the Chief Justice of the Supreme

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Court of Ohio.  
Ohio App., 1986.  
Breault v. Williamsburg Estates  
Not Reported in N.E.2d, 1986 WL 13169 (Ohio  
App. 6 Dist.)

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