

ORIGINAL

IN THE OHIO SUPREME COURT

KIMBERLY NEAL-PETTIT,

Plaintiff-Appellee,

v.

LINDA LAHMAN, et al.,

Defendant-Appellants.

Supreme Court Case No. 2009-0325

On Appeal from 8th Dist. App. Case No.
91551

**DEFENDANT-APPELLANT ALLSTATE INSURANCE COMPANY'S
REPLY BRIEF**

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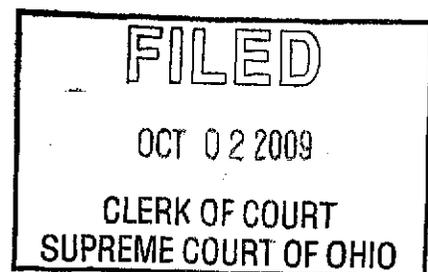
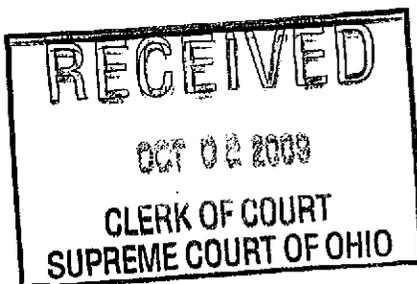


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I. Law & Argument

A. Summary of Argument

As was thoroughly set forth and argued in Allstate's Merit Brief, not only would paying attorneys fees violate well established public policy, but Allstate has no duty under the insurance contract to pay the attorney fee portion of the punitive damage award in this case.

1. Public Policy

As was argued in Allstate's Merit Brief, the Eighth District's decision in *Neal-Pettit v. Lahman*, Cuyahoga App. No. 91551, 2008-Ohio-6653, ignores the purpose of the public policy against insuring punitive damages awards, and the fact that such attorney fees can only be awarded as an aspect of a punitive damage award. The Eighth District's ruling contradicts the clear public policy in Ohio that *insurance companies cannot pay punitive damage awards*. Moreover, the ruling improperly places the punishment for the tortfeasor's actions upon his or her insurer.

2. Insurance Policy

In *Neal-Pettit*, supra, at ¶4, the Eighth District Court of Appeals found that, because attorney fees were not expressly stated in the policy exclusion - even though they clearly fell within the excluded categories of "punitive or exemplary damages, fines or penalties" and did not fall under the expressly defined coverage - such fees were covered under the policy. The Court interpreted R.C. 3937.182(B) to allow the paying of the portion of the punitive damages award for attorney fees because the statute prohibited the payment of "punitive damages" and did not specifically list the items that could comprise a punitive damage award, such as attorney fees. Id.

The Court of Appeals affirmed the decision of the Trial Court, but it did acknowledge that the attorney fees "are undeniably punitive in nature." Id. The Court then inexplicably

concluded that attorney fees awarded as part of a punitive damage award are “conceptually distinct from punitive damages.” *Id.*

If the fees are “punitive in nature” then they naturally arise out of the punitive damages award and are excluded under the policy. In fact, even Appellee acknowledges that the Court’s statement supports Allstate’s argument. In her Merit Brief, Appellee disagrees with the Court’s statement that the fees are punitive in nature, stating that “[p]laintiff must respectfully disagree with the Eighth District’s comment in the proceedings below that: ‘Attorney fees awarded with punitive damages are undeniably punitive in nature.’ *Neal-Pettit*, 2008-Ohio-6653 ¶ 4.” See Appellee’s Merit Brief, p. 16. Appellee went on further to state that “while the Eight[h] District thus appears to have mistakenly relied upon a single untenable sentence from *Digital [& Analog Design Corp. v. N. Supply Co.* (1992), 63 Ohio St.3d 657, 590 N.E.2d 737], the unanimous panel reached the correct conclusion by affirming the trial judge. *Neal-Pettit*, 2008-Ohio-6653 ¶ 4-5.” See Appellee’s Merit Brief, p. 17.

The Eighth District further failed to consider the express language in the insurance contract that only provides coverage for bodily injury or property damage. The policy does not provide for the payment of attorney fees awarded as part of a punitive damage claim, as such fees are penalties or fines arising out of a punitive damage award.

B. Proposition of law No. I: It is against public policy for an insurance company to pay an award of attorney fees as an element of a punitive damage award against an intoxicated driver.

It is against public policy in Ohio for an insurance company to pay any part of a punitive damage award. An insurance contract cannot insure a person against a punitive damage claim based upon the insured’s conduct. *Wedge Products, Inc. v. Hartford Equity Sales Co.* (1987), 31 Ohio St.3d 65, 67; R.C. 3937.182(B). Here, it is undisputable that the attorney fees were only available as part of the punitive damage award. The jury found that Lahman acted with malice,

and awarded attorney fees in the amount of \$46,825.00 as part of a punitive damages award. Accordingly, pursuant to Ohio public policy, the fees are not, and could not be, covered under the policy.

In her Memorandum in Opposition to Allstate's Motion for Summary Judgment, Plaintiff cited to a myriad of cases claiming that attorney fees can be paid as compensatory damages. But in each case so cited, the issue was *not who had to pay*, but rather how to classify the award to the plaintiff.

In her Merit Brief, Appellee takes issue with this argument, stating that “‘how to classify the award to the plaintiff’ lies at the heart of the instant dispute.” See Appellee's Merit Brief, p. 15. However, Appellee fails to take notice that, in the instant matter, the specific question is *whether it is against public policy for an insurance carrier to pay an award of attorney fees that arise solely out of a punitive damage claim*. None of Plaintiff's cases considered this issue. In fact, the majority of the cases, as discussed in Allstate's Merit Brief, actually address payment of punitive damages based upon one's own fraud, bad faith, intentional tort, etc. Not one case cited by Plaintiff required an insurance carrier to pay the attorney fee portion of the punitive damage award that arose out of its insured's willful or intentional conduct. Accordingly, said cases are not on point or illustrative of the issues presented in this case.

The legislature has made it clear that insurance against one's own willful or intentional conduct is against public policy as it would encourage wrongful behavior without consequence. See R.C. 3937.182(B). This prohibition stems from the underlying public policy that a person should not be able to escape liability for his or her own malicious, willful or intentional actions. In addition, any deterrent effect would be diminished if the wrongdoer could merely purchase insurance and have the insurer pay for their wrongful actions without any meaningful consequence to the insured.

In her Merit Brief, Appellee states that if Allstate “has its way in this Court, no carrier doing business in Ohio will ever have to cover an award of attorney fees and litigation expenses which has been issued in connection with punitive damages.” See Appellee’s Merit Brief, p. 12. Appellee’s statement is incorrect, in that, this is not just what Allstate ‘wants,’ it is what *Ohio law requires*. As discussed above, and at length in Allstate’s Merit Brief, the law in Ohio prohibits an insurance company from paying a punitive damage award. As the attorney fee award is but one element of a punitive damages award, and as it is against public policy for an insurance company to pay such damages, Allstate cannot be held liable for the attorney fees as a matter of law.

The Eighth District itself acknowledged that attorney fees “are undeniably punitive in nature.” *Neal-Pettit v. Lahman*, supra. Further, in *Griffin v. Lumberjack* (July 29, 1994), 96 Ohio App.3d 257, 266, 644 N.E.2d 1087, the Sixth District Court of Appeals stated that “in a tort action, an award of attorney fees is *inextricably intertwined with an award of punitive damages*. This principle was recognized by the Ohio Supreme Court in *Digital & Analog Design Corp. v. N. Supply Co.* (1992), 63 Ohio St.3d 657, 662, 590 N.E.2d 737, 742.” (Emphasis added.)

In sum, a review of the applicable case law, and even the Eighth District’s own statement in the proceedings below that the fees are “punitive in nature,” demonstrates that Ohio law considers fees “inextricably intertwined” with punitive damages. Accordingly, it is against public policy for Allstate to pay for these punitive attorney fees.

C. PROPOSITION OF LAW NO. II: Punitive damages and any accompanying award of attorney fees derivative of punitive damages are not damages “because of bodily injury” within the meaning of an insurance policy.

It is well-settled in Ohio law that an insurance company has no obligation to its insured, or to others harmed by the actions of an insured, unless the conduct of the insured falls within the coverage stated in the policy. *Gearing v. Nationwide Ins. Co.* (1996), 76 Ohio St.3d 34, 36.

Allstate *has not contractually agreed* to pay attorney fees arising out of the punitive damage award. Specifically, the policy states:

General Statement of Coverage

If a premium is shown on the Policy Declarations for Bodily Injury Liability Coverage and Property Damage Liability Coverage, **Allstate** will pay damages which an insured person is legally obligated to pay because of

1. **bodily injury** sustained by any person, and
2. damage to, or destruction of property.

Policy at p. 7 (emphasis in original). “Bodily injury” is further defined as “physical harm to the body, sickness, disease or death...” except for certain communicable diseases. Policy at 3.

In her Merit Brief, Appellee argues that “as a matter of simple logic and common sense, the fees and expenses were thus necessary ‘because of *** bodily injury’ and are thus recoverable as ‘damages’ under Allstate’s policy.” See Appellee’s Merit Brief, p. 11. Allstate respectfully disagrees with that statement.

The attorneys fee awarded here were not awarded *because of bodily injury*; rather, they were awarded based upon a punitive damage claim (as a result of intentional or malicious conduct). Appellee erroneously argues that the attorney fees were logically necessary because of bodily injury. Speaking logically, it is equally clear to Allstate that the opposite is true: such fees *do not arise out of* bodily injury.

In fact, *Capretta v. Goodson* (Dec. 18, 2000), Cuyahoga App. No. 76932, 2000 WL 1876404, attached hereto as **Appendix A**, helps illustrate Allstate’s point. In that case, the Eighth District Court of Appeals stated that “since an award of attorney fees is a punitive remedy flowing from a jury finding of malice and the award of punitive damages; *attorney fees are not intended to compensate the victim for damages flowing from the tort.*” This statement illustrates Allstate’s position that the fees were not awarded because of bodily injury. Rather, they were awarded solely as a punitive remedy *flowing from an award of punitive damages*. As

the insurance policy here covers damages arising only out of bodily injury or property damage, there is no agreement to pay the attorney fees, and the Eighth District's decision is erroneous.

D. PROPOSITION OF LAW NO. III: An insurance policy exclusion in accordance with public policy for “punitive or exemplary damages, fines or penalties” precludes coverage for an award of attorney fees that are part of a punitive damage award.

The exclusionary language in Allstate's policy clearly and unambiguously provides that there is no duty to provide coverage for fines or penalties arising out of a punitive or exemplary damage award. The policy specifically excludes coverage for punitive damages and other amounts, such as attorney fees, arising out of a punitive damage award:

We will not pay any punitive or exemplary damages, fines or penalties under Bodily Injury Liability or Property damage Liability coverage.

Policy at p. 7 (emphasis in original). In *Creed v. Allstate Insurance Company* (1987), 365 Pa. Super. 136, which is particularly on point with the facts in this case, the Pennsylvania Superior Court found that:

Under the terms of the policy of insurance issued by Allstate, Allstate did not agree to indemnify its insured for claims for punitive damages...[W]here the insurer has only agreed to indemnify for bodily injury and property damage, it has no obligation to provide indemnity for punitive damages. Having determined that there is no coverage for punitive damages, there was no duty to defend that portion of the case and, consequently, there is no obligation to pay counsel fees.

Id.

In *First Specialty Insurance Co. v. Caliber One Indemnity Co.* (2008), 988 So.2d 708, 712-14, which is specifically on point, the Florida Court of Appeals held that an exclusion for fines and penalties excluded any award of punitive damages or any attorney fees arising out of the punitive damage award as “punitive damages are a type of civil fine or penalty.” *Id.* at 712-714.

Allstate is aware that cases arising out of state are merely persuasive authority for this Honorable Court; however, as this specific issue is one of first impression in Ohio, such

persuasive authority is necessary and particularly useful. Further, there is some Ohio authority that aids Allstate's position. For example, in *Digital and Analog Design Corp. v. North Supply Co.* (1992), 63 Ohio St.3d 657, this Honorable Court stated:

The award of attorney fees, although seemingly compensatory and treated as such in the model jury instruction, does not compensate the victim for damages flowing from the tort. Rather, the requirement that a party pay attorney fees under these circumstances is a punitive (and thus equitable) remedy that flows from a jury finding of malice and the award of punitive damages. There is no separate tort action at law for the recovery of attorney fees under these circumstances. Without a finding of malice and the award of punitive damages, plaintiff cannot justify the award of attorney fees, unless there is a basis for sanctions under Civ.R. 11.

Digital & Analog Design Corp. at 662.

Clearly, the attorney fee award here is part of the punitive damage award. Even the Eighth District's holding in the proceedings below states that the fees are "punitive in nature." *Neal-Pettit*, supra. Indeed, but for the punitive damage award, there could not have been any attorney fee award. Attorney fees were available solely because the jury found malice and made an award of punitive damages. Because Allstate's policy excludes coverage for "punitive or exemplary damages, fines or penalties," Allstate has no duty to pay the attorney fees.

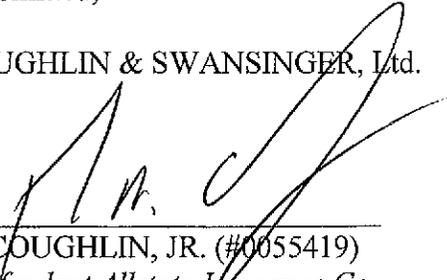
II. CONCLUSION.

Ohio law prohibits an insurance company from paying any amounts associated with a punitive damage claim as a matter of public policy. Further, Allstate did not contractually agree to assume liability for an attorney fee award deriving from a punitive damages claim. In fact, the policy actually clearly excludes payment of punitive damages; therefore, Allstate cannot be held liable for Plaintiff's attorney fees. Thus, this Court should reverse the Eighth District's decision, and hold that Allstate has no obligation to pay the attorney fee award.

Respectfully submitted,

RITZLER, COUGHLIN & SWANSINGER, Ltd.

By:



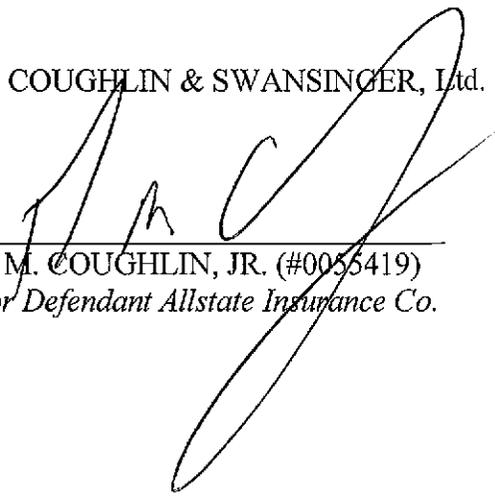
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PROOF OF SERVICE

A copy of the foregoing has been forwarded to the following by regular United States mail this 30th day of September 2009 to **Paul W. Flowers, Esq.**, 50 Public Square, 35th Floor, Terminal Tower, Cleveland, Ohio 44113; **W. Craig Bashein, Esq.**, 50 Public Square, 35th Floor, Terminal Tower, Cleveland, Ohio 44113 and **Terrence J. Kenneally, Esq.**, Old Forge Centre, 20595 Lorain Road, Terrace Level 1, Fairview Park, Ohio 44126.

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Not Reported in N.E.2d, 2000 WL 1876404 (Ohio App. 8 Dist.)
 (Cite as: 2000 WL 1876404 (Ohio App. 8 Dist.))

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

Court of Appeals of Ohio, Eighth District,
 Cuyahoga County.
 Gary CAPRETTA, et al. Plaintiffs-Appellants
 v.
 Kenneth GOODSON, et al. Defendants-Appellees
 No. 76932.

Dec. 18, 2000.

Character of Proceeding Civil appeal from Common Pleas Court Case No. CV-353856. Affirmed.
 Richard A. Oviatt, Cleveland, for Plaintiffs-Appellants.

Charlene R. Mileti, McCarthy Lebit Crystal & Haiman, Cleveland, for Defendants-Appellants.

JOURNAL ENTRY AND OPINION

KILBANE, J.

*1 This is an appeal from a jury verdict following a trial before Judge Nancy R. McDonnell and from an order denying appellants Gary and Sylvia Caprettas' motion for judgment notwithstanding the verdict (J.N.O.V.) or a new trial. The jury verdict awarded compensatory damages and attorney fees but no punitive damages to the Caprettas on their claims of breach of contract and fraud in their purchase of a home. They assert it was error to vacate that portion of the verdict awarding attorney fees (despite the absence of punitive damages); that the jury should have received additional instruction advising that a punitive damage award is a prerequisite to an award of attorney fees, and that the judge should have entered judgment on their claim for punitive damages in the amount of one penny or granted them a new trial. We do not agree and affirm.

The record discloses that in May 1996, the Caprettas purchased a residence at 17167 Goldenstar Drive, Strongsville, Ohio, from appellees Kenneth Goodson, Norma Goodson, and Mildred Laws ("the Goodsons") for \$149,000. While the disclosure statement accompanying the purchase agreement indicated that the home was absolutely free of defects and problems, the Caprettas' inspector submitted a report noting a few specific problems that included questions about the furnace, air conditioning, window seals, and bees. After the Goodsons claimed to have resolved these problems the Caprettas took possession in July 1996.

In September 1996, when the Caprettas noticed water present around the interior wall of the family room and sun room, they removed some dry wall and discovered deterioration and rot attributable to a roof leak. They also discovered that neither the air conditioner nor two of the windows had been fixed, an exterior gas light did not function, and the indoor-outdoor carpeting covering an exterior concrete walkway concealed various cracks.

The Caprettas filed a complaint alleging breach of contract and fraud on April 28, 1998. At trial they submitted into evidence copies of various bids for the repairs, including an April 1999 proposal for the repairs of the walls and the concrete walk totaling \$5,667, separate bids of \$660 and \$1,200 to repair only the concrete walk, a June 1998 receipt for \$350 reflecting patchwork done to the roof, and a March 1999 bid for \$8,000 to repair the roof. The Caprettas also contended that the seals of two windows still allowed moisture to leak between the panes and they replaced all the windows at a cost of \$5,410.

After the parties rested, the judge went through each instruction with the lawyers and noted that the punitive damage instruction "is right out of OJI." Neither attorney objected, and the judge indicated to Capretta's attorney that the instruction was "exactly as you gave it to me * * *." Capretta's pro-

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posed jury instruction provided a substantially similar "punitive damages" instruction as that found at OJI 23.71, ¶¶ 1-6, and ¶¶ 9-10, but it separately listed an "attorney fee" instruction as found at OJI 23.71, ¶ 11. The judge then instructed the jury as follows:

*2 Punitive damages. You will also decide whether the defendant shall be liable for punitive damages in addition to any other damages that you award to the plaintiff.

The purpose of punitive damages are to punish the offending party and make the offending party an example to discourage others from similar conduct.

You will also decide whether the defendant shall be liable for punitive damages in addition to any other damages that you award to the plaintiff. The purposes of punitive damages are to punish the offending party and to make the offending party an example to discourage others from similar conduct.

You may decide that the defendant is liable for punitive damages if you find by clear and convincing evidence that the defendant's acts or failures to act demonstrated malice, aggravated or egregious fraud, oppression, or insult, and the plaintiff has presented proof of actual damages that resulted from those acts or failures to act of the defendants.

Malice. Malice includes that state of mind under which a person's conduct is characterized by hatred, ill will, or a spirit of revenge.

Aggravated or Egregious Fraud. Fraud is aggravated if it is accompanied by the existence of malice or ill will. Fraud is egregious if the fraudulent wrongdoing is particularly gross.

Oppression. Oppression is an act or series of acts that wrongfully subject the victims to harm or hardship by the unjust or cruel use of force or authority.

Insult. Insult means any act or remark that is consciously, deliberately, or intentionally scornful or humiliating.

Clear and convincing. To be clear and convincing, the evidence must have more than simply a

greater weight than the evidence opposed to it, and must produce in your minds a firm belief or conviction about the facts to be proven.

The actual instruction did not include some of the instructions suggested by the Cabrettas, including that instruction found at ¶ 10 regarding the amount of punitive damages ^{FN1} or the attorney fee provision found at ¶ 11. ^{FN2} At the conclusion of all the instructions, the judge conducted a sidebar conference where, despite the above omissions, both lawyers affirmatively stated that each had no objection to charge.

FN1. "AMOUNT. If you award punitive damages, the amount should be fair and reasonable under all the facts and circumstances. It should not be excessive, nor influenced by passion, sympathy, or prejudice." Ohio Jury Instruction (OJI), 23.71, ¶ 10.

FN2. "ATTORNEY FEES. If you decide that the defendant is liable for punitive damages, you must also decide whether or not the defendant is liable for the attorney fees of counsel employed by the plaintiff in the prosecution of this action. (If you decide that the defendant is liable for those attorney fees, the Court will determine the amount.)" Ohio Jury Instruction (OJI), 23.71, ¶ 11.

After deliberation, all eight jurors found in favor of the Cabrettas for \$1,800 in actual damages. In a separate verdict form, six jurors provided as follows:

In addition to actual damages, we, the jury, make an additional award to the plaintiffs GARY and SYLVIA CAPRETTA, for punitive damages and award the plaintiff the sum of \$ *None* * and we decide that attorney fees *should* * * be awarded against the defendants, KENNETH and NORMA GOODSON.^{FN3}

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FN3. The following explanation is found at the bottom of the verdict form: “ * Insert in ink either ‘None’ or the dollar amount[,]” [and] * * Insert in ink either ‘should’ or ‘should not’.” See OHI 23 .71, ¶ 12.

After verdicts were read into the record, the following exchange occurred outside the presence of the jury:

[CABRETTAS' ATTORNEY]: I believe there is an inconsistency in the verdict forms. I don't believe you can award attorney fees without an award of punitive damages.

*3 I would request that the Court ask them to make that correction with respect to their ruling and advise them that the verdict has been inconsistent.

[GOODSONS' ATTORNEY]: Well, I agree. Obviously, my position would be that without punitive damages, there are no attorney fees.

[CABRETTAS' ATTORNEY]: I would suggest that the jury instruction-as you know, I didn't object at the time-appears to be ambiguous to some extent. I would ask the court at this time to make that correction. The jurors are here. They can go ahead and resolve this inconsistency.

THE JUDGE: [To bailiff,] do you have the instructions? You can take a look at the jury verdict forms.

Well, the charge itself just talked about punitive damages and what allows for punitive damages. It does not make any statement regarding the attorney fees.

The only mention of attorney fees is actually in the verdict form. Am I right?

[GOODSONS' COUNSEL]: I thought you read it to them. They could-I have a copy.

THE JUDGE: I'm looking through mine. I think that I just read the jury verdict forms.

[CAPRETTA'S COUNSEL]: It should specify that in order to find attorney fees-

THE JUDGE: I did at some point.

[GOODSONS' COUNSEL]: I don't remember, your Honor.

[CAPRETTA'S COUNSEL]: This Court at this point has the opportunity to resolve the ambiguity here. I would ask the Court to further instruct with reference to the inconsistency and have the jurors go back and redeliberate and resolve their inconsistency.

[GOODSONS' COUNSEL]: I would object, your Honor.

THE JUDGE: Well, here's the thing. They made their finding. There is no punitive damages. So if there is no punitive damages, then that actually resolves the question, I believe.

[GOODSONS' COUNSEL]: I believe it does, as a matter of law.

[CAPRETTA'S COUNSEL]: Your Honor, I think that they intended to give attorney fees. If they knew that it was a precondition to giving attorney fees, to have at least given one dollar for punitive damages.

I think it's very clear from the verdicts that the jurors expressed an intent to award attorney fees. They didn't intend to certify any kind of punishment against the defendants by way of punitive damages.

However, if they were award of the fact that in order to get into attorney fees that they had to award one dollar in punitive damages, they would have done that.

[GOODSONS' COUNSEL]: That's why you are not entitled to your attorney fees.

[CAPRETTAS' COUNSEL]: But it wasn't clear to them. It's obvious that they would have come back with zero-they would have come back with zero attorney fees if they knew they weren't allowed to award them because they didn't award punitive damages. There is obviously a conflict with reference to the forms and their decision. We are at a point right now when we can resolve it. I'm going to request this Court to go back and instruct the jury, and [Goodsons' attorney] can preserve this issue on appeal.

*4 [GOODSONS' COUNSEL]: You can preserve it for appeal.

[CAPRETTAS' COUNSEL]: No, I don't think

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that its going to be available to me on appeal down the road. We are here right now. We can correct it now.

We litigated the case in its entirety. We have got eight folks here who have heard the case. We don't have to litigate it again two years from now.

We can resolve this discrepancy right now with this jury, and then we can see whether or not this, in fact, was appropriate, in the Court of Appeals.

THE JUDGE: I'm not going to instruct them further. I think that because they found that there were no punitive damages, they have already decided that issue, and the issue of attorney fees actually becomes moot as soon as the issue of punitive damages is decided.

I'm not going to instruct them further, and, obviously, I note your objection.

The judge entered judgment on the jury verdict in the amount of \$1,800 with no punitive damages and vacated that portion of the verdict awarding attorney fees "as punitive damages were not found. As a matter of law attorney fees cannot be awarded if punitive damages are not awarded." The judge later denied the Caprettas' motion for judgment notwithstanding the verdict under Civ.R. 50 or, in the alternative, motion for new trial under Civ.R. 59 which was based upon the "inconsistent" punitive damage/attorney fee verdict.

The Caprettas raise five assignments of error which we will consider together:

- I. WHETHER THE TRIAL JUDGE COMMITTED PREJUDICIAL ERROR BY NULLIFYING THE JURY VERDICT AWARDING ATTORNEY FEES.
- II. WHETHER GOODSON WAIVED ANY RIGHT TO RELIEF BY OBSTRUCTING FURTHER JURY DELIBERATION.
- III. WHETHER THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY NOT INSTRUCTING THE JURY FURTHER AFTER THE INITIAL VERDICTS SO AS TO RESOLVE ANY INCONSISTENCY IN ITS VER-

DICT.

IV. WHETHER THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY NOT GRANTING APPELLANTS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT AND AWARD APPELLANT [S]/PLAINTIFFS ONE CENT (\$.01) AS PUNITIVE DAMAGES.

V. WHETHER THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY NOT GRANTING PLAINTIFFS/APPELLANTS' MOTION FOR NEW TRIAL.

While the Caprettas acknowledge that attorney fees could not be awarded in this case absent a punitive damages award, they nonetheless contend that the jury was misled when the instructions did not properly include the missive allowing attorney fees only if the jury made a finding of punitive damages. They also contend the Goodsons waived an objection to the award of attorney fees because they never objected to the verdict form. Additionally, the inconsistency could have been resolved if the Goodsons had not "knowingly and intentionally obstructed" their request that the judge further instruct the jury that a punitive damages award is a condition precedent to an attorney fee award.

The Caprettas submit that, given the jury's clear intent to award attorney fees, the judge should have entered judgment against the Goodsons for punitive damages and awarded one penny, a sum which "would neither punish nor set an example, but would simply give effect, ratify and sanction the jury's clear and un[-]mistaken intention." Alternatively, they argue that, even if they were not entitled to a J.N.O.V., they were entitled to a new trial in accordance with Civ.R. 49(B) given the inconsistency in the verdict form and the Goodsons' failure to object to the form.

*5 The Goodsons counter that the Caprettas are not entitled to a new trial or a J.N.O.V. because they are not entitled to attorney fees absent an award of punitive damages and that the judge correctly nullified the verdict to conform to the law on attorney fees. They also stress that the Caprettas waived this

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court's review of the attorney fee issue because they failed to object to the initial instruction.

In *Digital & Analog Design Corp. v. North Supply Co.* (1992), 63 Ohio St.3d 657, 662, 590 N.E.2d 737, the Supreme Court considered the purpose and nature of an attorney fee award in the context of punitive damages:

The award of attorney fees, although seemingly compensatory and treated as such in the model jury instruction, does not compensate the victim for damages flowing from the tort. Rather, the requirement that a party pay attorney fees under these circumstances is a punitive (and thus equitable) remedy that flows from a jury finding of malice and the award of punitive damages. There is no separate tort action at law for the recovery of attorney fees under these circumstances. Without a finding of malice and the award of punitive damages, plaintiff cannot justify the award of attorney fees, unless there is a basis for sanctions under Civ.R. 11.

"Most courts hold that the jury must *actually award* punitive damages before an award of attorney fees is proper." *Tulloh v. Goodyear Atomic Corp.* (1994), 93 Ohio App.3d 740, 756, 63 N.E.2d 1203.

In *Tulloh*, the judge gave a proper punitive damages/attorney fees instruction but, after awarding compensatory damages, the jury concluded that *Tulloh* was *not* entitled to punitive damages but *was* entitled to attorney fees. The judge immediately pointed out that verdict regarding punitive damages and attorney fees may be inconsistent. The attorneys and the judge agreed to discharge the jury and address the problem later and the judge then vacated that portion of the verdict regarding attorney fees. The Pike County Court of Appeals affirmed the order vacating the award, concluding that "where the jury was discharged without any attempt to reconcile its somewhat inconsistent determinations, we agree that an award of punitive damages was a prerequisite to an award of attorney fees." *Id.* at 757.

Unlike the jury instructions in *Tulloh*, the jury instruction given here did not include, as the Caprettas had proposed, an instruction allowing for the consideration of attorney fees upon an award of punitive damages. In addition, the Caprettas' attorney affirmatively asserted that he had no objection to the instructions when given the opportunity to challenge them before the jury retired. This failure to object to the instruction directly contributed to the errors of which they now complain. Civ.R. 51(A) provides in part that "[o]n appeal, a party may not assign as error the giving or the failure to give any instruction *unless the party objects before the jury retires to consider its verdict*, stating specifically the matter objected to and the grounds of the objection [Emphasis added]."

*6 We will not review the initial instruction absent plain error. The Supreme Court has described the "plain error" doctrine as follows:

In appeals of civil cases, the plain error doctrine is not favored and may be applied only in the extremely rare case involving exceptional circumstances where error, to which no objection was made at the trial court, seriously affects the basic fairness, integrity, or public reputation of the judicial process, thereby challenging the legitimacy of the underlying judicial process itself.

Goldfuss v. Davidson (1997), 79 Ohio St.3d 116, 679 N.E.2d 1099, syllabus. We do not find such error here.

The Caprettas argue that they were entitled to an *additional* instruction pursuant to Civ.R. 49(B) because the verdict was "inconsistent." In pertinent part, that rule provides:

When the general verdict and the answers are consistent, the appropriate judgment upon the verdict and answers shall be entered pursuant to Rule 58. When one or more of the answers is inconsistent with the general verdict, judgment may be entered pursuant to Rule 58 in accordance with the answers, notwithstanding the general verdict, or the court may return the jury for further consideration of its answers and verdict or

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may order a new trial.

“The purpose of using interrogatories is to test the general verdict.” *Colvin v. Abbey's Restaurant, Inc.* (1999), 85 Ohio St.3d 535, 538, 709 N.E.2d 1156.

In the present case, the parties did not use interrogatories. Rather, they used two general verdict forms: one for compensatory damages; the other for punitive damages and attorney fees. Without the full punitive damage/attorney fee instruction, the verdict form reasonably led the jurors to believe that they had the legal authority to award attorney fees *without* awarding punitive damages. As such, the jury rendered a verdict on punitive damages *and* attorney fees consistent with both the instruction given and the direction on the verdict form. That verdict, however, was contrary to the law as it pertained to an attorney fee award, and the Goodsons' attorney timely objected to the verdict. As the Caprettas' attorney acknowledged below,

It's very clear from the verdicts that the jurors expressed an intent to award attorney fees. They didn't intend to certify any kind of punishment against the defendants by way of punitive damages. * * * It's obvious that they would have come back with zero—they would have come back with zero attorney fees if they knew they weren't allowed to award them because they didn't award punitive damages.

The Caprettas essentially wanted the jurors to reconsider their punitive damage award to justify their attorney fee award. Such additional instruction would have run afoul of both *Digital & Analog Design* and the “American Rule,”^{FN4} since an award of attorney fees is a punitive remedy flowing from a jury finding of malice and the award of punitive damages; attorney fees are not intended to compensate the victim for damages flowing from the tort. Moreover, we do not consider the Goodsons' attorney's otherwise proper objection as an improper “obstruction” to the Caprettas' request for re-instruction.

FN4. E.g., *Pegan v. Crawmer* (1997), 79

Ohio St.3d 155, 156, 679 N.E.2d 1129 (“[I]n the absence of statutory authorization or a finding of conduct that amounts to bad faith, a prevailing party may not recover attorney fees.”)

*7 The dissent's claim that “punitive damages need not actually be awarded before a court can award attorney fees” reflects his misapprehension of the claims in this case. The Caprettas alleged breach of contract and fraud, and “a party seeking to recover attorney fees on a breach of contract claim may do so only if the parties contracted to reimburse the prevailing party for the cost of enforcing the contract terms.” *Brzezinski v. Feuerwerker* (Sept. 4, 2000), Cuyahoga App. No. 74288, unreported. Because the verdict form for compensatory damages did not differentiate between the contract and fraud claims, we cannot assume that the jury attributed any part of the \$1,800 award to their fraud claim. They were not, therefore, entitled to attorney fees under *Atram v. Star Tool & Die Corp.* (1989), 64 Ohio App.3d 388, 581 N.E.2d 1110.

Therefore, it was not error to deny the request to re-instruct the jury, vacate that portion of the award related to attorney fees, and deny the motions for J.N.O.V. and new trial.

Judgment affirmed.

It is ordered that the appellees recover from appellant their costs herein taxed.

This court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

KENNETH ROCCO, J., concur.

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TERRENCE O'DONNELL, P.J., dissents (see dissenting opinion).

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R.22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E), unless a motion for reconsideration with supporting brief, per App.R. 26(A) is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).

DISSENTING OPINION

TERRENCE O'DONNELL, P.J., Dissenting.

I disagree with the decision to affirm the judgment of the trial court in this instance. In my view, the jury returned what it believed to be an acceptable verdict in accordance with the instructions it received, but had no idea that its judgment could have been interpreted as inconsistent.

This is so because, for whatever reasons, the jury instruction did not indicate that an award of punitive damages needed to be made before the jury considered the award of attorney fees. Inadvertently, that jury instruction was omitted from the court's charge.

The problem compounded when, upon receipt of the apparently inconsistent verdict, the court did not revisit the issue with the jury in an effort to resolve the inconsistency.

When this circumstance presents itself, two mutually exclusive options arise: one, to consider vacating the award of attorney fees or two, to consider that because the jury had already expressed its intent to award attorney fees, to further allow it to reconsider an award of punitive damages. Here, the court arbitrarily selected the first option which denied jury consideration of the second.

*8 On appeal, no error is assigned to us regarding the jury instructions; accordingly, I do not believe these issues are waived. Indeed, they are not raised. Rather, a proper and timely request for a jury clarification of an apparent inconsistency in the verdict was not allowed. The trial court ruled the issue of attorney fees moot with the denial of the punitive damage award.

My chief concerns here are threefold: that the jury had been asked to consider compensatory, punitive and attorney fee awards without complete instructions as had been given in *Tulloh v. Goodyear Atomic Corp.* (1994), 93 Ohio App.3d 740; that no opportunity was given to have the jury resolve the dispute or reconcile its verdicts; and that the court ruled contrary to reported authority in this district to the effect that punitive damages need not actually be awarded before a court can award attorney fees. See *Atram v. Star Tool & Die Corp.* (1989), 64 Ohio App.3d 388, citing *Oakwood v. Makar* (1983), 11 Ohio App.3d 46.

The timely request for the jury to reconcile the inconsistent verdict or the motion for new trial should have been granted. I would assert the failure to do so constituted an abuse of discretion because we now will never be able to determine what the jury would have done had proper instructions been given at the time of the initial charge or following the verdict when the jury upon instruction could have revisited the issue and clarified the inconsistency. The only fair solution at this time, it seems to me, is to grant a new trial, and I would do so.

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END OF DOCUMENT