



Recently, the Supreme Court of Ohio, in reversing the decision of the Eighth District Court of Appeals and prior precedent, held that a party awarded punitive damages and attorney fees at trial may now recover attorney fees associated with defending the judgment against subsequent appeals, *Cruz v. English Nanny & Governess School*, Slip Opinion No. 2022-Ohio-3586. This decision upends prior precedent and threatens a litigant's substantive right to appeal due to the threat of being taxed as costs the attorney fees of the opposing party.

In *Cruz*, the jury awarded plaintiffs compensatory and punitive damages. *Id.* at ¶¶8-9. The trial court reduced the damages after reviewing post-trial motions but allowed an award for attorney fees and costs that was less than the amount initially sought by the plaintiffs. *Id.* at ¶¶10-11. On appeal, the Eighth District reversed the trial court's remittitur and remanded the matter for reconsideration. *Id.* at ¶13. Additionally, the Eighth District held that the trial court abused its discretion in calculating the attorney fee amount and further held that it was an error to deviate from the lodestar amount because of the existence of a contingency fee agreement. *Id.* at ¶14.

On remand, the trial court reinstated the amounts awarded by the jury, increased the attorney fee award to be closer in line with the lodestar amount presented in the post-trial hearing, and included additional fees for post-trial work, including the appeal. *Id.* at ¶15-16. On appeal, in pertinent part, the Eighth District reversed the trial court's decision to award the additional attorney fees incurred related to the appeal. *Id.* at ¶17. Plaintiffs appealed the decision to the Supreme Court of Ohio to address whether attorney fees for the entire course of the lawsuit, including appeal, are permissible. *Id.* at ¶18.

After considering the litany of prior precedent and statutory language relied upon by the Eighth District in reversing the attorney fee award issue, the Supreme Court concluded that allowing the recovery of attorney fees incurred in defending an appeal where attorney fees have been awarded does not run afoul of the American Rule or the punitive damages exception to the American Rule because Ohio permits an award of attorney fees under R.C. 2315.21. *Cruz*, at ¶¶34-46, ¶50. In assessing whether the lodestar calculation presented in the case was reasonable, the Court noted that the number of hours multiplied by a reasonable rate is the "starting point for determining the amount of a reasonable fee," and "it is simple economics" to permit a prevailing party to recover reasonable fees for defending the judgment. *Id.* at ¶47-48. In reaching this determination, the Court concluded, "This rul[ing] is consistent with the punitive-damages exception to the American Rule established at common law centuries ago, is not limited by statutory caps on punitive damages, and will make the lodestar calculation more accurate." *Id.* at ¶51.

The dissent correctly noted that the decision in *Cruz*, *supra*, will have a chilling effect on defendants "against whom the most serious judgment in a civil case has been rendered – an award of punitive damages and attorney fees." *Id.* at ¶53. Given the increased frequency of awards for punitive damages and attorney fees, litigants must make special consideration to assess whether an appeal is "worth it" rather than whether the underlying decision is consistent with Ohio law and the facts of the case, lest the court tack on additional attorney fees to a judgment. Similarly, this decision will mandate that additional efforts be employed to limit the potential for an award under R.C. 2315.21 through increased deposition preparation, client counseling, the pursuit of viable alternative dispute resolution options, and appropriate and well-researched motion practice. BSPH and its attorneys are ready to help clients navigate this new complication and obtain the best results possible.

