

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

DINSMORE & SHOHL, LLP,	:	APPEAL NO. C-060798
	:	TRIAL NO. A-0502552
Plaintiff-Appellee,	:	
	:	<i>JUDGMENT ENTRY.</i>
vs.	:	
BETSY ZERBE,	:	
ANGELA ZERBE,	:	
and	:	
WICK TONTI,	:	
Defendants-Appellants.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.¹

Plaintiff-appellee Dinsmore & Shohl, LLP, (“Dinsmore”) filed a complaint to recover attorney fees from defendants-appellants Betsy Zerbe, Angela Zerbe, and Wick Tonti for legal work performed in *Roe v. Tonti* (“the Zerbe litigation”). The defendants filed answers and counterclaims, essentially alleging malpractice, breach of contract, fraud, and the charging of excessive and unnecessary attorney fees for the Zerbe litigation. Dinsmore had withdrawn from representation of Wick Tonti in the Zerbe litigation on September 17, 2004, at Tonti’s request. In September 2004, Angela Zerbe had also requested that Dinsmore withdraw from representing her, but Dinsmore’s motion to

¹ See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

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withdraw was not granted until October 19, 2005. Affidavits filed by Dinsmore stated that Betsy Zerbe had agreed to be responsible for the legal fees incurred by Angela Zerbe and Wick Tonti for the Zerbe litigation. The Zerbe litigation fees were not paid.

Dinsmore filed a motion for summary judgment, along with the affidavits of Michael Hawkins and Michael Newman, the attorneys who had represented the defendants in the Zerbe litigation. The affidavits stated that the legal fees charged were the regular rates charged by each attorney and were reasonable “in light of the scope of work commensurate with the Zerbe litigation.” In response, the defendants submitted their own affidavits, asserting that the legal fees were unreasonable and unnecessary, and essentially alleging malpractice on the part of Dinsmore. Prior to the hearing on the motion for summary judgment, the defendants did not submit an affidavit by an attorney expert stating that the charged fees were unreasonable or unnecessary, or that the legal representation had fallen below an acceptable standard. At the hearing on the motion, defendants’ counsel stated that he was ready to proceed and that he did not think that an expert affidavit on the issue of attorney fees was necessary. The trial court orally granted the motion for summary judgment because the defendants had not submitted an expert affidavit to counter the affidavits of Hawkins and Newman. Subsequent to the hearing, defendants’ counsel attempted to submit his own affidavit stating that the fees were unreasonable and unnecessary.

An entry granting the motion for summary judgment in Dinsmore’s favor on all claims was journalized on August 22, 2006. The trial court ordered the fees to be paid out of funds held in trust pursuant to a preliminary injunction issued in the Zerbe litigation. The court gave defendants 15 days to post an appeal bond, which they did not do. Defendants have appealed, raising five assignments of error for review.

Dinsmore argues that the appeal should be dismissed because the judgment was executed on October 4, 2006, the defendants never moved to stay the trial court's judgment pending appeal, and the defendants did not post an appeal bond despite being given 15 days by the trial court to do so.

Satisfaction of a judgment renders an appeal from that judgment moot.² "Where the court rendering judgment has jurisdiction of the subject matter of the action and of the parties, and fraud has not intervened, and the judgment is voluntarily paid and satisfied, such payment puts an end to the controversy, and takes away * * * the right to appeal or prosecute error or even to move for vacation of judgment."³ A party has acted voluntarily in satisfying a judgment when he fails to seek a stay of the trial court's judgment pending appeal.⁴ If the appellant does not obtain a stay of the trial court's judgment, the non-appealing party has the right to attempt to satisfy its judgment even though the appeal is pending.⁵ If the judgment is satisfied, the appeal must be dismissed because the issues raised have become moot.⁶

The defendants in this case did not move to stay the trial court's judgment, and they did not post an appeal bond despite being given 15 days to do so by the trial court. The judgment was executed on October 4, 2006. The defendants failed to avail themselves of a viable legal remedy. By their actions, or more appropriately their inaction, the defendants voluntarily satisfied the judgment. Therefore, the appeal must be dismissed as moot.

² See *Blodgett v. Blodgett* (1990), 49 Ohio St.3d 243, 551 N.E.2d 1249; *Wiest v. Weigele*, 170 Ohio App.3d 700, 2006-Ohio-5348, 868 N.E.2d 1040.

³ See *Rauch v. Noble* (1959), 169 Ohio St. 314, 159 N.E.2d 451, citing *Lynch v. Bd. of Edn. Of City School Dist. of City of Lakewood* (1927), 116 Ohio St. 361, 156 N.E.2d 188, paragraph three of the syllabus.

⁴ See *Wiest v. Weigele*, citing *Hagood v. Gail* (1995), 105 Ohio App.3d 780, 664 N.E.2d 1373; *Fifth Third Bank v. The Wallace Group, Inc.* (Nov. 3, 1994), 1st Dist. No. C-930699.

⁵ See *Wiest v. Weigele*, supra at ¶12.

⁶ See *id.*, citing *Hagood v. Gail*, supra.

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The appeal is dismissed as moot.

A certified copy of this Judgment Entry shall constitute the mandate, which shall be sent to the trial court under App. R. 27. Costs shall be taxed under App.R. 24.

PAINTER, P.J., DINKELACKER and WINKLER, JJ.

RALPH WINKLER, retired, from the First Appellate District, sitting by assignment.

To the Clerk:

Enter upon the Journal of the Court on September 26, 2007
per order of the Court _____.

Presiding Judge