

COURT OF APPEALS  
FAIRFIELD COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

TERESA PENIX	:	JUDGES:
	:	Julie A. Edwards, P.J.
	:	William B. Hoffman, J.
Plaintiff-Appellee	:	John W. Wise, J.
	:	
-vs-	:	Case No. 10-CA-19
	:	
	:	
OHIO REAL ESTATE APPRAISER	:	<u>OPINION</u>
BOARD, et al.,	:	
	:	
Defendants-Appellants	:	

CHARACTER OF PROCEEDING: Civil Appeal from Fairfield County  
Court of Common Pleas Case No.  
08 CV 984

JUDGMENT: Reversed and Remanded

DATE OF JUDGMENT ENTRY: January 18, 2011

APPEARANCES:

For Plaintiff-Appellee

For Defendants-Appellants

RONALD B. NOGA  
1010 Old Henderson Road, Suite One  
Columbus, Ohio 43220

RICHARD CORDRAY  
Ohio Attorney General

THEODORE L. KLECKER  
Assistant Attorney General  
Executive Agencies  
30 East Broad Street, 26<sup>th</sup> Floor  
Columbus, Ohio 43215-3428

*Edwards, P.J.*

{¶1} Defendant-appellant, Ohio Real Estate Appraiser Board, appeals from the March 22, 2010, Judgment Entry of the Fairfield County Court of Common Pleas granting the Motion for Attorney Fees filed by plaintiff- appellee Teresa Penix.

#### STATEMENT OF THE FACTS AND CASE

{¶2} In April of 2005, appellee Teresa Penix was a registered real estate appraisal assistant working under Richard Chapman, an Ohio licensed real estate appraiser. Appellee obtained her license as an Ohio residential real estate appraiser in 2006.

{¶3} After the Ohio Division of Real Estate and Professional Licensing received a complaint regarding an appraisal that appellee had done, an investigation was initiated. In July of 2007, the Division sent appellee a copy of the complaint against her.

{¶4} A hearing before a Hearing Officer for the Ohio Division of Real Estate and Professional Licensing was held on May 8, 2008. The Hearing Officer, in her May 30, 2008, Report and Recommendation, recommended that appellee be found in violation of R.C. 4763.11(G)(5) and R.C. 4763.11(G)(14) based on her failure to provide the Ohio Division of Real Estate and Professional Licensing, pursuant to its investigation, with a complete copy of her workfile for the appraisal report of the subject property.

{¶5} The Real Estate Appraiser Board, in an Adjudication Order filed on July 24, 2008, adopted the Findings of Fact and Conclusions of Law and Recommendation of the Hearing Officer and ordered that appellee's Ohio residential real estate appraiser

license be suspended for thirty (30) days and that appellee pay a fine in the amount of \$500.00.

{¶6} Appellee then filed an appeal with the Fairfield County Court of Common Pleas pursuant to R.C. 119.12. The trial court, pursuant to a Judgment Entry filed on February 26, 2009, affirmed the July 24, 2008 Adjudication Order.

{¶7} Appellee then filed an appeal with this Court. Pursuant to an Opinion filed in *Penix v. Ohio Real Estate Appraiser Bd.*, Fairfield App. No. 09-CA-14, 2009-Ohio-6439, this Court upheld the suspension of appellee's real estate license, but held that appellant had no authority to impose a monetary penalty on appellee. This Court remanded the matter to the trial court for further proceedings and assessed 50% of the costs of the appeal to appellant and 50% to appellee.

{¶8} Thereafter, on January 28, 2010, appellee filed a Motion for Issuance of Final Order and for Attorney Fees Pursuant to R.C. Sections 119.12 and 2335.39. Appellee, in her motion, sought a final order from the trial court stating that the 30 day suspension of her real estate license had been satisfied. Appellee also sought an award of \$5,081.25 in attorney fees, which represented 50% of the attorney fees that appellee had incurred.

{¶9} As memorialized in a Judgment Entry filed on March 22, 2010, the trial court vacated that portion of the Board's Order assessing a monetary fine against appellee. The trial court also granted appellee's Motion for Attorney Fees. In its Judgment Entry, the trial court stated, in relevant part, as follows: "[N]oting that this court's decision was affirmed in part and reversed in part and in keeping with the

assessment of costs set forth by the Fifth District Court of Appeals, this court awards attorney fees to [appellee] in the amount of \$3112.50.”

{¶10} Appellant now raises the following assignment of error on appeal:

{¶11} “THE LOWER COURT ERRED WHEN IT AWARDED ATTORNEY FEES PURSUANT TO R.C. 119.12 AND R.C. 2335.39.”

I

{¶12} Appellant, in its sole assignment of error, argues that the trial court erred when it awarded appellee attorney fees pursuant to R.C. 119.12 and R.C. 2335.39. We agree.

{¶13} Appellate courts review a trial court's ruling on a motion for attorney fees for abuse of discretion. R.C. 2335.39(B)(2); *In re Williams* (1992), 78 Ohio App.3d 556, 558, 605 N.E.2d 475. “The term “abuse of discretion” connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable.” *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

{¶14} Pursuant to R.C. 119.12, a trial “court shall award compensation for fees in accordance with section 2335.39 of the Revised Code to a prevailing party \* \* \* in an appeal filed pursuant to this section.” In turn, R.C. 2335.39(B)(1) states, in relevant part, as follows: “[e]xcept as provided in divisions (B)(2) and (F) of this section \* \* \* the prevailing eligible party is entitled, upon filing a motion in accordance with this division, to compensation for fees incurred by that party in connection with the action or appeal.”

{¶15} R.C. 2335.39(B)(2) states that after a party files a motion for attorney fees pursuant to R.C. 2335.39(B)(1),\* \* \* [T]he court shall review the request for the award of

compensation for fees and determine whether the position of the state in initiating the matter in controversy was substantially justified, whether special circumstances make an award unjust, and whether the prevailing eligible party engaged in conduct during the course of the action or appeal that unduly and unreasonably protracted the final resolution of the matter in controversy. \* \* \*

{¶16} “\* \* \* [T]he state has the burden of proving that its position in initiating the matter in controversy was substantially justified [or] that special circumstances make an award unjust \* \* \*.” R.C. 2335.39(B)(2). If the court determines that the state has sustained its burden of proving that its position in initiating the underlying matter was substantially justified or that special circumstances otherwise make an award of fees unjust, the court must deny the motion for attorney fees. R.C. 2335.39(B)(2)(a).

{¶17} In *State ex rel. R.T.G., Inc. v. State*, 98 Ohio St.3d 1, 2002-Ohio-6716, 780 N.E.2d 998, at paragraph 63. the Ohio Supreme Court held the state must pay attorney fees pursuant to R.C. 2335.39 if “(1) the state was not substantially justified in initiating the matter in controversy, (2) there are no special circumstances that make the award unjust, (3) the moving party is not the state but is a party to the legal action at issue, and (4) the moving party prevailed in the legal action.” (Emphasis added).

{¶18} "The intent of the attorney-fees subsection of R.C. 2335.39 is to protect citizens from unjustified state action and to censure frivolous government action." *Gilmore v. Ohio State Dental Bd.*, 161 Ohio App.3d 551, 2005-Ohio-2856, 831 N.E.2d 461, at ¶ 13, citing *RTG*, supra.

{¶19} Appellant does not dispute that appellee was the prevailing eligible party. The critical issue thus becomes whether or not appellant was substantially justified in

initiating the matter in controversy. The Ohio Supreme Court, in the *State ex rel. R.T.G.* case, held that the language in R.C. 2335.39(B)(2) permits fees where the State initiated either the conduct that gave rise to the litigation or initiated the litigation caused by the controversy. *Id.* at paragraph 67. “To initiate” means to commence an action, not to continue a proceeding already begun. See *State ex rel. Ohio Dept. of Health v. Sowald*, 65 Ohio St.3d 338, 342, 1992-Ohio-1, 603 N.E.2d 1017. “ [A] position may be justified even though it is not correct if there is a genuine pretrial dispute concerning the propriety of the state's action from the facts of the case or the law applicable thereto. \* \* If a reasonable person, knowledgeable in the area of law, believes that the state's position is correct, then the substantially justified standard has been met.’ \* \* \* Hence, if the ‘board's actions were supported by an articulated rationale that a reasonable person, being fully aware of the situation, could find substantially justified,’ then the board is substantially justified in bringing the administrative action.” *In re Williams*, supra at 558, quoting *Boyle v. Ohio State Med. Bd.* (Aug. 7, 1990), Franklin App. No. 89AP-1186, 1990 WL 113575.

{¶20} In the case sub judice, the relevant charge against appellee was that she failed to provide the Ohio Division of Real Estate and Professional Licensing with a complete copy of her workfile for the appraisal report of the subject property. Following a hearing before a Hearing Officer for the Ohio Division of Real Estate and Professional Licensing , the Hearing Officer recommended that appellee be found in violation of R.C. 4763.11(G)(5) and R.C. 4763.11(G)(14) based on her failure to provide the Ohio Division of Real Estate and Professional Licensing, pursuant to its investigation, with a complete copy of her workfile. The Real Estate Appraiser Board, in an Adjudication

Order filed on July 24, 2008, adopted the Findings of Fact and Conclusions of Law and Recommendation of the Hearing Officer and ordered that appellee's Ohio residential real estate appraiser license be suspended for thirty (30) days and that appellee pay a fine in the amount of \$500.00.

{¶21} Appellee then filed an appeal with the Fairfield County Court of Common Pleas pursuant to R.C. 119.12. The trial court, pursuant to a Judgment Entry filed on February 26, 2009, affirmed the July 24, 2008, Adjudication Order. After appellee appealed to this Court, we upheld the suspension of appellee's license, but held that there was no authority for the imposition of the \$500.00 monetary penalty.

{¶22} Based on the foregoing, we find that appellant was substantially justified in initiating a charge against appellee for failing to provide a copy of her workfile.

{¶23} Appellee argues the issue is not whether appellant was substantially justified in initiating the charge against appellee relating to the workfile, but rather whether appellant was substantially justified in fining appellee. However, we find the case of *Malik v. Ohio State Med. Bd.* (Oct. 2, 1989), Franklin App. No. 88AP-741, 1989 WL 112346, unreported to be instructive. In such case, the appellant was charged with committing fraud, misrepresentation or deception relating to her application to the State Medical Board for a limited registration to practice medicine. The appellant was alleged to have violated R.C. 4731.22(A) and 4731.08. Following a hearing, a hearing officer determined that appellant had made a misrepresentation of facts on her application in violation of R.C. 4731.22(A), but also concluded that such misrepresentation did not involve a violation of R.C. 4731.08. The officer's proposed order, however, included a reprimand for a misrepresentation of fact. The State Medical Board approved the

hearing officer's findings, but modified the order to include a reprimand and allowed the appellant's application for a limited registration.

{¶24} The common pleas court reversed the board's order. The court held that the board's order did not conform to R.C. 119.06 because appellant was not given notice that reprimand was one of the possible sanctions.<sup>1</sup>

{¶25} The appellant then filed a motion for attorney fees pursuant to R.C. 2335.39. The matter was heard by a referee who, in a report, recommended that such motion be denied because the State Medical Board was substantially justified in its action because the original charge had merit. The court approved the referee's report, stating, in its decision, in relevant part as follows: "As stated, the reprimand issued by the Board was reversed on procedural grounds. In so doing, the Court did not decide the propriety of the reprimand on the merits. If the acts of the Appellant as an applicant for a license, either by commission or omission, reveal probable cause to believe there is a violation of any statute or rule directly relating to licensing, the Board cannot be said to be acting without justification in initiating a complaint. The Board has a broad responsibility to the public, including the duty to obtain accurate information and facts from applicants for licenses.

{¶26} "In the case sub judice, the Appellant's alleged failure to accurately answer questions directly material to the Board's legitimate inquiry relating to her license, justified to the extent of probable cause, the initiating of disciplinary action. The fact that Appellant prevailed on appeal to this Court does not of itself give rise to a presumption that Appellee acted without justification." *Id* at 2.

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<sup>1</sup> The facts are confusingly set forth in the *Malik* case. We hope that our summary is accurate.



{¶27} The appellant, in *Malik*, then appealed. The Tenth District Court of Appeals affirmed the judgment of the trial court, finding that the State Medical Board's decision to initiate the action against the appellant was substantially justified.

{¶28} Thus, as noted by appellant, in *Malik* "the Medical Board levied a sanction...which it was without authority to issue. The Court found Malik was not entitled to attorney fees because the underlying charges initiating the case were substantially justified." Similarly, in the case sub judice, while there was no authority for the imposition of the \$500.00 fine, the underlying charge initiating the case (i.e. the failure to provide the workfile) was substantially justified.

{¶29} We find, therefore, that the trial court erred in granting appellee's Motion for Attorney Fees.

{¶30} Appellant's sole assignment of error is, therefore, sustained.

{¶31} Accordingly, the judgment of the Fairfield County Court of Common Pleas is reversed and this matter is remanded to the trial court for further proceedings.

By: Edwards, P.J.

Hoffman, J. and

Wise, J. concur

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JUDGES

JAE/d0929

IN THE COURT OF APPEALS FOR FAIRFIELD COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

TERESA PENIX	:	
	:	
Plaintiff-Appellee	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
OHIO REAL ESTATE APPRAISER	:	
BOARD, et al.,	:	
	:	
Defendants-Appellants	:	CASE NO. 10-CA-19

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Fairfield County Court of Common Pleas is reversed and this matter is remanded to the trial court for further proceedings. Costs assessed to appellee.

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JUDGES