NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

JEW

FIRST CIRCUIT

NUMBER 2017 CW 0767

STEPHEN E. WESLEY AND
KATHY GUNN WESLEY

VERSUS

OUR LADY OF THE LAKE HOSPITAL, INC.

Judgment Rendered: JUN 14 2018

* * * * * * *

Appealed from the
19th Judicial District Court
In and for the Parish of East Baton Rouge, Louisiana
Trial Court Number 638822

Honorable Timothy E. Kelley, Judge

* * * * * * *

Charles E. Griffin, II St. Francisville, LA	Attorney for Relators Plaintiffs – Stephen E. Wesley and Kathy Gunn Wesley
Frank S. Craig, III Michael R. Hubbell Saul R. Newsome Baton Rouge, LA	Attorneys for Respondents Defendant – Our Lady of the Lake Hospital, Inc.

* * * * * *

BEFORE: McCLENDON, WELCH, AND THERIOT, JJ.

Mct. Theriot, J. Agrees in part, dissents in part with reasons

JMc McClendon, J. concurs.

WELCH, J.

The plaintiffs, Stephen E. Wesley and Kathy Gunn Wesley ("the Wesleys"), appeal a judgment sustaining a peremptory exception raising the objection of no cause of action and dismissing their first amended and supplemental petition for specific performance against the defendant, Our Lady of the Lake Hospital, Inc. ("OLOL"). OLOL has answered the appeal seeking an award of attorney fees for defending this appeal. We convert the appeal to an application for supervisory writs, grant the writ, affirm the judgment of the trial court, and decline to address the answer to appeal.

FACTUAL AND PROCEDURAL HISTORY

We borrow from our earlier opinion, **Wesley v. Our Lady of Lake Hosp., Inc.**, 2015-1649, pp. 2-4 (La. App. 1st Cir. 6/3/16) (*unpublished*):

> On April 24, 2015, the Wesleys filed a petition for specific performance against OLOL. According to the allegations of the petition, on December 7, 2007 (with an effective date of December 10, 2007), OLOL executed a purchase agreement with the Wesleys to purchase a particular piece of immovable property containing approximately 3.35 acres, which was located at 17155 Jefferson Highway in Baton Rouge, Louisiana, for the sum of $1,170,000.00. One of the conditions for the sale of the property was the requirement that the Wesleys obtain, from the City of Baton Rouge ("the City"), a revocation regarding the public's right of use of a 60-foot right-of-way designated as "Edelweiss Drive" on the plats pertaining to the subject property. The original time period of the purchase agreement was 60 days from the December 10, 2007 effective date, unless otherwise mutually agreed upon by the Wesleys and OLOL.
>
> The Wesleys were not able to obtain the revocation from the City regarding the Edelwiess Drive property within the 60 day time frame, so the parties agreed to amend the purchase agreement on March 4, 2008. In the amended purchase agreement, the parties agreed that the Edelweiss Drive property would be omitted from the property description in the sale and that OLOL would purchase the remainder of the property (approximately 2.54 acres) for the sum of $768,213.80. The parties also agreed that once the Wesleys obtained the revocation from the City regarding the right of use of the Edelweiss Drive property, OLOL would purchase that property at a price of $6.85 per square foot. In the amended purchase agreement, the Wesleys were to obtain the formal revocation from the City within a 90-day period; otherwise, OLOL [would] not have an obligation to purchase the Edelweiss Drive property.

> The revocation process, as well as other curative work for the title that had to be performed by the Wesleys, extended past the 90–day period set forth in the amended purchase agreement. After all title defects had been cured and the revocation by the City completed and recorded, the Wesleys informed OLOL that they were ready and willing to close on the remaining property, *i.e.,* the Edelweiss Drive property, and they requested that a sale date be set. OLOL responded that they were no longer interested in the Edelweiss Drive property and refused to purchase the property on the basis that the revocation process and other curative work had not been completed within the 90-day period set forth in the amended purchase agreement.[]
>
> The Wesleys then filed ... suit against OLOL. The Wesleys claimed that OLOL was aware that the revocation process and curative title work would take longer than 90 days, that OLOL was involved in the revocation process and title work, and that OLOL was in constant contact and communication with the Wesleys regarding these issues. Thus, the Wesleys claimed that they were entitled to demand specific performance for the consummation of the sale and purchase of the Edelweiss Drive property for the sum previously agreed to in the amended purchase agreement, plus reasonable attorney's fees and costs.
>
> In response, OLOL filed a peremptory exception raising the objection of no cause of action. OLOL claimed that since the Wesleys admitted that they had 90 days to obtain the revocation of the right of use from the City regarding the Edelweiss Drive property and that they failed to do so, OLOL had no obligation to purchase the property under the specific terms of the amended purchase agreement. Furthermore, OLOL contended that, to the extent the Wesleys claimed that specific performance was available because OLOL and the Wesleys continued to communicate regarding the revocation by the City and the curative title work, those subsequent dealings were insufficient to alter the terms of the purchase agreement or the amended purchase agreement because those subsequent dealings were never reduced to writing (*i.e.,* an authentic act or act under private signature), and thus, were not enforceable. Accordingly, OLOL argued that the Wesleys failed to state a cause of action for specific performance.
>
> After a hearing, the trial court rendered judgment sustaining OLOL's peremptory exception raising the objection of no cause of action and dismissing the Wesleys' claims against OLOL. A judgment in accordance with the trial court's ruling was signed on August 13, 2015, and ... the Wesleys ... appealed, challenging the trial court's ruling on the exception.

On appeal, this Court found that the Wesleys failed to set forth a cause of action for the specific performance for the consummation of the sale of the Edelweiss Drive property according to the terms set forth in the amended purchase

agreement, and therefore, affirmed that portion of the trial court's judgment sustaining the objection of no cause of action. **Wesley**, 2015-1649 at p.6. In doing so, this Court noted that, according to the allegations of the Wesleys' petition and the purchase agreements that were annexed thereto, the amended purchase agreement, which was in writing, contained a condition—it required the Wesleys "to obtain the formal revocation within a 90–day period; otherwise [OLOL] did not have an obligation to purchase ... [the] Edelweiss Drive property[.]" **Wesley**, 2015-1649 at p.5. This Court further noted that according to the petition, the Wesleys did not obtain the revocation from the City in the 90-day period following the amended purchase agreement. *Id.* Therefore, this Court determined that since the condition for the contract of sale failed, OLOL had no obligation to purchase the property and the Wesleys could not demand specific performance of the amended purchase agreement. **Wesley**, 2015-1649 at p.6. In addition, this Court determined that to the extent that the Wesleys claimed that they were entitled to specific performance of the amended purchase agreement based on subsequent communications regarding the revocation and other curative title work, the Wesleys failed to establish or allege that those communications met the formal requirements of a contract to sell or purchase agreement so as to extend or modify the amended purchase agreement or otherwise to create an obligation on behalf of OLOL to purchase the Edelweiss Drive property. *Id.*

However, this Court further found that the Wesleys should have been given an opportunity to amend their petition, because we could not determine whether the grounds for the objection of no cause of action could be removed by amendment of the petition so as to state a cause of action for specific performance. **Wesley**, 2015-1649 at pp.6-7; see La. C.C.P. art. 934. Therefore, this Court vacated the trial court's ruling dismissing OLOL from this suit and remanded to

the trial court with instructions to allow the Wesleys the opportunity to amend their petition. **Wesley**, 2015-1649 at p.7.

Following remand, on June 17, 2016, the Wesleys filed their first amended and supplemental petition. Therein, the Wesleys essentially alleged that OLOL, through oral and written communications between the parties' attorneys, waived the 90-day period set forth in the amended purchase agreement and altered provisions of the amended purchase agreement. The Wesleys also claimed that they had relied on OLOL's attorney's actions and communications indicating that OLOL was still interested in the Edelweiss Drive property and that the curative work to the title to that property should continue. Based on these assertions, the Wesleys claimed that they were entitled to demand specific performance for the consummation of the sale and purchase of the Edelweiss Drive property for the sum previously agreed to in the amended purchase agreement, plus reasonable attorney fees and costs. In response, OLOL again filed a peremptory exception raising the objection of no cause of action. OLOL claimed that even with the added allegations that OLOL waived the 90-day period, altered the terms of the agreement, and relied on OLOL's attorney's actions and communications, OLOL was still not obligated to purchase the Edelweiss Drive property under the specific terms of the agreement and amended purchase agreement. In the exception, OLOL also sought an award of attorney fees pursuant to the terms of the purchase agreement.

After a hearing, the trial court signed a judgment on March 7, 2017, which sustained OLOL's peremptory exception raising the objection of no cause of action and dismissed the Wesleys' claims against OLOL. The March 7, 2017 judgment also provided that the Wesleys would "bear [OLOL's] reasonable attorney's fees,

to be taxed on a future date."[1] From this judgment, the Wesleys have appealed, challenging the trial court's ruling on the objection of no cause of action.

APPELLATE JURISDICTION

We must first determine whether the trial court's judgment is a final appealable judgment. Appellate courts have the duty to examine subject matter jurisdiction *sua sponte*, even when the parties do not raise the issue. **Shapiro v. L & L Fetter, Inc.**, 2002-0933 (La. App. 1st Cir. 2/14/03), 845 So.2d 406, 408. This Court's appellate jurisdiction extends to "final judgments." La. C.C.P. art. 2083. A final judgment is one that determines the merits of a controversy, in whole or in part. In contrast, an interlocutory judgment does not determine the merits, but only preliminary matters in the course of an action. La. C.C.P. art. 1841.

Whether a partial final judgment is immediately appealable during ongoing litigation is determined by examining the requirements of La. C.C.P. art. 1915. Louisiana Code of Civil Procedure article 1915(B) provides that "[w]hen a court renders a partial judgment ..., as to one or more but less than all of the claims, demands, issues, or theories" presented in an action, that judgment shall not constitute a final judgment, and thus shall not be immediately appealable, unless it is designated as a final judgment by the court after an express determination that there is no just reason for delay.

---

[1] The record before us does not contain a judgment setting the actual amount of attorney fees owed by the Wesleys to OLOL. OLOL has answered the Wesleys' appeal seeking an award of attorney fees incurred for this appeal. Notably, OLOL's claim for attorney fees is based on the terms of the purchase agreement; it is not based on a claim for damages for frivolous appeal. An answer to appeal is appropriate when the appellee desires to have the judgment on appeal modified, revised, or reversed in part or seeks damages against the appellant. See La. C.C.P. art. 2133. OLOL has not sought damages for frivolous appeal and since the issue of attorney fees owed by the Wesleys to OLOL pursuant to the purchase agreement has not been addressed in a judgment of the trial court, there is no award of attorney fees that can be modified, revised, or reversed in part by this Court. Furthermore, for the reasons detailed herein, this Court is not exercising its appellate jurisdiction, but rather its supervisory jurisdiction. Therefore, we decline to address OLOL's answer to appeal. OLOL's claim for attorney fees incurred during this appeal is more appropriately addressed by the trial court when its makes the determination of the total amount of attorney fees owed by the Wesleys during this litigation pursuant to the terms of the purchase agreement.

In this case, the March 7, 2017 judgment that the Wesleys appealed sustained OLOL's peremptory exception raising the objection of no cause of action and dismissed the Wesleys' claims against OLOL. However, that judgment also provided that the Wesleys would bear OLOL's attorney fees, the amount of which would be determined at a later date. Since the trial court's March 7, 2017 judgment does not address all of the issues or claims presented in the action (*i.e.*, it does not contain a specific ruling on the amount of attorney fees), the March 7, 2017 judgment is a partial judgment. Further, the March 7, 2017 judgment was not certified as a final judgment pursuant to La. C.C.P. art. 1915(B), and thus, it does not constitute a final judgment for the purpose of an immediate appeal.[2] However, in the interest of judicial efficiency and considering that the appeal was filed within the delays for taking supervisory writs, we elect to exercise our supervisory jurisdiction and to convert the appeal to an application for supervisory writs of review. As such, we will review the merits of OLOL's peremptory exception raising the objection of no cause of action under our supervisory jurisdiction. See **Stelluto v. Stelluto**, 2005-0074 (La. 6/29/05), 914 So.2d 34, 39; **Monterrey Center, LLC v. Ed.ucation Partners, Inc.**, 2008-0734 (La. App. 1st Cir. 12/23/08), 5 So.3d 225, 228-229; **Roberson v. Roberson**, 2012-2052 (La. App. 1st Cir. 8/5/13), 122 So.3d 561, 564; see also La. Const., Art. V, §10(A).

[2] Compare **R.G. Claitor's Realty v. Rigell**, 2006-1629 (La. App. 1st Cir. 5/4/07), 961 So.2d 469, 471, writ denied, 2007-1214 (La. 9/21/07), 964 So.2d 340 and **O'Connell v. Braud**, 2010-1885 (La. App. 1st Cir. 8/10/11) (*unpublished*), writ denied, 2011-1953 (La. 11/14/11), 75 So.3d 945 (wherein appeals of partial judgments, which adjudicated the main demand and included an award of attorney fees to be fixed upon subsequent motion or at a later date, were maintained because the jurisdictional defects were cured by a subsequent judgment adjudicating that remaining claim between the parties, *i.e.*, fixing the amount of attorney fees and/or the designation of the judgment as final and appealable and declaring no just reason for delay under La. C.C.P. 1915(B)); but cf. **In re Interdiction of Metzler**, 2015-0982 (La. App. 1st Cir. 2/22/16), 189 So.3d 467, 468-469 (wherein the appeal of a judgment that provided, among other things that "all attorney fees and costs incurred in the defense of [Mrs.] Metzler shall be assessed to and paid by [Mr.] Cadow," but did not provide the exact amount of attorney fees or that such fees would be set at a later date, was dismissed because the judgment, although final, lacked precision or certainty).

NO CAUSE OF ACTION

The peremptory exception of no cause of action tests the legal sufficiency of a pleading by determining whether the law affords a remedy on the facts alleged. **Naquin v. Bollinger Shipyards, Inc.**, 2013-1638 (La. App. 1st Cir. 5/2/14), 147 So.3d 207, 209, writ denied, 2014-1091 (La. 9/12/14), 148 So.3d 933. The exception is triable solely on the face of the petition and any attached documents. **Paulsell v. State, Dept. of Transp. and Development**, 2012-0396 (La. App. 1st Cir. 12/28/12), 112 So.3d 856, 864, writ denied, 2013-0274 (La. 3/15/13), 109 So.3d 386. For purposes of resolving the issues raised by the exception, the well-pleaded facts in the petition must be accepted as true. **Reynolds v. Bordelon**, 2014-2362 (La. 6/30/15), 172 So.3d 589, 594-595. Because the objection of no cause of action raises a question of law and the trial court's decision is based solely on the sufficiency of the petition, review of the trial court's ruling on the exception is *de novo*. **Scheffler v. Adams and Reese, LLP**, 2006-1774 (La. 2/22/07), 950 So.2d 641, 647.

The Wesleys' claim, as amended, against OLOL is based on the amended purchase agreement, which was a contract to sell.[3] In an attempt to rectify the insufficiencies in the Wesleys' petition that were identified by this Court in **Wesley**, 2015-1649 at pp. 5-6 (*i.e.*, the failure of the condition for the contract of sale and the failure to allege or establish that the amended purchase agreement was

---

[3] Louisiana Civil Code article 2623 sets forth the requisite elements of a contract to sell or purchase agreement, and it provides:

> An agreement whereby one party promises to sell and the other promises to buy a thing at a later time, or upon the happening of a condition, or upon performance of some obligation by either party, is a bilateral promise of sale or contract to sell. Such an agreement gives either party the right to demand specific performance.
>
> A contract to sell must set forth the thing and the price, and meet the formal requirements of the sale it contemplates.

Thus, under this article, a contract to sell immovable property must meet the formal requirements of a sale of immovable property, *i.e.*, it must be in writing—as an authentic act or act under private signature. See La. C.C. art. 1839.

extended or modified pursuant to the formal requirements of a contract of sale or that OLOL was otherwise obligated to purchase the Edelweiss Driver property), the Wesleys have alleged, in their amended petition, that there were oral and written communications ongoing between OLOL's attorney and the Wesleys' attorney wherein the 90-day period (the condition on which the sale was based) was waived and that the agreement was altered because OLOL, through its attorneys, continued to express an interest in purchasing the Edelweiss Drive property after the 90-day period lapsed. The Wesleys also claimed that they would not have sold the remainder of the property had they not received assurances that OLOL would purchase the Edelweiss Drive property once the title defects were cured, and that the Wesleys relied on the oral and written assurances of OLOL, through its attorneys, that OLOL was still interested in purchasing the Edelweiss Drive property and that the curative work on the property should continue so that OLOL could purchase the property.

However, OLOL points out that, pursuant to the explicit terms of the purchase agreement, which was incorporated into the amended purchase agreement, the purchase agreement could not be changed orally; rather, any modification of the agreement had to be in writing and signed by the parties. Since there was no allegation of a subsequent modification of the amended purchase agreement that was in writing and signed by the parties, OLOL maintains that the Wesleys have failed to set forth a cause of action for specific performance under the amended purchase agreement. In addition, OLOL contends that, to the extent that the Wesleys claim that they are entitled to specific performance based on the principles of detrimental reliance (*i.e.* the allegations that they relied on the representations of OLOL's attorney), the Wesleys have also not stated a cause of action. OLOL points out that the purchase agreement specifically set forth that the parties could not rely on statements or actions of the other party's representative

and because this matter involves the sale of immovable property, the Wesleys could not, as a matter of law, rely on any purported promise made by OLOL unless it was an authentic act or act under private signature. We agree.

As previously noted, both the original purchase agreement and the amended purchase agreement were attached to the Wesleys' original petition. Article X, Section 10.6 of the original purchase agreement provided as follows

> This Agreement, including the Exhibits, contains the entire agreement between the parties pertaining to the subject matter hereof and fully supersedes all prior agreements and understandings between the parties pertaining to such subject matter. *This Agreement cannot be changed orally, and no executory agreement shall be effective to waive, change, modify or discharge it in whole or in part unless such executory agreement is in writing and is signed by the parties* against whom enforcement of any waiver, change, modification or discharge is sought.

(Emphasis added).

Furthermore, Section 10.3 of the original purchase agreement provides:

> This Agreement shall not be binding in any way upon Seller or Purchaser unless and until Seller and Purchaser shall execute and deliver the same to each other and, accordingly, *Seller and Purchaser acknowledge and agree that they cannot and will not rely upon any other statement or action of the other or their representatives* as evidence of their approval of this Agreement or the subject matter hereof.

(Emphasis added).

The amended purchase agreement provided:

> (ix) The parties do hereby agree that if Seller obtains formal revocation of the existing 60' public right of way known as Edelweiss Drive, within ninety (90) days of the Effective Date of the [amended purchase agreement] and obtains full ownership of said property, and can deliver merchantable title, in Purchaser's Counsel's opinion, then Seller agrees to sell and Purchaser agrees to purchase said 60' strip at the price of $6.85 per square foot, pursuant to the terms and conditions of the [original purchase agreement] between the parties, except as such terms and conditions may be modified herein.... Should Seller not obtain formal revocation within said ninety (90) day period, [OLOL] shall have no obligation to purchase said 60' strip of land.

Based on our *de novo* review of the Wesleys' petition, as amended, and accepting all of the allegations of fact set forth therein and documents attached thereto as true, we find that the Wesleys have failed to set forth a cause of action for specific performance for the consummation of the sale of the Edelweiss Drive property. As set forth in **Wesley**, 2015-1649 at p.5, the amended purchase agreement contained a condition, the failure of which relieved OLOL from any obligation to purchase the Edelwesiss Drive property. The Wesleys' petition established that the condition failed; therefore OLOL had no obligation to purchase the property. See **Wesley**, 2015-1649 at pp.5-6. Insofar as the Wesleys' claim in their amended petition that they are entitled to specific performance because the condition for the sale was waived and the amended purchase agreement was altered, we note that the petition, as amended, is devoid of any allegations that the waiver of the condition and/or the alteration of the amended purchase agreement was in writing and signed by the parties, as would be required under the terms of the purchase agreement. Thus, the Wesleys have failed to set forth a cause of action for specific performance for the consummation of the sale of the Edelweiss Drive property according to the terms set forth in the amended purchase agreement based on a waiver or alteration of the purchase agreement.

With respect to the Wesleys' claim seeking specific performance on the basis of detrimental reliance, we note that the purchase agreement specifically prohibited the parties from relying on any statements made by the parties' representatives. As such, the Wesleys' allegation that they relied on the assurances of OLOL's attorney are insufficient to establish a cause of action for specific performance based on detrimental reliance. Furthermore, the principles of detrimental reliance are only applicable when there is: (1) a representation by conduct or word; (2) justifiable reliance; and (3) a change in position to one's detriment because of the reliance. See **Suire v. Lafayette City-Parish Consol.**

Government, 2004-1459 (La. 4/12/05), 907 So.2d 37, 59. With respect to immovable property, reliance on a promise of sale that is not in writing, or that does not meet the formal requirements for the sale it contemplates, is not justifiable or reasonable as a matter of law. See La. C.C. arts. 1839, 2440, and 2623; **John W. Stone Oil Distributor, L.L.C. v. River Oaks Contractors & Developers, Inc.**, 2007-1001 (La. App. 5th Cir. 5/27/08), 986 So.2d 103, 107-108, writ denied, 2008-1397 (La. 9/26/08), 992 So.2d 992; see generally **Rumore v. Rodrigue**, 2015-0282, p.4 n.13 (La. App. 1st Cir. 12/23/15) (*unpublished*), writ denied, 2016-0155 (La. 3/24/16), 190 So.3d 1191 (finding that the principles of detrimental reliance were not applicable because the promise to sell immovable property was not in writing). In this case, the Wesleys did not allege that the promise by OLOL upon which they detrimentally relied met the formal requirements of the sale it contemplated, *i.e.* the Wesleys did not allege that any purported promise by OLOL (after the lapse of the condition set forth in the amended purchase agreement) to purchase the Edelweiss Drive property was in writing as an authentic act or act under private signature. Thus, the Wesleys failed to state a cause of action for specific performance based on detrimental reliance.

Accordingly, the trial court properly sustained OLOL's peremptory exception raising the objection of no cause of action and dismissed the Wesleys' claims against OLOL, and we hereby affirm the March 7, 2017 judgment of the trial court.[4]

CONCLUSION

For all of the above and foregoing reasons, we convert the appeal of the March 7, 2017 judgment to an application for a supervisory writ of review. We

[4] Since we already afforded the Wesleys the opportunity to amend their petition to remove the grounds for the objection of no cause of action, but in their amended petition they were unable to allege facts setting forth a cause of action for specific performance, it is unnecessary to allow the plaintiffs another opportunity to amend their petition. See La. C.C.P. art. 934.

grant the application for supervisory writ, affirm the March 7, 2017 judgment, which sustained Our Lady of the Lake Hospital, Inc.'s peremptory exception raising the objection of no cause of action and dismissed the claims of Stephen E. Wesley and Kathy Gunn Wesley against Our Lady of the Lake Hospital, Inc., and we decline to address Our Lady of the Lake Hospital, Inc.'s answer to appeal.

All costs herein are assessed to the plaintiffs/relators, Stephen E. Wesley and Kathy Gunn Wesley.

APPEAL CONVERTED TO APPLICATION FOR SUPERVISORY WRITS OF REVIEW; WRIT APPLICATION GRANTED; JUDGMENT AFFIRMED; ANSWER TO APPEAL NOT ADDRESSED.

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2017 CW 0767

STEPHEN E. WESLEY AND KATHY GUNN WESLEY

VERSUS

OUR LADY OF THE LAKE HOSPITAL, INC.

THERIOT, J., agrees in part, dissents in part, and assigns reasons.

I agree with the majority's decision regarding the merits of the appeal, but respectfully disagree with the majority declining to address the appellee's answer to the appeal regarding the award of attorney fees. Attorney fees are recoverable when specifically authorized by statute or a contract. La. C.C.P. art. 863. I find that this court is the proper court to award attorney fees and would grant appellee's request and award reasonable attorney fees for defending this appeal pursuant to section 10.7 of the purchase agreement. Furthermore, an increase in attorney fees should be awarded when a party who was awarded attorney fees in the trial court is forced to and successfully defends an appeal. ***Motta vs. Brockton***, 2016-0089 (La. App. 1st Cir. 9/16/16), 2016 WL 4942325 (citing ***Aswell v. Div. of Admin., State***, 2015-1851 (La. App. 1st Cir. 6/3/16), 196 So.3d 90, ---). See also ***Alfonso v. Alfonso***, 99-261 (La. App. 5th Cir. 7/27/99), 739 So.2d 946, 949-950 (wherein the appeal of a judgment that awarded attorney fees was affirmed in addition to awarding additional attorney fees to defend upon appeal).