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Attorney's Fees in Frivolous Civil Actions

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Introduction

1. Baseless claims, stonewall defenses, and sham appeals in civil actions place an unreasonable price on the prevailing party by making him pay for his attorneys fees—such actions should be discouraged inasmuch as they unnecessarily waste time (and money) of litigants and court officials (and thus the public).

2. The right to pursue vindication of one's rights through litigation is essential to a civilized, democratic society and access to that right should not be unreasonably limited because of the threat of having to pay attorney's fees of both parties. Further, access to the courts to re-evaluate formerly settled principles of common law, constitutional law or statutory interpretation should not be discouraged by having to risk payment of attorneys fees for both parties to a lawsuit; to provide otherwise will tend to freeze the development of legal principles.

The Courts Commission and the General Assembly hope that new G.S. 6-21.1 will satisfy both of these statements of public policy. In 1983 the Courts Commission recommended a bill to the General Assembly that would allow attorney's fees to be awarded to the prevailing party in "frivolous" cases. With minor changes, the recommendation was enacted into law in the 1984 budget session of the General Assembly. The new statute is effective for actions begun on or after October 1, 1984.

Legislative History

In discussing the desirability of enacting a bill dealing with attorney's fees, the Commission examined several statutes from other states. It examined the "English rule," in which attorney's fees are routinely awarded to the prevailing party and rejected that approach as representing too heavy a risk to the potential litigant. It examined the "American rule," in which attorneys fees are awarded only when specifically authorized by statute. North Carolina follows that rule (see, e.g., 281 N.C. 533, 271 N.C. 702), but recent legislative sessions have demonstrated the legislature's increasing willingness to allow prevailing parties to collect attorney's fees (see G.S. 6-19.1, -19.2, -21(2), -21.3, -21.4; all of those statutes, however, deal with specific kinds of lawsuits). The Commission's approach was to retain the general rule that awards of attorney's fees must be specifically authorized, but it adds an important new category of cases in which such awards are proper.

After examining several different statutes that deal with the general issue of frivolous litigation, the Commission decided to follow Florida's statute as a model. It concluded that the Florida statute represented the best compromise between discouraging frivolous litigation and not discouraging reasonable claims. While Florida's case law can only be persuasive authority, its use as a model should offer some guidance as to the kinds of situations that may be encountered

in North Carolina. This memorandum will briefly analyze the differences between the North Carolina and Florida statutes and then will summarize Florida's experience with its statute.

G.S. 6-21.5 reads:

> § 6-21.5. *Attorney's fees in nonjusticiable cases.*—In any civil action or special proceeding the court, upon motion of the prevailing party, may award a reasonable attorney's fee to the prevailing party if the court finds that there was a complete absence of a justiciable issue of either law or fact raised by the losing party in any pleading. The filing of a general denial or the granting of any preliminary motion, such as a motion for judgment on the pleadings pursuant to G.S. 1A-1, Rule 12, a motion to dismiss pursuant to G.S. 1A-1, Rule 12(b)(6), a motion for a directed verdict pursuant to G.S. 1A-1, Rule 50, or a motion for summary judgment pursuant to G.S. 1A-1, Rule 56, is not in itself a sufficient reason for the court to award attorney's fees, but may be evidence to support the court's decision to make such an award. A party who advances a claim or defense supported by a good faith argument for an extension, modification, or reversal of law may not be required under this Section to pay attorney's fees. The court shall make findings of fact and conclusions of law to support its award of attorney's fees under this Section.

Florida Statute 57.105 reads:

> A court shall award a reasonable attorney's fee to the prevailing party in any civil action in which the court finds that there was a complete absence of a justiciable issue of either law or fact raised by the losing party.

North Carolina's statute differs from Florida's in several major respects:

1. It applies to special proceedings as well as civil actions.
2. It never requires a judge to award attorney's fees.
3. It applies only on motion of the prevailing party.
4. It spells out the effect of summary dispositions and of lawsuits seeking reversals of existing rules of law (Florida's case law has generally reached the same results, as is explained below).
5. It requires the judge to make findings of fact and conclusions of law supporting an award of attorney's fee (Florida cases reach a similar result).

Florida's Experience

The reported cases suggest that the Florida statute is not often invoked. Nevertheless, in seven years dozens of reported cases from the Florida courts of appeal have reviewed applications of the statute, and the state's supreme court has ruled on one case in which fees were awarded.

Coverage Under the Statute

Both statutes provide that attorney's fees must be predicated on a finding of a "complete absence of justiciable issue of either law or fact." Florida's courts have indicated that this language is "tantamount to a finding that the action is frivolous." Further, the court rejected an argument that a lack of an issue of law would justify a fee award, holding that absence of both legal *and* factual issues is required [*Allen v. Estate of Dutton*, 384 So. 2d 171 (Fla. App. 1980)]. The Florida Supreme Court adopted this interpretation in *Whitten v. Progressive Insurance Co.* [410 So. 2d 501 (Fla. 1982)]. Some specific fact situations applying this standard are discussed below.

1. **Voluntary Dismissals.** North Carolina's statute does not specify how voluntary dismissals are to be treated. Florida's courts have generally held that involuntary dismissals do not automatically entitle a prevailing defendant to attorney's fees (see *Allen*, 384 So.2d 171), but in several cases, the Florida courts have awarded fees with only slight additional factors to set the voluntary dismissal apart from the routine ones. See *MacBain v. Bowling*, 374 So. 2d 75 (Fla. App. 1977); *Merrill Enterprises v. Bartlett Oil Co.*, 421 So. 2d 770 (Fla. App. 1982). In *Merrill Enterprises*, the fact that the voluntary dismissal was taken at the last possible minute seemed to be important to the decision.

2. **Default Judgments.** North Carolina's statute does not specifically deal with default judgments, although the Courts Commission in its report indicated that it understood the Florida law to be inapplicable to default judgments. North Carolina's statute buttresses that interpretation. Like Florida's, it requires that the losing party "raise" the frivolous issue. Unlike Florida's, it requires that the issue be raised in a pleading. The clear intent appears to be to exclude default judgments from the act's coverage.

The first case in Florida to deal with this issue was *Sachs v. Haglund* [397 So. 2d 447 (Fla. App. 1981)]. It involved a default on a promissory note, and it reached the same result as probably would have been reached under the North Carolina statute. A more recent case involving a different kind of action reached a different result. *Castaway Lounge of Bay County, Inc. v. Reid* [411 So. 2d 282 (Fla. App. 1982)] involved a suit by a bar owner to prevent a competitor from doing business under an identical name. The plaintiff filed suit seeking a temporary and permanent injunction against the competitor. The competitor did not contest the granting of the temporary or permanent injunction, and he finally appeared only in response to an order to show cause why he should not be held in contempt for violating the terms of the injunction. He then failed to comply with the judge's order entered at the show-cause hearing. The trial court awarded attorney's fees to the plaintiff despite the defendant's failure to "raise" an issue. The court of appeals affirmed, holding that the purpose of the statute applies when

there are no justiciable issues that could have been raised to defend the action. The court distinguished the *Sachs* case because in *Sachs* the defendant's cooperation was unnecessary to the completion of the case, while in *Reid* the plaintiff's ability to obtain relief was frustrated while the defendant was in default. The North Carolina statute's requirement that the issue be raised in a pleading would arguably lead to a different result here. But note that the requirement that the defendant "raise" the issue posed no problem for the Florida court.

3. **Summary Judgment; Failure to State Claim.** North Carolina's statute specifically provides that summary judgments, judgments on the pleadings, and similar dispositions do not automatically justify a fee award. Florida's cases reach a similar result, but in several cases they have allowed attorney's fees when these dispositions have been used. In *Whitten* the court pointed out that summary judgments may be granted when there is no issue of fact, but usually there will be some issue of law. In *P.J. Constructors, Inc. v. Carter Electric Co.* [410 So. 2d 536 (Fla. App. 1982)], the court awarded fees on the basis of a plaintiff's failure to allege facts that would state a claim, even though it was given three opportunities to do so. Its attitude seemed to be that with two chances to amend the pleading, the plaintiff should have dropped the action or come up with a colorable claim.

Prevailing Party

In complex multi-party or multi-issue litigation, the determination of the prevailing party is not always simple. The issue has arisen in several cases in Florida. In *Angora Enterprises v. Condominium Association of Lakeside Village* [432 So. 2d 792 (Fla. App. 1983)], the court held that the statute was applicable to third-party litigation. In that case the defendant-contractor was sued for negligent construction, and it then sued a subcontractor as a third-party defendant. The trial court awarded attorney fees to the subcontractor in his defense of the third-party claim brought by the contractor. The court of appeals reversed on the facts, but it assumed that the procedure was proper if the facts supported the award. In *Puder v. Raymond International Builders, Inc.* [424 So. 2d 78 (Fla. App. 1982)], a fee award to a third-party defendant was affirmed in slightly different circumstances; here the court said that the defendant sued the third-party defendant solely for tactical reasons (which were unspecified) and had no valid claim for contribution against the third party. In *American Glass Industries, Inc. v. Allstate Insurance Co.* [441 So. 2d 672 (Fla. App. 1983)], an insurer brought a declaratory judgment to determine whether it was liable to defend a counterclaim against one of its insureds. The court affirmed a fee award against the insured, but not against any of the other defendants in the declaratory judgment suit.

The issue has also arisen in traditional two-party litigation. In *Hernandez v. Levia* [397 So. 2d 747 (Fla. App. 1981)], the court reviewed an award of attorney's fees to a plaintiff who sued a defendant for his failure to convey real estate pursuant to a sales contract. It held that the defendant raised a factual issue on the damages issue and remanded the case for a determination of the amount of the fee that could be attributed to the defense of the liability issue. In *T.I.E. Communications, Inc. v. Toyota Motor Center, Inc.* [391 So. 2d 697 (Fla. App. 1980)], the court awarded a fee for a frivolous appeal of a motion to set aside a default judgment, but apparently the fee did not include the plaintiff's attorney's fee for the disposition of the motion at trial [see also *Debra, Inc. v. Orange County,* 445 So. 2d 404 (Fla. App. 1984); *American Glass Industry, Inc.* 441 So. 2d 672]. But in *Stevenson v. Rutherford Motors* [440 So. 2d 28 (Fla. App. 1983)], the Court rejected an argument that it award the prevailing party a fee for an allegedly frivolous portion of the litigation (i.e., after discovery was complete), rejecting an implied dictum of an earlier opinion [*Greenberg v. Manor Pines Realty Corp.*, 414 So. 2d 260 (Fla. App. 1982)].

Miscellaneous

Florida has held that the statute applies in contempt actions [*Castaway Lounge,* 411 So. 2d 282]. North Carolina's statute expressly prohibits fee awards when a party advances a good-faith claim to modify, reverse, or extend current law. Florida's courts have recognized the need not to "chill" this kind of litigation and have generally reached results consistent with what might be expected under North Carolina's statute. One case, however, suggests that raising an issue that has clearly been decided is risky. In *American Glass Industries* (441 So. 2d 672), the issue was whether an insurer was liable for the defense of the injured plaintiff's father when the original defendant counterclaimed against the father. The court, finding a supreme court case directly on point against the father, awarded a fee to the insurance company. The father made no explicit argument for the reversal of the controlling case, and while the court did not say that such an explicit argument is necessary, it would clearly have helped the father's case.

Reasonableness of the Fee

Both North Carolina and Florida provide that fees are to be "reasonable." Beyond that, they offer no guidance. Prior North Carolina case law requires courts to consider the kind of case involved, the value of the property in question, the complexity of the legal issues, the amount of time involved, the fees ordinarily charged for such services, the skill and experience of the attorney, the results obtained,

and whether the contractual arrangement was for a fixed, hourly, or contingent fee. See *Redevelopment Commission v. Hyder* [20 N.C. App. 241 (1973)], which case also held that fee awards based solely on contingent fees are improper.

Florida's courts have had to deal with several issues in determining the amount of fee to be charged. In *Autorico, Inc. v. Government Employees Insurance Co.* [398 So. 2d 485 (Fla. App. 1981)], the plaintiff received a verdict of $2,400 and was awarded attorney's fees. His contract with his lawyer called for a contingent fee of one-third the verdict. The court, following principles similar to those used in *Hyder,* awarded a fee of $2,000. The appeals court held that the value of the service, not the contract between the plaintiff and his attorney, was the primary factor in determining the proper fee. (The case does not deal with who gets the difference between the plaintiff's contractual fee of $800 and the court-awarded fee of $2,000.) *Wright v. Acieiro* [437 So. 2d 242 (Fla. App. 1983)] raises and then gives answers to several similar issues. The case involved several public officials sued individually because of their official actions. The city for which they worked represented them, as required by state law. In awarding fees to the defendants even though the defendants had paid no attorney, the court noted that in numerous cases fees were awarded to governmental units represented by salaried attorneys. The fees simply helped offset the cost of the salary. In another case [*Galbraith v. Inglese,* 402 So. 2d 574 (Fla. App. 1981)], an attorney who appeared *pro se* (it is not clear how the court would rule if the *pro se* litigant were not an attorney) had also received a fee award. On the basis of these precedents, the court developed a general principle that fees need not have been actually spent in order to be awarded to the prevailing party. In this specific case, the court expressed confidence that the plaintiffs would turn the money over to the city instead of keeping it; keeping it would, in the court's view, unjustly enrich them.

Procedure

The Florida statute does not specify any procedural details for awarding an attorney's fee. North Carolina's statute provides sketchy details. It provides that fees can be awarded only on motion of the prevailing party, and it requires findings of fact and conclusions of law before an award is made. The statute requires findings and conclusions only if the fee can be awarded; it does not require them if the fee is denied. Appellate review of a denial of a motion will be more difficult without findings, but it is not clear that this statute requires them. Florida's courts require findings in both awards and denial of fees (*Whitten,* 410 So. 2d 501).

Florida's courts also allow the motion to be made after judgment is entered, but the preferred procedure is to file the motion with the original pleadings [*Autorico,* 398 So. 2d 485 (Fla. App. 1981)].

The statute does not specify that the award is to be part of the costs of the action, as other provisions of G.S. Chapter 6 do, but there seems to be no reason to treat this award differently from those.

Summary

The Courts Commission did not anticipate that this provision would often result in a fee award, but it believed that its existence would help deter truly frivolous actions, defenses, and appeals. Florida's experience suggests that this expectation is valid, but only time will tell whether this anticipation will be correct. ◆