

Nova Law Review

Volume 5, Issue 1

1980

Article 8

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Abstract

In the United States “absent statute or enforceable contract, litigants pay their own attorney’s fees.”

KEYWORDS: Attorney, Florida, Fees

Attorney's Fees: Florida Statute 57.105

In the United States “absent statute or enforceable contract, litigants pay their own attorney’s fees.”¹ Thus, the “American rule” is that attorney’s fees are not ordinarily among the costs a winning party may recover.²

The Florida Legislature became disenchanted with the results effectuated by this rule in the Florida judicial system, and perhaps unknowingly it leaned toward the system favored by the English. Their courts are authorized to award attorney’s fees to successful plaintiffs in litigation and “to defendants in all actions where such awards might be made to plaintiffs.”³ The adoption of the English system in the United States, however, could have a chilling effect on parties who think they have a genuine controversy, at law or in fact, in need of resolution but who do not want, or cannot afford, the additional expense of paying their adversary’s attorney’s fees in the event of a loss.

Florida courts have held in some cases that “irrespective of statute, contract, stipulation, or fund, in *exceptional circumstances*, where justified by inequitable conduct, attorney’s fees may be assessed as costs against the losing party.”⁴ Although a statute to that effect did not exist, the Florida Legislature periodically had enacted statutes awarding reasonable attorney’s fees under certain circumstances, such as in actions for unpaid wages,⁵ divorces,⁶ and mechanics liens,⁷ among

1. *Alyeska Pipeline Serv. v. Wilderness Soc’y*, 421 U.S. 240, 257 (1975).

2. *Roadway Express, Inc. v. Piper*, 48 U.S.L.W. 4836, 4838 (June 23, 1980). The Supreme Court held 28 U.S.C. § 1927 (1966), which provides that counsel “who so multiplies the proceedings in any case as to increase costs unreasonably and vexatiously may be required by the court to satisfy personally such costs,” was not intended to include attorneys fees as costs. The Court upheld the “American rule,” that each party pays his own attorney’s fees, but upheld the assessing of attorney’s fees as costs—in federal court—against counsel who has willfully abused the judicial processes and/or against a party who has instituted and/or litigated a lawsuit in bad faith.

3. 1 S. SPEISER, *ATTORNEYS FEES* 479 (1973).

4. Wahl, *Attorney’s Fees Taxed Against Opposing Party*, 37 FLA. B.J. 220 (1963) (emphasis supplied) (citing unreported Florida cases).

5. FLA. STAT. § 448.08 (1979).

others. It is evident that the Legislature was biting off pieces of the American rule a little at a time from the body of Florida common law.

I. Legislative History and Intent: Florida Statute § 57.105

In 1978,⁸ the Legislature enacted section 57.105 of the Florida Statutes, in derogation of the common law.⁹ Only applicable to civil litigation,¹⁰ the statute in its entirety reads: 57.105 Attorney's fee

The 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.¹¹

This section of the Florida Statutes has a short but interesting legislative history. In the House of Representatives it carried the nomenclature House Bill 1062.¹² Representative Barry Richard (District 112, Democrat, Miami), the bill's sponsor,¹³ read it for the first time by title and referred it to the Committee on Judiciary on April 5, 1978.¹⁴ The pertinent portion of the bill read as follows:

An act relating to civil litigation . . . providing that the court shall award a reasonable attorney's fee to the prevailing party in any civil action in which the court finds that there *are no genuine issues of law or*

6. FLA. STAT. § 61.16 (1979).

7. FLA. STAT. § 713.29 (1979).

8. FLA. STAT. § 57.105 (1979).

9. *Rivera v. Deauville Hotel, Employees Serv. Corp.*, 277 So. 2d 265 (Fla. 1973); *Stone v. Jeffres*, 208 So. 2d 827 (Fla. 1968).

10. *State v. LoChiatto*, 381 So. 2d 245, 246 (Fla. 4th Dist. Ct. App. 1980). The court held section 57.105 does not authorize an assessment of attorney's fees "for appellate proceedings in a criminal case for the reason that the statute pertains to appellate proceedings in civil cases."

11. FLA. STAT. § 57.105 (1979).

12. JOURNALS OF THE FLORIDA HOUSE OF REPRESENTATIVES, SPECIAL SESSION 1977-78, REGULAR SESSION 1978 at 112 [hereinafter JOURNAL-FLA. HOUSE].

13. JUDICIARY COMMITTEE STAFF REPORT, BILL NO. 1062 (Fla. House of Representatives, 1978); JUDICIARY-CIVIL COMMITTEE, SENATE STAFF ANALYSIS AND ECONOMIC STATEMENT, May 22, 1978, (Bill No. and Sponsor: H.B. 1062, Representative Richard).

14. JOURNAL-FLA. HOUSE at 112.

*material fact in dispute; providing an effective date.*¹⁵

The underscored language is quite similar to the language found in the Florida Rules of Civil Procedure designating the test for summary judgment.¹⁶ This similarity was intentional, because, at one time, Representative Richard had expected a blanket application of the bill to prevailing parties in summary judgment proceedings.¹⁷

The House Judiciary Committee debated the bill on April 20, 1978, with Representative Richard providing the majority of input.¹⁸ Richard referred to the bill as a vehicle "to close a major loophole in

15. *Id.*

16. Fla. R. Civ. P. 1.510(c):

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and administrations on file together with the affidavits, if any, to show that there is no genuine issue as to any material fact and that the moving party is entitled judgment as a matter of law.

This subsection to this rule was amended in 1976, "to require a movant to state with particularity the grounds and legal authority which he will rely upon in seeking summary judgment. This amendment will eliminate surprise. . . ." FLA. R. CT., Committee Note at 38 (1980).

New rule 1.510(c) reads:

The motion shall state with particularity the grounds upon which it is based and the substantial matters of law to be argued and shall be served at least twenty days before the time fixed for hearing. The adverse party may serve opposing affidavits prior to the day of hearing . . . [the body of previously quoted rule 1.510(c), prior to amendment, appears here in full and unchanged]. A summary judgment, interlocutory in character may be rendered on the issue of liability alone. . . .

FLA. R. CT., at 37.

It is curious to note the proximity in time between the addition of section 57.105 to the Florida Statutes and the amendment to rule 1.510(c) of the Florida Rules of Civil Procedure. As will be indicated, the legislature's concern about victims of "frivolously" filed lawsuits or defenses led to the development of section 57.105. The amendment to rule 1.510(c) was designed to avoid surprise to a motion for summary judgment. Both measures appear to be attempts to produce more just results in their respective spheres.

17. *Proposed Statute on Attorney's Fees: Taped Debates on H.B. 1062* (May 4, 5 & 8, 1978) [hereinafter cited as H.B. 1062-taped debates]. The Judiciary Committee designed the bill to read the same as the previous year's bill, which died on the calendar.

18. *Proposed Statute on Attorney's Fees: Hearing on H.B. 1062 Before the House Judiciary Committee* (April 20, 1978) (taped hearing).

terms of the ability of the injured person to get compensation; that is, the inability of injured persons to get attorney's fees."¹⁹ He referred to it as a means by which a person against whom a frivolous suit had been filed, or defense raised, could be recompensed.

On April 21, 1978, the Committee on Judiciary recommended the bill pass.²⁰ It was set on the April 26th calendar,²¹ but it was not debated in the House until May 4th, 5th, and 8th, 1978.²² The tape recorded debates²³ of the bill contain more information regarding legislative intent than any available written material.²⁴ However, the best method of determining legislative intent is a juxtaposition of the House and Senate Journals with the taped debates.

The May 4th debates commenced with Representative Richard's comments regarding the purpose of the bill: "The court in which there is a frivolous lawsuit filed, a frivolous defense raised, it [sic] shall provide attorney's fees to the prevailing party."²⁵

Representative Charles C. Pappy, Jr. (District 117, Democrat, Miami), concerned with the apparent misnomer of the proposed legislation, stated his views: "Mr. Richard, if you want to give attorney's fees in frivolous suits, why don't you say so in your bill?"²⁶ Pappy further remarked, "there are many cases filed in which a side loses that should not have to pay attorney's fees;" and to avoid having the bill misconstrued the word frivolous should be used because "we all know what that means."²⁷

19. *Id.*

20. JOURNAL-FLA. HOUSE at 314.

21. *Id.* at 332.

22. *Id.* at 417, 428, 434; H.B. 1062-taped debates.

23. H.B. 1062-taped debates.

24. JOURNAL-FLA. HOUSE at 112, 314, 332, 417, 428, 434, 453, 665, 827, 1196; FLA. JOURNAL OF THE SENATE, SPECIAL SESSION 1977-78, REGULAR SESSION 1978 at 357, 453, 456, 564, 575 [hereinafter cited as JOURNAL-FLA. SENATE]; 1978 Fla. Laws, ch. 78-275; JUDICIARY COMMITTEE STAFF REPORT, Bill No. 1062 (Fla. House of Representatives, 1978); JUDICIARY-CIVIL COMMITTEE SENATE STAFF ANALYSIS AND ECONOMIC STATEMENT, May 22, 1978, (Bill No. H.B. 1062); FLA. STAT. § 57.105 (1979). None of the written documents refer to H.B. 1062 or section 57.105 as having anything to do with "frivolous" lawsuits.

25. H.B. 1062-taped debates.

26. *Id.*

27. *Id.*

After Representative Richard explained the terminology of the bill,²⁸ he stated his desire to have the bill made applicable to all summary judgments. Representative William C. Andrews (District 27, Democrat, Gainesville) presented an amendment to strike the enacting clause to keep the bill alive on the House floor for debate.²⁹ Andrews' concern was that if a suit were instituted in good faith to test the "validity or constitutionality of a statute," and the facts were not disputed, the passage of the bill inappropriately would mandate the assessing of attorney's fees against the losing party.³⁰ There was further debate regarding the chilling effect the bill's passage would have on the basic constitutional right of accessibility to the courts³¹ balanced against the need to provide relief to victims of frivolously filed lawsuits or defenses³² and constituents' demands to have that need fulfilled.³³

On May 5th, Representative Andrews' first amendment was withdrawn and a second substituted.³⁴ The second amendment provided for the striking of "are no genuine issues of law or material fact in dispute" and, in its stead, the insertion of "was a complete absence of a justiciable issue of either law or fact."³⁵ This phrase was to eliminate the requirement that attorney's fees be awarded to prevailing parties in all summary judgments. However, this clause was found by Representative Richard H. Langley (District 35, Republican, Clermont) to be inadequate in that only the defendant would be awarded attorney's fees because the proposed language implied the plaintiff should never have

28. *Id.* Statement of Representative Richard.

It was precisely for the reason you suggest, Mr. Papy, that the Judiciary Committee last year changed the bill which did start with the word frivolous. They did it because the word frivolous is not defined in the law; because they were concerned that the judges would apply it inconsistently in one case or another; and, because the terminology which is used here is a term of art which is well established in the law. This way we'd have a more consistent standard.

29. *Id.*

30. *Id.*

31. *Id.* Representative T.M. Woodruff (District 60, Republican, St. Petersburg).

32. *Id.* Representative Richard.

33. *Id.* Representative Dorothy Eaton Sample (District 61, Republican, St. Petersburg).

34. JOURNAL-FLA. HOUSE at 428.

35. *Id.*

filed the lawsuit.³⁶ The addition of the words “raised by the losing party” after the word “fact,” proposed by Representative William E. Sadowski (District 113, Democrat, Miami) in his amendment, was an attempt to resolve the discrepancy.³⁷

Prior to the voting on May 8th,³⁸ three pertinent questions arose. The first mistakenly questioned the propriety of the legislature’s assisting attorneys in the collection of their fees.³⁹ The second referred to default judgments, which would require the assessing of attorney’s fees against the defaulting party, but which would not preclude the judgment from being vacated.⁴⁰ The third dealt with the court’s dismissal of frivolous lawsuits which would also require the assessment of attorney’s fees against the loser.⁴¹ Nevertheless, the bill passed as amended on a

36. H.B. 1062-taped debates.

37. JOURNAL-FLA. HOUSE at 428.

38. *Id.* at 434.

39. H.B. 1062-taped debates.

Representative William R. Conway (District 29, Democrat, Ormond Beach) questioned: “Why does the legislature have a right or a responsibility to guarantee attorneys that they’ll be able to collect their fees when they don’t do that for anyone else?”

Representative Richard replied:

Mr. Conway, that’s not what the bill really does at all. . . . The attorneys are going to get their fees one way or the other. The only question that this bill addresses is who’s to pay them. . . . There’s a familiar maxim in the law that says that for every wrong there’s a remedy. The only difficulty with that maxim is that there is one wrong for which there is no remedy, and that is when a person sues you for no reason whatsoever. If I walk up to you in the street and I punch you in the face and if it costs you \$1000 for dental care to correct the damage, you can sue me for that \$1000. But if I file a lawsuit against you—which anyone of us in this room and any person in the State of Florida can do, anybody can file a lawsuit against any other person—and I have absolutely no basis whatsoever for it, and it costs you \$5000 to hire a lawyer to defend yourself, and you win, you have no basis whatsoever in the law today to get that money back from me and the judge can’t entitle you to get it back from me. So, what this bill says is that if I sue you without justification, that you can get the attorney fees you have to pay your lawyer back from me, because I never should have sued you in the first place.

40. H.B. 1062-taped debates.

41. *Id.*

Representative R. Ed. Blackburn, Jr. (District 64, Democrat, Temple Terrace): “Is it not true that under your bill if someone brings a frivolous and completely unwarranted suit against me, the court dismisses it, then would not that plaintiff have to pay

sixty-four to forty vote and was certified to the Senate.⁴²

The Senate requested and received a staff analysis of the bill,⁴³ and the Committee on Judiciary-Civil, recommended it pass.⁴⁴ On May 29th, 1978, on a thirty-seven to zero vote, proposed statute section 57.105 passed the Senate and subsequently became law.⁴⁵

II. Case Law Interpreting Florida Statute § 57.105

The first court to deal with section 57.105 was the Circuit Court of Palm Beach County in *Morgan v. Boca Raton Community Hospital, Inc.*⁴⁶ The defendant had been rendered a favorable decision by a medical mediation panel⁴⁷ and sought attorney's fees. The case revolved around "whether a medical mediation proceeding [was] a 'civil action' within the meaning of Florida Statute 57.105."⁴⁸ The court held it was not, after extrapolating pertinent data from cases that focused on the statutory construction of section 768.44 of the Florida Statutes⁴⁹ from which medical mediation panels derived their existence. Although it may bear consideration in the determination of "quasi-judicial" pro-

my defense attorney?"

Representative Richard: "Absolutely, Mr. Blackburn, because I think that's only right. . . ."

42. JOURNAL-FLA. HOUSE at 434.

43. JUDICIARY-CIVIL COMMITTEE, SENATE 'STAFF ANALYSIS AND ECONOMIC STATEMENT, May 22, 1978, Bill No. H.B. 1062:

A. Economic Impact on the Public:

This bill would have the effect of discouraging much litigation; especially that instituted with the intent of securing a settlement rather than actually securing a judgment on the merits of a cause of action. In many instances cases are settled only to avoid the inconvenience and costs of defending a suit, not because one party is clearly at fault.

B. Economic Impact on State or Local Government:

This bill would result in some savings to the judicial branch, by lessening the number of cases the system must handle.

44. JOURNAL-FLA. SENATE at 453.

45. *Id.* at 475.

46. 49 Fla. Supp. 46 (1979).

47. *See* FLA. STAT. § 768.56 (Supp. 1980).

48. 49 Fla. Supp. at 47.

49. As it was being administered, the medical mediation statute, FLA. STAT. § 768.44 (1979), was declared unconstitutional in *Aldana v. Holub*, 381 So. 2d 231 (Fla. 1980).

ceedings,⁵⁰ the question in *Morgan* is now moot, due to the recent abolition of medical mediation panels in *Aldana v. Holub*.⁵¹

Soon after the *Morgan* decision, *Southeast Growers, Inc. v. Designed Facilities, Inc.*,⁵² was decided by a Broward County Court Judge. The case was ripe for summary judgment since the issue of fact, whether there had been an oral representation made, was "covered by the Statute of Frauds, Florida Statute § 725.01 (1975)."⁵³ The defendant's attorney counterclaimed for attorney's fees under section 57.105 and the judge elected to treat the counterclaim as an "affirmative defense" rather than as an independent motion. He made a determination that section 57.105 "is not the subject of a separate and independent cause of action."⁵⁴ The section is triggered by a reaction to a frivolous claim or defense. The judge ruled that "where a claim is asserted by plaintiff and defeated as a result of an affirmative defense raised by defendant, attorney's fees cannot be awarded to defendant under § 57.105."⁵⁵

The finding that the award of attorney's fees is an affirmative defense is contrary to the legislative intent.⁵⁶ In order for attorney's fees to be assessed against the losing party the court must make a "finding" of "a complete absence of a justiciable issue of either law or fact raised by the losing party."⁵⁷ The judge distinguished the standards for summary judgment and the requisites for the application of 57.105, and did not make a finding as to the validity of defendant's request for attorney's fees. He avoided the question. Had the judge ruled that an oral representation falling under the Statute of Frauds was a valid issue, and not a frivolous question, he would have arrived at the same result, i.e., the denial of attorney's fees.

Subsequently, the Third District Court of Appeal decided *McBain*

50. 49 Fla. Supp. at 47.

51. 381 So. 2d 231 (Fla. 1980).

52. 49 Fla. Supp. 160 (1979).

53. *Id.* at 162.

54. *Id.*

55. *Id.* at 163.

56. H.B. 1062-taped debates.

57. *City of Miami Beach v. Town of Bay Harbor Islands*, 380 So. 2d 1112 (Fla. 3d Dist. Ct. App. 1980).

v. Bowling.⁵⁸ The court authorized the award of attorney's fees following the finding of a complete absence of a justiciable issue of law or fact even if the suit is voluntarily dismissed. This holding covers a situation implied, but not addressed, during the legislative debates fourteen months earlier.⁵⁹

The *McBain* court referred to *Randle Eastern Ambulance Service, Inc. v. Vasta*⁶⁰ to demonstrate the effect of section 57.105. In writing the *Randle* opinion, Justice England, addressed the central issue that "a plaintiff's volitional dismissal divests a trial court of jurisdiction to entertain a later request to be relieved from the dismissal."⁶¹

In the presence of existing law, a plaintiff is prevented from several filings and dismissals of the same claim⁶² and the defendant can "recoup . . . court costs when a voluntary dismissal has been taken."⁶³ Yet, the *Randle* court recognized that:

There is no recompense . . . for a defendant's inconvenience, his attorney's fees, or the instability to his daily affairs which are caused by a plaintiff's self-aborted lawsuit. Nor is there any recompense for the cost and inconvenience to the general public through the plaintiff's precipitous or improvident use of judicial resources.⁶⁴

This is precisely the view held by the majority of legislators who voted on the bill which became section 57.105 at approximately the same time *Randle* was decided.⁶⁵ It is obvious that not all voluntarily dismissed claims are frivolously filed. However, the defendant now has some recourse to dissuade the occurrence of frivolous claims.

The court in *McBain* looked also to *Gordon v. Warren Heating & Air Conditioning, Inc.*⁶⁶ as support for its decision to award attorney's

58. 374 So. 2d 75 (Fla. 3d Dist. Ct. App. 1979).

59. See note 41 *supra*, where the discussion referred to "court dismissals," but not to voluntary dismissals.

60. 360 So. 2d 68 (Fla. 1978).

61. *Id.* at 68-69.

62. *Id.* at 69, citing FLA. R. Civ. P. 1.420(a)(1) (voluntary dismissals).

63. *Id.*, citing FLA. R. Civ. P. 1.420(d) (costs).

64. *Id.*

65. *Randle* was decided May 18, 1978. The House of Representatives voted May 8, 1978, and the Senate May 29, 1978, on what ultimately became section 57.105.

66. 340 So. 2d 1234 (Fla. 4th Dist. Ct. App. 1976).

fees. The *Gordon* court interpreted Florida Statutes § 713.29,⁶⁷ which deals with the awarding of attorney's fees to the prevailing party in actions enforcing mechanics liens.

Two issues resolved by the *Gordon* court were similar to those presented in *McBain* regarding section 57.105. First, whether a party against whom an action has been dismissed is entitled to attorney's fees. Second, "whether a judgment for those fees and costs must be entered as soon as the original action is dismissed rather than as part of the new action."⁶⁸

The *Gordon* court held that "where a mechanic's lien claim [was] voluntarily or involuntarily dismissed, the party against whom the claim was brought is the "prevailing party," and is entitled to recover attorney's fees and costs . . .⁶⁹ [and the prevailing party] should [be] awarded costs and attorney's fees immediately following dismissal of the first action."⁷⁰ Thus, *McBain* supports the rationales of both *Randle* and *Gordon*.

No other case in Florida has so painstakingly analyzed section 57.105 as *Allen v. Estate of Dutton*.⁷¹ The facts in *Allen* revolve around three wills: 1) a will by the husband, appellant's natural father, 2) a will by the wife, appellant's stepmother, executed on the same day, May 27, 1969, as the husband's will, before the same witnesses, and containing a provision declining to exercise the power to appoint the corpus of the "Ellen C. Dutton Trust", so that, at her death, the corpus would be added to the "Dutton Family Trust;" and 3) a revoking will by the wife-stepmother, executed June 22, 1971, after the husband-father's death, specifically exercising the power to appoint given to her by her husband's will, but not appointing the corpus of the trust to the "Dutton Family Trust," of which appellant was a substantial beneficiary.⁷² The wife-stepmother died on April 15, 1978 and her 1971 will

67. FLA. STAT. § 713.29 (1975).

68. *Id.* at 1235.

69. The court cited *Mardan Kitchen Cabinets, Inc. v. Bruns*, 312 So. 2d 709 (Fla. 3rd Dist. Ct. App. 1975); *Jackson v. Hatch*, 288 So. 2d 564 (Fla. 2d Dist. Ct. App. 1974); and *Lion Oil Co., Inc. v. Tamarac Lakes, Inc.*, 232 So. 2d 20 (Fla. 4th Dist. Ct. App. 1970). *See also* Annot., 65 A.L.R.3d 1087 (1975).

70. 340 So. 2d at 1235.

71. 384 So. 2d 171 (Fla. 5th Dist. Ct. App. 1980).

72. *Id.* at 172.

was admitted to probate.⁷³ Appellant contested the validity of the 1971 will but the lower court granted appellee's motion for judgment on the pleadings and awarded appellee's attorneys "\$23,000 under the provisions of Section 57.105."⁷⁴

Appellant's contention was "that since the statute [was] silent as to contracts *not to revoke a will*, (emphasis in original) such contracts need not be in writing."⁷⁵ The statute referred to is Florida Statute § 731.051.⁷⁶ "[S]ection 732.701 Florida Statutes (1975) . . . [which provides] that an agreement not to revoke a will must be in writing and signed by the agreeing party in the presence of two attesting witnesses, . . . was not in effect at the time the will in question was executed,"⁷⁷ and was therefore inapplicable.

The court looked to other jurisdictions for clues,⁷⁸ and came to the conclusion that the lower court properly awarded judgment in favor of appellee.⁷⁹ However, the court did not conclude likewise for attorney's fees.

The appellate court determined that since "[t]he heading of chapter 57 in the statute books is 'Court Costs' it is obvious that the Legislature intended to treat this award as part of the only subject matter therein, court costs."⁸⁰ Had an award of attorney's fees been proper, the lower court would have been justified in awarding them under section 57.105 as "costs not included in the final judgment even after a notice appealing the final judgment has been filed."⁸¹

Allen, like *McBain*, treated attorney's fees as "costs."⁸² Although, under the Florida Rules of Civil Procedure rule 1.420(d), costs did not include attorney's fees at the time of the *Randle* decision (one of the cases to which *McBain* referred), once section 57.105 was enacted, at-

73. *Id.*

74. *Id.* at 172-73.

75. *Id.* at 173.

76. *Id.*, citing FLA. STAT. § 731.051 (1957).

77. *Id.*

78. *Id.* The Court reviewed *West v. Day*, 328 Mass. 381, 103 N.E.2d 813 (1952), which cited cases from its own and other jurisdictions.

79. *Id.* at 175.

80. *Id.* at 174.

81. *Id.*

82. 374 So. 2d at 76.

torney's fees became "costs" if they fell within the statute's purview.⁸³

The *Allen* court, to determine the propriety of the attorney's fees which were awarded, chose legislative intent as a method of statutory interpretation to find the prerequisites for the invocation of section 57.105. In an analysis which parallels that of the House of Representatives, the court concluded that a finding of "complete absence" of a justiciable issue of law or fact was akin to a "total or absolute lack" thereof, and "tantamount to a finding that the action is frivolous."⁸⁴ The court analogized the case at bar to *Treat v. State ex. rel. Mitton*.⁸⁵

The *Allen* court used *Treat's* definition of a frivolous appeal:

A frivolous appeal is not merely one that is likely to be unsuccessful. It is one that is so readily recognizable as devoid of merit on the face of the record that there is little, if any, prospect whatsoever that it can ever succeed . . . one so clearly untenable, or the insufficiency of which is so manifest . . . that its character may be determined without argument or research. An appeal is not frivolous where a substantial justiciable question can be spelled out of it, or from any part of it, even though such question is unlikely to be decided other than as the lower court decided it. . . .⁸⁶

Since the *Allen* court found that a justiciable issue of law was raised, it reversed the lower court's assessment of attorney's fees.⁸⁷ It also held that "[m]erely losing, either on the pleadings or by summary judgment, is not enough to invoke the operation of the statute . . . that the action [has to be] so clearly devoid of merit both on the facts and the law as to be completely untenable."⁸⁸ Perhaps the court went slightly further than the Legislature intended by stating that *both* the facts and the law presented must be completely untenable. However, the analysis and holding more accurately reflect the legislative intent of the statute than any other Florida case.

There is yet another variation to the assessment of attorney's fees.

83. *Id.*

84. 384 So. 2d at 175.

85. 121 Fla. 509, 163 So. 883 (1935).

86. 384 So. 2d at 175.

87. *Id.*

88. *Id.* (emphasis supplied).

In *Department of Revenue v. Gurtler*,⁸⁹ the appellate court made the finding that a complete absence of a justiciable issue of law or fact existed at the trial level and assessed “[o]ne thousand (1,000) dollars in attorney’s fees in favor of the appellant,”⁹⁰ pursuant to section 57.105. In the lower court, Gurtler, the appellee, had been successful but the appellate court required that the record be corrected and supplemented. Ultimately, Gurtler conceded at the appellate level that his position at trial had been “baseless.”⁹¹ The appellate court reversed and remanded with instructions to enter judgment in favor of the appellant, Department of Revenue, and award it attorney’s fees.

In the same light, if the trial record indicates an adequate legal and factual basis has been layed as a foundation⁹² for a claim or defense, an appellate court will find a motion under section 57.105 untenable.⁹³ If attorney’s fees are awarded, but the order “contains no finding, as required by statute, that ‘there was a complete absence of a justiciable issue of either law or fact raised by the losing party,’” the order is technically deficient.⁹⁴ The case would need to be “remanded to the trial court with directions to make an appropriate finding . . . and thereafter to assess or deny attorney’s fees depending on the finding entered. . . .”⁹⁵

III. Other Jurisdictions With Statutes Similar to 57.105

Illinois, has had a statute authorizing the award of reasonable attorney’s fees in effect since 1955.⁹⁶ Within the past five years, six other

89. 381 So. 2d 242 (Fla. 4th Dist. Ct. App. 1979).

90. *Id.*

91. *Id.*

92. *Michigan Nat’l Bank of Detroit v. Maierhoffer*, 382 So. 2d 318 (Fla. 3d Dist. Ct. App. 1979).

93. *Id.* at 322.

94. *City of Miami Beach*, 380 So. 2d at 1112.

95. *Id.* at 1114.

96. ILL. REV. STAT. ch. 110, § 41, Historical and Practical Notes (1968). Current legislation, effective November 23, 1977, reads:

§ 41 (Civil Practice Act § 41) Untrue statements.

Allegations and denials, made without reasonable cause and found to be untrue, shall subject the party pleading them to the payment of reasonable expenses, actually incurred by the other party by reason of the untrue pleading, together with a reasonable attorney’s fee, to be summarily taxed by the court

states have adopted or amended existing statutes similar to section 57.105.⁹⁷

upon motion made within 30 days of the judgment or dismissal.

The State of Illinois or any agency thereof shall be subject to the provisions of this Section in the same manner as any other party.

Where the litigation involves review of a determination of an administrative agency, the court shall include in its award for expenses an amount to compensate a party for costs actually incurred by that party in contesting on the administrative level an allegation or denial made by the state without reasonable cause and found to be untrue.

Id. (Supp. 1980-81).

97. MINN. STAT. ANN. § 549.21 (West 1978):

Reimbursement for certain costs in civil actions.

Upon motion of a party prevailing as to an issue, the court in its discretion may award to that party costs, disbursements, reasonable attorney fees and witness fees relating to the issue if the party or attorney against whom costs, disbursements, reasonable attorney and witness fees are charged acted in bad faith as to that issue. To qualify for an award under this section, a party shall give timely notice of intent to claim an award, which notice shall in any event be given prior to the resolution of the issue. An award under this section shall be without prejudice and as an alternative to any claim for sanctions that may be asserted under the rules of civil procedure. Added by Laws 1978, c. 738 § 5, eff. April 5, 1978.

WIS. STAT. ANN. § 814.025 (West Supp. 1980-81):

814.025 Costs upon frivolous claims and counterclaims.

(1) If an action or special proceeding commenced or continued by a plaintiff or a counterclaim, defense or cross complaint commenced, used or continued by a defendant is found, at any time during the proceedings or upon judgment, to be frivolous by the court, the court shall award to the successful party costs determined under s. 814.04 and reasonable attorney fees.

(2) The costs and fees awarded under sub. (1) may be assessed fully against either the party bringing the action, special proceeding, cross complaint, defense or counterclaim or the attorney representing the party or may be assessed so that the party and the attorney each pay a portion of the costs and fees.

(3) In order to find an action, special proceeding, counterclaim, defense or cross complaint to be frivolous under sub. (1), the court must find one or more of the following:

(a) The action, special proceeding, counterclaim, defense or cross complaint was commenced, used or continued in bad faith, solely for purposes of harassing or maliciously injuring another.

(b) The party or the party's attorney knew, or should have known, that the action, special proceeding, counterclaim, defense or cross complaint was without any reasonable basis in law or equity and could not be supported by a good faith

A. ILLINOIS

The Illinois statute has been interpreted by their courts as an at-

argument for an extension, modification or reversal of existing law.

MASS. GEN. LAWS ANN. ch. 231, §§ 6E-6G (West 1976). 6E provides definitions applicable to sections 6E-6G, and section 6G applies to appeals.

§ 6F. Cost, Expenses and interest for insubstantial, frivolous or bad faith claims or defenses

Upon motion if any party in any civil action in which a finding, verdict, decision, award, order or judgment has been made by a judge or justice or by a jury, auditor, master or other finder of fact, the court may determine, after a hearing, as a separate and distinct finding, that all or substantially all of the claims, defenses, setoffs or counterclaims, whether of a factual, legal or mixed nature, made by any party who was represented by counsel during most or all of the proceeding, were wholly insubstantial, frivolous and not advanced in good faith. The court shall include in such finding the specific facts and reasons on which the finding is based.

If such a finding is made with respect to a party's claim, the court shall award to each party against whom such claims were asserted an amount representing the reasonable counsel fees and other costs and expenses incurred in defending against such claims . . . [provisions made for those not represented by counsel omitted].

Apart from any award made pursuant to the preceding paragraph, if the court finds that all or substantially all of the defenses, setoffs or counterclaims to any portion of a monetary claim made by any party who was represented by counsel during most or all of the proceeding were wholly insubstantial, frivolous and not advanced in good faith, the court shall award interest to the claimant on that portion of the claim according to the provisions of the preceding paragraph.

In any award made pursuant to either of the preceding paragraphs, the court shall specify in reasonable detail the method by which the amount of the award was computed and the calculation thereof.

No finding shall be made that any claim, defense, setoff or counterclaim was wholly insubstantial, frivolous and not advanced in good faith solely because a novel or unusual argument or principle of law was advanced in support thereof. No such finding shall be made in any action in which judgment was entered by default without an appearance having been entered by the defendant. The authority granted to a court by this section shall be in addition to, and not in limitation of, that already established by law.

If any parties to a civil action shall settle the dispute which was the subject thereof and shall file in the appropriate court documents setting forth such settlement, the court shall not make any finding or award pursuant to this section with respect to such parties. If an award had previously been made pursuant to this section, such award shall be vacated unless the parties shall agree otherwise.

tempt on the part of "the legislature to penalize the litigant who pleads

COLO. REV. STAT. § 13-17-101 (1977) (Subsections (2) and (4) omitted):
Frivolous or Groundless Actions

13-13-101. Attorney fees. (1) Subject to the provisions of subsection (2) and (3) of this section, in any suit involving money damages in any court of this state, the court shall award, except as this part 1 otherwise provides; as part of its judgment and in addition to any costs otherwise assessed, reasonable attorney fees.

(3) The court shall not award attorney fees among the parties unless it finds that the bringing, maintaining, or defense of the action against the party entitled to such award was frivolous or groundless. The court must make findings either affirmative or negative as to the matters set forth in this subsection (3).

N.D. CENT. CODE § 28-26-01 (1977):

28-26-01. Attorney's fees by agreement—Exceptions—Awarding of costs and attorney's fees to prevailing party.

1. Except as provided in subsection 2, the amount of fees of attorneys in civil actions must be left to the agreement, express or implied, of the parties.

2. In civil actions the court may, in its discretion, upon a finding that a claim for relief was frivolous, award reasonable actual or statutory cost, or both, including reasonable attorney's fees to the prevailing party. Such costs may be awarded regardless of the good faith of the attorney or client making the claim for relief if there is such a complete absence of actual facts or law that a reasonable person could not have thought a court would render judgment in their favor, providing the prevailing party has in responsive pleading alleged the frivolous nature of the claim.

IDAHO CODE § 12-121 (1976):

12-121. Attorney's fees.

In any civil action, the judge may award reasonable attorney's fees to the prevailing party or parties, provided that this section shall not alter, repeal or amend any statute which otherwise provides for the award of attorney's fees.

The following two states also regulate attorney's fees but are not discussed in this article:

NEV. REV. STAT. § 18.010 (1979).

18.101 Award of attorney's fees.

1. The compensation of an attorney and counselor for his services is governed by agreement, express or implied, which is not restrained by law.

2. The court may make an allowance of attorney's fees to:

(a) The plaintiff as prevailing party when the plaintiff has not recovered more than \$10,000; or

(b) The counterclaimant as prevailing party when he has not recovered more than \$10,000; or

(c) The defendant as prevailing party when the plaintiff has not sought recovery in excess of \$10,000.

frivolous or false matters or brings a suit without any basis in law and thereby puts the burden upon his opponent to expend money for an attorney to make a defense against an untenable suit."⁹⁸ An Illinois court dismissed an action on a pre-trial motion, stating that "[o]ne of the purposes of [the Illinois statute] is to prevent litigants from being subjected to harassment by the bringing of actions against them which in their nature are vexations, based upon false statements, or brought without any legal foundation."⁹⁹

The Illinois Statute, designed to prevent abuse of the judicial process,¹⁰⁰ has been in existence longer than any similar statute in other jurisdictions. This has given Illinois courts greater experience in dealing with, and exposure to, problems arising under statutes comparable to section 57.105. Although, it is the most comprehensive law in its category in scope,¹⁰¹ it is more limited than the Florida Statute since its application is discretionary with the trial court.¹⁰² Unless there is clear

3. In awarding attorney's fees the court may pronounce its decision on such fees at the conclusion of the trial or special proceeding without written motion and with or without presentation of additional evidence.

4. No oral application or written motion for attorney's fees alters the effect of a final judgment entered in the action or the time permitted for an appeal therefrom.

5. Subsections 2 to 4, inclusive, do not apply to any action arising out of written instrument or agreement which entitles the prevailing party to an award of reasonable attorney's fees.

MD. R.P. 604(b) (1957).

b. Bad Faith—Unjustified Proceeding—Delay.

In an action or part of an action, if the court finds that any proceeding was had (1) in bad faith, (2) without substantial justification, or (3) for purposes of delay the court shall require the moving party to pay to the adverse party the amount of the costs thereof and the reasonable expenses incurred by the adverse party in opposing such proceeding, including reasonable attorney's fees.

98. *Ready v. Ready*, 33 Ill. App. 3d 145, 178 N.E.2d 650, 658 (1961).

99. *Id.*

100. *Murezek v. Powers Label Co.*, 31 Ill. App. 3d 939, 335 N.E.2d 172, 176 (1975).

101. Compare note 96 *supra* with note 97 *supra*. Attorney fees may be assessed against the State of Illinois.

102. *Johnson v. LaGrange State Bank*, 73 Ill. App. 3d 342, 383 N.E.2d 185, 196 (1978); *Ascardis v. Russis*, 78 Ill. App. 3d 375, 397 N.E.2d 14, 16 (1979); *Howell v. Edelin*, 66 Ill. App. 3d 437, 383 N.E.2d 1224, 1234 (1978); *Laff v. Chapman Performance Prods., Inc.*, 63 Ill. App. 3d 297, 379 N.E.2d 773, 785 (1978). *Brandberry Park*

abuse of discretion the lower court's decision will not be disturbed on review.¹⁰³

In order for the trial court to award or deny attorney's fees in Illinois there must be a hearing on the matter.¹⁰⁴ At the hearing, the burden of proof is on the movant to "prove that the allegations against him: (1) were made without reasonable cause; (2) not in good faith; and (3) are untrue."¹⁰⁵ Currently, the test does not require that the movant prove a lack of good faith.¹⁰⁶

There is Illinois case law wherein the award of attorney's fees has been reversed because the movant failed to fulfill his burden,¹⁰⁷ and that burden cannot be fulfilled, if the only evidence offered at the hearing pertains to the amount of the fees.¹⁰⁸ An Illinois appellate court will not find abuse of discretion if an award of attorney's fees is well documented in the record;¹⁰⁹ nor will it review a denial of attorney's fees absent abuse of discretion.¹¹⁰ Yet in Illinois, as in Florida, a prevailing party is not automatically awarded attorney's fees—especially if there is a finding that a genuine dispute existed, although it may not have been an issue at the trial.¹¹¹

The allowance of attorney's fees "is an attempt to penalize any

East Apts. v. Zale, 63 Ill. App. 3d 253, 379 N.E.2d 674, 681 (1978). Farwell Constr. Co. v. Ticktin, 59 Ill. App. 3d 954, 376 N.E.2d 621, 626 (1978); Bainerd v. Flannery, 59 Ill. App. 3d 991, 373 N.E.2d 26, 29 (1978); Morton v. Environmental Land Sys., Ltd., 55 Ill. App. 3d 369, 370 N.E.2d 1106, 1111 (1977); Dudanas v. Plate, 44 Ill. App. 3d 901, 358 N.E.2d 1171, 1179 (1976); Village of Evergreen Park v. Spangler, 40 Ill. App. 3d 947, 353 N.E.2d 257, 259 (1976); Murezek v. Powers Label Co., 335 N.E.2d at 176.

103. 376 N.E.2d at 626; 370 N.E.2d at 1111.

104. 303 N.E.2d at 1234.

105. 335 N.E.2d at 176. See also *Couri v. Home Ins. Co.*, 53 Ill. App. 3d 593, 368 N.E.2d 1029, 1035 (1977); 373 N.E.2d at 29; 383 N.E.2d at 196.

106. 397 N.E.2d at 16.

107. *Medical Modalities Assoc., Inc. v. Quick*, 65 Ill. App. 3d 300, 382 N.E.2d 620, 623 (1978); *Meeker v. Beeson*, 76 Ill. App. 3d 940, 395 N.E.2d 698, 701 (1979).

108. 383 N.E.2d at 196.

109. 379 N.E.2d at 681; *In re Estate of Knutson*, ___ Ill. App. 3d ___, 404 N.E.2d 1003 (1980).

110. 370 N.E.2d at 1111.

111. *Farnot v. Irmco Corp.*, 73 Ill. App. 3d 851, 292 N.E.2d 591, (1979). (A dispute had existed as to whether an individual was employed by a certain party, however, that question was not made an issue at trial due to mutual stipulation).

litigant who pleads false matters and thereby puts undo burden on an opponent to expend money in order for his attorney to disprove such pleadings."¹¹² Since the statute is penal in nature, Illinois courts limit its scope to "those cases falling strictly within its terms."¹¹³

In Florida, the court must make a finding of a complete absence of justiciable issue of law or fact before attorney's fees can be assessed against the losing party.¹¹⁴ If such a finding is made in Illinois, it is discretionary with the court whether attorney's fees will be awarded.¹¹⁵ This interpretation places a double burden on the movant. He must overcome the burden of proof at a special hearing, and if his motion is denied, the movant must prove at the appellate level, abuse of discretion on the part of the trial court—an inherently difficult burden to overcome.

B. NORTH DAKOTA

North Dakota's statute is equivalent to Illinois' and its courts have looked to Illinois case law for guidance in interpreting it.¹¹⁶ The statute, authorizes a court, at its discretion, to award "costs" to the prevailing party in a civil action by way of indemnity for his expenses in the action.¹¹⁷ It was recently amended to include attorney's fees.¹¹⁸

However, attorney's fees will not be "allowed to a party who has successfully defended against an action unless the action was frivolous."¹¹⁹ The finding of frivolousness is initially made at the trial court's discretion.¹²⁰ Reasonable attorney's fees may be awarded to the

112. *Metro-Goldwyn-Mayer, Inc. v. Antioch Theatre Co.*, 52 Ill. App. 3d 122, 367 N.E.2d 247, 257 (1977).

113. 335 N.E.2d at 176. *See also* 372 N.E.2d at 946; 370 N.E.2d at 1111; 358 N.E.2d at 1179.

114. 384 So.2d at 174.

115. *See* note 102 *supra*.

116. *Matter of Estate of Nelson*, 281 N.W.2d 245, 247 (N.D. 1979).

117. N.D. CENT. CODE § 28-26-01 (1943).

118. *See* note 97 *supra*.

119. *Conrad v. Suhr*, 274 N.W.2d 571, 579 (N.D. 1979). *See also* *Peterson v. Hart*, 278 N.W.2d 133, 136 (N.D. 1979).

120. *Corwin Chrysler-Plymouth, Inc. v. Winchester Fire Ins. Co.*, 279 N.W.2d 638, 646 n.4 (N.D. 1979).

prevailing party once such a finding is made.¹²¹

C. MINNESOTA AND IDAHO

Minnesota¹²² and Idaho¹²³ also have discretionary statutes. The statute in Minnesota is considered an enactment of the exception to the general rule, i.e. “[g]enerally attorney’s fees may not be awarded to a successful litigant absent specific contractual or statutory authority [except] where the unsuccessful party has acted in bad faith, vexatiously, wantonly, or for oppressive reason.”¹²⁴

The Minnesota Supreme Court has held that the trial court is in the best position to determine bad faith and other factual issues.¹²⁵ The court gave significant weight to the statute’s legislative history by quoting its author, who “stated to the [Minnesota] Senate Judiciary Committee that this section forces more responsible litigation by imposing costs including attorney’s fees on a party or his lawyer who presses an issue not in good faith—so people have to search through their lawsuits more effectively for what really ought to be litigated.”¹²⁶

Idaho cases on point, deal with the “technical” aspects of the application of its statute. Since the statute is not substantive, but remedial and procedural, retroactive application was proper to a claim arising prior, but tried subsequently, to the statute’s enactment.¹²⁷ However, it is incumbent upon the movant to establish the claim or defense “was being maintained frivolously, unreasonably or without foundation.”¹²⁸ If the movant seeks attorney’s fees under an improper statute, but has established his adversary’s claim is devoid of merit, the

121. *Id.*

122. *Minnesota-Iowa Television Co. v. Wantonwan T.V. Improvement Ass’n*, 294 N.W.2d 297, 311 (Minn. 1980).

123. *See* note 97 *supra* and *Palmer v. Idaho Bank & Trust of Kooskia*, 100 Idaho 642, 603 P.2d 597, 600 (1979); *Furtrell v. Martin*, 100 Idaho 473, 600 P.2d 777, 783 (1979); *Cunningham v. Bundy*, 100 Idaho 456, 600 P.2d 132, 135 (1979).

124. *Cherne Industries, Inc. v. Grounds & Assoc.*, 278 N.W.2d 81, 96 (Minn. 1979).

125. *Id.* at 97.

126. 294 N.W.2d at 311 n.1.

127. *Jensen v. Shank*, 99 Idaho 565, 585 P.2d 1276-78 (1978). *See also* *Buckalew v. City of Orangeville*, 100 Idaho 460, 600 P.2d 136, 139 (1979), citing *Jensen*.

128. *Matter of Estate of Bowman*, ___ Idaho ___, 609 P.2d 663, 669 (1980).

court may affirm the award if it is proper under another statute.¹²⁹ The assessment of attorney's fees against two or more parties must be prorated against each of them, otherwise the case will be remanded for such a determination.¹³⁰

D. COLORADO

The Colorado statute, whose application is discretionary with the trial court,¹³¹ restricts attorney's fees awards to suits involving money damages.¹³² It is clear, however, that a party who "asserts claims in a subsequent action which were compulsory counterclaims in a former proceeding . . ." has asserted frivolous claims¹³³ and attorney's fees would be awarded to the prevailing party.

E. MASSACHUSETTS AND WISCONSIN

Massachusetts and Wisconsin are the two states whose statutes most resemble Florida's. Their statutes also use the word "shall" instead of "may," mandating the assessment of attorney's fees upon a finding of frivolousness. Massachusetts courts have not enforced the statute,¹³⁴ although they have provided a warning of their authority to do so in the future.¹³⁵

129. *Torix v. Allred*, 100 Idaho 905, 606 P.2d 1334, 1340 (1980).

130. 585 P.2d at 1278.

131. *Wood v. Jensen*, ___ Colo. App. ___, 585 P.2d 309, 310 (1978).

132. *In re Marriage of Erickson*, ___ Colo. App. ___, 602 P.2d 909, 911 (1979); *People v. Freeman*, 196 Colo. 238, 583 P.2d 921, 923 (1979).

133. 585 P.2d at 310.

134. *In Hosford v. Rei*, ___ Mass. ___, 377 N.E.2d 427 (1978), judgment was entered prior to the effective date of the statute. "Substantial questions of first impression" prevented the statute from being applicable in *Goodwin Bros. Leasing, Inc. v. Nouis*, ___ Mass. App. Ct. ___, 366 N.E.2d 38, 44 (1977). In *Glynn v. City of Gloucester*, ___ Mass. ___, 401 N.E.2d 886, 888 n.1 (1980), the city "waived" its "appeal from denial of its motion for attorney's fees and costs . . . [because it had] not briefed or argued . . ." the matter. If a party simply presents no evidence before a master, whose findings are not final, attorney's fees cannot be assessed against the party. *Vaught Constr. Co. v. Bertonazzi Buick Co., Inc.*, 371 Mass. 553, 359 N.E.2d 286, 290-91 (1976).

135. *Pollack v. Kelley*, 372 Mass. 469, 362 N.E.2d 525, 530 (1977). "The plaintiff has now been delayed more than three years in obtaining a trial on his claim. The

Recently, a Wisconsin appellate court was presented with factual circumstances that one would imagine to be the basis of a typical frivolous lawsuit.¹³⁶ An individual, who drove an automobile owned by another, was covered by Prudential Property and Casualty Insurance Company.¹³⁷ The driver was also covered by Sentry Insurance Company, but the Sentry policy unambiguously indicated that the individual was not covered in the particular instance.¹³⁸ "Prudential pursued a third-party action against Sentry *after* Sentry [had] provided Prudential with all the material necessary to demonstrate . . . the action was frivolous."¹³⁹ The trial court denied Sentry's motion for costs and reasonable attorney's fees.¹⁴⁰

In its analysis the appellate court noted the weight of the evidence required a finding that Prudential's claim was frivolous.¹⁴¹ It did not have to find abuse of discretion on the lower court's part because "[u]se of the word 'shall' creates a presumption that the statute is mandatory."¹⁴² Therefore, Sentry's motion was well taken and the case was remanded for a determination of the amount of reasonable attorney's fees to be awarded.¹⁴³

IV. Conclusion

As individuals become more conscious of accessibility to the courts and exercise their legal rights, the possibilities of frivolous or groundless lawsuits increases as does the need to provide relief to their "victims." The common law torts of malicious prosecution and abuse of process are insufficient remedies because they require the wronged

two premature attempted appeals have produced nothing for the defendant, and the resulting delay to the plaintiff can serve no purpose but to contribute to the loss of confidence in the courts as the avenue for adjudication of private disputes with reasonable dispatch. The continued use of such delaying tactics in the face of settled law against the presentation of interlocutory appeals may result in sanctions against offenders in appropriate cases in the future." *Id.*

136. *Sommer v. Carr*, 95 Wis. 2d 651, 291 N.W.2d 301 (1980).

137. *Id.* at 302.

138. *Id.* at 303-04 n.2.

139. *Id.* at 301.

140. *Id.* at 302.

141. *Id.*

142. *Id.* at 302 n.1.

143. *Id.* at 304.

party to institute an entirely new lawsuit. The trendsetter states mentioned in this article, provide statutes in which "a party who is put to the defense of a groundless lawsuit has available the remedy of a motion in the original action for an award of attorney's fees."¹⁴⁴

The American rule remains intact in Florida: "attorney's fees may be awarded a prevailing party only under three circumstances, viz: (1) where authorized by contract; (2) where authorized by a constitutional legislative enactment; and (3) where awarded for services performed by an attorney in creating or bringing into court a fund or other property."¹⁴⁵ Section 57.105, falling under the second category, is yet another statute under which attorney's fees can be awarded.

By not making the application of section 57.105 discretionary the Legislature endeavored to create uniformity. The results, the assessment of attorney's fees, would also serve as an admonishment to parties who, but for the statute, would abuse court processes. It is obvious that not all settlements, nor all dismissals, voluntary or otherwise, have groundless foundations. Therefore, a well-documented hearing on the matter will preclude a chilling effect on court accessibility.

The Florida Legislature was concerned that lawsuits were instituted to either force a settlement or gamble with court processes.¹⁴⁶ A party opposing a frivolous claim had to weigh two unpleasant alternatives: to defend his position, or to accept a settlement which ultimately might have been less costly than litigation. A party thrust into this position could only lose confidence in the courts as adjudicators of private conflicts and feel frustrated at such injustice. In this sense section 57.105 is a remedial statute. Although section 57.105 is not a panacea for all court system abuses, it may serve to curtail frivolous claims and defenses.

Bertha P. Sanchez

144. *Lyddon v. Shaw*, 56 Ill. App. 3d 815, 372 N.E.2d 685, 691 (1978).

145. *Estate of Hampton v. Fairchild—Florida Constr. Co.*, 341 So. 2d 759, 761 (Fla. 1977), citing *Kittel v. Kittel*, 210 So. 2d 1, 3 (Fla. 1967).

146. H.B. 1062-taped debates.