THE SWORD OF DAMOCLES: ATTORNEY FEES UNDER SECTION 57.105 FLORIDA STATUTES

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When litigation is concluded, every party hopes that his attorney fees will be paid by someone else. Unfortunately for the litigants, the American Way is for each party to pay his own fees, win or lose. *See, Whitten v. Progressive Cas. Ins. Co.*, 410 So.2d 501, 505 (Fla. 1982) (Statutes authorizing an award of attorney's fees are in derogation of common law and are to be strictly construed). Over the years, the legislature has liberalized this rule. It has increasingly adopted statutes to allow for an award of attorney's fees against someone other than a party hiring the attorney. This fee assessment can be seen in the probate context. There are two statutes in the Florida Probate Code that entitle some attorney's fees to be assessed against the estate. Both have a history of becoming more generous over time in authorizing payment of a party's attorney's fees from probate estates.

ATTORNEY FEES UNDER FLORIDA PROBATE CODE

Section 733.6171 and its predecessor section 733.617 have allowed the personal representative's attorney reasonable compensation payable from estate assets. While that presumably would allow payment to more than one lawyer, there are limits on how many lawyers can be paid under this provision. Moreover, there is one big limit: you are paid under this statute only if you are the *personal representative's* lawyer.

OFFERING A WILL TO PROBATE

Likewise, Section 733.14 F.S. (1973) once allowed attorney fees to be paid from estate assets for the proponent offering a will to probate, but only if the proponent was the nominated personal representative. It said:

> **733.14 Costs--**
>
> . . . .
>
> (2) An executor, being prima facie justified in offering a will, in due form, for probate, shall generally receive his costs and attorney's fees out of the estate, even though he is unsuccessful.

With the adoption of the modern Probate Code in 1975, this statute was liberalized to authorize the payment of attorney's fees of any will proponent acting in good faith.

> **733.106 Costs and attorney's fees.--**
>
> . . . .
>
> (3) A person nominated as personal representative, or any proponent of a will if the person so nominated does not act within a reasonable time, if in good faith justified in offering the will in due form for probate, shall receive costs and attorney's fees from the estate even though he is unsuccessful.

Section 733.106 (2) says a proponent of a will offered to probate in good faith is entitled to attorney fees, even though probate of the will is denied.

More recently, the statute was modified as follows:

> **733.106 Costs and attorney's fees.--**
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> . . . .
>
> (3) A person nominated as personal representative, or any proponent of a will if the person so nominated does not act within a reasonable time, if in good faith justified in offering the will in due form for probate, shall receive costs and attorney's fees from the estate even though probate is denied or revoked.

Note that the statute was again liberalized. Formerly, the statute allowed the fees even if the probate was denied. Now, the statute is clear that the fees are allowable even if probate of the will is first allowed and then revoked.[1]

ATTORNEY SERVICES THAT BENEFIT ESTATE

What if the services of the attorney are not related to the offering of a will to probate? Under the 1974 version of the statute, fees were not payable from the estate. That was also liberalized in the 1975 rewrite of the Code. Then, the following subsections were added to section 733.106:

[1] Provided, of course, the proponent acted in good faith. Sec. 733.106 (4) Fla. Stat.

(3) Any attorney who has rendered services to an estate may apply for an order awarding attorney fees, and after informal notice to the personal representative and all persons bearing the impact of the payment, the court shall enter its order on the petition.

(4) When costs and attorney's fees are to be paid out of the estate, the court may, in its discretion, direct from what part of the estate they shall be paid.

This was a big change. Now, any attorney who has rendered services deemed to benefit the estate is entitled to fees. But, there must have been a demonstrated benefit to the estate to have fees awarded under this provision. Thus, a successful proponent of a will who fails to wait a reasonable time for the nominated personal representative to offer a will to probate should qualify to have his attorney fees paid. A person who sues to bring assets into the estate can have the estate pay his attorney fees. Not only that, anyone who brings litigation to effectuate the testamentary intent set out in the decedent's will is deemed to have benefited the estate, and is entitled to have his fees paid out of the estate. Here are cases in which the estate was deemed to be benefited and where the attorney's fees were determined to be payable out of the estate:

- Services of attorneys who brought a fund into an estate. *In re: Cassidy's Estate*, 160 So. 2d 743 (Fla. 3d DCA 1964) and the fees may be charged against the fund so obtained. *Id.*

- Services useful in simply effectuating testamentary intentions set forth in the will. *In re: Estate of Lewis*, 442 So. 2d 290 (Fla. 4th DCA 1983).

- The person who successfully defends an "attack" on the decedent's will is entitled to fees. *Samuels v. Ahearn*, 436 So. 2d 1096, *reh. den.* 449 So. 2d 265 (Fla. 4th DCA 1983).

- Attorneys for children of a decedent who helped establish that the widow had killed the decedent and thus was disqualified from inheriting from him provided a service that was beneficial to the estate. *Baumer v. Howard*, 542 So. 2d 400 (Fla. 1st DCA 1989).

Subsection (4) also allows for assessing the burden of the fees paid from the estate to the person who should equitably be charged for the fees, but that allocation, however, is limited to that person's interest in the estate. For example, if the fees awarded under this section are in excess of the

beneficiary's share of the estate, the courts have held that there is no personal liability for the fees on the beneficiary. *Dourado v. Chousa*, 604 So.2d 864 (Fla. 5th DCA 1992). It would be nice to have a statute that would allow personal liability of the losing party in excess of his interest in the estate. We have one, but it is not in the Probate Code.

FLORIDA STATUTE 57.105

As this statute was originally adopted in 1978, this law provided that the court shall award a reasonable attorney's fee to the prevailing party in a case where there is a "complete absence of a justiciable issue of law or fact." Section 57.105 FS (1979). In the words of several decisions, the case had to be frivolous to authorize a fee award. *See, e.g. Gries Inv. Co, v. Chelton*, 388 So. 2d 1281 (Fla. 3d DCA 1980).

It appears that the legislature was telling the courts that it did not want apparently baseless cases cramming up the judicial process. However, it appeared as though the courts had a difficult time finding a case they didn't like. In a sample of 28 appellate cases decided between 1978 and 1986 involving this section, only 14% were deemed to be worthy of allowing an award of attorney fees under 57.105.

LAWYER LIABILITY

In 1986, the legislature again amended this statute, apparently in an attempt to tell the courts it really, really meant what it said: award those fees against all those frivolous litigants. The 1986 amendment provided that the attorney's fees awarded under 57.105 would "be paid to the prevailing party in equal amounts by the losing party and the losing party's attorney in any civil action." Section 57.105 (1).

The legislature seemed to be refocusing the law to allow courts to go after the frivolant's[2] lawyers as well. The 1986 legislature did not want to be too difficult on the lawyers, though. It gave them this exception in a new provision: "…provided the losing party's attorney is not personally responsible if he has acted in good faith based upon the representations of his client."

The addition of lawyer liability might have impressed some courts because the percentage of cases that were found frivolous and allowed fees after 1986 nearly doubled. In a sample of eight appellate decisions considering 57.105 between 1986 and 1990, 25% of them approved the awarding of fees against firvolant litigants. That apparently was not enough for the legislature, though. So, in 1990, the legislature provided for

[2] Not a real word, at least not before now.

prejudgment interest on the fees awarded. And, in our sample of 50 cases decided from 1990 through 2000, appellate courts upheld the award of 57.105 fees in 28% of the cases. That is, attorneys and their frivolant clients are being dinged for fees under this statute at twice the rate in the years right after the statute was first enacted.

THE 1999 AMENDMENT: A NUCLEAR BOMB?

Not being happy with those results, the legislature has again acted. In 1999, the statute was again amended. The 1999 version, the present version of the statute, provides as follows:

> **57.105 Attorney's fee; sanctions for raising unsupported claims or defenses; service of motions; damages for delay of litigation.**--
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> (1) Upon the court's initiative or motion of any party, the court shall award a reasonable attorney's fee to be paid to the prevailing party in equal amounts by the losing party and the losing party's attorney on any claim or defense at any time during a civil proceeding or action in which the court finds that the losing party or the losing party's attorney knew or should have known that a claim or defense when initially presented to the court or at any time before trial:
>
> (a) Was not supported by the material facts necessary to establish the claim or defense; or
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> (b) Would not be supported by the application of then-existing law to those material facts.
>
> However, the losing party's attorney is not personally responsible if he or she has acted in good faith, based on the representations of his or her client as to the existence of those material facts. If the court awards attorney's fees to a claimant pursuant to this subsection, the court shall also award prejudgment interest.
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> (2) Paragraph (1) (b) does not apply if the court determines that the claim or defense was initially presented to the court as a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law, as it applied to the material facts, with a reasonable expectation of success.
>
> (3) At any time in any civil proceeding or action in which the moving party proves by a preponderance of the evidence that any action taken by the opposing party, including, but not

limited to the filing of any pleading or part thereof, the assertion of or response to any discovery demand, the assertion of any claim or defense; or the response to any request by any other party, was taken primarily for the purpose of unreasonable delay, the court shall award damages to the moving party for its reasonable expenses incurred in obtaining the order, which may include attorney's fees, and other loss resulting from the improper delay.

(4) A motion by a party seeking sanctions under this section must be served but may not be filed with or presented to the court unless, within 21 days after service of the motion, the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected.

(5) The provisions of this section are supplemental to other sanctions or remedies available under law or under court rules.

(6) If a contract contains a provision allowing attorney's fees to a party when he or she is required to take any action to enforce the contract, the court may also allow reasonable attorney's fees to the other party when that party prevails in any action, whether as plaintiff or defendant, with respect to the contract. This subsection applies to any contract entered into on or after October 1, 1988.

Note that the new iteration of this law significantly liberalizes its provisions and strengthens the hands of the frivolant's opponents. For example, the court need no longer await a motion for fees. It can award fees of its own accord.[3]

The legislature also added: "on any claim or defense at any time during a civil proceeding" to subsection (1). Presumably, this addition is to assure courts that they have the power to assess fees if only a part of the action is frivolous. If so, this reverses a line of cases that holds to the contrary.

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[3] This was not in the statute prior to 1999, but in at least two cases, it appears the Fifth District Court of Appeal determined it was in its power to award 57.105 fees of its own accord. In *Dept. of Revenue v. Smatt*, 679 So.2d 1191 (Fla. 5th DCA 1996) the court affirmed the trial court, declared the appeal frivolous, and remanded the case for imposition of attorney's fees under section 57.105. The court appears to have acted on the attorney fee issue of its own initiative. It did the same in *Dicus v. Dist. Bd. Of Trustees for Valencia*, 764 So.2d 563 (Fla. 5th DCA 1999). Further, the court directed, "In its discretion, the trial court may impose all or a portion of the attorney's fee award against Dicus' attorney, who also represented her in the trial court." This is a little different from the 50/50 split specified in section 57.105 Fla. Stat.

For example, in *Barber v. Oakhills Estates Partnership*, 583 Sl.2d 1114 (Fla. 2 DCA 1991), the court held that attorney's fees could not be awarded under section 57.105 where only one of three counts was frivolous. *See also, Schoutz v. Laurie,* 512 So.2d 1003 *rev. den.* 520 So.2d 586 (Fla. 2d DCA 1987). And the Fifth District Court of Appeal articulated the standard to preclude a section 57.105 fee award as long as "at least some of the counts asserted by the plaintiffs were arguable." *Builders Shoring and Scaffloking v. King*, 453 So. 2d 534 (Fla. 5th DCA 1984). That made sense, because the statute allowed fees only if there was a *complete* absence of law or fact raised by the losing party.

AT ANY TIME DURING A CIVIL PROCEEDING OR ACTION

The little words "at any time during a civil proceeding or action" added to this statute are also not insignificant. Originally, the statute allowed an attorney's fee award only to the prevailing party and only when the court found "there was a complete absence of a justiciable issue of either law or fact raised by the losing party." Deleting the complete absence language and adding this language suggests that 57.105 fees are awardable for partial frivolity and matters short of a final order. Otherwise, the statute would not be available for fees on interlocutory matters. *See, Ruppel v. Gulf Winds Apartments, Inc.*, 508 So.2d 534 (Fla. 2d DCA 1987), which denied fees under section 57.105 to a plaintiff after defendant lost a frivolous motion to dismiss. Likewise, the First DCA held it was error to award 57.105 fees to the prevailing party who moved to strike a portion of a petition for revocation of probate. The court reasoned that the statute is only available for a party who prevailed on the entire action, not just a portion of it. *Bashure v. Estate of Paulk*, 498 So.2d (Fla. 1st DCA 1986).

Under subsection (3), the statute also allows for fees for any matter that occurs during the course of a proceeding, such as for interposing dilatory motions. It seems to address more the delay caused than harassment. The statue allows for fees when an action is shown to have been taken for the purpose of unreasonable delay. If the statute is applied to other unreasonable and onerous strategies, it will have to come from the interpretation of the statute as a whole, rather than from any specific provision of it.

WE ARE NOT IN KANSAS, ANYMORE

The Fourth DCA, reviewing the extensive rewrite of section 57.105, concluded, "Hence most of the old interpretations of the statute as it was drafted before 1999 are no longer authoritative." *Forum v. Boca Burger, Inc.*, 788 So.2d 1055,1061 (Fla. 4th DCA 2001).

In *Boca Berger*, the complaint was met with a motion to dismiss. An afternoon hearing was set on the motion. In the interim, plaintiff hired

additional counsel who amended the complaint and served it on defendant's counsel the morning of the hearing. The hearing on the motion to dismiss the original complaint nevertheless proceeded.

Florida rules allow a party to amend a pleading once as a matter of course at any time before a responsive pleading is served. Fla.R.Civ.P. 1.190(a). Defense counsel for Boca Berger argued that an opinion of a Michigan federal case interpreting federal rules "suggested" that attempting to amend a complaint while a motion to dismiss is pending is procedurally improper. He also told the trial court that an opinion of the 4th DCA also "suggested" that leave to amend or attempting to amend a complaint at the eleventh hour would cause prejudice to the opposing party and was within the discretion of the trial court to deny. *Id. At 1058.* Neither argument could have been made in good faith, the appellate court said.

The Michigan federal court's interpretation of a federal rule is inapplicable in the face of a clear Florida rule to the contrary. Moreover, the 4th DCA's cited opinion, the court said, "does not even remotely suggest anything to the contrary." *Id. at 1058-59.* The trial court was misled by defense counsel's arguments, it held. The rule of candor within the rules regulating conduct of the bar prohibits counsel from misleading the court as to the rule of law.[4] The conduct of the defense counsel in this case violated that rule, the court decided. The appellant moved for attorney's fees on the appeal. The appellate court concluded that it could not grant that request under the 1986 version of the law. Under the 1999 version, however, the conclusion is different.

The court noted that the old standard for awarding fees was that the court must find a complete absence of a justiciable issue of either law or fact raised by the losing party. That required the court to find that the action is frivolous. *Id. At 1060,* citing *Whitten v. Progressive Casualty Insurance Co.*, 410 So.2 501, 505 (Fla. 1982). The new hurdle is much lower, though.

> No longer does the statute apply only to an entire action; it now applies to any claim or defense. No longer are awards of fees limited to "a complete absence of a justiciable issue of either law or fact raised by the losing party." The operative standard is now that the party and counsel "knew or should have known" that any claim or defense asserted was (a) not supported by the facts or (b) not supported by the application of "then-existing" law."

[4] *See* R.Reg.Fla.Bar 4-3.3(3) "A lawyer shall not knowingly… fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel…."

Boca Berger at 1061.

Under this standard, the court had no trouble granting appellant's motion for 57.105 fees.

> If in the circumstances of this case the rule of candor cannot be unflinchingly enforced under this 21st century version of section 57.105, then this freshly cast legislation is a vessel as empty as its predecessor was.

Id. at 1062.

Boca Burger strongly suggests that the tide has definitely turned in applying section 57.105 to sanction counsel and client. Each smaller amendment of this statute has led to larger proportions of cases in which appellate courts have concluded that application of the statute is appropriate. This, the most significant liberalization of the statute ever, should lead to a far greater increase it the statute's utilization. And, it is useful in probate proceedings.

THE PROBATE CONTEXT

Consider the following hypothetical case: The personal representative of an estate is also its major beneficiary. The decedent, her father, established a significant joint account with the decedent's wife, the personal representative's step-mother. The personal representative sues her step-mother in an attempt to bring the account into the estate with no evidence regarding the account other than the account card, which lists the account in the name of the decedent "or" his spouse.

Prior to 1992, the personal representative had a good chance of success in such a case, at least in some jurisdictions within the state. Some case law held that absent a clear indication to the contrary, opening a bank account in the name of the decedent "or" another person did not create a survivorship account. Accordingly, some further proof of the decedent's intent would be required to prevent the decedent's funds in such an account from being included in the decedent's estate. *See, Merkle v. Cannata*, 642 So.2d 811 (Fla. 2d DCA 1994). However, in 1992 the existing joint bank account statute, section 655.063 Fla. Stat. was repealed. It was replaced by section 655.79 Fla. Stat., which establishes the presumption that all such accounts are survivorship accounts, unless clear and convincing proof is offered to the contrary. Fla. Laws 1992 c. 92-303 sec. 194, eff. July 3, 1992.

In this hypothetical case, the personal representative knows or should know that there is nothing to be gained by suing the widow, but she does so anyway. When the widow successfully defends the action, she would like to have the decedent's estate pay her legal fees.

Her fee recovery is not provided for in the Probate Code. Fees are not available to the widow under section 733.6171, because her attorney is not the personal representative's attorney. Further, the widow is not entitled to have her attorney paid under section 733.106, because the services in defense of the case were not "services to an estate." But, the personal representative probably can be held liable for the widow's fees under section 57.105.

THE SUMMARY JUDGMENT COMPARISON

The language of the statute, even as it was worded before 1999, is similar to the language of Fla.R.Civ.P 1.510 (c) relative to summary judgments. The rule says a party is entitled to summary judgment if the record shows:

> …that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Section 57.105, before 1999, said that attorney's fees shall be awarded where the court finds:

> …that there was a complete absence of a justiciable issue of either law or fact raised by the complaint or defense of the losing party….

Despite the similarity of the language, courts have made it clear that the standard is not the same. *See, e.g., Whitten v. Progressive Cas. Ins. Co.*, 410 So.2d 501 (Fla. 1982). The courts have explained that the case has to be frivolous to justify a fee award, and that is a higher standard than that required for a summary judgment, notwithstanding the similarity of the standards in the wording of the statute and the rule.

> Not every party that prevails in a motion for summary judgment, motion to dismiss for failure to state a cause of action, judgment on the pleadings, evidentiary hearing or trial is automatically entitled to attorney's fees under section 57.105.

Id at 505-506.

That may no longer be the case under the 21st Century version of the statute. Frivolity is no longer the standard under the statute. All that is necessary for an award of attorney fees or a summary judgment are as follows:

Summary Judgment:	**Attorney's Fees:**
That there is no genuine issue as to any material fact, and	The claim is not supported by the material facts necessary to establish the claim or defense; or
That the moving party is entitled to a judgment as a matter of law.	Would not be supported by the application of then-existing law.
Fla.R.Civ.P. 1.510 (c)	Section 57.105 (1) Fla. Stat

Is it possible that the standard for 57.105 fees is now lower than the standard for summary judgments? Consider that:

- the language in the statute and the rule are similar;
- the statute no longer applies only to frivolous cases; and
- the statue uses the disjunctive and the rule the conjunctive.

In its explanation as to why a party entitled to summary judgment might not be entitled to 57.105 fees, the Second DCA explained that at the time a case is filed, the known facts might justify an action that later discovered facts indicate has no merit. *Rojas v. Drake,* 569 So.2d (Fla. 2d DCA 1990). However, once it appears that the case is untenable, continuing a case more than a reasonable time after a party discovers the facts do not support the case may expose the party and his counsel to 57.105 fees.

In all likelihood, the courts would not rule that the standard for 57.105 fees is lower than the standard for summary judgment or judgment on the pleadings. However, it may very well conclude that under the new law, a summary judgment or judgment on the pleadings entitles the movant to fees in the case as a matter of law, if not from its inception, then from some date after which the court determines the party should have given up.

For example, it has been held that filing a lawsuit that is barred by a statute of limitations is not per se frivolous. *Piancone v. Engineering Design, Inc.,* 534 So.2d 896 (Fla 5th DCA 1988). The explanation is that limitations is an affirmative defense. It can be waived by some action of a party. A plaintiff does not know whether it will be raised when the complaint is filed,

so a complaint that may be subject to a limitations defense is not frivolous *at the time the complaint is filed. Id.* The new statute is no longer focused on the date the complaint is filed. Therefore the continuance of an action after the plaintiff knew that the defendant is relying upon a good limitations defense, a fee award is due under the new statute. *See, Home Indemnity, Inc. v. Floyd Beck Trucking, Inc.* 533 So. 2d 317 (Fla. 5th DCA 1988) awarding fees under 57.105 where plaintiff had filed two previous actions against the defendant, the defendant had raised the statute of limitations defense in the second suit and the third suit was filed at a time when no justiciable argument of law or fact could be made to defeat the statute of limitations defense).

CONCLUSION

Over the last couple of decades, the legislature has made it increasingly easier to have attorney fees paid by one's adversary. The evolution of the probate attorney's fees statutes is illustrative. Even today, though, where an attorney brings or defends a case that does not benefit an estate no fees are payable form the estate even where the action determined issues that were important to the estate's administration. In those situations, the Probate Code does not provide for payment of that attorney's fees.

Section 57.105 Florida Statutes, provides a way to seek fees from one's opposing side. The legislature has repeatedly liberalized the statute since its initial enactment. The results can be seen in the appellate decisions. Twice as many cases are found to be worthy of 57.105 fees than was the case after its initial enactment. In 1999 and in 2002, the legislature liberalized the statute again. Its application is no longer restricted to frivolous cases. The number of cases in which we see 57.105 fees awarded should grow exponentially. It is a statute meant to apply to all civil actions, and, it should be equally useful in the probate context. Many more attorney fees will be paid to litigants other than the personal representative under this revised statute. It will also be available to litigants whose attorney's fees would not otherwise be payable from an estate due to a lack of apparent benefit to the estate.