

Senate Bill No. 299

(By Senators Carmichael and M. Hall)

[Introduced January 8, 2014; referred to the
Committee on the Judiciary.]

10 A BILL to amend the Code of West Virginia, 1931, as amended, by
11 adding thereto a new article, designated §55-19-1, §55-19-2,
12 §55-19-3, §55-19-4, §55-19-5, §55-19-6, §55-19-7, §55-19-8,
13 §55-19-9, §55-19-10, §55-19-11 and §55-19-12, all relating to
14 actions and suits; creating a loser-pays civil justice system;
15 providing for recovery of attorney's fees by prevailing party
16 and applicability to causes of action and parties; procedure
17 for recovery of attorney's fees; rebuttable presumption;
18 election by plaintiff and defendant; revocation of election;
19 dismissal or nonsuit of action; award of litigation costs;
20 liability of attorney; and when this article controls over any
21 other law relating to the award of attorney's fees or other
22 costs of litigation in connection with the civil action.

23 *Be it enacted by the Legislature of West Virginia:*

1 That the Code of West Virginia, 1931, as amended, be amended
2 by adding thereto a new article, designated §55-19-1, §55-19-2,
3 §55-19-3, §55-19-4, §55-19-5, §55-19-6, §55-19-7, §55-19-8,
4 §55-19-9, §55-19-10, §55-19-11 and §55-19-12, all to read as
5 follows:

6 **ARTICLE 19. LOSER PAYS.**

7 **§55-19-1. Recovery of attorney's fees by prevailing party;**
8 **applicability to causes of action and parties.**

9 (a) The prevailing party with respect to a claim may recover
10 reasonable attorney's fees from an individual, corporation, or
11 other legal entity if the claim is for:

- 12 (1) Rendered services;
- 13 (2) Performed labor;
- 14 (3) Furnished material;
- 15 (4) Freight or express overcharges;
- 16 (5) Lost or damaged freight or express;
- 17 (6) Killed or injured stock;
- 18 (7) A sworn account; or
- 19 (8) An oral or written contract.

20 (b) The prevailing party with respect to a claim may not
21 recover reasonable attorney's fees from an individual, corporation,
22 or other legal entity if the claim is for:

- 23 (1) Any civil action primarily governed by the family law

1 chapters of this code;

2 (2) A class action;

3 (3) A shareholder's derivative action;

4 (4) An action filed in magistrate court.

5 (5) A civil action in which the amount in controversy,
6 including all requests for damages, reimbursement of attorney's
7 fees, and litigation costs, is less than \$100,000 and the plaintiff
8 has made an election to proceed.

9 (c) This article applies to any party who is a claimant or
10 defendant, including, but not limited to:

11 (1) A county;

12 (2) A municipality;

13 (3) A public school district;

14 (4) A public junior college district;

15 (5) A charitable organization;

16 (6) A nonprofit organization;

17 (7) A hospital district;

18 (8) A hospital authority;

19 (9) Any other political subdivision of the state; and

20 (10) The State of West Virginia.

21 **§55-19-2. Procedure for recovery of attorney's fees.**

22 Attorney's fees may be recovered under this article if:

23 (1) The person seeking to recover attorney's fees is

1 represented by an attorney;

2 (2) The plaintiff presents the claim to the opposing party or
3 to a duly authorized agent of the opposing party; and

4 (3) Payment for the just amount owed is not tendered before
5 the expiration of the thirtieth day after the claim is presented.

6 **§55-19-3. Presumption.**

7 It is presumed that the usual and customary attorney's fees
8 for a claim of the type described in section one of this article
9 are reasonable. The presumption may be rebutted.

10 **§55-19-4. Judicial notice.**

11 The court may take judicial notice of the usual and customary
12 attorney's fees and of the contents of the case file without
13 receiving further evidence in:

14 (1) A proceeding before the court; or

15 (2) A jury case in which the amount of attorney's fees is
16 submitted to the court by agreement.

17 **§55-19-5. Liberal construction.**

18 This article shall be liberally construed to promote its
19 underlying purposes.

20 **§55-19-6. Defendant election.**

21 (a) A defendant may elect to apply the provisions of this
22 article to any civil action in which a plaintiff has asserted a

1 claim against the defendant.

2 (b) An election under this section must identify each
3 plaintiff against whom the election is made.

4 (c) An election may not be made before the sixtieth day after
5 the date the defendant filed an answer to the plaintiff's civil
6 action or within sixty days of the date of trial.

7 (d) The election must be:

8 (1) In writing;

9 (2) Signed by the attorneys of record of the defendant;

10 (3) Filed with the papers as part of the record; and

11 (4) Served on all plaintiffs against whom the election is
12 made.

13 (e) A deadline under this section may be amended or modified
14 by agreement of the parties or by order of the court in a discovery
15 control plan as provided by Rule 26, West Virginia Rules of Civil
16 Procedure.

17 **§55-19-7. Plaintiff election.**

18 (a) Plaintiffs may elect to apply the provisions of this
19 article in a civil action which:

20 (1) The total amount of damages the plaintiff seeks to
21 recover for all claims is not less than \$10,000 and not more than
22 \$100,000; and

23 (2) The plaintiff files and serves a written election.

1 (b) A plaintiff election must be made at the time the electing
2 plaintiff first files a claim in the action.

3 (c) A plaintiff may make an election not later than the
4 sixtieth day after the date the last defendant has filed an answer.

5 (d) An election made by a plaintiff under this section is
6 binding on all parties to the expedited civil action unless a
7 defendant files a claim more than sixty days before trial and in
8 that claim makes a good faith claim that the recovery of monetary
9 damages might be in excess of \$100,000.

10 **§55-19-8. Revocation of election.**

11 (a) An election made under sections six and seven of this
12 article may be revoked wholly or partly by agreement of the
13 parties.

14 (b) A revocation under this section must identify the
15 plaintiffs and defendants for whom the revocation is made. A
16 revocation may be made at any time before an award is made under
17 section ten of this article based on the election. The revocation
18 must be:

19 (1) In writing;

20 (2) Signed by the attorneys of record of all parties to whom
21 the revocation applies; and

22 (3) Filed as part of the record.

23 **§55-19-9. Dismissal or nonsuit of action.**

1 If a plaintiff against whom an election is made by a defendant
2 under section six of this article nonsuits or voluntarily dismisses
3 with prejudice the civil action for which the election is made not
4 later than the fifteenth day after the date the plaintiff was
5 served with the election, the election does not apply to the
6 nonsuited or dismissed civil action.

7 **§55-19-10. Award of litigation costs.**

8 (a) If an election is made under this article, the prevailing
9 party may recover the prevailing party's litigation costs.

10 (b) The determination of which party is the prevailing party
11 is a question of law for the court.

12 (c) Litigation costs under this article are costs directly
13 related to the civil action between the plaintiff and the
14 defendant. Litigation costs include:

15 (1) Reasonable and necessary attorney's fees;

16 (2) Reasonable and necessary travel expenses;

17 (3) Reasonable fees for not more than two testifying expert
18 witnesses; and

19 (4) Court costs.

20 (d) A fee agreement that results in a fee that is fixed or
21 contingent on results obtained or uncertainty of collection before
22 the legal services have been rendered may not be considered in the
23 determination of the amount of reasonable and necessary attorney's

1 fees.

2 **§55-19-11. Liability of attorney.**

3 (a) This section applies to a civil action if:

4 (1) A party is entitled to recover litigation costs under
5 section ten of this article;

6 (2) The election under sections six and seven of this article
7 states that the party making the election will seek litigation
8 costs under section ten; and

9 (3) An attorney of record for the party against whom
10 litigation costs are recoverable has a financial interest in the
11 civil action.

12 (b) If the trier of fact determines that a civil action is an
13 abusive civil action, an attorney of record for the party against
14 whom litigation costs are recoverable is liable to the prevailing
15 party, jointly and severally, for the amount of the litigation
16 costs awarded.

17 (c) The determination of whether an attorney has a financial
18 interest in a civil action is a question of law for the court. An
19 attorney is not an attorney of record for the purposes of this
20 section if the attorney withdraws as attorney of record and
21 relinquishes any financial interest in the civil action more than
22 sixty days before trial.

23 (d) The determination of whether a civil action is an abusive

1 civil action is a question of fact. In a case in which the
2 determination of whether a civil action is an abusive civil action
3 is submitted to a jury, the charge to the jury must ask whether the
4 civil action filed by the plaintiff was an abusive civil action.
5 The following instruction must be included in the charge: "You are
6 instructed that an abusive civil action is a civil action that a
7 reasonable person would conclude is a misuse of the civil justice
8 process."

9 **§55-19-12. Applicability of other law.**

10 If an election is made under sections six or seven of this
11 article, this article controls over any other law to the extent the
12 other law requires, authorizes, prohibits, or otherwise governs the
13 award of attorney's fees or other costs of litigation in connection
14 with the civil action.

NOTE: The purpose of this bill is to create a "loser pays"
civil justice system providing for recovery of attorney's fees by
the prevailing party and its applicability to causes of action and
parties.

This article is new; therefore, strike-throughs and
underscoring have been omitted.