

Senate Bill No. 108

(By Senator Carmichael)

[Introduced January 14, 2015; referred to the Committee on the Judiciary.]

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

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

19 That the Code of West Virginia, 1931, as amended, be amended by adding thereto a new
20 article, designated §55-19-1, §55-19-2, §55-19-3, §55-19-4, §55-19-5, §55-19-6, §55-19-7,
21 §55-19-8, §55-19-9, §55-19-10, §55-19-11 and §55-19-12, all to read as follows:

22 **ARTICLE 19. LOSER PAYS.**

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

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

- 5 (1) Rendered services;
- 6 (2) Performed labor;
- 7 (3) Furnished material;
- 8 (4) Freight or express overcharges;
- 9 (5) Lost or damaged freight or express;
- 10 (6) Killed or injured stock;
- 11 (7) A sworn account; or
- 12 (8) An oral or written contract.

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

- 15 (1) Any civil action primarily governed by the family law chapters of this code;
- 16 (2) A class action;
- 17 (3) A shareholder's derivative action;
- 18 (4) An action filed in magistrate court.
- 19 (5) A civil action in which the amount in controversy, including all requests for damages,
20 reimbursement of attorney's fees, and litigation costs, is less than \$100,000 and the plaintiff has
21 made an election to proceed.

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

1 to:

2 (1) A county;

3 (2) A municipality;

4 (3) A public school district;

5 (4) A public junior college district;

6 (5) A charitable organization;

7 (6) A nonprofit organization;

8 (7) A hospital district;

9 (8) A hospital authority;

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

11 (10) The State of West Virginia.

12 **§55-19-2. Procedure for recovery of attorney's fees.**

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

14 (1) The person seeking to recover attorney's fees is represented by an attorney;

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

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

19 **§55-19-3. Presumption.**

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

22 **§55-19-4. Judicial notice.**

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

3 (1) A proceeding before the court; or

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

5 **§55-19-5. Liberal construction.**

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

7 **§55-19-6. Defendant election.**

8 (a) A defendant may elect to apply the provisions of this article to any civil action in which
9 a plaintiff has asserted a claim against the defendant.

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

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

14 (d) The election must be:

15 (1) In writing;

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

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

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

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

22 **§55-19-7. Plaintiff election.**

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

2 (1) The total amount of damages the plaintiff seeks to recover for all claims is not less than
3 \$10,000 and not more than \$100,000; and

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

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

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

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

12 **§55-19-8. Revocation of election.**

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

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

18 (1) In writing;

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

20 (3) Filed as part of the record.

21 **§55-19-9. Dismissal or nonsuit of action.**

22 If a plaintiff against whom an election is made by a defendant under section six of this article

1 nonsuits or voluntarily dismisses with prejudice the civil action for which the election is made not
2 later than the fifteenth day after the date the plaintiff was served with the election, the election does
3 not apply to the nonsuited or dismissed civil action.

4 **§55-19-10. Award of litigation costs.**

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

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

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

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

11 (2) Reasonable and necessary travel expenses;

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

13 (4) Court costs.

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

17 **§55-19-11. Liability of attorney.**

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

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

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

22 (3) An attorney of record for the party against whom litigation costs are recoverable has a

1 financial interest in the civil action.

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

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

9 (d) The determination of whether a civil action is an abusive civil action is a question of fact.
10 In a case in which the determination of whether a civil action is an abusive civil action is submitted
11 to a jury, the charge to the jury must ask whether the civil action filed by the plaintiff was an abusive
12 civil action. The following instruction must be included in the charge: "You are instructed that an
13 abusive civil action is a civil action that a reasonable person would conclude is a misuse of the civil
14 justice process."

15 **§55-19-12. Applicability of other law.**

16 If an election is made under sections six or seven of this article, this article controls over any
17 other law to the extent the other law requires, authorizes, prohibits, or otherwise governs the award
18 of attorney's fees or other costs of litigation in connection 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.