



**H.B. 58**  
123rd General Assembly  
(As Introduced)

**Reps. Womer Benjamin, Taylor, Tiberi, Terwilleger, Olman, Buchy**

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**BILL SUMMARY**

- Prohibits a court of record from awarding attorney's fees to any party on a claim for declaratory relief under the General Declaratory Judgments (GDJ) Law unless a statutory provision explicitly authorizes a court of record to award attorney's fees on a claim for declaratory relief under the GDJ Law or unless an award of attorney's fees is authorized by the Frivolous Conduct Law, by the Civil Rules, or by an award of punitive or exemplary damages against the party ordered to pay attorney's fees.
- Declares the General Assembly's intent in enacting the attorney's fees award prohibition provisions to supersede the effect of the holding in *Motorists Mut. Ins. Co. v. Brandenburg* (1995), 72 Ohio St.3d 157.

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**CONTENT AND OPERATION**

**Background law**

**Nature of a declaratory judgment action--in general**

Chapter 2721. of the Revised Code contains the General Declaratory Judgments (GDJ) Law (see **COMMENT 1**). Under the GDJ Law, courts of record *generally* are authorized to declare *rights, status, and other legal relations*

whether or not further relief is or could be claimed. The judicial "declaration" may be affirmative or negative in nature and has the effect of a final judgment or decree. (Sec. 2721.02.)

The GDJ Law also authorizes three *specific types* of declaratory judgment actions. First, any person interested under a deed, will, or written contract or any person whose rights, status, or other legal relations are affected by a constitutional provision, statute, rule, municipal ordinance, township resolution, contract, or franchise may commence a declaratory judgment action for the resolution of associated construction or validity issues and to have a declaration of associated rights, status, or other legal relations. Second, a declaratory judgment action is authorized for the construction of a contract either before or after there has been a breach of the contract. Third, any person interested as or through an executor, administrator, trustee, guardian, other fiduciary, creditor, devisee, legatee, heir, next of kin, or cestui que trust in the administration of a trust or certain types of estates may commence a declaratory judgment action to ascertain the members of certain classes of persons, to direct the fiduciaries involved to do or abstain from doing any particular act in their fiduciary capacity, or to determine any question arising in the administration of the estate or trust (e.g., questions of construction of wills and other writings). (Secs. 2721.03, 2721.04, and 2721.05--not in the bill.)

The GDJ Law is statutorily declared to be a *remedial* law and is statutorily required to be liberally construed and administered (sec. 2721.13).

#### **Awards of court costs and attorney's fees**

**Court costs.** In any action or proceeding under the GDJ Law, the court may make an award of *court costs* "as is equitable and just" (sec. 2721.11).

**Attorney's fees.** The GDJ Law does not expressly authorize a court of record to award reasonable attorney's fees to a prevailing party in a declaratory judgment action under that law. It does provide in section 2721.09 that, "whenever necessary or proper," a court of record may give "further relief based on a declaratory judgment or decree previously granted." The application for that relief must be by "petition" (i.e., a complaint) filed in a court of record with jurisdiction to grant that relief. If the application is sufficient, the court (on reasonable notice) must require any adverse party whose rights have been adjudicated by the declaratory judgment or decree to show cause why the further relief should not be granted.

In *Motorists Mut. Ins. Co. v. Brandenburg* (1995), 72 Ohio St.3d 157, the Ohio Supreme Court construed section 2721.09 and held in syllabus as follows:

A trial court has the authority under R.C. 2721.09 to assess attorney fees based on a declaratory judgment issued by the court. The trial court's determination to grant or deny a request for fees will not be disturbed, absent an abuse of discretion.

See **COMMENT 2** for the Court's rationale for this determination.

### **Changes proposed by the bill**

#### **Codified law**

The bill supersedes the effect of the Supreme Court's holding in *Brandenburg* (see "**Uncodified law**" below) by enacting provisions in the GDJ Law specifically addressing awards of attorney's fees. In new section 2721.16, the bill prohibits a court of record from awarding attorney's fees to any party on a claim for declaratory relief under the GDJ Law unless a statutory provision *explicitly authorizes* a court of record to award attorney's fees on a claim for declaratory relief under the GDJ Law or unless an award of attorney's fees is *authorized* by the Frivolous Conduct Law (see **COMMENT 3**), by the Civil Rules, or by an award of punitive or exemplary damages against the party ordered to pay attorney's fees. References in another statutory provision to an "award of costs or expenses" incurred in connection with an action or proceeding does not authorize an award of attorney's fees for purposes of the bill's provisions. (Sec. 2721.16(A).)

The bill states that its attorney's fees award provisions are remedial in nature and apply in connection with (1) an action or proceeding for declaratory relief under the GDJ Law that is *commenced on or after* the bill's effective date and (2) an action or proceeding for declaratory relief under the GDJ Law that was commenced *prior to* and is *pending on* the bill's effective date in a court of record. The latter "application" provisions apply notwithstanding any statutory provision in existence on the day immediately prior to the bill's effective date (e.g., existing sec. 2721.09), notwithstanding any judicial construction prior to the bill's effective date of a statutory provision of that nature (e.g., *Brandenburg*), notwithstanding the holding in any Ohio court decision that authorized an award of attorney's fees to a party to a civil action or proceeding based on common law grounds rather than a statutory authorization of the General Assembly, regardless of the date upon which a cause of action accrued that pertains to an action or proceeding in which declaratory relief is sought under the GDJ Law, and regardless of who is the plaintiff or the defendant in an action or proceeding of that nature. (Sec. 2721.16(B).) (See also **COMMENT 4**.)

### Uncodified law

The bill states in uncodified law that the General Assembly declares that, in enacting section 2721.16 and in making conforming amendments in other statutes, it is the General Assembly's intent to do all of the following (Section 3):

(1) To supersede the effect of the Supreme Court's holding in *Brandenburg* that the "whenever necessary or proper" and "further relief" language in existing section 2721.09 reflects the General Assembly's conferral of authority upon an Ohio trial court to award "attorney's fees based on a declaratory judgment issued by the court";

(2) To recognize the dissent's accurate construction in *Brandenburg* of the "whenever necessary or proper" and "further relief" language in section 2721.09 (see **COMMENT 5**);

(3) To recognize the holding of the Ohio Supreme Court in *Sorin v. Bd. of Edn.* (1976), 46 Ohio St.2d 177, and its progeny that Ohio follows the "American Rule" under which an award of attorney's fees to a prevailing party in a civil action or proceeding generally must be based on an express authorization of the General Assembly;

(4) To recognize, consistent with the American Rule, that authority to grant an award of attorney's fees in connection with an action or proceeding in which declaratory relief is sought under the GDJ Law must be expressly conferred by the General Assembly upon Ohio courts and has not been so conferred prior to the bill's effective date.

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### **COMMENT**

1. Several Revised Code sections outside the GDJ Law authorize individuals to commence a declaratory judgment action in connection with particular subject matters. One example is section 2907.36, which authorizes a declaratory judgment action by prosecuting attorneys, other "chief legal officers," and certain individuals to obtain a determination of whether particular materials or performances are obscene or harmful to juveniles in violation of the Pornography Law. Another example is section 3709.99, which authorizes specified individuals under certain conditions to commence a declaratory judgment action for a determination of the reasonableness or lawfulness of a board of health "health-, disease-, or nuisance-related" regulation or order that the individuals allegedly have violated. Apparently, unless a statute outside of the GDJ Law prescribes a *distinct* procedure governing an authorized declaratory judgment action or proceeding, the procedure of the GDJ applies to the action or proceeding.

2. In *Brandenburg*, the Supreme Court explained the rationale underlying its syllabus as follows:

In *Vance v. Roedersheimer* (1992), 64 Ohio St.3d 552, 556, . . . this court reaffirmed that in Ohio, an award of attorney fees must be predicated on statutory authorization or upon a finding of conduct which amounts to bad faith. . . .

. . .

Appellants assert that regardless of the specific duties imposed upon an insurer and irrespective of the insurer's conduct, a trial court, as incidental to a declaration of an insurer's obligations to its insured, has the discretion under R.C. 2721.09 to permit a recovery of attorney fees by the insured. We agree with appellants.

R.C. 2721.09 provides in part that:

*"Whenever necessary or proper, further relief based on a declaratory judgment or decree previously granted may be given. (Emphasis added.)"*

It is beyond dispute that questions concerning insurance policies are within the purview of R.C. Chapter 2721. . . . R.C. 2721.09 plainly permits a trial court, following a binding judicial interpretation of an insurance policy based upon a declaratory judgment action, to provide relief which the court deems "necessary or proper."

By its clear terms, the intent of R.C. 2721.09, affording further relief in declaratory judgment actions, is to provide a trial court with the authority to enforce its declaration of right. See, also, R.C. 2721.11 (In any proceeding under the Declaratory Judgment Act a trial court "may make such award of costs as is equitable and just."). Nowhere in R.C. Chapter 2721. is there any provision which narrows the broad authority conferred by R.C. 2721.09. Moreover, R.C. 2721.09 does not place any legal significance on the insurer's conduct nor is the operation of the section conditioned

on which party actually prevails in the underlying action. Rather, the only limitation placed on the trial court is that the relief must be "necessary or proper." Hence, this court should not create a blanket limitation precluding an award of attorney fees based upon conduct of a party and/or who wins or who loses. This is even more apparent given the requirement under R.C. 2721.13 that "[s]ections 2721.01 to 2721.15, inclusive, of the Revised Code are remedial, and shall be liberally construed and administered."

72 Ohio St.3d at 158-160.

3. The Frivolous Conduct Law, section 2323.51, generally authorizes a court, at any time prior to the commencement of the trial in a civil action or within 21 days after the entry of judgment in a civil action or at any time prior to the hearing in an appeal of the type described in the definition of "conduct" in division (A)(1)(b) of that section (quoted below) that is filed by an inmate or within 21 days after the entry of judgment in an appeal of that nature (hereafter, "inmate-filed appeal") to award *court costs, reasonable attorney's fees, and other reasonable expenses* incurred in connection with the civil action or appeal to a party to the civil action or appeal who was adversely affected by frivolous conduct. The award may be assessed against a party, the party's counsel of record, or both. (Sec. 2323.51(B)(1) and (4).)

Section 2323.51(A)(1) defines "conduct" as any of the following:

(a) The filing of a civil action, the assertion of a claim, defense, or other position in connection with a civil action, filing a pleading, motion, or other paper in a civil action, including, but not limited to, a motion or paper filed for discovery purposes, or the taking of any other action in connection with a civil action;

(b) The filing by an inmate of a civil action or appeal against a government entity or employee, the assertion of a claim, defense or other position in connection with a civil action of that nature or the assertion of issues of law in an appeal of that nature, or the taking of any other action in connection with a civil action or appeal of that nature.

Section 2323.51(A)(2) defines "frivolous conduct" as either of the following:

(a) Conduct of an inmate or other party to a civil action, of an inmate who has filed an appeal of the type described in division (A)(1)(b) of this section, [above] or of the inmate's or other party's counsel of record that satisfies any of the following:

(i) It obviously serves merely to harass or maliciously injure another party to the civil action or appeal or is for another improper purpose, including, but not limited to, causing unnecessary delay or a needless increase in the cost of litigation.

(ii) It is not warranted under existing law, cannot be supported by a good faith argument for an extension, modification, or reversal of existing law, or cannot be supported by a good faith argument for the establishment of new law.

(iii) Allegations or other factual contentions have no evidentiary support or, if specifically so identified, are not likely to have evidentiary support after a reasonable opportunity for further investigation or discovery;

(iv) Denials or factual contentions are not warranted by the evidence or, if specifically so identified, are not reasonably based on a lack of information or belief.

(b) An inmate's commencement of a civil action or appeal against a government entity or employee when any of the following applies:

(i) The claim that is the basis of the civil action fails to state a claim or the issues of law that are the basis of the appeal fail to state any issues of law.

(ii) It is clear that the inmate cannot prove material facts in support of the claim that is the basis of the civil action or in support of the issues of law that are the basis of the appeal.

(iii) The claim that is the basis of the civil action is substantially similar to a claim in a previous civil action commenced by the inmate or the issues of law that are the basis of the appeal are substantially similar to issues of law raised in a previous appeal commenced by the inmate, the claim that is the basis of the current civil action or the issues of law that are the basis of the current appeal involve the same parties or arise from the same operative facts as the claim or issues of law in the previous civil action or appeal.

The court may make an award of court costs, reasonable attorney's fees, and other reasonable expenses upon the motion of a party to the civil action or the inmate-filed appeal or on the court's own initiative, but only after the court follows the notice and hearing procedures specified in division (B)(2) of section 2323.51. The amount of an award that represents reasonable attorney's fees cannot exceed, and may be equal to or less than, whichever of the following is applicable: (a) if the party is being represented on a contingent fee basis, an amount that corresponds to reasonable fees that would have been charged for legal services had the party been represented on an hourly fee basis or another basis other than a contingent fee basis, or (b) in all other situations, the attorney's fees that were reasonably incurred by a party. An award of reasonable attorney's fees does not affect or determine the amount of or the manner of computation of attorney's fees as between an attorney and the attorney's client. (Sec. 2323.51(B)(3) and (C).)

Section 2323.51(A)(4) defines "reasonable attorney's fees" or "attorney's fees," when used in relation to a "civil action or appeal against a government entity or employee" (for purposes of section 2323.51, see definition, below) as including both of the following, as applicable:

(a) The approximate amount of the compensation, and the fringe benefits, if any, of the attorney general, an assistant attorney general, or special counsel appointed by the attorney general that has been or will be paid by the state in connection with the legal services that were rendered by the attorney general, assistant attorney general, or special counsel in the civil action or appeal against the government entity or employee, including, but not limited to, a civil action or appeal commenced pro se by an inmate, and that were necessitated by frivolous conduct of an inmate represented by counsel of record, the counsel of record of an inmate, or a pro se inmate.

(b) The approximate amount of the compensation, and the fringe benefits, if any, of a prosecuting attorney or other chief legal officer of a political subdivision, or an assistant to a chief legal officer of those natures, who has been or will be paid by a political subdivision in connection with the legal services that were rendered by the chief legal officer or assistant in the civil action or appeal against the government entity or employee, including, but not limited to, a civil action or appeal commenced pro se by an inmate, and that were necessitated by frivolous conduct of an inmate represented by counsel of record, the counsel of record of an inmate, or a pro se inmate.

Section 2969.21(B)(1) defines "civil action or appeal against a government entity or employee" as any of the following:

(a) A civil action that an inmate commences against the state, a political subdivision, or an employee of the state or a political subdivision in a court of common pleas, court of appeals, county court, or municipal court or in the supreme court;

(b) An appeal of the judgment or order in a civil action of the type described in division (B)(1)(a) of this section that an inmate files in a court of appeals or in the supreme court.

The Frivolous Conduct Law does not affect or limit the application of any provision of the Rules of Civil Procedure, the Rules of Appellate Procedure, or another court rule or section of the Revised Code to the extent that the provision prohibits an award of court costs, attorney's fees, or other expenses incurred in connection with a particular civil action or appeal or authorizes an award of court costs, attorney's fees, or other expenses incurred in connection with a particular civil action or appeal in a specified manner, generally, or subject to limitations. (Sec. 2323.51(D).)

4. The bill amends several Revised Code sections for "technical" purposes, including (a) the updating for consistency purposes of terminology throughout the GDJ Law (e.g., "*actions* and proceedings in which declaratory relief is sought"), (b) the modification of *existing* cross-references to the GDJ Law to reflect the proposed enactment of section 2721.16 (i.e., by the substitution of references to "*Chapter 2721. of the Revised Code*" or "*this chapter*" for existing references to

"sections 2721.01 to 2721.15"), and (c) the addition in the GDJ Law of "internal" cross-references to that law (i.e., by references to "declaratory relief sought *under this chapter*"). (Secs. 2721.01, 2721.02, 2721.06, 2721.07, 2721.08, 2721.10, 2721.11, 2721.12, 2721.13, 2721.14, 2721.15, 2907.36(A), and 3709.99(B).)

5. The bill's uncodified law refers to the "accurate" construction of section 2721.09 in the dissenting opinion of Justice Cook in *Brandenburg* (concurred in by Justice Wright and Chief Justice Moyer). The dissenting opinion reads in part as follows:

R.C. 2721.09 provides, "[w]henever necessary or proper, *further relief* based on a declaratory judgment or decree previously granted may be given. \* \* \*" (Emphasis added.) The "further relief" in this and similar declaratory judgment statutes from other states allows a court to grant consequential or incidental relief such as a money judgment, injunction, specific performance, mandamus, and accounting; relief that is remedial in nature, not punitive. . . . The intent of the statute affording further relief in declaratory judgment actions is to grant the trial court the power to enforce its declaration of right. . . . The benefit of the statute is the judicial economy of implementing the declaration of rights without the necessity of filing a separate action.

The term "further relief" also appears in R.C. 2721.02. It reads in pertinent part: "Courts of record may declare rights, status and other legal relations whether or not *further relief* is or could be claimed." (Emphasis added.) The context in which "further relief" is used in R.C. 2721.02 supports the view that its use in R.C. 2721.09 does not relate to attorney fees.

Moreover, it is difficult to argue that R.C. 2721.09 is statutory authorization for the award of attorney fees where the statute does not use the words "attorney fees"; in no less than sixty-six other sections of the Revised Code that do authorize attorney fees, those specific words appear in the statutory grant. . . .

. . .

This rule of law prohibiting the award of attorney fees in declaratory judgment actions absent bad faith, fraud, or stubbornly litigious behavior has been routinely applied by Ohio courts. The appellate court in *Gen. Acc. Assur. Corp. v. Motorists Mut. Ins. Co.* (1965), 2 Ohio App.2d 234, 235-236 . . . held that "[t]he Declaratory Judgment Act does not provide for recovery of attorney fees and expenses incidental to suit brought under the Act. The Legislature did not intend this relief to be available to the prevailing party. Only court costs may be awarded to the prevailing party by the court \* \* \*." (Emphasis sic.) . . .

Former appellate judge, now federal district court judge Sam H. Bell, in *G.S.T. v. Avon Lake, supra*, at 89 . . . wrote, "[s]ubject to the limitation that the court must first find evidence of bad faith or fraud, or a stubborn propensity to needless litigation on the part of the defendant party, a court in its inherent power under R.C. 2721.09 may assess the opponents reasonable attorney fees and costs against him." Similarly, in *Chace v. Dorcy Internatl., Inc.* (1991), 68 Ohio App.3d 99, 114, . . . the appellate court ruled that "where an insurer resorts to delaying tactics, fails to defend and takes a litigious course of conduct that the insured hardly bargained for, the trial court has the discretion to allow expense, costs and attorney fees," citing *Motorists Mut. Ins. Co. v. Trainor* (1973), 33 Ohio St.2d 41 . . . .

With the parties to this appeal acknowledging that the insurer's challenge to coverage was justifiable, and with courts eschewing R.C. 2721.09 as an independent ground for awarding attorney fees, the awarding of fees in this action is without legal support.

### III

The majority's broad grant of authority for awarding attorney fees is not limited to insurance cases or even the unfair result that seems to have befallen the Brandenburgs. The syllabus of this case does not just extend the law of *Motorists Mut. Ins. Co. v. Trainor*,

*supra*, to allow the recovery of fees in a declaratory judgment action where the insurer, acting in good faith, unsuccessfully challenges the insured's right to coverage. Rather, this case allows recovery of attorney fees in any declaratory judgment action. The only limitation is that a trial court, in its discretion, find that an award of attorney fees is necessary or proper.

With this state of the law, I can foresee creditor/debtor contracts, labor contracts, zoning rights issues, employment rights/contract issues, all being pursued as declaratory judgment actions with the expectation of (1) having the contract construed favorably, (2) applying and receiving the further relief necessary to enforce the declaration of rights, and (3) recovering the proper further relief of attorney fees for having prevailed on the declaration of rights. Any case involving a justiciable controversy as to contracts, rights, or legal status (R.C. 2721.02 and 2721.03) now may support an award of attorney fees . . . .

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72 Ohio St.3d at 161-163.

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## HISTORY

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Introduced	01-20-99	pp. 94-95

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