



H.B. 472
123rd General Assembly
(As Introduced)

**Reps. Krebs, Tiberi, Amstutz, Evans, Hollister, Hood, Netzley, Taylor,
Van Vyven, Williams**

BILL SUMMARY

- Permits a prevailing party in a tort action to apply to the court in which the party prevailed for an award of reasonable attorney's fees, court costs, and other reasonable expenses incurred in the prosecution or defense of the claims for relief or assignments of error upon which that party prevailed.
- Provides the requirements and procedures for the filing of an application for that type of award after the conclusion of the trial or appeal of a tort action.
- Requires the court to conduct a hearing and award the prevailing party's reasonable attorney's fees, court costs, and other reasonable expenses and provides criteria for the court's determination of the amount of reasonable attorney's fees.
- Provides that the bill does not apply to the extent that any Civil or Appellate Rule or other Revised Code section expressly provides that a prevailing party is not entitled to an award, is entitled to an award without having to comply with the bill's procedures or upon complying with another procedure, or is entitled to a specified type of award.
- Applies the bill's provisions to tort actions commenced on or after the bill's effective date.

TABLE OF CONTENTS

Background law	2
Overview of the bill	2
Application for attorney's fees in tort actions.....	3

Filing by prevailing party	3
Contents of application.....	3
Service of application	4
Hearing and award	4
Determination of award.....	4
Criteria for determining amount of attorney's fees	4
Effect of award.....	5
Nonapplicability of the bill.....	5
Definitions	6
Applicability	6

CONTENT AND OPERATION

Background law

Ohio follows the "American Rule" regarding the recovery of attorney's fees in a lawsuit. The basic tenet of the "American Rule" is for each party to pay that party's own attorney's fees. The "English Rule" shifts the burden of paying the prevailing party's attorney's fees to the losing party. Under the "American Rule," the prevailing party in a lawsuit may *not* recover attorney's fees as part of the costs of litigation in the absence of statutory authorization. *Shuey v. Preston* (1961), 172 Ohio St. 413, followed in *Sorin v. Warrensville Heights School District Board of Ed.* (1976), 46 Ohio St.2d 177, *Ohio Edison Co. v. Franklin Paper Co.* (1985), 18 Ohio St.3d 15.

The Revised Code contains at least 90 sections that specifically authorize the award or recovery of attorney's fees by a prevailing party in a lawsuit or as a sanction for frivolous conduct. (See **COMMENT 1.**)

Overview of the bill

The bill establishes a special procedure for a prevailing party in a tort action to apply to the court in which the party prevailed for an award of reasonable attorney's fees, court costs, and other reasonable expenses incurred in the prosecution or defense of the claims for relief or assignments of error upon which that party prevailed. The application must be made after the rendition of the verdict in the trial or the entry of the decision in the appeal. The bill requires the court to award that prevailing party's reasonable attorney's fees, court costs, and other reasonable expenses after a hearing. It specifies the criteria upon which the court must base its determination of the amount of the party's reasonable attorney's fees.

Application for attorney's fees in tort actions

Filing by prevailing party

The bill authorizes a "prevailing party" in a "tort action" (see "Definitions," below) to file an application with the court in which the party prevailed for an award of reasonable attorney's fees, court costs, and other reasonable expenses incurred in the prosecution or defense of the claims for relief or assignments of error upon which that party prevailed. The prevailing party must file the application no later than ten days after the verdict is rendered in the trial or the entry of the decision in the appeal. For good cause shown, the court may extend the time for filing the application. The prevailing party must make the application jointly with the party's counsel of record. (R.C. 2323.53(C).)

Contents of application

The bill requires the prevailing party's application to include all of the following (R.C. 2323.53(C)(1), (2), and (3)):

(1) An itemized list of the *legal services* rendered in the prosecution or defense of the claims for relief or assignments of error upon which the party prevailed, the time expended in rendering the services, and whichever of the following amounts is applicable:

(a) If the prevailing party was represented pursuant to a "contingent fee agreement," (see "Definitions," below) the amount of the reasonable attorney's fees that would have been associated with the services had the prevailing party been represented on an hourly fee basis or another basis *other than* a contingent fee basis;

(b) If the prevailing party was *not* represented pursuant to a contingent fee agreement, the attorney's fees associated with the services;

(2) An itemized list of the *court costs* incurred in connection with the prosecution or defense of the claims for relief or assignments of error upon which the party prevailed;

(3) An itemized list of the *other reasonable expenses* incurred in connection with the prosecution or defense of the claims for relief or assignments of error upon which the party prevailed, together with a statement or receipt in support of each item.

Service of application

The bill requires a prevailing party who files an application for an award of reasonable attorney's fees, court costs, and other reasonable expenses to cause a copy of that application to be served upon each party that is *not* a prevailing party and that is the subject of the application. The prevailing party must cause service to be made in a manner described in Civ. R. 4.3 or 4.6 (see **COMMENT 2** and 3) no later than five business days after the filing of the application. (R.C. 2323.53(D).)

Hearing and award

Under the bill, if a prevailing party files an application for an award of reasonable attorney's fees, court costs, and other reasonable expenses after the conclusion of any trial or appeal of a tort action, the court in which the party prevailed, after holding a hearing as described in the following paragraph, must award to the prevailing party that party's reasonable attorney's fees, court costs, and other reasonable expenses incurred in the prosecution or defense of the claims for relief or assignments of error upon which that party prevailed (R.C. 2323.53(B)).

The bill provides that no later than 20 days after the filing of an application for an award of reasonable attorney's fees, court costs, and other reasonable expenses and after giving notice of the date, time, and location of the hearing to the parties and their counsel of record, the court in which the party prevailed must hold a hearing and render its decision on the application. If two or more prevailing parties have filed an application, the court must determine *separately* the amount of the award of each prevailing party for reasonable attorney's fees, court costs, and other reasonable expenses. (R.C. 2323.53(E).)

Determination of award

Criteria for determining amount of attorney's fees

The bill prohibits the court, in determining the amount of a prevailing party's reasonable attorney's fees, from fixing that amount in excess of whichever of the following amounts is applicable (R.C. 2323.53(E)(1) and (2)):

(1) If the prevailing party was represented pursuant to a contingent fee agreement, an amount that corresponds to reasonable attorney's fees that would have been associated with the legal services rendered in the prosecution or defense of the claims for relief or assignments of error upon which that party prevailed had the prevailing party been represented on an hourly fee basis or another basis *other than* a contingent fee basis;

(2) If the prevailing party was *not* represented pursuant to a contingent fee agreement, the attorney's fees associated with the legal services rendered in the prosecution or defense of the claims for relief or assignments of error upon which that party prevailed.

Effect of award

An award of reasonable attorney's fees and reasonable expenses made in accordance with the bill does not affect or determine the amount of or the manner of computation of attorney's fees and expenses as between an attorney and the attorney's client (R.C. 2323.53(F)).

Nonapplicability of the bill

The bill provides that its provisions *do not apply* to the extent that any provision of the Civil Rules or Appellate Rules or any provision of another section of the Revised Code *expressly* provides any of the following in regard to a prevailing party in a tort action or in an appeal of a final judgment rendered in a tort action (R.C. 2323.53(F)(1), (2), and (3)):

(1) That a prevailing party is *not entitled to an award* of that party's reasonable attorney's fees, court costs, or other reasonable expenses incurred in the prosecution or defense of the claims for relief or assignments of error upon which that party prevailed;

(2) That a prevailing party is entitled to an award of that party's reasonable attorney's fees, court costs, or other reasonable expenses incurred in the prosecution or defense of the claims for relief or assignments of error upon which that party prevailed *without having to comply with the procedures* specified in the bill or upon complying with *another procedure*;

(3) That a prevailing party is entitled to a *specified type of award* of attorney's fees, court costs, and other reasonable expenses incurred in the prosecution or defense of the claims for relief or assignments of error upon which that party prevailed, including, but not limited to, an award subject to a distinct monetary ceiling, an award of court costs only, or an award of court costs and expenses.

Definitions

For purposes of its provisions, the bill defines the following terms (R.C. 2323.53(A)):

(1) "Prevailing party" means both of the following:

(a) A plaintiff or a defendant in whose favor a final judgment is awarded on any claim for relief in a tort action that has *not been settled by agreement* of the parties.

(b) An appellant or an appellee in whose favor a decision is rendered on any assignment of error asserted in an appeal of a final judgment rendered in a tort action that has *not been settled by agreement* of the parties.

(2) "Tort action" means a civil action for damages for injury, death, or loss to person or property, and includes a product liability claim. "Tort action" does *not* include a civil action for a breach of contract or another agreement between persons.

(3) "Contingent fee agreement" means an agreement for the provision of legal services by an attorney under which the compensation of the attorney is contingent, in whole or in part, upon a judgment being rendered in favor of or a settlement being obtained for the client and is either a fixed amount or an amount to be determined by a specified formula, including, but not limited to, a percentage of any judgment rendered in favor of or settlement obtained for the client (R.C. 4705.15--not in the bill but referred to in the bill).

Applicability

The bill states that its provisions apply only to tort actions that are commenced on or after the effective date of the act (Section 2).

COMMENT

1. Following are examples of types of actions or proceedings in which the listed sections of the Revised Code specifically authorize the award or recovery of attorney's fees:

<u>Revised Code section</u>	<u>Description</u>
101.15(E)	Action to enforce the General Assembly Open Meetings Law.
121.22(I)	Action to enforce the Open Meetings Law.
149.43(C)	Mandamus action to compel compliance with the Public Records Law.
163.62	Award to a landowner in an unsuccessful condemnation proceeding instituted by a state agency to acquire real property.

<u>Revised Code section</u>	<u>Description</u>
1310.06(D)	Action by a lessee claiming unconscionability with respect to a consumer lease.
1311.311	Action by a contractor or subcontractor if a public authority fails to make payment for labor and materials for a public improvement.
1322.11(A)	Action by a buyer for certain violations under the Mortgage Broker Registration Law.
1333.93	Action to recover consideration paid for a pyramid sales plan.
1335.11(D)	Action by a sales representative for commissions due from a principal.
1345.09(F)	Action by a consumer for a violation of the Consumer Sales Practices Law.
1345.75(A)	Action by a consumer for loss due to motor vehicle warranty nonconformities.
1707.432(D), (E), and (F)	Plaintiff class action for damages arising from the sale of securities.
1925.02(B)	Counterclaim or cross-claim in small claims court exceeding \$3,000 and found to be without substantial grounds.
2151.421(G)	Action by a person alleging that participation in making a report of suspected child abuse or neglect or in a judicial proceeding based on the report was not in good faith.
2307.51(D)	Civil action for damages for dilation and extraction procedure found to be frivolous conduct.
2307.52(C)	Civil action for damages for terminating a human pregnancy after viability found to be frivolous conduct.
2307.61	Civil action for damages for willful damage to property or for theft offense.
2307.62(B)	Action by an owner or operator of a cable television or cable communications system aggrieved by certain prohibited conduct.
2307.70	Civil action for damages for vandalism, desecration, or ethnic intimidation or an action against a parent for a minor child's act constituting any of those violations.

<u>Revised Code section</u>	<u>Description</u>
2307.81(C)	Action by a producer of perishable agricultural or aquacultural food products for disparagement of such food products.
2323.51	Civil action or appeal found to be frivolous conduct.
2743.48(F)	Action against the state for wrongful imprisonment.
2743.65(A)	Claim for crime victims reparations award.
2923.34(H)	Civil action for a violation of the Engaging in a Pattern of Corrupt Activity Law.
2933.32(D)	Civil action for unlawful body cavity search or strip search.
3105.18(H)	Divorce or legal separation proceedings.
3109.051(K)	Contempt proceeding for failing to comply with or interfering with a court order or decree granting companionship or visitation rights.
3701.244(B)	Civil action for violation of the laws pertaining to informed consent for HIV test, confidentiality of identity information in HIV tests, or procedures for notification of the presence of contagious or infectious disease.
3721.17(I)	Action by or on behalf of a nursing or rest home resident whose patient rights are violated.
3721.24(C)	Action for violation of a prohibition against retaliation for making a report of abuse or neglect of a nursing or rest home resident.
3722.12(D)	Action for violation of the rights of residents of adult care facilities.
4111.10(A)	Action by an employee for an employer's underpayment of wages under the Minimum Wage Law.
4111.17(D)	Action by an employee discriminated against in violation of the Wage Discrimination Law.
4112.021(D)	Action by a person aggrieved by an unlawful discriminatory practice in credit transactions.
4112.05(G) and 4112.051(D)	Complaint filed with the Civil Rights Commission or civil action filed in court alleging unlawful discriminatory practice in

<u>Revised Code section</u>	<u>Description</u>
	housing or housing finance.
4719.15	Action by a purchaser for an unlawful or deceptive telephone solicitation sales practice.
5321.02(B)	Action by a tenant for retaliatory action taken by a landlord for the tenant's reporting of certain violations by the landlord.

2. Civil Rule 4.3(B) provides the following methods of service of process *outside Ohio* upon a person who, at the time of service of process, is a nonresident of Ohio or is an Ohio resident who is absent from Ohio:

(1) *Service by certified or express mail.*
 Evidenced by return receipt signed by any person, service of any process shall be by certified or express mail unless otherwise permitted by these rules. The clerk shall place a copy of the process and complaint or other document to be served in an envelope. The clerk shall address the envelope to the person to be served at the address set forth in the caption or at the address set forth in written instructions furnished to the clerk with instructions to forward. The clerk shall affix adequate postage and place the sealed envelope in the United States mail as certified or express mail return receipt requested with instructions to the delivering postal employee to show to whom delivered, date of delivery, and address where delivered.

The clerk shall forthwith enter the fact of mailing on the appearance docket and make a similar entry when the return receipt is received. If the envelope is returned with an endorsement showing failure of delivery, the clerk shall forthwith notify, by mail, the attorney of record or, if there is no attorney of record, the party at whose instance process was issued and enter the fact of notification on the appearance docket. The clerk shall file the return receipt or returned envelope in the records of the action. If the envelope is returned with an endorsement showing failure of delivery, service is

complete when the attorney or serving party, after notification by the clerk, files with the clerk an affidavit setting forth facts indicating the reasonable diligence utilized to ascertain the whereabouts of the party to be served.

All postage shall be charged to costs. If the parties to be served by certified or express mail are numerous and the clerk determines there is insufficient security for costs, the clerk may require the party requesting service to advance an amount estimated by the clerk to be sufficient to pay the postage.

(2) *Personal service.* When ordered by the court, a "person" as defined in division (A) of this rule may be personally served with a copy of the process and complaint or other document to be served. Service under this division may be made by any person not less than eighteen years of age who is not a party and who has been designated by order of the court. On request, the clerk shall deliver the summons to the plaintiff for transmission to the person who will make the service.

Civil Rule 4.6 provides in relevant part as follows:

(A) *Limits of effective service.* All process may be served anywhere in this state and, when authorized by law or these rules, may be served outside this state.

....

(C) *Service refused.* If service of process is refused, and the certified or express mail envelope is returned with an endorsement showing such refusal, or the return of the person serving process states that service of process has been refused, the clerk shall forthwith notify, by mail, the attorney of record or, if there is no attorney of record, the party at whose instance process was issued. If the attorney, or serving party, after notification by the clerk, files with the clerk a written request for ordinary mail service, the clerk shall send by ordinary mail a copy of the summons and complaint or other document to be served to the defendant at the address set forth in the

caption, or at the address set forth in written instructions furnished to the clerk. The mailing shall be evidenced by a certificate of mailing which shall be completed and filed by the clerk. Answer day shall be twenty-eight days after the date of mailing as evidenced by the certificate of mailing. The clerk shall endorse this answer date upon the summons which is sent by ordinary mail. Service shall be deemed complete when the fact of mailing is entered of record. Failure to claim certified or express mail service is not refusal of service within the meaning of division (C) of this rule.

(D) *Service unclaimed.* If a certified or express mail envelope is returned with an endorsement showing that the envelope was unclaimed, the clerk shall forthwith notify, by mail, the attorney of record or, if there is no attorney of record, the party at whose instance process was issued. If the attorney, or serving party, after notification by the clerk, files with the clerk a written request for ordinary mail service, the clerk shall send by ordinary mail a copy of the summons and complaint or other document to be served to the defendant at the address set forth in the caption, or at the address set forth in written instructions furnished to the clerk. The mailing shall be evidenced by a certificate of mailing which shall be completed and filed by the clerk. Answer day shall be twenty-eight days after the date of mailing as evidenced by the certificate of mailing. The clerk shall endorse this answer date upon the summons which is sent by ordinary mail. Service shall be deemed complete when the fact of mailing is entered of record, provided that the ordinary mail envelope is not returned by the postal authorities with an endorsement showing failure of delivery. If the ordinary mail envelope is returned undelivered, the clerk shall forthwith notify the attorney, or serving party, by mail.

(E) *Duty of attorney of record or serving party.* The attorney of record or the serving party shall be responsible for determining if service has been made and shall timely file written instructions with the clerk

regarding completion of service notwithstanding the provisions in Civ.R. 4.1 through 4.6 which instruct a clerk to notify the attorney of record or the serving party of failure of service of process.

3. It appears that the bill's references to the methods of service of process also should include Civ. R. 4.1 which provides the methods of service of process *within Ohio*. Civ. R. 4.1 provides as follows:

All methods of service within this state, except service by publication as provided in Civ. R. 4.4(A), are described in this rule. Methods of out-of-state service and for service in a foreign country are described in Civ. R. 4.3 and 4.5.

(A) *Service by certified or express mail.* Evidenced by return receipt signed by any person, service of any process shall be by certified or express mail unless otherwise permitted by these rules. The clerk shall place a copy of the process and complaint or other document to be served in an envelope. The clerk shall address the envelope to the person to be served at the address set forth in the caption or at the address set forth in written instructions furnished to the clerk with instructions to forward. The clerk shall affix adequate postage and place the sealed envelope in the United States mail as certified or express mail return receipt requested with instructions to the delivering postal employee to show to whom delivered, date of delivery, and address where delivered.

The clerk shall forthwith enter the fact of mailing on the appearance docket and make a similar entry when the return receipt is received. If the envelope is returned with an endorsement showing failure of delivery, the clerk shall forthwith notify, by mail, the attorney of record or, if there is no attorney of record, the party at whose instance process was issued and enter the fact of notification on the appearance docket. The clerk shall file the return receipt or returned envelope in the records of the action.

All postage shall be charged to costs. If the parties to be served by certified or express mail are numerous and the clerk determines there is insufficient security for costs, the clerk may require the party requesting service to advance an amount estimated by the clerk to be sufficient to pay the postage.

(B) *Personal service.* When the plaintiff files a written request with the clerk for personal service, service of process shall be made by that method.

When process issued from the Supreme Court, a court of appeals, a court of common pleas, or a county court is to be served personally, the clerk of the court shall deliver the process and sufficient copies of the process and complaint, or other document to be served, to the sheriff of the county in which the party to be served resides or may be found. When process issues from the municipal court, delivery shall be to the bailiff of the court for service on all defendants who reside or may be found within the county or counties in which that court has territorial jurisdiction and to the sheriff of any other county in this state for service upon a defendant who resides in or may be found in that other county. In the alternative, process issuing from any of these courts may be delivered by the clerk to any person not less than eighteen years of age, who is not a party and who has been designated by order of the court to make service of process. The person serving process shall locate the person to be served and shall tender a copy of the process and accompanying documents to the person to be served. When the copy of the process has been served, the person serving process shall endorse that fact on the process and return it to the clerk, who shall make the appropriate entry on the appearance docket.

When the person serving process is unable to serve a copy of the process within twenty-eight days, the person shall endorse that fact and the reasons therefor on the process and return the process and copies to the clerk who shall make the appropriate entry on the appearance docket. In the event of failure

of service, the clerk shall follow the notification procedure set forth in division (A) of this rule. Failure to make service within the twenty-eight day period and failure to make proof of service do not affect the validity of the service.

(C) *Residence service.* When the plaintiff files a written request with the clerk for residence service, service of process shall be made by that method.

Residence service shall be effected by leaving a copy of the process and the complaint, or other document to be served, at the usual place of residence of the person to be served with some person of suitable age and discretion then residing therein. The clerk of the court shall issue the process, and the process server shall return it, in the same manner as prescribed in division (B) of this rule. When the person serving process is unable to serve a copy of the process within twenty-eight days, the person shall endorse that fact and the reasons therefor on the process, and return the process and copies to the clerk, who shall make the appropriate entry on the appearance docket. In the event of failure of service, the clerk shall follow the notification procedure set forth in division (A) of this rule. Failure to make service within the twenty-eight-day period and failure to make proof of service do not affect the validity of service.

HISTORY

ACTION	DATE	JOURNAL ENTRY
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