

ATTORNEY FEES IN NON-JUSTICIABLE CASES

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Contents

I.	Introduction.....	1
II.	Trial Court Review and Findings of Fact.....	1
III.	Effect of Dispositive Motion Rulings.....	2
IV.	“Complete Absence of a Justiciable Issue”.....	3
V.	“Good Faith Argument” Exception.....	7
VI.	“Prevailing Party”.....	7
VII.	Appellate Review Standard.....	7
VIII.	No Fees for Appellate Work.....	7
IX.	Fees Only Against Parties.....	8
X.	Fees after Rule 41 Dismissal.....	8
XI.	No Fees on Rule 60(b) Advisory Opinion.....	8
XII.	Not Applicable to Arbitration.....	8
	Appendix.....	9

- I. Introduction.** The long-standing rule in North Carolina is that, unless a statute provides otherwise, the parties to litigation are responsible for their own attorney fees. *Hicks v. Albertson*, 284 N.C. 236, 238 (1973); *Stevenson v. Bartlett*, 177 N.C. App. 239, 244–45 (2006) (quoting *City of Charlotte v. McNeely*, 281 N.C. 684, 691 (1972)) (Attorney fees “in this State are entirely creatures of legislation, and without this they do not exist.”). G.S. 6-21.5 permits a court to award fees to a prevailing party where the claimant pursued a claim the law does not recognize or for which the courts cannot provide redress. The statute provides,

In any civil action, special proceeding, or estate or trust proceeding, the court, upon motion of the prevailing party, may award a reasonable attorney’s fee to the prevailing party if the court finds that there was a complete absence of a justiciable issue of either law or fact raised by the losing party in any pleading.

G.S. 6-21.5 (see Appendix for full text of statute). The legislative purpose behind the statute is “to discourage frivolous legal action.” *Persis Nova Constr., Inc. v. Edwards*, 195 N.C. App. 55, 66 (2009) (quoting *Short v. Bryant*, 97 N.C. App. 327, 329 (1990)). “Frivolous action in a lawsuit can occur at any stage of the proceeding and whenever it occurs is subject to the legislative ban.” *Bryant*, 97 N.C. App. at 329. This paper discusses this statute, its interactions with procedural rules, and the key cases interpreting it.

II. Trial Court Review and Findings of Fact.

- A. Review.** The trial court must conduct a “review of all relevant pleadings and documents” in determining whether fees are appropriate. *Lincoln v. Bueche*, 166 N.C. App. 150, 153 (2004); *Barris v. Town of Long Beach*, 208 N.C. App. 718, 722 (2010); see, e.g., *Hexion Specialty Chems., Inc. v. Oak-Bark Corp.*, 2012 WL 2458638, *9 (E.D.N.C. 2012) (unpublished) (court reviewed entire record in examining whether fees were appropriate under G.S. 6-21.5).

The trial court's review is to determine if either:

- The pleadings contain a complete absence of a justiciable issue of either law or fact; or
- The losing party "persisted in litigating the case after a point where he should reasonably have become aware that the pleading he filed no longer contained a justiciable issue." *Sunamerica Fin. Corp. v. Bonham*, 328 N.C. 254, 258 (1991); *Wayne Street Mobile Home Park, LLC v. North Brunswick Sanitary Dist.*, __N.C. App.__, 713 S.E.2d 748, 753–54 (2011).

- B. Findings of Fact Required When Fees are Granted.** "The court shall make findings of fact and conclusions of law to support its award of attorney's fees under this section." G.S. 6-21.5; see also *Brooks v. Giesey*, 334 N.C. 303, 311–313 (1993) (examining the trial court's findings and conclusions in affirming the award of attorney fees).

III. Effect of Dispositive Motion Rulings.

- A. Dismissal.** A dismissal or dispositive judgment does not equal nonjusticiability, but it may be *evidence* of nonjusticiability.

1. The Statute:

"The...granting of any preliminary motion, such as a motion for judgment on the pleadings pursuant to G.S. 1A-1, Rule 12, a motion to dismiss pursuant to G.S. 1A-1, Rule 12(b)(6), a motion for a directed verdict pursuant to G.S. 1A-1, Rule 50, or a motion for summary judgment pursuant to G.S. 1A-1, Rule 56, is not in itself a sufficient reason for the court to award attorney's fees, but may be evidence to support the court's decision to make such an award." G.S. 6-21.5.

2. Cases:

- a. Summary Judgment.** Where a plaintiff lost on a summary judgment (Rule 56) motion, but had prevailed on an earlier motion for judgment on the pleadings (Rule 12(c)) as to the same claim, the trial court did not abuse its discretion in denying fees to defendant under G.S. 6-21.5. *Runnels v. Robinson*, __ N.C. App. __, 711 S.E.2d 486, 491–92 (2011); see also, e.g., *Meineke Car Care Centers, Inc. v. RLB Holdings, LLC*, 2010 WL 1049418, *1–2 (W.D.N.C. 2010) (unpublished) (quoting G.S. 6-21.5) (even though summary judgment was granted, the Court "fail[ed] to find that the...claim represented a 'complete absence of a justiciable issue'").
- b. Directed Verdict.** Where a plaintiff lost at the directed verdict (Rule 50) stage, but had survived an earlier summary judgment (Rule 56) motion as to the same claims, it was proper under the facts of that case for the court to deny the defendant's motion for attorney fees. *Free Spirit Aviation, Inc. v. Rutherford Airport Auth.*, 206 N.C. App. 192, 200–201 (2010).

- B. Surviving Motion to Dismiss.** Surviving a motion to dismiss for failure to state a claim (Rule 12(b)(6)) does not necessarily mean a claim is justiciable. *Winston-Salem Wrecker Assoc., Inc. v. Barker*, 148 N.C. App. 114, 119–21 (2001); see also *Free Spirit*, 206 N.C. App. at 199 (court may still later determine whether

“the actual facts, as opposed to the allegations, are not sufficient to raise a justiciable issue”); *cf.* *Sunamerica Fin. Corp. v. Bonham*, 328 N.C. 254, 258–59 (1991) (explaining that a complaint may be justiciable on its face, but when read in conjunction with a responsive pleading, is clearly no longer justiciable).

IV. “Complete Absence of a Justiciable Issue.”

A. In General. A “justiciable issue” is one that is “real and present as opposed to imagined or fanciful.” *Sunamerica*, 328 N.C. at 257 (internal quotation omitted).

A “complete absence of a justiciable issue” suggests that it must conclusively appear that such issues are absent even giving the losing party’s pleadings the indulgent treatment which they receive on motions for summary judgment and to dismiss.” *Sprouse v. North River Ins. Co.*, 81 N.C. App. 311, 326 (1986); *K&K Dev. Corp. v. Columbia Banking Fed. Sav. & Loan*, 96 N.C. App. 474, 479 (1989).

B. Cases.

1. Matter Non-Justiciable (fee award proper).

- *Sunamerica Fin. Corp. v. Bonham*, 328 N.C. 254, 258–60 (1991). Affirming attorney fees where the complaint adequately pled the existence of a debt between the parties, but the answer raised the statute of limitations defense, at which time it “should have become apparent to plaintiff that, barring circumstances permitting the statute of limitations to be tolled, the complaint no longer contained a justiciable issue.” The plaintiff had “a continuing duty to review the appropriateness of persisting in litigating a claim which was alleged to be time-barred.” The complaint was filed over four years after expiration of the statute of limitations, yet the plaintiff “forged on frivolously attempting to create a controversy.”
- *Wayne Street Mobile Home Park, LLC v. North Brunswick Sanitary Dist.*, ___ N.C. App. ___, 713 S.E.2d 748, 749–54 (2011). A mobile home park challenged a 10% late fee issued by a local sanitation district, alleging that the district was a “public utility” not permitted by statute to charge a fee of greater than 1%. The trial court dismissed the complaint and ordered plaintiff to pay attorney fees under G.S. 6-21.5. The court of appeals analyzed a 1950 supreme court decision declaring that sanitary districts are not “public utilities” and concluded that the case remains binding and controlling; thus the plaintiff’s complaint “did not present a justiciable issue.”
- *Credigy Receivables, Inc. v. Whittington*, 202 N.C. App. 646, 648–52; 655–59 (2010). Affirming an award of fees against a debt purchaser that purchased a default judgment on a delinquent credit card debt. In its efforts to locate the debtor, debt purchaser eventually located defendant and began the process of collection. Defendant, whose identity had been stolen and who was not the true debtor, procured counsel and disputed the debt. After several months of communications, the defendant and debt purchaser

eventually agreed that the defendant was not the true debtor and that default judgment should be set aside. Debt purchaser, however, would not withdraw its collection efforts until the defendant agreed to withdraw her motion for attorney fees. At the hearing, the trial court awarded her attorney fees for all efforts taken to contest the collection. The court of appeals stated that debt purchaser stood in the shoes of the original creditor, and as a matter of the law of assignment had no justiciable claim against defendant.

- *Winston-Salem Wrecker Assoc., Inc. v. Barker*, 148 N.C. App. 114, 119–21 (2001). Affirming the trial court's determination that a case was non-justiciable where a wrecker service brought claims against a sheriff on the eve of the sheriff's election primary. The sheriff asserted "insurmountable" defenses including sovereign immunity, which "foreclosed any reasonable expectation of an affirmative recovery," yet the plaintiff "persisted in pursuing the litigation by propounding discovery and seeking admissions." Further, the plaintiff did not present a good faith argument for the extension of law where it was clear the motive for the suit was a bad faith effort to affect the primary election.
- *Barnes v. Ford Motor Co.*, 95 N.C. App. 367, 373–74 (1989). Reversing the trial court's denial of attorney fees where a lessee sought punitive damages in its breach of lease action against lessor. The court of appeals stated that, "the law is well settled in North Carolina that punitive damages in contract may not be recovered except [in very limited circumstances]." Thus, the lessor's motion for attorney fees "connected with its preparation to defend against the punitive damages claim should have been granted and we remand for judgment accordingly."
- *In re Williamson*, 91 N.C. App. 668, 683–84 (1988). In an action to establish defendant's non-paternity of a child, plaintiffs' bare allegations that defendant and the child's mother were married only a short time before the child's birth, and that the child did not look like defendant, were not sufficient to create a "justiciable issue of law or fact" when coupled with the fact that plaintiffs "consistently identified [defendant] as [the child's] father" in prior, related court proceedings. The trial court thus properly awarded attorney fees to defendant for his defense against the non-paternity suit.
- *Sprouse v. North River Ins. Co.*, 81 N.C. App. 311, 326 (1986). Affirming trial court's conclusion that there was a complete absence of a justiciable issue in a case against a trustee in a foreclosure sale. The complaint sought to compel the trustee to take an action he was not legally able to perform and otherwise stated causes of action totally unsupported by North Carolina law. The court stated that these were "all matters of which defendant

[an insurance company] should have been aware,” and that a “trustee should not...be required to expend his or her own resources defending against meritless claims and delaying tactics.” Thus “[t]he award of attorney fees was entirely proper.”

2. Matter Not Non-Justiciable (no fee award).

- *Investors Title Ins. Co. v. Herzig*, 330 N.C. 681, 695 (1992). Rejecting an argument for attorney fees in an unfair trade practices action stating, “[s]ince both parties were able to sustain and prevail on several different issues through the various stages of this case, one cannot reasonably say that there was a complete lack of a justiciable issue as to either party.”
- *Bryson v. Sullivan*, 330 N.C. 644, 664–65 (1992). Affirming the trial court’s denial of a fee award where the defendants raised defenses that rendered the plaintiff’s complaint nonjusticiable. The plaintiffs dismissed their complaint seven weeks later, but before the summary judgment hearing. The supreme court determined that there was no evidence that the plaintiffs took any steps to further the litigation during those intervening weeks, thus they did not “persist in litigating the case,” and an award of attorney fees under 6-21.5 was not authorized.
- *Runnels v. Robinson*, __ N.C. App. __, 711 S.E.2d 486, 491–92 (2011) (internal quotation omitted). Trial court did not abuse its discretion in denying attorney fees to the defendants who were granted summary judgment in March 2010 on the basis of their defense of release. In June 2009, their motion for judgment on the pleadings as to the defense of release had been denied. Thus, the court held that the trial court “necessarily did not find plaintiff’s claims to lack merit” and the plaintiff did not “persist[] in litigating the case after a point where [she] should reasonably have become aware the pleading [she] filed no longer contained a justiciable issue.”
- *Free Spirit Aviation v. Rutherford Airport Auth.*, 206 N.C. App. 192, 200–201 (2010) (internal quotation omitted). Where the plaintiff’s claims were defeated on a directed verdict motion, but the same claims had survived a motion for summary judgment before the trial court and in an earlier appeal, the trial court properly denied the defendants’ motion for attorney fees as to those claims. The court stated that, “we do not see how it can be said that there was a complete absence of a justiciable issue in the case given the order denying summary judgment.” (The court then noted that this is a fact-specific analysis and does “not address whether fees are always precluded after a denial of summary judgment[.]”)
- *Egelhof v. Szulik*, 193 N.C. App. 612, 621–22 (2008). Trial court dismissed a shareholder derivative complaint because it failed to

allege a particular element required by Delaware law. The defendants' motion for attorney fees pursuant to G.S. 6-21.5 was denied. The court of appeals affirmed, pointing out that the trial court's order specifically noted that the relevant point of Delaware law is "fraught with difficulty and not susceptible to bright line tests," "always fact specific and contextual," and "done on a case-by-case basis."

- *Willow Bend Homeowners Assoc., Inc. v. Robinson*, 192 N.C. App. 405, 417 (2008). Affirming the denial of fees to a homeowners' association that prevailed on its suit to recover an unpaid assessment, holding that the defendants "raised an appropriate challenge" to the restrictive covenants and "made a good faith argument" regarding the covenants' invalidity.
- *Lincoln v. Bueche*, 166 N.C. App. 150, 153–56 (2004). The trial court erred in finding that plaintiff's implied warranty of habitability claim was non-justiciable where both the pleadings and materials produced in discovery revealed allegations and facts that might have supported the claim.
- *Brittain v. Cinnoca*, 111 N.C. App. 656, 661–62 (1993). Affirming the trial court's denial of an attorney fee award against malpractice defendant whose case was dismissed as being barred by the statute of limitations. The court agreed that the plaintiffs "advanced their claim in good faith for an extension or modification of the existing law" by arguing that the limitation period should not have begun until the plaintiff discovered or should have discovered that he was injured as a result of defendant's wrongdoing.
- *K & K Dev. Corp. v. Columbia Banking Fed. Sav. and Loan Assoc.*, 96 N.C. App. 474, 478–79 (1989). Subdivision developer filed action against lienholders for expenditures made to bring property into compliance with protective covenants. Developer later attempted to enforce the lien on the property as superior to the liens of the holders of deeds of trust. The trial court granted summary judgment for the trustees and ordered the plaintiff to pay attorney fees pursuant to G.S. 6-21.5. The court of appeals affirmed summary judgment but reversed the award of attorney fees, holding that the plaintiff's legal argument was a "good faith, albeit unsuccessful, attempt to extend North Carolina law as it applies to the enforcement of covenants and conditions."
- *Harris v. Harris*, 93 N.C. App. 67, 71 (1989). Former wife brought action for the remaining \$15,000 of a total distributive award of \$400,000. The trial court entered summary judgment for the husband on grounds that he was entitled to the \$15,000 as a tax-related credit and awarded husband's attorney fees. The court of appeals reversed the fee award, finding that "it is clear that

plaintiff's complaint contained allegations which raised the existence of a justiciable issue as to her entitlement to [an award]."

- *Bryant v. Short*, 84 N.C. App. 285, 288 (1987). Affirming an award of attorney fees where a review of the complaint revealed no justiciable issue. Also noting, however, that the trial court also based the fee on the fact that plaintiff had "demonstrated...a propensity for personal attacks against opposing parties," and admonishing that because the "personal attacks" were unrelated to the issue of justiciability, this basis would not by itself have supported such a fee.

V. "Good Faith Argument" Exception. G.S. 6-21.5 provides that, "A party who advances a claim or defense supported by a good faith argument for an extension, modification, or reversal of law may not be required under this section to pay attorney's fees." See *Willow Bend*, 192 N.C. App. at 417; *Winston-Salem Wrecker*, 148 N.C. App. at 119–21; *Brittain*, 111 N.C. App. at 661–62; *K & K Dev. Corp.*, 96 N.C. App. at 478–79.

VI. "Prevailing Party." Attorney fees under G.S. 6-21.5 are awardable only to a "prevailing party." A prevailing party "is a party who prevails on a claim or issue in an action, not a party who prevails *in the action*." *Persis Nova Constr. Inc.*, 195 N.C. App. 55,66–67 (2009) ("[B]y the plain language of the statute, attorney's fees may be awarded against more than one party in an action.").

There may be more than one prevailing party in an action. *Free Spirit Aviation, Inc. v. Rutherford Airport Auth.*, 206 N.C. App. 192, 203–204 (2010) (remanding where trial court "mistakenly believed that it was required to designate either plaintiffs or defendants as the prevailing party, and that it was not possible for both to be prevailing parties.")

VII. Appellate Review Standard. A determination of whether a justiciable issue has been presented is reviewed de novo. *Free Spirit*, 206 N.C. App. at 197 ("The presence or absence of justiciable issues in pleadings is...a question of law that this Court reviews de novo."); *K&K Dev. Corp.*, 96 N.C. App. at 479.

A decision to award or deny fees is reviewed for abuse of discretion. *Wayne Street Mobile Home Park, LLC v. North Brunswick Sanitary Dist.*, ___ N.C. App. ___, 713 S.E.2d 748, 753–54 (2011) (quoting *Persis Nova Constr., Inc. v. Edwards*, 195 N.C. App. 55, 67 (2009) ("The decision to award or deny attorney's fees under Section 6– 21.5 is a matter left to the sound discretion of the trial court.")).

VIII. No Fees for Appellate Work. Upon remand from appeal, the trial court awarded attorney fees to defendants pursuant to G.S. 6-21.5 for expenses incurred at the appellate level. The court of appeals reversed, holding that fees "incurred after plaintiff's filing of notice of appeal and due directly to his appeal to this Court and petition to our Supreme Court" were not recoverable under this statute. *Hill v. Hill*, 173 N.C. App. 309, 318 (2005).

- IX. Fees Only Against Parties.** The trial court has no authority to require an attorney to pay attorney fees to the prevailing party. Only a party to the action may be required to pay the fee. *Bryson v. Sullivan*, 330 N.C. 644, 665–66 (1992).
- X. Fees after Rule 41 Dismissal.** After a claim is dismissed pursuant to Rule 41(a), the court retains jurisdiction to award fees under this statute:
- Th[e] broad limitation on the trial court’s power to enter orders after a voluntary dismissal does not extend so far...as to bar the trial court from awarding attorney fees pursuant to...G.S. 6-21.5 where the plaintiff’s now dismissed action was frivolously filed or maintained in the absence of a justiciable issue.
- VSD Communications, Inc. v. Lone Wolf Pub. Grp, Inc.*, 124 N.C. App. 642, 644 (1996).
- XI. No Fees on Rule 60(b) Advisory Opinion.** Where appeal was pending, and trial court issued an advisory opinion as to how it would rule on a Rule 60(b) motion, trial court could not award attorney fees to the party in whose favor it would rule. Because its Rule 60(b) opinion was merely advisory, there was not yet any “prevailing party” on that motion, and thus the trial court was without jurisdiction (“functus officio”) as to the matter of attorney fees. *Morgan v. Nash Cty.*, __ N.C. App. __ , 735 S.E.2d 615, 626 (2012).
- XII. Not Applicable to Arbitration.** Attorney fees under G.S. 6-21.5 are not awardable as a result of expenses incurred in arbitration rather than during litigation in North Carolina’s courts. *Thorneburg Hosiery Co., Inc. v. G.L. Wilson Build. Co.*, 94 N.C. App. 769, 772 (1989).

**Appendix
G.S. 6-21.5**

“In any civil action, special proceeding, or estate or trust proceeding, the court, upon motion of the prevailing party, may award a reasonable attorney's fee to the prevailing party if the court finds that there was a complete absence of a justiciable issue of either law or fact raised by the losing party in any pleading. The filing of a general denial or the granting of any preliminary motion, such as a motion for judgment on the pleadings pursuant to G.S. 1A-1, Rule 12, a motion to dismiss pursuant to G.S. 1A-1, Rule 12(b)(6), a motion for a directed verdict pursuant to G.S. 1A-1, Rule 50, or a motion for summary judgment pursuant to G.S. 1A-1, Rule 56, is not in itself a sufficient reason for the court to award attorney's fees, but may be evidence to support the court's decision to make such an award. A party who advances a claim or defenses supported by a good faith argument for an extension, modification, or reversal of law may not be required under this section to pay attorney's fees. The court shall make findings of fact and conclusions of law to support its award of attorney's fees under this section.”