

1 A bill to be entitled
 2 An act relating to award of attorney's fees; reenacting
 3 and amending s. 57.105, F.S., relating to attorney's fees
 4 and sanctions for raising unsupported claims or defenses;
 5 providing an entitlement to fees and requiring compliance
 6 with filing provisions; providing legislative intent;
 7 providing applicability; providing for retroactive
 8 applicability of a specified amendment; reenacting and
 9 amending s. 768.79, F.S., relating to offer of judgment
 10 and demand for judgment; allowing offers to be made by or
 11 to any party or parties; requiring joint proposals to
 12 state the amount and terms attributable to each party;
 13 providing an exception when a party is alleged to be
 14 solely vicariously, constructively, derivatively, or
 15 technically liable; providing an exception for specified
 16 parties in actions governed by the Florida Small Claims
 17 Rules; providing legislative intent; providing
 18 applicability; providing an effective date.

19
 20 WHEREAS, the legislative power of the state is vested
 21 solely in the Legislature of the State of Florida, and the
 22 Legislature is the only branch of government constitutionally
 23 authorized to confer substantive rights, and

24 WHEREAS, shifting fees to the losing party is in derogation
 25 of the common law American rule that each party in a lawsuit pay
 26 its own attorney's fees, and

27 WHEREAS, the award of attorney's fees is a substantive
 28 right that may be conferred only by the Legislature, and

29 WHEREAS, a substantive right created by the Legislature may
 30 not be abolished by the courts, and

31 WHEREAS, the Legislature enacted chapter 99-225, Laws of
 32 Florida, which amended both section 57.105, Florida Statutes,
 33 and section 768.79, Florida Statutes, and

34 WHEREAS, the Legislature provided the standard for the
 35 award of attorney's fees under section 57.105, Florida Statutes,
 36 which provides that attorney's fees shall be awarded to the
 37 prevailing party in a civil proceeding or action in which the
 38 court finds that the losing party or the losing party's attorney
 39 knew or should have known that a claim or defense, when
 40 initially presented to the court or at any time before trial,
 41 was not supported by the material facts necessary to establish
 42 the claim or defense or would not be supported by the
 43 application of then-existing law to those material facts, and

44 WHEREAS, the standard for the award of attorney's fees
 45 under section 57.105, Florida Statutes, is not whether the claim
 46 or defense was "frivolous," and

47 WHEREAS, the application of a standard other than the
 48 standard adopted by the Legislature for the award of a
 49 substantive right encroaches upon the Legislature's right to
 50 confer substantive rights, and

51 WHEREAS, it is the intent of the Legislature to preserve
 52 and protect the separation of powers clause in Section 3,
 53 Article II of the State Constitution, NOW, THEREFORE,

54

55 Be It Enacted by the Legislature of the State of Florida:

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HB 367

2008

57 Section 1. For the purpose of manifesting the
58 Legislature's intent to confer the substantive right to the
59 award of attorney's fees, section 57.105, Florida Statutes, is
60 reenacted, subsection (4) of that section is amended, and
61 subsection (8) is added to that section, to read:

62 57.105 Attorney's fee; sanctions for raising unsupported
63 claims or defenses; service of motions; damages for delay of
64 litigation.--

65 (1) Upon the court's initiative or motion of any party,
66 the court shall award a reasonable attorney's fee to be paid to
67 the prevailing party in equal amounts by the losing party and
68 the losing party's attorney on any claim or defense at any time
69 during a civil proceeding or action in which the court finds
70 that the losing party or the losing party's attorney knew or
71 should have known that a claim or defense when initially
72 presented to the court or at any time before trial:

73 (a) Was not supported by the material facts necessary to
74 establish the claim or defense; or

75 (b) Would not be supported by the application of then-
76 existing law to those material facts.

77
78 However, the losing party's attorney is not personally
79 responsible if he or she has acted in good faith, based on the
80 representations of his or her client as to the existence of
81 those material facts. If the court awards attorney's fees to a
82 claimant pursuant to this subsection, the court shall also award
83 prejudgment interest.

84 (2) Paragraph (1)(b) does not apply if the court
85 determines that the claim or defense was initially presented to
86 the court as a good faith argument for the extension,
87 modification, or reversal of existing law or the establishment
88 of new law, as it applied to the material facts, with a
89 reasonable expectation of success.

90 (3) At any time in any civil proceeding or action in which
91 the moving party proves by a preponderance of the evidence that
92 any action taken by the opposing party, including, but not
93 limited to, the filing of any pleading or part thereof, the
94 assertion of or response to any discovery demand, the assertion
95 of any claim or defense, or the response to any request by any
96 other party, was taken primarily for the purpose of unreasonable
97 delay, the court shall award damages to the moving party for its
98 reasonable expenses incurred in obtaining the order, which may
99 include attorney's fees, and other loss resulting from the
100 improper delay.

101 (4) A party is entitled to an award of sanctions under
102 this section only if a motion is by a party seeking sanctions
103 under this section must be served by a party seeking sanctions
104 under this section. Such motion shall but may not be filed with
105 or presented to the court unless, within 21 days after service
106 of the motion, the challenged paper, claim, defense, contention,
107 allegation, or denial is not withdrawn or appropriately
108 corrected. Any motion filed with the court that does not comply
109 with this subsection is null and void. This subsection is
110 substantive and may not be waived except in writing. This

111 subsection does not apply to sanctions ordered upon the court's
112 initiative.

113 (5) In administrative proceedings under chapter 120, an
114 administrative law judge shall award a reasonable attorney's fee
115 and damages to be paid to the prevailing party in equal amounts
116 by the losing party and a losing party's attorney or qualified
117 representative in the same manner and upon the same basis as
118 provided in subsections (1)-(4). Such award shall be a final
119 order subject to judicial review pursuant to s. 120.68. If the
120 losing party is an agency as defined in s. 120.52(1), the award
121 to the prevailing party shall be against and paid by the agency.
122 A voluntary dismissal by a nonprevailing party does not divest
123 the administrative law judge of jurisdiction to make the award
124 described in this subsection.

125 (6) The provisions of this section are supplemental to
126 other sanctions or remedies available under law or under court
127 rules.

128 (7) If a contract contains a provision allowing attorney's
129 fees to a party when he or she is required to take any action to
130 enforce the contract, the court may also allow reasonable
131 attorney's fees to the other party when that party prevails in
132 any action, whether as plaintiff or defendant, with respect to
133 the contract. This subsection applies to any contract entered
134 into on or after October 1, 1988.

135 (8) This section creates substantive rights to the award
136 of attorney's fees, and any procedural provisions are directly
137 related to the definition of those rights. Any procedural
138 aspects of this provision are intended to implement the

139 substantive provisions of the law.

140 Section 2. The amendment to subsection (4) of section
 141 57.105, Florida Statutes, made by this act is remedial in nature
 142 and is intended to apply retroactively.

143 Section 3. For the purpose of manifesting the
 144 Legislature's intent to confer the substantive right to the
 145 award of attorney's fees, section 768.79, Florida Statutes, is
 146 reenacted and amended to read:

147 768.79 Offer of judgment and demand for judgment.--

148 (1) In any civil action for damages filed in the courts of
 149 this state, if a defendant files an offer of judgment that ~~which~~
 150 is not accepted by the plaintiff within 30 days, the defendant
 151 shall be entitled to recover reasonable costs and attorney's
 152 fees incurred by her or him or on the defendant's behalf
 153 pursuant to a policy of liability insurance or other contract
 154 from the date of filing of the offer if the judgment is one of
 155 no liability or the judgment obtained by the plaintiff is at
 156 least 25 percent less than such offer, and the court shall set
 157 off such costs and attorney's fees against the award. Where such
 158 costs and attorney's fees total more than the judgment, the
 159 court shall enter judgment for the defendant against the
 160 plaintiff for the amount of the costs and fees, less the amount
 161 of the plaintiff's award. If a plaintiff files a demand for
 162 judgment that ~~which~~ is not accepted by the defendant within 30
 163 days and the plaintiff recovers a judgment in an amount at least
 164 25 percent greater than the offer, she or he shall be entitled
 165 to recover reasonable costs and attorney's fees incurred from
 166 the date of the filing of the demand. If rejected, neither an

167 offer nor demand is admissible in subsequent litigation, except
 168 for pursuing the penalties of this section.

169 (2) The making of an offer of settlement that ~~which~~ is not
 170 accepted does not preclude the making of a subsequent offer. An
 171 offer must:

172 (a) Be in writing and state that it is being made pursuant
 173 to this section.

174 (b) Name the party or parties making it and the party or
 175 parties to whom it is being made.

176 (c) State with particularity the amount offered to settle
 177 a claim for punitive damages, if any.

178 (d) State its total amount.

179

180 The offer shall be construed as including all damages that ~~which~~
 181 may be awarded in a final judgment.

182 (3) A proposal may be made by or to any party or parties
 183 and by or to any combination of parties properly identified in
 184 the proposal. A joint proposal shall state the amount and terms
 185 attributable to each party.

186 (4) Notwithstanding subsection (3), when a party is
 187 alleged to be solely vicariously, constructively, derivatively,
 188 or technically liable, whether by operation of law or by
 189 contract, a joint proposal made by or served on such a party
 190 need not state the amount and terms attributable to each party.
 191 Acceptance by any party shall be without prejudice to rights of
 192 contribution or indemnity.

193 (5) ~~(3)~~ The offer shall be served upon the party to whom it
 194 is made, but it shall not be filed unless it is accepted or

195 unless filing is necessary to enforce the provisions of this
 196 section.

197 (6)~~(4)~~ An offer shall be accepted by filing a written
 198 acceptance with the court within 30 days after service. Upon
 199 filing of both the offer and acceptance, the court has full
 200 jurisdiction to enforce the settlement agreement.

201 (7)~~(5)~~ An offer may be withdrawn in writing that ~~which~~ is
 202 served before the date a written acceptance is filed. Once
 203 withdrawn, an offer is void.

204 (8)~~(6)~~ Upon motion made by the offeror within 30 days
 205 after the entry of judgment or after voluntary or involuntary
 206 dismissal, the court shall determine the following:

207 (a) If a defendant serves an offer that ~~which~~ is not
 208 accepted by the plaintiff, and if the judgment obtained by the
 209 plaintiff is at least 25 percent less than the amount of the
 210 offer, the defendant shall be awarded reasonable costs,
 211 including investigative expenses, and attorney's fees,
 212 calculated in accordance with the guidelines promulgated by the
 213 Supreme Court, incurred from the date the offer was served, and
 214 the court shall set off such costs in attorney's fees against
 215 the award. When such costs and attorney's fees total more than
 216 the amount of the judgment, the court shall enter judgment for
 217 the defendant against the plaintiff for the amount of the costs
 218 and fees, less the amount of the award to the plaintiff.

219 (b) If a plaintiff serves an offer that ~~which~~ is not
 220 accepted by the defendant, and if the judgment obtained by the
 221 plaintiff is at least 25 percent more than the amount of the
 222 offer, the plaintiff shall be awarded reasonable costs,

223 including investigative expenses, and attorney's fees,
 224 calculated in accordance with the guidelines promulgated by the
 225 Supreme Court, incurred from the date the offer was served.

226
 227 For purposes of the determination required by paragraph (a), the
 228 term "judgment obtained" means the amount of the net judgment
 229 entered, plus any postoffer collateral source payments received
 230 or due as of the date of the judgment, plus any postoffer
 231 settlement amounts by which the verdict was reduced. For
 232 purposes of the determination required by paragraph (b), the
 233 term "judgment obtained" means the amount of the net judgment
 234 entered, plus any postoffer settlement amounts by which the
 235 verdict was reduced.

236 (9)~~(7)~~(a) If a party is entitled to costs and fees
 237 pursuant to the provisions of this section, the court may, in
 238 its discretion, determine that an offer was not made in good
 239 faith. In such case, the court may disallow an award of costs
 240 and attorney's fees.

241 (b) When determining the reasonableness of an award of
 242 attorney's fees pursuant to this section, the court shall
 243 consider, along with all other relevant criteria, the following
 244 additional factors:

- 245 1. The then apparent merit or lack of merit in the claim.
- 246 2. The number and nature of offers made by the parties.
- 247 3. The closeness of questions of fact and law at issue.
- 248 4. Whether the person making the offer had unreasonably
 249 refused to furnish information necessary to evaluate the
 250 reasonableness of such offer.

251 5. Whether the suit was in the nature of a test case
 252 presenting questions of far-reaching importance affecting
 253 nonparties.

254 6. The amount of the additional delay cost and expense
 255 that the person making the offer reasonably would be expected to
 256 incur if the litigation should be prolonged.

257 ~~(10)(8)~~ Evidence of an offer is admissible only in
 258 proceedings to enforce an accepted offer or to determine the
 259 imposition of sanctions under this section.

260 (11) This section does not apply to any party not
 261 represented by an attorney in an action governed by the Florida
 262 Small Claims Rules.

263 (12) This section creates substantive rights to the award
 264 of attorney's fees, and any procedural provisions are directly
 265 related to the definition of those rights. Any procedural
 266 aspects of this provision are intended to implement the
 267 substantive provisions of the law.

268 Section 4. It is the intent of this act and the
 269 Legislature to accord the utmost comity and respect to the
 270 constitutional prerogatives of the judiciary of this state, and
 271 nothing in this act should be construed as an effort to impinge
 272 upon those prerogatives. To that end, if any court of competent
 273 jurisdiction enters a final judgment concluding or declaring
 274 that a provision of this act improperly encroaches upon the
 275 authority of the Florida Supreme Court to determine the rules of
 276 practice and procedure in the courts of this state, the
 277 Legislature intends that such provision be construed as a

HB 367

2008

278 | request for rule change pursuant to Section 2, Article V of the
279 | State Constitution and not as a mandatory legislative directive.

280 | Section 5. This act shall take effect July 1, 2008, and
281 | the amendments to section 768.79, Florida Statutes, made by this
282 | act shall apply only to offers made on or after that date.