

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/CS/CS/HB 829 Attorney Fees and Costs

SPONSOR(S): Judiciary Committee, Local, Federal & Veterans Affairs Subcommittee, Civil Justice Subcommittee, Sabatini and others

TIED BILLS: IDEN./SIM. **BILLS:** SB 1140

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	10 Y, 3 N, As CS	Jones	Poche
2) Local, Federal & Veterans Affairs Subcommittee	11 Y, 4 N, As CS	Miller	Miller
3) Judiciary Committee	12 Y, 6 N, As CS	Jones	Poche

SUMMARY ANALYSIS

Local governments have broad authority to legislate on any matter not inconsistent with federal or state law. If the Legislature preempts an area of regulation to the state, local governments are prohibited from exercising authority in that area. If a local government enacts an ordinance on a matter preempted to the state, a person may file a lawsuit asking the court to declare the ordinance void.

Florida law provides that a court may impose sanctions on a party or attorney who raises a frivolous claim or defense or unreasonably delays a judicial proceeding. The court may require the culpable party or attorney to pay for the other party's attorney fees. A party can appeal a court's award or denial of sanctions; however, the appellate court must affirm the award or denial, unless the lower court abused its discretion.

CS/CS/CS/HB 829 entitles a party to attorney fees and costs if the party prevails in an action challenging a local government ordinance as preempted. However, attorney fees and costs may not be awarded if the local government:

- Receives written notice that an ordinance or proposed ordinance is expressly preempted; and
- Within 21 days of receiving the notice, repeals or withdraws the ordinance.

The remedies under the bill are cumulative to other available sanctions or remedies. Ordinances related to growth management are excluded from the bill, except for an ordinance or requirement burdening a business's trademark, trade dress, or similar right under s. 553.79(20), F.S. The bill states it is remedial and applies retroactively to cases pending or commenced on or after July 1, 2019.

The bill does not appear to have a fiscal impact on state government, but may have an indeterminate negative impact on local governments. The bill also may have an indeterminate positive impact on private parties who successfully challenge a local government's enactment or enforcement of an ordinance on a matter preempted to the state.

The bill provides an effective date of July 1, 2019.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Preemption

The Florida Constitution grants local governments broad home rule authority. Non-charter county governments may exercise those powers of self-government that are provided by general or special law.¹ Counties operating under a county charter have all powers of self-government not inconsistent with general law or special law approved by the vote of the electors.² Municipalities have governmental, corporate, and proprietary powers that enable them to conduct municipal government, perform municipal functions and provide services, and exercise any power for municipal purposes except when expressly prohibited by law.³ A local government enactment may be inconsistent with state law if:

- The State Constitution preempts a subject area;
- The Legislature preempts a subject area; or
- It conflicts with a state statute.

Florida law recognizes two types of preemption: express and implied. Express preemption requires a specific legislative statement; it cannot be implied or inferred.⁴ To expressly preempt a subject area, the Legislature must use clear statutory language stating that intent.⁵ Implied preemption occurs when the Legislature has demonstrated an intent to preempt an area, though not expressly. Florida courts find implied preemption when "the legislative scheme is so pervasive as to evidence an intent to preempt the particular area, and where strong public policy reasons exist for finding such an area to be preempted by the Legislature."⁶

Where state preemption applies, a local government may not exercise authority in that area.⁷ Whether a local government ordinance or other measure violates preemption is ultimately decided by a court. If a local government improperly enacts an ordinance or other measure on a matter preempted to the state, a person may challenge the ordinance by filing a lawsuit. If the court rules against the government, it can declare the preempted ordinance void.⁸

Attorney Fees, Costs, and Interest

In Florida, a party generally may recover attorney fees only if authorized by statute or agreement of the parties. This is known as the "American Rule."⁹

Florida law requires a party or attorney who brings an unsupported claim or defense to pay attorney fees, or sanctions, to the other party.¹⁰ A party may move for sanctions and, under certain circumstances, a court may impose sanctions on its own. Sanctions are appropriate where a party or attorney:

¹ Art. VIII, s. 1(f), Fla. Const.

² Art. VIII, s. 1(g), Fla. Const.

³ Art. VIII, s. 2(b), *See also* s. 166.021(1), F.S.

⁴ *See City of Hollywood v. Mulligan*, 934 So. 2d 1238, 1243 (Fla. 2006); *Phantom of Clearwater, Inc. v. Pinellas County*, 894 So. 2d 1011, 1018 (Fla. 2d DCA 2005).

⁵ *Mulligan*, 934 So. 2d at 1243.

⁶ *Tallahassee Mem. Reg. Med. Ctr., Inc. v. Tallahassee Med. Ctr., Inc.*, 681 So. 2d 826, 831 (Fla. 1st DCA 1996).

⁷ Judge James R. Wolf and Sarah Harley Bolinder, *The Effectiveness of Home Rule: A Preemptions and Conflict Analysis*, 83 Fla. B.J. 92 (June 2009).

⁸ *See, e.g., Nat'l Rifle Ass'n of Am., Inc. v. City of S. Miami*, 812 So.2d 504 (Fla. 3d DCA 2002).

⁹ *Dade County v. Peña*, 664 So. 2d 959, 960 (Fla. 1995); *Reiterer v. Monteil*, 98 So. 3d 586, 587 (Fla. 2d DCA 2012).

¹⁰ S. 57.105, F.S.

- Brought a claim or defense unsupported by the material facts necessary to establish the claim or defense;
- Brought a claim or defense unsupported by the application of then-existing law to the material facts; or
- Took an action primarily for the purpose of unreasonable delay.¹¹

Sanctions cannot be imposed:

- Where a party reasonably presented a claim or defense as a good faith argument for the extension, modification, or reversal of existing law;
- Against the culpable party's attorney, if the attorney acted in good faith based on his or her client's representations as to material fact; or
- Against a represented party whose attorney raised an unsupported legal claim or defense.¹²

A party may appeal a court's ruling on sanctions, and the appellate court must review the award or denial of sanctions under the abuse of discretion standard, meaning the appellate court must uphold the lower court's decision unless it was "arbitrary, fanciful, or unreasonable."¹³ Any questions of law that form the basis of the award or denial of sanctions are reviewed de novo, meaning the appellate court rules on evidence and matters of law without any deference to the lower court's legal interpretations.¹⁴

Under Florida law, the prevailing party in any civil action is entitled to an award of their costs.¹⁵ Costs that may be awarded in the judgment include those for which account is kept by the clerk of the court¹⁶ and other specified expenses such as amounts for posting and maintaining bonds, court reporter fees, taxes on legal services, if applicable, and expert witness fees under certain conditions.¹⁷

The holder of a judgment for money damages is entitled to interest on the entire judgment amount at the specified statutory rate.¹⁸ If the judgment has the practical effect of determining the specific amount of damages on the claim, or "liquidating" the claim, as of a date prior to the judgment, the plaintiff is entitled to prejudgment interest at the applicable statutory rate from the date of that loss.¹⁹ The prejudgment interest amount is added to the remaining amounts awarded by the court for damages in the judgment.

Effect of Proposed Changes

CS/CS/CS/HB 829 entitles a party to attorney fees and costs if the party prevails in an action challenging a local government ordinance as preempted by the Florida Constitution or Florida law. Under the bill, if a court determines a local government's ordinance is preempted, the court must award to the prevailing party and against the government reasonable attorney fees and costs and damages, which may include prejudgment interest. The bill defines "attorney fees and costs" as those reasonable and necessary attorney fees and costs incurred for all:

- Preparations;
- Motions;
- Hearings;
- Trials; and
- Appeals.

¹¹ *Id.*

¹² S. 57.105(3), F.S.

¹³ *MC Liberty Express, Inc. v. All Points Servs., Inc.*, 252 So. 3d 397 (3d DCA 2018) (quoting *Canakar v. Canakar*, 382 So. 2d 1197, 1203 (Fla. 1980)); *Ferere v. Shure*, 65 So. 3d 1141 (Fla. 4th DCA 2011).

¹⁴ *Id.*

¹⁵ S. 57.041, F.S.

¹⁶ S. 57.021, F.S.

¹⁷ S. 57.071, F.S.

¹⁸ S. 55.03, F.S. The Chief Financial Officer determines the applicable interest rate on a quarterly basis. S. 55.03(1), F.S. The initial interest rate for a judgment is that in effect at the time the judgment is awarded. The judgment interest rate is then adjusted annually on January 1 to the rate in effect on that date. S. 5.03(3), F.S.

¹⁹ *Argonaut Insurance Company v. May Plumbing Company*, 474 So. 2d 212, 215 (Fla. 1985).

The bill provides a safe harbor in specified situations, prohibiting an award of attorney fees and costs if the local government:

- Receives written notice that an ordinance or proposed ordinance is expressly preempted; and
- Within 21 days of receiving the notice, repeals or withdraws the ordinance.

The remedies provided under the bill are cumulative to other available sanctions or remedies. Ordinances related to growth management are excluded from the bill, except for an ordinance or requirement burdening a business's trademark, trade dress, or related right under s. 553.79(20), F.S. The bill states it is remedial and applies retroactively to cases pending or commenced on or after July 1, 2019.

The bill provides an effective date of July 1, 2019.

B. SECTION DIRECTORY:

Section 1: Creates s. 57.112, F.S., relating to attorney fees and costs and damages; preempted local actions.

Section 2: Provides an effective date of July 1, 2019.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

The bill requires a court to award attorney fees and costs, including prejudgment interest, against a local government for passing a preempted ordinance, which may have an indeterminate negative fiscal impact on local governments.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill may have an indeterminate positive impact on private parties who bring actions challenging the enactment or enforcement by a local government of an ordinance on a matter preempted by state law, in that the prevailing private parties will be authorized to recover their attorney fees for such actions.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. The bill does not appear to require counties or municipalities to spend funds or take action requiring the expenditures of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

Not applicable.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 20, 2019, the Civil Justice Subcommittee adopted one technical amendment and reported the bill favorably as a committee substitute. The amendment corrected a misspelled word.

On March 26, 2019, the Local, Federal & Veterans Affairs Subcommittee adopted a strike-all amendment and reported the bill favorably as a committee substitute. The amendment:

- Removed a revision to s. 57.105, F.S.;
- Required a court to assess and award attorney fees and costs and damages to a party who prevails in challenging an ordinance on a matter preempted to the state;
- Prohibited an award of attorney fees and costs if the local government withdraws or repeals the ordinance within 21 days of receiving written notice that the ordinance is preempted to the state or the filing of a motion for attorney fees and costs under the new statutory section;
- Provided the new statutory section:
 - Is supplemental to other available sanctions or remedies;
 - Does not apply to growth management ordinances; and
 - Applies retroactively to cases pending or commenced on or after July 1, 2019.

On April 16, 2019, the Judiciary Committee adopted one amendment and reported the bill favorably as a committee substitute. The amendment:

- Specified that attorney fees may not be awarded if the local government:
 - Receives written notice that an ordinance or proposed ordinance is expressly preempted; and
 - Within 21 days of receiving the notice, repeals or withdraws the ordinance.
- Provided that the bill does not apply to local government ordinances relating to growth management, except under s. 553.79(20), F.S.

This analysis is drafted to the committee substitute as approved by the Judiciary Committee.