

To: New Jersey Law Revision Commission
From: Samuel M. Silver
Re.: Attorney's Fees in Appellate Cases
Date: April 10, 2017

MEMORANDUM

Executive Summary

Staff was presented, by a member of the public, with an editorial from the New Jersey Law Journal entitled, "Clarify Frivolous Litigation Rule's Applicability to Appeals."¹ In response, Staff searched for any relevant legislation introduced so far this session and identified A4133 which would permit attorney fee awards in frivolous land use litigation; and, S669, which would expand the scope of the Frivolous Litigation Statute.

The New Jersey Frivolous Litigation Statute applies to a "prevailing party" in a civil action.² At any time during the proceedings, or upon the entry of a judgment, a judge may find a complaint, counterclaim, cross-claim or defense of the non-prevailing person was frivolous.³ The Supreme Court of New Jersey has limited the definition of "prevailing party" to exclude attorneys.⁴ Currently, the Frivolous Litigation Statute does not apply to appellate filings.⁵ Thus, no **statute** addresses the award of attorney's fees and costs in appellate matters.

In an effort to determine whether the editorial might give rise to a project for the Commission, Staff examined the background and current state of this area of the law.

Background

In New Jersey, there are two avenues of relief available to litigants forced to incur attorney's fees while defending against a frivolous claim. The New Jersey Legislature enacted a law permitting an aggrieved litigant to seek attorney's fees. The law, commonly referred to as the "Frivolous Litigation Statute"⁶, addresses the issue of frivolous litigation filed by a party. An analysis of this statute, and the case law in this area, will clarify the breadth, depth, and applicability of this statute to appellate matters.

The "Frivolous Litigation Statute" is not the only mechanism a litigant may use to seek redress for having to defend against frivolous litigation. The New Jersey Supreme Court has the exclusive power to regulate attorneys admitted to practice law in New Jersey.⁷ The Court uses its authority to adopt rules designed to curb the filing of frivolous by attorneys in both the trial and

¹ Editorial Board, *Clarify Frivolous Litigation Rule's Applicability to Appeals* (2017) N.J.L.J., <http://www.njlawjournal.com/id=1202781150478/Clarify-Frivolous-Litigation--Rules-Applicability-to-Appeals?slreturn=20170213171352> (last visited March 30, 2017).

² N.J.S. 2A:15-59.1(a)(1).

³ *Id.*

⁴ *McKeown-Brand v. Trump Castle Hotel & Casino*, 132 N.J. 546, 555 (1992).

⁵ *Colca v. Anson*, 413 N.J. Super. 405 (App. Div. 2010).

⁶ N.J.S. 2A:15-59.1.

⁷ *McKeown-Brand v. Trump Castle Hotel & Casino*, 132 N.J. at 555 (1992).

appellate courts.⁸ Further, it has used its dominion in this area to limit the reach of frivolous litigation statutes⁹

In Part I, the New Jersey Rules of Court set forth the general rules of procedure. This section contains rules to address frivolous litigation at the trial court level.¹⁰ The rule setting forth the requirements for an award of attorney fees in an appellate setting are found in Part II.¹¹ A review of these rules will help identify the intersection and overlap between statute and court rule governing in this area of law.

The General Rule Regarding Fees and Costs: The American Rule

New Jersey trial courts, like their federal counter-parts, maintain a strong policy against fee-shifting. In accordance with this policy, New Jersey has adopted the “American Rule” on legal costs. Under this rule, “...the parties to litigation should bear their own legal costs.”¹²

The purpose of the American Rule, is threefold: (1) to allow unrestricted access to the courts for all persons; (2) to ensure equity by not penalizing persons for exercising their right to litigate a dispute, even if they should lose; and, (3) administrative convenience.¹³ By having every litigant bear his own counsel fees, the implementation of this rule furthers the interests of sound judicial administration.¹⁴

At the trial court level Rule 4:42-9(a) serves as the source rule for those seeking an award of attorney’s fees in civil actions. The Rule states, “[n]o fee for legal services shall be allowed in the taxed costs or otherwise....”¹⁵ Thus, in following the American Rule, the parties are required to pay their own fees.

Where the Supreme Court perceives the interests of justice have been compromised, they may modify the rule.¹⁶ Currently, Rule 4:42-9 provides for eight specific fee-shifting exceptions.¹⁷ Rule 4:42-9(a)(8) provides for the award of attorney’s fees, “[i]n all cases where attorney’s fees are permitted by statute.” It is possible that a statute may intersect with an area traditionally within the domain of the judiciary. These statutes have been accepted by the New Jersey Supreme Court because they have been deemed not to conflict with or supersede

⁸ *N.J.R.C.* 1:4-8; and *N.J.R.C.* 2:11-4.

⁹ *McKeown-Brand v. Trump Castle Hotel & Casino*, 132 N.J. 546, 555 (1992).

¹⁰ *N.J.R.C.* 1:1-1 and 1:4-8.

¹¹ *N.J.R.C.* 2:11-4.

¹² *Auto Lenders v. Gentilini Ford*, 181 N.J. 245, 281 (2004).

¹³ *In re Niles*, 176 N.J. 282, 294 (2003).

¹⁴ *Gerhardt v. Continental Ins. Cos.*, 48 N.J. 291, 301 (1966).

¹⁵ *Rule 4:42-(9)(a)*.

¹⁶ *Coleman v. Fiore Bros. Inc.*, 113 N.J. 594, 596 (1989); *see also the discussion of Rule 2:11-4 infra*

¹⁷ *Rule 4:42-9(a)* provides for the award of attorney’s fees in one of the following matters: (1) a family action; (2) a fund in court; (3) in a probate action; (4) in an action for the foreclosure of a mortgage; (5) in an action to foreclose a tax certificate; (6) in an action upon a liability or indemnity policy of insurance; (7) as expressly provided by these rules; (8) in all cases where attorney’s fees are permitted by statute.

judicial power.^{18,19} Where the Court has perceived an intrusion of its judicial power, it is relied upon the separation of powers doctrine to limit the statute.

Separation of Powers

The New Jersey Constitution mandates that the Supreme Court, “...make rules governing the administration of all courts in the State and, **subject to the law**, the practice and procedure in all such courts.”²⁰ In addition, the Supreme Court has exclusive jurisdiction over the admission to practice law and discipline of admitted persons.²¹ The exclusive jurisdiction of the Court, however, is not without limitation. The Supreme Court of New Jersey recognizes a distinction between substantive and procedural matters.²²

As early as 1950, the New Jersey Supreme Court drew a distinction between “substance” and “procedure.”²³ The judiciary maintains jurisdiction over procedural matters.²⁴ The Court also recognized that the separation of powers doctrine was never intended to create exclusive spheres of competence. Thus, the Court shares its jurisdiction with the Legislature.²⁵

The power to discipline attorneys, however, falls within the **exclusive jurisdiction** of the Supreme Court.²⁶ The New Jersey Supreme Court recognizes the award of counsel fees as a disciplinary issue and therefore a procedural matter.²⁷ An award against an attorney, therefore, falls within the jurisdiction of the courts. Where a statute may be found to directly, or indirectly, sanction an attorney the Court has limited that portion of the statute.

The Frivolous Litigation Statute

In 1988, the New Legislature enacted the “Frivolous Litigation Statute.”²⁸ The purpose of this statute was to protect parties from baseless litigation. Under the statute, the prevailing party may recover, “all reasonable litigation costs and reasonable attorney fees.”²⁹ The statute permits a court to award litigation costs and reasonable attorney fees to the prevailing party when they have met certain conditions precedent.

Under section (a) of the statute a party must prevail in some aspect of the litigation to seek attorney’s fees and costs.³⁰ In addition, the statute limits the types of pleadings that fall

¹⁸ *McKeown-Brand*, 132 N.J. at 555.

¹⁹ See <https://www.judiciary.state.nj.us/civil/NJFeeShiftingStatute.pdf> (last visited April 04, 2017).

²⁰ *N.J. Const. art. VI, § 2, π 2* (emphasis added).

²¹ *Id.*

²² *Winberry v. Salisbury*, 5 N.J. 240, cert. denied, 340 U.S. 877 (1950).

²³ *Id.*

²⁴ *Id.*

²⁵ *In re Salaries for Probation Officers*, 58 N.J. 422, 425 (1971).

²⁶ *McKeown-Brand v. Trump Castle Hotel & Casino*, 132 N.J. 546, 554 (1992).

²⁷ *McKeown-Brand*, 132 N.J. at 554 citing *Busik v. Levine*, 63 N.J. 351, 372-73 (1973); and, *State v. Otis Elevator Co.*, 12 N.J. 1, 5 (1953).

²⁸ N.J.S. 2A:15-59.1.

²⁹ *Id.*

³⁰ N.J.S. 2A:15-59.1(a)(1).

within its purview. The statute applies to complaints, counterclaims, cross-claims or defenses that have been filed in an action. Further, the recovery of attorney fees and costs may occur only after a court makes certain findings about the pleadings. A recovery of costs and/or fees may occur only if “at any time during the proceedings or upon judgment that a complaint, counterclaim, cross-claim *or* defense of the non-prevailing person was **frivolous**.”³¹

In section (b), the statute sets forth the definition of “frivolous.” To be considered frivolous, one of the enumerated pleadings must have been filed in “bad faith, solely for the purpose of harassment, delay or malicious injury...”³² If the court finds one of the enumerated pleading is “...without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law...” a court may find that it is frivolous.³³ The judge may then enter an order awarding attorney’s fees and costs to the offended party.³⁴

The New Jersey Supreme Court has not hesitated to limit the reach of this statute when it believed the statute impinged on the Court’s constitutional power over procedural matters – for example, the way a party conducts litigation.

McKeown-Brand v. Trump Castle Hotel & Casino³⁵

In *McKeown-Brand v. Trump Castle Hotel & Casino*, the New Jersey Supreme Court addressed the application of the frivolous litigation statute to attorneys. The Court was not concerned with the purpose of the statute; rather, the statute’s encroachment on the Court’s exclusive power over attorney discipline.³⁶

In its decision the New Jersey Supreme Court reminded the parties that the power of the Court to regulate attorneys is exclusive.³⁷ Where a statute, or a portion thereof, encroaches on judicial prerogative and interests it will be found unconstitutional.³⁸ Ultimately, the court limited the applicability of the frivolous litigation statute, *N.J.S. 2A:15-59 et seq.*, to **non-lawyer** “parties.”³⁹

In its opinion, the *McKeown-Brand Court* called upon the Civil Practice Committee for a learned discussion on the issue of sanctions.

New Jersey Rules of Court: Rule 1:4-8

³¹ *Id.* (Emphasis added).

³² N.J.S. 2A:15-59.1(b)(1).

³³ N.J.S. 2A:15-59.1(b)(2).

³⁴ N.J.S. 2A:15-59.1(b)(2).

³⁵ 132 N.J. 546, 554 (1992).

³⁶ *Id.*

³⁷ *McKeown-Brand*, 132 N.J. at 555. See also, *In re LiVolsi*, 85 N.J. 576, 583 (1981); and, *In re Hearing on Immunity for Ethics Complainants*, 96 N.J. 669, 678 (1984).

³⁸ *Id.*

³⁹ *Id.*

Following the decision in *McKeown-Brand v. Trump Castle Hotel & Casino*, the Supreme Court referred the issue of “sanctions” to the Civil Practice Committee. The Supreme Court adopted the minority report of the Civil Practice Committee permitting fee-shifting. The New Jersey Rules of Court were subsequently modified to provide for a frivolous-pleading penalty against attorneys.

The present court rule dealing with frivolous litigation is Rule 1:4-8. This rule is based on Rule 11 of the Federal Rules of Civil Procedure. Like the federal rule, Rule 1:4-8 requires that prior to filing a pleading, motion or brief, an attorney is required to sign each document.⁴⁰

A signature certifies that the signatory has: read the pleading, written motion, or other paper and to the best of his or her knowledge, information, and belief formed after an inquiry reasonable under the circumstances the filing is warranted; the paper is not being presented for any improper purpose⁴¹; the legal contentions are warranted by existing law or by a non-frivolous argument for their extension⁴²; the factual allegations have evidentiary support⁴³; and, denials are warranted on the evidence.⁴⁴

Unlike the frivolous litigation statute, Rule 1:4-8 applies equally to both clients and their lawyers. Furthermore, the rule does not require that the aggrieved party prevail in the entire case as a condition precedent to pursuing sanctions. A party forced to defend against “frivolous” litigation may avail themselves of the protections provided in Rule 1:4-8 by serving upon the offending party a motion seeking sanctions. This motion may be served upon the offending party at any point during the litigation. Once a final judgment has been entered, an aggrieved party must serve there motion upon their adversary within twenty (20) days.⁴⁵

This rule was adopted to deter the repetition of frivolous conduct.⁴⁶ To prevent such behavior, the rule provides for the imposition of a variety of sanctions against the offending party. The sanction may consist of: (1) an order to pay a penalty into court⁴⁷; or, (2) an order directing payment to the movant of some or all of the reasonable attorney’s fees and other expenses incurred as a direct result of the violation.⁴⁸ Depending on the nature of the offending conduct, the Court may enter an order providing for both sanctions.⁴⁹

What is the Current Status of Matters on Appeal?

• *N.J.S. 2A:15-59.1*

⁴⁰ *N.J.R.C. 1:4-5.*

⁴¹ *N.J.R.C. 1:4-8(a)(1).*

⁴² *N.J.R.C. 1:4-8(a)(2).*

⁴³ *N.J.R.C. 1:4-8(a)(3).*

⁴⁴ *N.J.R.C. 1:4-8(a)(4).*

⁴⁵ *See generally, R. 1:4-8(b) (2).*

⁴⁶ *N.J.R.C. 1:4-8(d).*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

The Frivolous Litigation Statute, *N.J.S.* 2A:15-59.1, applies to a “complaint, counterclaim, cross-claim or defense.” As such, the statute does **not** apply to appellate pleadings.⁵⁰

Thus, when presented with what would otherwise appear to be a “frivolous” appeal, an aggrieved party is only left with the protections provided by the New Jersey Rules of Court.

• **Rule 1:4-8**

A plain reading of Rule 1:4-8 suggests that this frivolous litigation rule is not applicable to frivolous appeals.⁵¹ As such, the court did not explicitly make the rule applicable to appeals that would be considered frivolous under the same criteria.⁵²

Conversely, one may argue the application of Rule 1:4-8 is not limited to the trial court.⁵³ When confronted with what may be considered a frivolous appeal a party may initiate the protective procedures set forth in Rule 1:4-8. Grounds for such a motion may be found in Rule 1:1-1. This rule maintains, “[u]nless otherwise stated, the rules in Part I are applicable to the Supreme Court, the Superior Court, the Tax Court, the surrogate’s court, and the municipal courts.”

The Rules of Court are applicable to the Superior Court – both the trial and appellate divisions – as well as to the Supreme Court.⁵⁴ Thus, if the offending documents are an appellate filing, a written demand may be served upon the litigant demanding that the appeal be withdrawn in accordance with the requirements of the rule. Pursuant to this rule, a party may apply for and receive an array of sanctions against the offending adversary.⁵⁵

All motions, with the exception of motions for bail, staying any order for judgment, summary disposition, and leave to appeal, are decided by a single judge.⁵⁶ Motions are generally decided on the papers and without oral argument – unless otherwise directed by the court.⁵⁷ Once a determination has been made, granting or denying the motion, an order is mailed to the parties.⁵⁸ The nature in which the results of a motion are disseminated by the Court – mailing

⁵⁰ *Lewis v. Lewis*, 132 N.J. 541, 545 (1993); *Zavodnick v. Leven*, 340 N.J. Super. 94, 103 (App. Div. 2001); *Colca v. Anson*, 413 N.J. Super. 405, 422 (App. Div. 2010).

⁵¹ See Pressler & Verniero, *Current N.J. Court Rules (GANN)*, Comment on R. 2:11-4.

⁵² Editorial Board, *Clarify Frivolous Litigation Rule’s Applicability to Appeals* (2017) N.J.L.J., <http://www.njlawjournal.com/id=1202781150478/Clarify-Frivolous-Litigation--Rules-Applicability-to-Appeals?slreturn=20170213171352>

⁵³ See Mandel, *New Jersey Appellate Practice (GANN)*, Comment on R. 1:4-8 at §31:2-3; see also Glenn Reiser, *Blog, Should New Jersey Enact a Court Rule Punishing Litigants for Filing Frivolous Appeals?* December 22, 2016, <http://www.njlawconnect/appellate-practice-frivolous-appeals/>

⁵⁴ *N.J.R.C.* 1:1-1. See Pressler & Verniero, *Current N.J. Court Rules (GANN)*, Comment on R. 1:1-1 noting the rules do not apply directly to administrative agencies performing a quasi-judicial function. Administrative agencies are governed by the Administrative Procedure Act *N.J.S.* 52:14B-1 *et seq.*

⁵⁵ See R. 1:4-8(d)(1) and (2).

⁵⁶ *N.J.R.C.* 2:8-1(c).

⁵⁷ *N.J.R.C.* 2:8-1(b).

⁵⁸ *N.J.R.C.* 2:8-1(d).

results only to the litigants – may account for the scarcity of information regarding the use of Rule 1:4-8 in the appellate setting.

In addition to the remedy available to a litigant pursuant to Rule 1:4-8, the New Jersey Rules of Court contain a separate rule governing attorney's fees on appeal.

• ***Rule 2:11-4 Attorney's Fees on Appeal***

The Rules in Part II govern the practice and procedure in the Court and the Appellate Division of the Superior Court.⁵⁹ The rules contained in this section set forth the process and procedure by which a litigant may apply for attorney's fees from and adversary in an appellate matter.⁶⁰

There are three instances under in which a party may recover attorney's fees for legal work on an appeal. Except for appeals arising out of mortgage or tax certificate foreclosures, legal fees may be awarded in all actions in which an award of counsel fees is permitted by Rule 4:42-9(a).⁶¹ Next, legal fees may be awarded in a worker's compensation proceeding.⁶² Finally, fees may be awarded as a sanction when the opposing party violates the rules for prosecution of appeals.⁶³

Fee requests that do not fall within one of these three sections of the rule will, absent generally be denied.⁶⁴ Thus, absent express authorization by statute or rule of court, appellate courts are not empowered to award attorney's fees or expenses.⁶⁵

Legislative Activity in this Area

• ***Assembly Bill 4133***

Assembly Bill 4133 was sponsored by Assemblyman Michael Patrick Carroll and Assemblywoman Bettylou DeCrocce. This bill seeks to amend the existing frivolous litigation statute in the State of New Jersey to address litigation in the land use context and, as a result, is not directly relevant to this inquiry.

• ***Senate Bill 669***

⁵⁹ *N.J.R.C.* 2:1.

⁶⁰ *N.J.R.C.* 2:11-4.

⁶¹ *Id.* noting that Rule 4:42-9(a) provides for the award of attorney's fees in one of the following matters: (1) a family action; (2) a fund in court; (3) in a probate action; (4) in an action for the foreclosure of a mortgage; (5) in an action to foreclose a tax certificate; (6) in an action upon a liability or indemnity policy of insurance; (7) as expressly provided by these rules; (8) in all cases where attorney's fees are permitted by statute.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Floyd v. Morristown European Motors, Inc.*, 138 N.J. Super. 588, 594 (App. Div. 1976)(denying a request for fees in a dispute over payment of a commission between an auto dealership and a salesman).

⁶⁵ *Miller v. Mun. Council of Wayne Tp.*, 139 N.J. Super. 526, 528 (App. Div.) *certify. den.* 71 N.J. 494 (1976).

Senate Bill 669 was sponsored by Senator Ronald Rice. This bill seeks to **expand** the existing frivolous litigation statute in the State of New Jersey. These changes do not mirror the language contained in Rule 1:4-8.

The changes proposed in the current bill would expand the breadth and depth of the existing law. The changes are as follows: (1) the term “frivolous” would be expanded to include any pleading filed with the purpose of retaliating against a legitimate claim; (2) it would expand the types of pleadings for which would be encompassed by the statute; (3) expansion of fees to include expenses for experts, counsel fees, pre-judgment interest and consequential damages; (4) allowing any party or attorney to be sanctioned for frivolous pleadings; (5) provide for non-monetary sanctions; and, (6) provide for a twenty-one day safe-harbor period within which to withdraw the inappropriate pleading.

This bill does not address the issue raised in the New Jersey Law Journal editorial. The current incarnation of the statute does not apply to appellate matters because it too is specifically limited to complaints, counterclaims, cross-claims or defense deemed to be frivolous.⁶⁶ However, the proposed expansion of the statute to include “any pleading” may expand its applicability to the appellate filings.

Conclusion

There is no statute in New Jersey that addresses frivolous litigation in appellate matters. Staff seeks authorization to conduct additional research and outreach regarding this issue in an effort to determine whether such a statute would be of assistance in addressing appellate filings.

Should such further research and outreach be approved by the Commission, Staff will contact the Civil Practice Committee to advise of the Commission’s consideration of this issue, and offer any documents produced by the Commission.

⁶⁶ *Lewis v. Lewis*, 132 N.J. 541, 545 (1993); *Zavodnick v. Leven*, 340 N.J. Super. 94, 103 (App. Div. 2001); *Colca v. Anson*, 413 N.J. Super. 405, 422 (App. Div. 2010).