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COMMENTARY

Section 57.105: A Tool for Lack of a Justiciable Issue, Not a Weapon for Appeals

This article considers the purpose of 57.105, its use in an appellate proceeding, and the implication of a recent ruling from the Third District Court of Appeal.

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Section 57.105 of the Florida Statutes permits a party to obtain attorney fees when the opposing party raises a claim or defense that is unsupported by either law or fact. The statute is not designed for use where a party disagrees with an argument raised or is angry that a losing party seeks appellate review. This article considers the purpose of 57.105, its use in an appellate proceeding, and the implication of a recent ruling from the Third District Court of Appeal.

Purpose of Section 57.105

The central purpose behind Section 57.105 is to deter meritless, frivolous filings. The section allows a court to award attorney fees to a party when the opposing party raises baseless claims in the trial court or brings a sham appeal to the appellate court.

An appeal is frivolous where an attorney raises arguments that are not grounded in fact or are not warranted by law, including by a reasonable argument that existing law should be extended, modified or reversed. Many lawyers are quick to serve or file a 57.105 motion on appeal. However, lawyers should carefully consider whether serving such a motion in an appeal has merit.

57.105 Is Not an Appellate Weapon

Upon obtaining a favorable judgment in the trial court, lawyers are frequently irritated when the losing party appeals the judgment. The prevailing party may believe that the losing party's position has no merit and that any appeal is frivolous and only serves to delay a client's victory. Yet, lawyers must recognize that just because they disagree with a position, it does not mean that the position is baseless.

Zealous advocacy must be respected on all sides. An attorney may decide the attorney has a duty to advocate for a client by pursuing an appeal, but that attorney must also be cautious not to pursue a baseless claim. Similarly, an attorney defending a judgment on appeal must recognize that a disagreement over an appealed issue does not call for an automatic filing of a motion pursuant to 57.105.

A motion under 57.105 should be used as a tool and not as a weapon. It is not an opportunity to litigate the merits of the actual appeal, nor is it an intimidation tactic. Just as a 57.105 motion should not be used in the trial court as a settlement tactic, a 57.105 motion should not be used on appeal to intimidate a party into dismissal. Attorneys must recognize that there is a distinct difference between raising an unsuccessful argument on appeal and raising an argument that is not supported by material facts or not supported by existing law to the material facts.

In filing a 57.105 motion, an appellee has a high standard to show that the opposing party or its attorney knew that the appeal had no basis in law or fact. An appellee can frequently be blinded by irritation when an appeal is filed, fail to recognize that the initial brief raises actual justiciable argument and jump to weaponize a 57.105 motion to intimidate an appellant into ending an appeal. Appellate courts disfavor attempts to litigate an appeal through a 57.105 motion and motion practice.

On appeal, motions under section 57.105 should be reserved for extreme circumstances and not for circumstances where a party simply disagrees with an appeal. Rather than filing a losing 57.105 motion that costs time and money, an appellee's best strategy is generally to file an answer brief to address the arguments raised on appeal and to support affirmance of the lower court's decision.

The Paying Parties

In filing an appeal, an attorney has a duty to advise a client of the potential for sanctions if an appeal is meritless and has an ethical duty to withdraw rather than pursue a frivolous appeal. If a successful motion under 57.105 is brought, an appellate court—just like the trial court—may order a party, the attorney, or both to pay sanctions.

The Third District Court of Appeal (Third DCA) recently issued an opinion in *Shapiro v. WPLG,* 3D21-1733, 2023 WL 3485524 (Fla. 3d DCA May 17, 2023) holding that an attorney who appeared in a case after two sanctions motions were served was still responsible for paying fees pursuant to the 57.105 motions. While the attorney was not directly served with the two prior motions for sanctions, he had appeared as co-counsel of record at the time a third amended complaint was filed that was not filed in good faith and was on notice of the prior motions. While not final until disposition of a timely motion for rehearing, the Third DCA held that the late-appearing attorney was also responsible for fees.

Accordingly, when entering a late appearance in a case, attorneys at both the trial court and appellate court levels should make themselves aware of previously filed pleadings that have triggered a motion under 57.105.

In deciding whether to file a 57.105 motion, attorneys must remember that a 57.105 motion is a tool to ensure justiciability. It is not designed to be a weapon to litigate a case or express disagreement to an argument on appeal.

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