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ILLINOIS LAW MANUAL

CHAPTER X
SETTLEMENTS & RELEASES

B. COSTS, ATTORNEY FEES AND INTEREST

1. Costs

"Costs" are allowances in the nature of incidental damages awarded by law to reimburse the prevailing party, to some extent, for expenses necessarily incurred in the assertion of his rights in court. Irwin v. McMillan, 322 Ill. App. 3d 861 (2nd Dist. 2001). At common law, a successful litigant was not entitled to recover from his opponent the costs and expenses of the litigation. The allowance and recovery of costs is therefore entirely dependent on statutory authorization. Vicencio v. Lincoln-Way Builders, Inc., 204 Ill. 2d 295 (2003); Village of Franklin Park v. Aragon Management, Inc., 298 Ill. App. 3d 774 (1st Dist. 1998). The proper definition of "costs" has been left for the courts to determine. Boyle v. Manley, 263 Ill. App. 3d 200, 206 (1st Dist. 1994). Nevertheless, because statutes permitting the recovery of costs are in derogation of the common law, they must be strictly construed. Calcagno v. Personalcare Health Mgmt., Inc., 207 Ill. App. 3d 493, 502 (4th Dist. 1991). Moreover, a successful litigant is not entitled to recover the ordinary expenses of litigation. Wiegman v. Hitch-Inn Post of Libertyville, Inc., 308 Ill. App. 3d 789, 804 (2nd Dist. 1999) (court disallowed prevailing plaintiff to recover costs associated with deposition subpoenas, medical records, court reporter, and transcription fees for discovery depositions and enlarging of photographs because no statutory authority advanced to justify such an award).

The following Illinois statutes, among others, authorize recovery of costs:

> **Plaintiff to recover costs.** If any person sues in any court of this state in any action for damages personal to the plaintiff, and recovers in such action, then judgment shall be entered in favor of the plaintiff to recover costs against the defendant, to be taxed, and the same shall be recovered and enforced as to other judgments for the payment of money, except in the cases hereinafter provided.

735 ILCS 5/5-108.

> **Defendant to recover costs.** If any person sues in any court of this state, in any action, wherein the plaintiff may have costs and case judgment is entered in favor of the plaintiff and the action is voluntarily dismissed by the plaintiff or is dismissed for want of prosecution or judgment is entered against the plaintiff, then judgment shall be entered in favor of the defendant to recover defendant's costs against the plaintiff (except against executors or administrators prosecuting in the right of their testator or intestate), to be taxed, and the costs shall be recovered of the plaintiff, by like process as the plaintiff may have had against the defendant, in case judgment had been entered for such plaintiff.

735 ILCS 5/5-109.

> **Judgment on motion.** If in any action, judgment upon any motion directed to the complaint, answer or reply, by either party

to the action, is entered against the plaintiff, the defendant shall recover costs against the plaintiff. If such judgment is entered in favor of the plaintiff, the plaintiff shall recover costs against the defendant; and the person so recovering costs may collect same in the same manner as judgments for the payment of money are enforced.

735 ILCS 5/5-110.

Dismissals. In all cases, where any action is voluntarily dismissed by the plaintiff or is dismissed for want of prosecution by reason that the plaintiff neglects to prosecute the same, the defendant shall recover judgment for his or her costs, to be taxed and to be collected in the same manner as judgments for the payment of money are enforced.

735 ILCS 5/5-116.

Voluntary Dismissal.

(a) The plaintiff may, at any time before trial or hearing begins, upon notice to each party who has appeared or each such party's attorney, and upon payment of costs, dismiss his or her action or any part thereof as to any defendant, without prejudice, by order filed in the cause.

(b) The court may hear and decide a motion that has been filed prior to a motion filed under subsection (a) of this section when that prior filed motion, if favorably ruled on by the court, could result in a final disposition of the cause.

(c) After trial or hearing begins, the plaintiff may dismiss, only upon terms fixed by the court (1) upon filing a stipulation to that effect signed by the defendant, or (2) on motion specifying the ground for dismissal, which shall be supported by affidavit or other proof.

(d) A dismissal under subsection (a) of this section does not dismiss a pending counterclaim or third party complaint.

(e) Counterclaimants and third-party plaintiffs may dismiss upon the same terms and conditions as plaintiffs.

735 ILCS 5/2-1009.

Following instructions to construe costs statutes narrowly, trial courts have traditionally been reluctant to award much in the way of costs to a prevailing litigant. Historically, all that was recoverable to a prevailing plaintiff was his filing fees, appearance and jury demand fees, and trial subpoena costs. Household Int'l v. Liberty Mutual, 195 Ill. 2d 578 (2001). As far back as 1982, the Illinois Supreme Court determined that only those costs associated with depositions "necessarily used at trial" could be awarded to a prevailing party. Galowich v. Beech Aircraft Corp., 92 Ill. 2d 157, 166 (1982). The Appellate Court in Boyle defined "necessarily used at trial" as when a witness dies or disappears prior to trial. Boyle, 263 Ill. App. 3d at 206. Thus, depositions used for impeachment or to refresh a recollection are not "necessarily used at trial" and should not be awarded as costs to a prevailing party at trial.

In 1999, the Fifth District Appellate Court, in Perkins v. Harris, 308 Ill. App. 3d 1076 (5th Dist. 1999), awarded to a prevailing plaintiff the costs associated with the videotaped evidence deposition of a treating physician – including the practitioner's professional fee for testifying, and the costs of recording, transcribing and editing the videotaped testimony. The basis for the award was the trial court's finding that the physician was unable to appear in person at trial "due to his demanding surgery schedule." Id. at 1080. Thus, the Perkins court determined that the evidence deposition was "necessarily used at trial." Id. Thereafter, trial courts in northern Illinois routinely awarded costs to prevailing plaintiffs associated with physicians' and chiropractors' professional fees and evidence deposition transcript fees. Some trial courts also awarded to

prevailing plaintiffs the costs associated with a medical care provider's live appearance at trial.

In June 2001, however, the Second District Appellate Court, in Irwin v. McMillan, 322 Ill. App. 3d 861 (2nd Dist. 2001), criticized the Perkins decision and its unjustified extension of costs to a prevailing litigant. The court in Irwin ruled that a medical care provider's evidence deposition was not "necessarily used at trial" just because the provider's busy schedule prevented him from appearing in person at trial. Id. at 866. In other words, an evidence deposition under such circumstances was not indispensable to the trial, such as when a witness dies or disappears prior to trial. Id. As such, the prevailing plaintiff was not entitled to recover the costs associated with the taking of the evidence deposition. Id. at 867.

The court in Irwin also determined that there was no statutory justification for a trial court's award of costs associated with a medical care provider's live appearance at trial. Id. Thus, the Irwin court determined that the prevailing plaintiff was only entitled to costs associated with filing fees, service of summons fees, and trial subpoena fees. Id. at 869.

In Vincencio v. Lincoln-Way Builders, Inc., 204 Ill. 2d at 295, the Illinois Supreme Court upheld the Appellate Court's analysis in Irwin. In Vincencio, the lower court had granted, as "costs" under 735 ILCS 5/5-108, the prevailing plaintiff's physician's fee for an evidence deposition, along with the associated fees of a videographer and court reporter.

The Illinois Supreme Court reversed the lower court. The Supreme Court held the evidence deposition in question was not "necessarily used at trial" because the physician was not unavailable due to death, or disappearance, pursuant to Ill.S.Ct.R 204(c). All fees associated with the evidence deposition were therefore "litigation costs," not recoverable by statute. (See also, Moller v. Lipov and Key Medical Group, Ltd., 368 Ill. App. 3d 333 (1st Dist. 2006), where the Appellate Court refused to assess as a cost the fees incurred by the prevailing plaintiff's health care professional's report.)

2. Attorney Fees

In Illinois, there is no common law principle allowing the recovery of attorney fees either as costs or damages. Qazi v. Ismail, 50 Ill. App. 3d 271 (1st Dist. 1977); LaSalle Nat. Trust N.A. v. Board of Directors of the 1100 Lake Shore Drive Condominium, 287 Ill. App. 3d 449 (1st Dist. 1997). Illinois courts will not award attorney fees unless fees are specifically authorized by statute or provided for by contract between the parties. W.E. O'Neil Const. v. General Casualty, 321 Ill. App. 3d 550 (1st Dist. 2001).

There are numerous statutes which provide for the awarding of attorney fees to the prevailing party. See also Asaltzman, A Brief Look At Statutory Attorney's Fees in Illinois, 73 Ill. E.J. 266 (1985) (noting eighty-eight statutes that allow attorney fees).

The determination as to what constitutes a reasonable attorney fee award is within the discretion of the trial court. Lewis K. Cohen Ins. Trust v. Stern, 297 Ill. App. 3d 220 (1st Dist. 1998). In assessing the reasonableness of attorney fees, the trial court should consider the skill and standing of the attorneys employed, the nature of the case, the novelty and difficulty of the issues involved, the degree of responsibility required, the usual and customary charge for the same or similar services in the community, and whether there is a reasonable connection between the fees charged and the litigation. In re Trusts of Strange ex rel. Whitney, 324 Ill. App. 3d 37 (2nd Dist. 2001).

Illinois Supreme Court Rule 137 requires all pleadings and papers to be signed by an attorney of record or by a party, if the party is not represented by an attorney. The signature is treated as a certification that the pleadings or papers have been read and that after reasonable inquiry they are well grounded in fact and law, and that they are not interposed for any improper purpose. The Supreme Court rule authorizes the trial courts to impose certain sanctions for violations of the rule, including attorney fees.

Rule 137 does not require the imposition of sanctions, but it does require a trial judge who imposes sanctions to set forth with specificity the reasons and basis of any sanction in a separate written order.

3. Interest

It is a general rule in Illinois that interest is not recoverable unless contracted for or authorized by statute. In re Liquidation of Pine Tops Ins., 322 Ill. App. 3d 693 (1st Dist. 2001). While there are decisions holding that a chancery court may award interest where circumstances require it to do justice between the parties, such decisions have concerned situations involving actual or constructive fraud. Galler v. Galler, 61 Ill. 2d 464 (1975).

735 ILCS 5/2-1303 (1993) reads as follows:

> **Interest on Judgment.** Judgments recovered in any court shall draw interest at the rate of 9% per annum from the date of the judgment until satisfied or 6% per annum when the judgment debtor is a unit of local government, as defined in Section I of Article VII of the Constitution, a school district, a community college district, or any other governmental entity. When judgment is entered upon any award, report or verdict, interest shall be computed at the above rate, from the time when made or rendered to the time of entering judgment upon the same, and included in the judgment. Interest shall be computed and charged only on the unsatisfied portion of the judgment as it exists from time to time. The judgment debtor may, by tender of payment of judgment, costs and interest accrued to the date of tender, stop the further accrual of interest on such judgment notwithstanding the prosecution of an appeal, or other steps to reverse, vacate or modify the judgment.

- Interest is properly allowed on arbitration awards as well as judgments. Contract Development Corp. v. Beck, 255 Ill. App. 3d 660 (2nd Dist. 1994); Edward Elec. Co. v. Automation, Inc., 229 Ill. App. 3d 89 (1st Dist. 1992). Absent an agreement between the parties, prejudgment interest is properly awarded only when specifically provided for by statute, and only if the damages are liquidated or subject to exact computation. Ouwenga v. Nu-Way Ag, Inc., 239 Ill. App. 3d 518 (3rd Dist. 1992). Previously, prejudgment interest was not awardable in suits for recovery for negligence, Wilson v. Cherry, 244 Ill. App. 3d 632 (4th Dist. 1993), nor under the Wrongful Death Act. Robles v. Chicago Transit Authority, 235 Ill. App. 3d 121 (1st Dist. 1992). This has changed pursuant to Public Act 102-0006, the Illinois judgment interest statute now imposes prejudgment interest in all actions brought to recover damages for personal injury or wrongful death as follows: Prejudgment interest will accrue "on all damages, except punitive damages, sanctions, statutory attorney's fees, and statutory costs."

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