



Arkansas Association of Defense Counsel

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DON'T LET UP AT THE END: PERFECT CLAIM FOR ATTORNEY'S FEES UNDER ARCP 54(e)(1)—OR BE SURE THE CLAIM HAS BEEN PROPERLY ASSERTED OTHERWISE

By Scott Tidwell

Arkansas follows the “American Rule,” which provides that attorney’s fees are not recoverable from an opponent unless expressly provided for by statute, court rule or agreement between the parties. Security Pacific Housing Services, Inc. v. Fiddle, 315 Ark. 178, 866 S.W.2d 375 (1993); Hearne v. Banks, 2009 Ark. App. 590, 376 S.W.3d 444 (2009). Certain statutes may provide for the recovery of an attorney’s fee in a particular situation. (The Work Near High Voltage Lines Act, A.C.A. §11-5-301 et seq. allows for the owner or operator of an electrical line to recover all loss, costs and damages, including attorney’s fees, incurred by way of property damage or personal injury by the owner or operator of the lines, including defense of suits brought by others, as a result of contact with the lines in violation of the Act’s requirements that when any person or entity desires to carry on any activity or work within ten feet of the energized line that person or entity notify the owner or operator of the line so that appropriate arrangements can be made.) A more general statute that permits the recovery of attorney’s fees is A.C.A. §16-22-308, which provides that the prevailing party in any civil action to recover on an open account, statement of account, account stated, promissory note, bill, negotiable instrument, or contract relating to the purchase or sale of goods, wares or merchandise or for labor or services or breach of contract (unless otherwise provided by law or the subject contract) may be allowed a reasonable attorney’s fee.

A 1997 amendment to Arkansas Rule of Civil Procedure 54 begins that “claims for attorneys’ fees and related nontaxable expenses shall be made by motion.” See subdivision (e)(1).

How does the Rule 54 (“Judgments; costs”) requirement relate to statutes (or court rules or agreements by parties) that provide for the recovery of an attorney’s fee?

Ark. R. Civ. P. 54(e)(1) continues that the claim for attorneys’ fee shall be made by motion “unless the substantive law governing the action provides for the recovery of such fees as an element of damages to be proved at trial.” For example, the Arkansas Supreme Court and Court of Appeals held in State Auto Property and Casualty Insurance Company v. Swaim, 338 Ark. 49, 991 S.W.2d 555 (1999), Millwood-RAB Marketing, Inc. v. Blackburn, 95 Ark. App. 253, 236 S.W.3d 551 (2006), and Hunter v. Video Real Estate Agency, Inc. (2004 WL 2603588) that an award of attorney’s fees pursuant to Arkansas Code Annotated § 16-22-308 “obviates the need for a motion to be filed requesting the fees.”

Further, the Reporter’s Notes to Rule 54 state that subdivision (e)(1) “makes plain that the subdivision does not apply to attorneys’ fees recoverable as an element of damages, as when sought under the terms of a contract. Such damages typically are to be claimed in a pleading.”

While it seems that all members of the bar do this as matter of practice, Rule 54, and the Reporter’s Notes thereto, give us particular reason to ask for an award of an attorney’s fee in pleadings and to give statutory and/or contractual authority for such an award. Such claims made, often repeatedly, in pleadings will help in response to a defeated party, who,

feeling as such, makes a reach after a Court, while making a finding in favor of your client, permits you to make a claim for the award of an attorney's fee in addition to whatever other relief is granted by the Court's ruling. If your client is entitled to an award of an attorney's fee per A.C.A. §16-22-308 or otherwise under the substantive law governing the action, you may correctly, though not without ultimate fear or frustration, count on your prior claims for attorney's fees made by pleading. Without the filing of a separate motion for an attorney's fee, your opponent may object to however else a particular sum is presented to the Court (in a proposed Order, letter to the Court or a filed or unfiled Affidavit of counsel in support of fees).

The safe move then, to avoid an objection to a claim for an attorney's fee in the first place, is to file a written motion for fees, even if an oral motion was made in front of the Court. This cautious approach will protect against an objection that a motion was not in writing and "filed", as Rule 54(e)(2) requires (when a motion is required at all).

Without a written and filed motion for an attorney's fee though, one or more alternative arguments, in addition to the argument that Rule 54(e) does not apply for the reasons stated above, may still permit an award of an attorney's fee.

First, State Auto Property and Casualty Insurance Company v. Swaim holds that Rule 54(e)(1) does not require a written motion but that an oral motion is sufficient. See also Millwood-RAB Marketing, Inc. v. Blackburn, and Hunter v. Video Real Estate Agency, Inc. If a motion need not be written, it must need not be filed.

Second, it may be that an Order granting relief and from which an attorney's fee may be awarded is not a final judgment and that Rule 54 does not apply. For example, the unliquidated award of attorney's fees pursuant to A.C.A. §16-22-309 (attorney's fee limitation in any civil case in which the court finds a complete absence of a justiciable issue of either law or fact) is not a final order. Stewart Title Guaranty v. Cassill, 41 Ark. App. 22, 847 S.W.2d 465 (1993).

A "judgment", for purposes of Rule 54, is any decree or order from which an appeal lies. "A final judgment is one that dismisses the parties, discharges them from the action, or concludes their rights to the subject matter in controversy." Looney v. Looney, 336 Ark. 542, 986 S.W.2d 858 (1999); see also Smith v. Smith, 337 Ark. 583, 990 S.W.2d 550 (1999); Arkansas Dept. of Human Services v. Farris, 309 Ark. 575, 832 S.W.2d 482 (1992). Rule 54(b) states that when more than one claim for relief is presented in an action or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties. The policy of the rule is to avoid piecemeal appeals. See Maroney v. City of Malvern, 317 Ark. 177, 876 S.W.2d 585 (1994); Cortese v. Atlantic Richfield, 320 Ark. 639, 898 S.W.2d 467 (1995); and Eason v. Flannigan, 349 Ark. 1, 75 S.W.3d 702 (2002). Rule 54(b) does not "obviate the requirement of finality, but instead merely provides that a judgment which is final as to less than all of the litigants or the claims is subject to appeal in accordance with the conditions recited in the rule." Haase v. Stranes, 337 Ark. 193, 987 S.W.2d 704 (1999). Accordingly, a prevailing party, whether it wants to or not, should not be able to successfully claim that an order as to one or some but not all claims or against one or some but not all parties is not final judgment avoiding Rule 54 consideration just because of the remaining claims or parties.

In a further effort to erase any questions of whether an attorney's fee has or can be awarded; under what authority an attorney's fee can be awarded; whether a motion for an attorney's fee is required and, if so, whether it is to be filed; and whether the judgment is final, or will be after the expiration of 30 days (a circuit court judgment does not become final until at least 30 days after its entry. Tanner v. City of Little Rock, 261 Ark. 573, 550 S.W.2d 177 (Ark. 1977)), counsel for the prevailing party should request to draft the order. This will likely be the case anyway if the favorable ruling is made in open court. If appropriate in the subject court, and not too presumptuous, a proposed judgment presented to the Court before a ruling to be issued on the pleadings without a hearing may erase any confusion. Counsel might leave

a blank in the judgment for an entry of an attorney's fee; submit with the proposed judgment an affidavit for an attorney's fee; or, provide in the judgment the precise method and timing by which the prevailing party may make a request for the award of an attorney's fee.

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