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Committee on Community Affairs

VEXATIOUS LITIGATION

Statement of the Issue

During the 2011 legislative session, concern was raised that land use laws, regulations, and local land use ordinances were being abused by individuals or organizations that file lawsuits in bad faith for financial gain. Although s. 163.3184, F.S., requires good faith filing, there was interest in finding out whether the protections already in place for landowners could be strengthened without harming affected citizens' access to courts. There are statutes in place in Florida to protect persons from vexatious litigation in civil actions, administrative proceedings, and land use changes.¹ This issue brief reviews the law on vexatious litigation and frivolous lawsuits.

Discussion

Introduction

Vexatious litigation occurs when a person repeatedly abuses the judicial process, using it for frivolous or malicious purposes. The courts have an inherent ability to manage vexatious litigants to preserve the proper functioning of the court system.² Additionally, many states, including Florida, have statutory protections in place to prevent abusive or frivolous litigation. Penalties include payment of court costs, registration of the individual as a vexatious litigant, the requirement that a vexatious litigant furnish security and/or the requirement that a vexatious litigant obtain court approval before proceeding on a claim. These protections have generally not been found to violate the constitutional right of access to the courts.³

Access to Courts

Article 1, s. 21 of the Florida Constitution protects access to the courts. It reads "The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay."⁴ Additionally, access to the courts is protected by the U.S. Constitution's right to substantive due process.⁵ As a result, access to the courts is a fundamental right. If legislation infringes on a fundamental right, courts will review the law under a strict scrutiny test and uphold it only when it is narrowly tailored to serve a compelling state interest.⁶

Florida Laws

Civil Actions

Florida has the Florida Vexatious Litigant Law. At the time of enactment of the Vexatious Litigant Law, there were already statutes that awarded attorney's fees and costs to individuals who filed frivolous claims. However, this statute went farther requiring certain *pro se* litigants to provide security prior to going forward with an action

¹ Sections 68.093, 120.595, and 163.3184, F.S. Note that this issue brief will not deal with the body of law related to vexatious litigation by prisoners, focusing instead on laws that could affect land use issues.

² *Peterson v. State*, 817 So. 2d 838, 840 (Fla. 2002); *Attwood v. Singletary*, 661 So. 2d 1216 (Fla. 1995).

³ *Smith v. Fisher*, 965 So. 2d 205 (Fla. 4th DCA 2007).

⁴ FLA. CONST. art. 1, s. 21.

⁵ *Mitchell v. Moore*, 786 So. 2d 521 (Fla. 2001).

⁶ *Smith v. Fisher*, 965 So. 2d 205 (Fla. 4th DCA 2007).

because of the concern that attorney's fees and costs were often not recoverable from *pro se* claimants who might be collection proof.

A "vexatious litigant" is defined as:

- A person⁷ who, in the immediately preceding 5-year period, has commenced, prosecuted, or maintained, *pro se*, five or more civil actions in any court in this state, except an action governed by the Florida Small Claims Rules, which actions have been finally and adversely determined against such person or entity; or
- Any person or entity previously found to be a vexatious litigant pursuant to this section.⁸

An action is not deemed to be "finally and adversely determined" if an appeal in that action is pending. If an action has been commenced on behalf of a party by an attorney licensed to practice law in this state, that action is not deemed to be *pro se* even if the attorney later withdraws from the representation and the party does not retain new counsel.

The defendant may move to require the plaintiff to provide security for their claim. If a court finds a litigant to be a vexatious litigant who is not likely to prevail, the court may require the plaintiff to furnish security.⁹ If the security is not furnished, the court can dismiss the action with prejudice.¹⁰ The court may also enter an order prohibiting a vexatious litigant from filing an action without first obtaining leave of court.¹¹ The Florida Supreme Court maintains a registry of vexatious litigants.¹²

In addition to the Florida Vexatious Litigant Law, numerous other sections of law specifically provide sanctions and/or restrictions to vexatious litigants. Specifically:

- Attorney's fees and damages can be obtained when a claim or defense was not supported by the law or facts or if a pleading was filed for the purposes of unreasonable delay.¹³
- The Florida False Claims Act allows a court to award the defendant his/her reasonable attorney's fees and costs if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.¹⁴
- There are a number of statutory provisions limiting the rights of prisoners to file vexatious or frivolous causes of action.¹⁵
- A party who files an action under the Deceptive and Unfair Trade Practices Act can be required to post a bond in the amount reasonable to indemnify the defendant for any damages incurred if the defendant brings a motion alleging that the action is frivolous, without legal or factual merit, or brought for the purpose of harassment.¹⁶ Similarly, if a civil action is brought for unfair trade practices under the insurance trade practices act and that action is found to be frivolous or for the purposes of harassment, the plaintiff is liable for court costs and reasonable attorney's fees incurred by the defendant.¹⁷

Administrative Proceedings

Section 120.595, F.S., allows an administrative law judge (ALJ) to determine that a party participated in the proceeding for an improper purpose. An "improper purpose" is defined as participation in an administrative hearing primarily to harass or to cause unnecessary delay or for frivolous purpose or to needlessly increase the cost of litigation, licensing, or securing the approval of an activity. The ALJ considers whether: (1) the

⁷ The word "person" includes individuals, children, firms, associations, joint adventures, partnerships, estates, trusts, business trusts, syndicates, fiduciaries, corporations, and all other groups or combinations. Section 1.01(3), F.S.

⁸ Section 68.093(3)(a), F.S.

⁹ Section 68.093(3)(b), F.S.

¹⁰ Section 68.093(3)(c), F.S.

¹¹ Section 68.093(4)(5), F.S.

¹² Section 68.093(6), F.S.

¹³ Section 57.105, F.S.

¹⁴ Section 68.086, F.S.

¹⁵ See ss. 58.085, 903.132, 944.279, 944.28, F.S.

¹⁶ Section 501.211, F.S.

¹⁷ Section 626.9927, F.S.

nonprevailing adverse party has participated in two or more proceedings involving the same prevailing party and the same project (2) in which the nonprevailing adverse party did not establish either the factual or legal merits of its position and (3) the factual or legal position asserted in the instant proceeding would have been cognizable in the previous proceedings. If these requirements are satisfied, there is a rebuttable presumption that the nonprevailing adverse party participated in the pending proceeding for an improper purpose. If an ALJ determines that a party participated in the proceeding for an improper purpose, the ALJ may award costs and attorney's fees. Additionally, attorney's fees and damages can be obtained when a claim or defense was not supported by the law or facts or if a pleading was filed for the purposes of unreasonable delay under s. 57.105(5), F.S.

Sections 120.569(2)(e) (actions under the administrative procedures act generally) and 163.3184 (actions under the comprehensive planning laws), F.S., both require a good faith filing. The signature of an attorney or party constitutes a certificate that he or she is not bringing the motion for any improper purpose, such as to harass or to cause unnecessary delay, or for economic advantage, competitive reasons, or frivolous purposes or needless increase in the cost of litigation. If a pleading, motion, or other paper is signed in violation of these requirements, the ALJ may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee. All four of these statutes are generally referenced in an action for attorney's fees in a growth management case.¹⁸

Interestingly, although ch. 120 and ch. 163, F.S., both require a good faith filing, a petitioner may be deemed to have a frivolous appeal under ch. 120, F.S., even though they have the right to make an initial challenge under s. 163.3184, F.S. Section 163.3184, F.S., allows affected parties to challenge a comprehensive plan amendment. An affected party includes: persons owning property, residing, or owning or operating a business within the boundaries of the local government whose plan is the subject of the review, and owners of real property abutting real property that is the subject of a proposed change to a future land use map.¹⁹ There is no requirement that these parties prove that they were adversely affected by the plan amendment. To have standing to appeal an administrative decision, however, a party must show that they were adversely affected by the final agency action.²⁰ Therefore, a filing may be deemed frivolous at the appellate level that was not necessarily frivolous when the administrative challenge was commenced.²¹

Other

Florida Bar Rule 4-3.1 states, "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law." This rule is designed to prevent abuse of the legal system and can result in sanctions against attorneys who pursue frivolous or vexatious litigation.

Florida Case Law

The courts have the ability to enjoin persons engaged in the manifest abuse of the judicial process.²² However, in *Delgado v. Hearn* the court decided that "[w]hile it is clear that a litigant's right to access the courts may be restricted upon a showing of egregious abuse of the judicial process, due process requires that courts first provide notice and an opportunity to respond before imposing this extreme sanction."²³ Egregious abuse of the judicial

¹⁸ *E.g., Highlands Homeowners' Association, Inc., v. DCA*, Case No. 06-3946GM, 2007 WL 39052 (DOAH 2007).

¹⁹ Section 163.3180, F.S.

²⁰ Section 120.68, F.S.

²¹ *Martin County Conservation Alliance v. Martin County, Dep't of Comm'y Affairs*, 35 Fla. L. Weekly D2765 (Fla. 1st DCA 2010) *pending rehearing*.

²² *Cofield v. Alabama Public Service Com'n*, 936 F.2d 512 (11th Cir. 1991); *Willis v. State*, 736 So. 2d 723 (Fla. 2d DCA 1999); *In re Public Defender's Certification of Conflict and Motion to Withdraw due to Excessive Case Load and Motion for Writ of Mandamus*, 793 So. 2d 1 (Fla. 2d DCA 1998).

²³ 805 So. 2d 1017 (Fla. 2d DCA 2002) (citing *Attwood v. Singletary*, 661 So. 2d 1216 (Fla. 1995) and *State v. Spencer*, 751 So. 2d 47 (Fla. 1999)).

process may require misconduct in more than one action before the court can award an injunction barring a plaintiff against further self-representation.²⁴

Other States

Most states have statutes that award attorneys fees and/or costs to the defendant when the petitioner files a frivolous suit. Far fewer states have barriers to litigation for frivolous or vexatious suits. California,²⁵ Florida, Hawaii,²⁶ Iowa,²⁷ and Texas²⁸ all have statutes allowing the court to require the plaintiff to furnish security if the court finds that the plaintiff is a vexatious litigant and is unlikely to prevail on the merits.

Many vexatious litigant statutes require that the vexatious litigant be proceeding *pro se*.²⁹ However, select cases found that a litigant was a vexatious litigant even when represented by counsel. In one of these cases, the court reasoned that the statute's legislative purpose would be frustrated by a construction of the statute permitting a vexatious litigant to avoid the designation by simply obtaining counsel.³⁰

Ohio has statutes that define a vexatious litigant in part as one who has engaged in persistent vexatious conduct.³¹ Once a litigant is determined to be a vexatious litigator, they must obtain leave of the court to proceed with litigation. The court may grant leave when it is satisfied that the litigation is not an abuse of process.³² Unlike the majority of vexatious litigation cases, at least one Ohio court rejected the argument that a party could not be a vexatious litigant if their complaints and motions had some basis in the law. The court noted that a party can be a vexatious litigant when the conduct obviously serves merely to harass or maliciously injure another party to the civil action.³³

Pennsylvania makes it a first degree misdemeanor to vex others with unjust and vexatious suits.³⁴ This provision is a codification of the common law doctrine of "barratry," which involves frequently stirring up suits and quarrels between individuals.³⁵

Conclusion

Florida law has a variety of ways to deal with vexatious litigants. The court has the inherent authority to enjoin them from bringing suit or filing frivolous motions. A number of statutes award attorney's fees, costs, and even damages to defendants when the plaintiff's actions were frivolous or for an improper purpose. Finally, *pro se* litigants who are unlikely to succeed on the merits may be required to provide security to pay for the defendant's litigation expenses and/or obtain court approval to proceed with the action. Other states have similar approaches, and those approaches have generally been upheld under constitutional challenges.³⁶

²⁴ *Rares v. Campbell*, 661 So. 2d 408 (Fla. 3d DCA 1995).

²⁵ Section 391, Ca. Stat. *et seq.*

²⁶ Section 634J-1, Hawaii Stat., *et seq.*

²⁷ Section 617.16, I.C. (allowing the court to find a plaintiff is a vexatious litigant without requiring the defendant to file a motion).

²⁸ Section 11.051, Civ. Practice & Remedies Code, *et seq.*

²⁹ *Littlejohn v. Grundy*, 2007 WL 2391260 (Cal. App. 2d Dist. 2007); *Ramirez v. Encore Wire Corp.*, 196 S.W. 3d 469 (Tex. App. Dallas 2006).

³⁰ *Camerado Ins. Agency, Inc. v. Superior Court*, 12 Cal. App. 4th 838 (3d Dist. 1993).

³¹ Ohio Rev. Code Ann. § 2323.52(A)(2).

³² *Id.*

³³ *Ortiz v. Frye*, 2008 WL 2331441 (Ohio Ct. App. 7th Dist. Jefferson County 2008).

³⁴ Title 18, s. 5109, P.C.S.

³⁵ *Com. v. Lewis*, 453 A.2d 982 (Super. 1982).

³⁶ *See generally*, Validity, Construction, and Application of State Vexatious Litigant Statutes, 45 A.L.R. 6th 493 (2009).