

RESOLUTION 3-03-2002

DIGEST

SLAPP Motion: Attorney Fees

Amends Code of Civil Procedure section 425.16 to eliminate the reference to Code of Civil Procedure section 128.5.

RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

Reasons:

This resolution amends Code of Civil Procedure section 425.16 to eliminate the reference to Code of Civil Procedure section 128.5. This resolution should be approved in principle because it would eliminate confusion by removing the requirement that the court award attorney fees to a prevailing plaintiff pursuant to a provision that is no longer effective.

Code of Civil Procedure section 425.16, subdivision (c), provides that under specified circumstances the trial court shall award attorney's fees to a plaintiff "pursuant to Section 128.5." But by its own terms, section 128.5 applies only to actions filed on or before December 31, 1994. (Code Civ. Proc., § 128.5, subd. (b)(1).) Thus, the reference in section 425.16 is ineffective and potentially confusing.

Moreover, to the extent that the reference to section 128.5 might be interpreted as being to the standards set forth in that section, that reference is unnecessary. Section 425.16 gives sufficient direction to the court by providing that fees should be awarded to a prevailing plaintiff if the motion to strike "is frivolous or is solely intended to cause unnecessary delay . . ." (*Id.* at subd. (c).)

TEST OF RESOLUTION

RESOLVED that the Conference of Delegates recommends that legislation be sponsored to amend Code of Civil Procedure section 425.16 to read as follows:

- 1 §425.16
- 2 (a) The Legislature finds and declares that there has been a disturbing increase
- 3 in lawsuits brought primarily to chill the valid exercise of the constitutional rights of
- 4 freedom of speech and petition for the redress of grievances. The Legislature finds and
- 5 declares that it is in the public interest to encourage continued participation in matters of
- 6 public significance, and that this participation should not be chilled through abuse of the
- 7 judicial process. To this end, this section shall be construed broadly.
- 8 (b)(1) A cause of action against a person arising from any act of that person in
- 9 furtherance of the person's right of petition or free speech under the United States or California
- 10 Constitution in connection with a public issue shall be subject to a special motion to strike,

11 unless the court determines that the plaintiff has established that there is a probability that the
12 plaintiff will prevail on the claim.

13 (2) In making its determination, the court shall consider the pleadings, and supporting
14 and opposing affidavits stating the facts upon which the liability or defense is based.

15 (3) If the court determines that the plaintiff has established a probability that he or she
16 will prevail on the claim, neither that determination nor the fact of that determination shall be
17 admissible in evidence at any later stage of the case, and no burden of proof or degree of proof
18 otherwise applicable shall be affected by that determination.

19 (c) In any action subject to subdivision (b), a prevailing defendant on a special motion
20 to strike shall be entitled to recover his or her attorney's fees and costs. If the court finds that a
21 special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court
22 shall award costs and reasonable attorney's fees to a plaintiff prevailing on the motion, pursuant
23 to ~~Section 128.5~~.

24 [Subdivisions (d) through (k) remain unchanged.]

(Proposed new language underlined; language to be deleted stricken.)

PROPONENT: Bar Association of Northern San Diego County

STATEMENT OF REASONS

Existing Law: The legislature has seen fit to pass Code of Civil Procedure section 425.16 to provide a motion process to permit early review and disposition of SLAPP (Strategic Lawsuit Against Public Participation) lawsuits, and, as a matter of public policy, to include a provision for the award of attorney fees to certain successful parties in connection with such motions. Existing subdivision (c) of section 425.16 provides for such an award of attorney fees pursuant to Code of Civil Procedure section 128.5. However, Code of Civil Procedure section 128.5, by its own terms, applies only to actions filed on or before December 31, 1994.

This Resolution: Would delete the Code of Civil Procedure section 128.5 provision, leaving the procedural vehicle for determining availability of attorney fees open.

The Problem: Under the current wording of Code of Civil Procedure section 425.16, subdivision (c), attorney fees are available "pursuant to Code of Civil Procedure section 128.5." Because of this statutory provision, an argument could be made that since Code of Civil Procedure section 128.5 does not apply to cases filed after December 31, 1994, attorney fees are not available under the section. This resolution would eliminate the anomaly, leaving attorney fees available through other current procedural vehicles such as a motion accompanying a Memorandum of Costs. Please see, *e.g.*, *Los Angeles Times Communications v. American Humane Association* (2001) 92 Cal.App.4th 1095.

IMPACT STATEMENT

This proposed resolution does not affect any other law, statute or rule.

AUTHOR AND PERMANENT CONTACT: David R. Moore, MOORE & SKILJAN, 7700 El Camino Real, Suite 207, Carlsbad, CA 92009 (760) 944-7700

RESPONSIBLE FLOOR DELEGATE: David R. Moore