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American Rule may have third exception

In America, we firmly believe every party should bear his own attorney fees whether he wins or loses. This general rule, known as the American Rule, has exceptions or instances when the loser will be made to pay the winner's fees.

Nationwide, many state courts embrace two standard exceptions to the American Rule. Like the rest of the country, Illinois embraces these two exceptions. But many would argue Illinois has a third exception.

"There is no principle of the common law that permits a successful litigant to recover from his losing adversary the costs and expenses of the litigation. At common law, costs were never recoverable, nor was the successful plaintiff entitled to recover from the unsuccessful defendant his attorney fees or expenses of litigation as damages." *Ritter v. Ritter,* 381 Ill. 549, 552 (1943).

The first exception to this rule is where a statute declares that the loser should pay the winner's fees or costs. See *Rieker v. City of Danville*, 204 Ill. 191, 193 (1903) ("The right to recover fees or costs rests upon statutes, and they cannot be allowed or recovered unless given by statute").

The authorizing statute must be specific. "[S]tatutes permitting recovery of costs, being in derogation of the common law, must be strictly construed [citation] and litigants should not be permitted to recover as costs items other than those specified in the statute authorizing such awards. Illinois courts generally refuse to allow recovery for attorney fees unless the statute specifically states that 'attorney fees' are recoverable." *Negro Nest LLC v. Mid-Northern Management Inc.*, 362 Ill.App.3d 640, 648-49 (4th Dist. 2005).

The second exception to the American Rule is where a contract between the parties declares that the loser should pay the winner's fees or costs. See *Ritter*, 381 Ill. at 552 ("The rule is also well established that attorney fees and the ordinary expenses and burdens of litigation are not allowable to the successful party in the absence of ... some agreement or stipulation specially authorizing the allowance thereof, and this rule applies equally in courts of law and in courts of equity").

Courts require the contract be specific to trigger the exception. "When faced with cost or expense-shifting provisions in contracts, Illinois courts have consistently refused to read attorney fees into imprecise language." *Negro Nest LLC*, 362 Ill.App.3d at 648-49, citing *Reese v. Chicago, Burlington & Quincy R.R. Co.*, 5 Ill.App.3d 450, 457–58 (1972) ("costs" when used in express indemnity agreements does not include attorney fees and other expenses); *Singleton v. County of Cook*, 53 Ill.App.3d 994, 995–96 (1977) (agreement to "'indemnify and save harmless' ... 'against all loss, damage or expense ... as a result of any suits, actions or claims of any character'" is insufficient for recovery of attorney fees or expenses; noting "[t]he agreement did not even refer to attorney's fees and costs, and those items are not recoverable").

THE PROCEDURAL THICKET

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Illinois might have a third exception to the American Rule. In *Harvey v, Carponelli*, 117 Ill. App. 3d 448 (1st Dist. 1983), a pro se plaintiff sued her former law firm alleging professional negligence. The pro se litigant engaged in conduct detrimental to the dignity of the court and was held in contempt. The trial judge then granted defendant's request for attorney fees and costs against her. The pro se litigant appealed.

"The only remaining issue properly before this court is whether the trial court erred in awarding defendants $1,410.50 in attorney fees and $698 in costs. Defendants argue that the award is proper since the expenses were incurred as a result of plaintiff's wrongful conduct, not as a party plaintiff, but as 'pro se counsel' whose improper and impertinent behavior magnified the costs of the defendants' defense. We agree." *Harvey*, 117 Ill.App.3d at 454.

Now comes what looks awfully like the third exception. "In Illinois, one who commits a wrongful act is liable for all the ordinary and natural consequences of his act. (citations omitted). Moreover, when one's wrongful conduct forces another into litigation with third parties, he is liable for all of the costs of that litigation including attorney fees." *Harvey*, 117 Ill. App. 3d at 454.

I think this statement of the law is correct. See *Sorenson v. Fio Rito*, 90 Ill.App.3d 368 (1st Dist. 1980) ("We do not believe [the American Rule] was intended to preclude a plaintiff from recovering losses directly caused by the defendant's conduct simply because those losses happen to take the form of attorneys' fees. The plaintiff here is not attempting to recover the attorneys' fees she expended in bringing this lawsuit. Rather, she seeks to recover losses incurred in trying to obtain refunds of tax penalties which were assessed against her solely as a result of the defendant's negligence").

But *Harvey* applied this statement of law to authorize the recovery of a winners' cost of suit fees against the loser without a statutory or contractual basis. That is not an expression of damages in the *Sorenson* sense. Rather, *Harvey* seems to be a third exception to the American Rule — authorizing fee-shifting between the plaintiff and the defendant in an amount that approximates the cost of bringing or defending the suit.