

613 So.2d 47
District Court of Appeal of Florida,
Second District.

Betty B. O'BRIEN and James
L. Essenson, Esq., Appellants,
v.
Robert E. SARKA, Appellee.

No. 92-02013.

|
Jan. 15, 1993.

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Rehearing Denied Feb. 15, 1993.

Synopsis

After estate beneficiary intervened unsuccessfully in suit by guardian to collect fees from personal representative, attorney fees were awarded against beneficiary by the Circuit Court, Sarasota County, Andrew D. Owens, Jr., J., and beneficiary and her attorney appealed. The District Court of Appeal, Frank, J., held that beneficiary's motion for intervention was not completely untenable so as to support award of attorney fees.

Reversed.

West Headnotes (2)

[1] Costs

🔑 Bad Faith or Meritless Litigation

Requirement of frivolousness for award of attorney fees under statute is finding of complete absence of justiciable issue of law and fact raised by losing party. [West's F.S.A. § 57.105](#).

[1 Cases that cite this headnote](#)

[2] Executors and Administrators

🔑 Persons, Property, and Fund Liable in General

Intervention by estate beneficiary in action by guardian of deceased to collect fees from personal representative of estate was not completely untenable so as to support

award of attorney fees against beneficiary after guardian prevailed, where beneficiary asserted that she questioned adequacy of representation of her interests by personal representative because representative and guardian were coplaintiffs in other litigation against beneficiary, and beneficiary was attempting to protect assets of the estate. [West's F.S.A. § 57.105](#).

[1 Cases that cite this headnote](#)

Attorneys and Law Firms

*47 [James L. Essenson](#) of Law Firm of James L. Essenson, Sarasota, for appellants.

[Henry P. Trawick, Jr.](#), of Trawick & Valentine, P.A., Sarasota, for appellee.

Opinion

[FRANK](#), Judge.

Betty O'Brien and her attorney have appealed from the trial court's award of attorneys' fees imposed pursuant to [section 57.105, Florida Statutes](#). O'Brien had moved to intervene in an independent action filed by Sarka, the guardian of the deceased, against Thomas, the personal representative of the estate. Sarka was *48 attempting to collect guardianship fees and he had submitted a statement of claim against the estate to which O'Brien, in her capacity as beneficiary of the estate, objected. O'Brien's objection prompted Sarka to file the independent action. O'Brien petitioned to intervene, her motion was granted, and then Sarka moved for judgment on the pleadings. Sarka prevailed, and the court awarded him fees under [section 57.105](#).

[1] [2] To grant fees under [section 57.105](#), the court must find a *complete* absence of a justiciable issue of law and fact to have been raised by the losing party. As we stated in [Rojas v. Drake](#), 569 So.2d 859, 860 (Fla. 2d DCA 1990).

[T]he requirement of frivolousness for an award of attorney's fees is not equivalent to the standard required to prevail on a summary judgment,

judgment on the pleadings, or even a motion to dismiss for failure to state a cause of action. Rather, an award of attorney's fees under [section 57.105](#) is only proper where the action is so clearly devoid of merit both on the facts and the law as to be completely untenable.

O'Brien's Motion for Intervention was not, at first blush, completely untenable. She asserted that she questioned the adequacy of representation of her interests by Oleta Thomas, the personal representative of the estate, because

Sarka and Thomas were co-plaintiffs in other litigation against O'Brien. As a beneficiary, she was attempting to protect the assets of the estate. Although her intervention was invalid, the action was not so frivolous as to require that she and her attorney be punished for attempting it.

Reversed.

[DANAHY](#), A.C.J., and [LUTEN](#), CLAIRE K., Associate Judge, concur.

All Citations

613 So.2d 47, 18 Fla. L. Weekly D301, 18 Fla. L. Weekly D998