

Should you have to pay your opponent's lawyer if you lose a lawsuit?

John Sowell

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Jim Jones, who just retired as chief justice of the Idaho Supreme Court, didn't expect that a ruling last fall in a medical malpractice suit would cause a big stir.

The high court upheld an \$848,000 judgment after a jury found a Boise physician negligently and recklessly failed to diagnose hip dysplasia in a child.

As part of its decision, the Supreme Court awarded parents Randy and Gaylena Hoffer attorney fees, ruling that the appeal by the physician and other medical providers was frivolous. At the same time, the court announced that beginning March 1, judges could award such fees to prevailing parties in other civil cases "when justice so requires," creating a new, uncertain standard.

Lawyers worried that the threat of paying the other side's attorneys might have a chilling effect on whether people file lawsuits. They complained loudly.

Even Justice Roger Burdick, who succeeded Jones as chief justice, had the same concern. He wrote in a dissent that judges had no standard or guidance to follow in determining "when justice so requires."

"I believe that the majority's analysis will further inhibit access to justice and tilt the table even further toward moneyed interests in our courts," Burdick wrote in the case, which was decided in a 3-2 vote.

Jones, in a recent interview with the Idaho Statesman editorial board, said he envisioned the change having the opposite effect. He echoed the written decision in saying it was an attempt to undo a perceived overreach by the Supreme Court in 1979, when justices created the current practice — paying the winner's fees only if a judge deems a case frivolous. The phrase "when justice so requires" comes from a 1987 statement of legislative intent, wording that is not state law but is intended to provide context for such law.

He also said the change will affect a relatively small percentage of cases, as lawsuits over a contract already tend to carry some sort of "loser pays" provision.

“My take on it is that it gives a small party the standing, perhaps, to level the playing field,” Jones said. “There are so many issues where these big companies try to squash the little guy just by outmaneuvering and paying the lawyers to squash them.”

It’s precisely that little guy who will be harmed if the new rule goes into effect, said Sen. Grant Burgoyne, D-Boise.

“The fact is that ordinary people are not going to be able to fight city hall or anybody else because they’re putting their house, their kids’ college education, their own retirement on the line for a case,” said Burgoyne, an attorney for nearly 30 years who has represented both plaintiffs and defendants in civil cases. “If we had a complete ‘loser pay’ system, we lose the opportunity to have the courts be an engine of justice, where people can go to redress their grievances.”

Burgoyne and other Idaho lawmakers interested in keeping the current standard plan to introduce bipartisan legislation to preserve it. Members of both the Senate and House have been talking about the issue since the Legislature convened earlier this week, said Senate Majority Leader Bart Davis, R-Idaho Falls.

Howard Belodoff is associate director of Idaho Legal Aid Services, which provides representation for low-income residents. He said he’s pleased the Legislature is taking action.

“It’s really impossible for low-income people to get legal representation as it is. This will make it more unavailable and I don’t think that’s where the courts ought to be,” Belodoff said.

Belodoff said he was baffled that the fees standard became an issue at all. According to court records and hearing audio, no one — not lawyers, not the justices — publicly discussed a new standard for attorney fees during the malpractice case.

Long a concern for Jones

The scheduled rule change is in line with the “English rule,” practiced throughout Europe, Canada and the state of Alaska. There, the losers in court actions pay the legal costs of the other side. Here each party generally pays its own attorney fees, except in cases such as the frivolous-suit standard.

Though apparently unrelated to the malpractice case, the fact that the justices announced the change in a court opinion means their discussions and notes are not public record, under an exemption protecting judicial decision-making. But Jones provided some context.

He grew up on a farm in Eden and said judges in the Magic Valley followed the law the way Jones interpreted it until the 1979 ruling that established the frivolous-case standard.

After Jones was elected Idaho attorney general in 1982, he tried to introduce a bill reversing that standard. Attorneys from all sides and even a representative from the Supreme Court all objected. “I said, forget it.”

During his 12 years on the Supreme Court, Jones said, the idea periodically came up for discussion. Finally, when the justices sat down to discuss the Hoffer malpractice case, Jones and Justices Joel Horton and Daniel Eismann voted to implement the rule. Burdick and Justice Warren Jones voted against the provision.

Will anyone defend the change?

Belodoff said he hasn't heard of anyone except for those three justices who favor the new rule. He wondered whether anyone will testify against a bill to keep the current standard after it's introduced in the Legislature.

The insurance industry could potentially benefit if it doesn't have to cover attorney fees for large clients. But Burgoyne said he has spoken with industry representatives who aren't interested in taking a person's home or forcing them into bankruptcy and likely still not recovering legal fees in the process.

Those fees, Belodoff said, are part of doing business and are included in the premiums insurance companies charge their clients.

One supporter of the change comes from a well-known libertarian think tank. Walter Olson, a senior fellow with the Cato Institute, for more than two decades has called on the United States to adopt the English rule, which "satisfies a sense of fairness."

In "loser pay" countries, he said, there's no fear that cases with merit aren't being filed because litigants are afraid of having to pay the winning side. He said insurance companies offer policies covering legal expenses for individuals on both ends of a lawsuit.

"Critics of 'loser pay' will say, look, this is a random and frightening element, people will be afraid, they wouldn't want to go forward with a legitimate case or legitimate defense because they'll be too scared of this," Olson said. "The actual experience in other countries tends to be different. They say it's America where people are constantly spinning their wheels with a bad case."