

## New Legislation on Landlord's Out-of-Pocket Expenses

One of the General Assembly's last acts before adjourning in June was the enactment of [S.L. 2018-50 \(S 224\)](#), amending landlord-tenant law in apparent response to a decision by a Wake County Superior Court Judge. See "[It's Landlords vs. Tenants in Eviction Battle.](#)" Raleigh News & Observer 6/18/2018.

### Hargrove v. Grubb Management, Inc.

Superior Court Judge Shirley ruled in favor of plaintiff/tenant Jordan Hargrove in an action against his landlord for unfair debt collection practices in violation of GS 75-54. The judge's decision was based on a finding that the landlord had violated GS 42-46 by charging Mr. Hargrove \$191 in connection with a prior summary ejectment action dismissed by the landlord before trial. According to media accounts, the landlord required payment of the following fees as a condition of dismissing the action: (1) all past-due rent and the next month's rent in advance; (2) a late fee of \$43.75 pursuant to GS 42-46(a); (3) an administrative fee of \$43.75 pursuant to GS 42-46(e); (4) \$96 reimbursement for court costs and \$30 for service of process; and (5) attorney fees. (I'm guessing at these amounts based on the information in the news articles and order.)

Judge Shirley found the fees in (4) and (5) above to be improper under [GS 42-46\(h\)\(3\)](#), which – prior to this amendment—provided:

*It is contrary to public policy for a landlord to put in a lease or claim any fee for filing a complaint for summary ejectment and/or money owed other than the ones expressly authorized by subsections (e) through (g) of this section, and a reasonable attorney's fee as allowed by law. (Emphasis added.)*

Note: The portion of Judge Shirley's order related to attorney fees found that such fees are not authorized by [GS 6-21.2](#) in an action for summary ejectment unaccompanied by a claim for unpaid rent.

### New law

Judge Shirley's decision surprised and alarmed many in the property management community, and the General Assembly responded by amending GS 42-46 to add the following sections:

*(i) Out-of-Pocket Expenses. – In addition to the late fees referenced in subsections (a) and (b) of this section and the administrative fees of a landlord referenced in subsections (e) through (g) of this section, a landlord is also permitted to charge and recover from a tenant the following actual out-of-pocket expenses:*

*(1) Filing fees charged by the court.*

*(2) Costs for service of process pursuant to G.S. 1A-1, Rule 4 of the North Carolina Rules of Civil Procedure and G.S. 42-29.*

*(3) Reasonable attorneys' fees actually incurred, pursuant to a written lease, not to exceed fifteen percent (15%) of the amount owed by the tenant, or fifteen percent (15%) of the monthly rent stated in the lease if the eviction is based on a default other than the nonpayment of rent.*

*(j) The out-of-pocket expenses listed in subsection (i) of this section are allowed to be included by the landlord in the amount required to cure a default.*

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The amendment also makes a conforming change to GS 42-46(h)(3), adding these fees to the list of those allowed. The new law became effective June 25, 2018.

#### Relevance to small claims magistrates

The primary rule established by the new law – that landlords charging the listed fees are not engaging in an unfair business practice – will affect very few small claims cases, due to the rarity of unfair business practices cases in that court. The provision making tenants responsible for court costs – including service fees—reflects current practice across the State in judgments in which the landlord is the prevailing party. The exception to this – occurring when service is by posting and the tenant does not appear – is not affected by this legislation. Nor does this legislation affect the amount a tenant must tender in order to defeat a claim for summary ejectment based on the statutory implied forfeiture established by [GS 42-3](#).

The most significant aspect of the new law for small claims magistrates is the provision related to attorney fees. In general, attorney fees may be awarded only if authorized by a statute applicable to the particular sort of case being tried. The law related to attorney fees in summary ejectment cases has been somewhat unclear for years. When a provision in a written lease authorizes such fees, they have been upheld in actions for money damages caused by a tenant's breach of lease. [WRI/Raleigh v. Shaikh](#), 183 NC App 249 (2007). The statutory authorization in these cases has been found in GS 6-21.2(1) based on the character of the written lease as "evidence of indebtedness" under that statute. That rationale was approved in [NC Indus. Capital v. Clayton](#), 185 NC App 356 (2007), this time not only in connection with the claim for money damages, but also for attorney fees incurred in a previous summary ejectment action related to the same rental property. The Court indicated that attorney fees incurred "for participation in other proceedings to expedite collection or preserve assets" – such as a summary ejectment action – might be permissible under GS 6-21.2 if the plaintiff proves them reasonably related to the "principal proceeding" of collecting

a debt. No case law, however, specifically approved an award of attorney fees based on GS 6-21.2 in a simple summary ejectment action in which the landlord was seeking only to recover possession of the rental property.

S.L. 2018-50 changes all that. The amendment to GS 42-46 allows a landlord in a summary ejectment case to recover “reasonable attorney fees actually incurred” if agreed to in a written lease. The fees may not exceed 15% of the amount owed by the tenant, or 15% of the monthly rent if the action is based on a breach other than unpaid rent.

As with any new statute, there are questions about the details associated with the new law’s implementation. As we learn more, I’ll be sure to share with all of you!