



HENRY McMASTER
ATTORNEY GENERAL

May 5, 2006

The Honorable R. N. Langley
Magistrate, Florence County
P. O. Box 904
Johnsonville, South Carolina 29555

Dear Judge Langley:

In a letter to this office you referenced the provisions of S.C. Code Ann. § 16-3-1750 which provides for the seeking of a restraining order against an individual engaged in harassment in the first or second degree or stalking. Pursuant to such provision,

(B) An action for a restraining order must be filed in the county in which:

- (1) the defendant resides when the action commences;
- (2) the harassment in the first or second degree or stalking occurred;
- or
- (3) the plaintiff resides if the defendant is a nonresident of the State or cannot be found.

(C) A complaint and motion for a restraining order may be filed by any person. The complaint must:

- (1) allege that the defendant is engaged in harassment in the first or second degree or stalking and must state the time, place, and manner of the acts complained of, and other facts and circumstances upon which relief is sought;
- (2) be verified; and
- (3) inform the defendant of his right to retain counsel to represent him at the hearing on the complaint.

(D) The magistrates court must provide forms to facilitate the preparation and filing of a complaint and motion for a restraining order by a plaintiff not represented by counsel. The court must not charge a fee for filing a complaint and motion for a restraining order against a person engaged in harassment or stalking. However, the

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court shall assess a filing fee against the nonprevailing party in an action for a restraining order. The court may hold a person in contempt of court for failure to pay this filing fee. (emphasis added).

As set forth, such provision allows for the filing of a civil action seeking a restraining order for harassment or stalking. The complaint anticipates a hearing on the matter inasmuch as the complaint filed informs the defendant of the right to retain counsel at a hearing. While a fee is not charged for filing the complaint and motion for a restraining order, it is specified that the fee will be assessed against the nonprevailing party. I am unaware of any court decisions or prior opinions of this office addressing the matter of the assessment of the charge for the filing fee.

In your letter you stated that

In my opinion, the defendant would never prevail, but only have the greater weight of evidence on his side of the case and have the restraining order denied but would never be granted a restraining order against the plaintiff, therefore the defendant should never have to pay. The law seems to say that the plaintiff (who is the prevailing or non-prevailing party) should pay if he fails to prevail in the application for the restraining order.

In my opinion, inasmuch as a hearing is provided on the matter of the issuance of the restraining order, either the plaintiff who sought the restraining order or the defendant who would oppose such could be determined to be the prevailing party. In Dimick v. Dimick, 915 P.2d 254 (Nev. 1996), the Nevada Supreme Court commented that a party cannot be a "prevailing party" where an action has not proceeded to judgment. However, in the situation addressed by Section 16-3-1750, the matter does proceed to judgment and the decision regarding the issuance of the restraining order is resolved following the opportunity for a contested hearing.

The Indiana Court of Appeals in its decision in Salcedo, DPM v. Toepp, 696 N.E.2d 426 at 436 (Ind. Ct. App. 1998) defined the term "prevailing party" as "...a party who successfully prosecutes his claim or asserts his defense." In the situation involving the restraining order addressed in your letter, as stated, a hearing is held following the filing of a complaint and the matter of the issuance of a restraining order is resolved following a hearing. Such a situation assumes, therefore, the determination of a prevailing party and a nonprevailing party. If the defendant successfully asserts his defense, a restraining order would not be issued and he or she would be determined to be the prevailing party. With the determination of a prevailing party in such circumstances, there is also the determination of a nonprevailing party who in the situation where a restraining order is not issued would be the plaintiff. Of course, if the plaintiff successfully prosecutes the claim and obtains a restraining order, then that individual is the prevailing party and the defendant would be the nonprevailing party. In both situations, pursuant to Section 16-3-750, the court then would assess the filing fee against the nonprevailing party which could be either the

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plaintiff if a restraining order is issued or the defendant is the court declines to issue the restraining order.

If there are any questions, please advise.

Sincerely,



Charles H. Richardson
Senior Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Assistant Deputy Attorney General