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TORTS Torts: Defamation and Abusive Litigation

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TORTS

Torts: Defamation and Abusive Litigation

CODE SECTIONS:	O.C.G.A. §§ 51-5-12 (new), 51-7-80 to -85 (new)
BILL NUMBER:	SB 239
ACT NUMBER:	416
SUMMARY:	One person may sue another for libelous statements made in visual or sound media. Section 1 of the Act permits a defendant to plead and prove certain facts which will prevent the plaintiff from recovering punitive damages and also will mitigate actual damages. These facts include: the defendant acted without malice; the plaintiff did not request a retraction; or the defendant published a retraction in a manner as conspicuous as that of the defamatory statement. Section 2 of the Act defines the tort of abusive litigation. A plaintiff may sue in tort if a defendant, with malice, levied a claim against him which was frivolous, groundless in law or fact, or vexatious. The Act permits several complete defenses to the tort, including: that the original plaintiff pursued the suit in good faith; that the plaintiff voluntarily dismissed the suit; or that the defendant in the abusive litigation suit was substantially successful in the underlying suit that formed the basis of the claim for abusive litigation.
EFFECTIVE DATE:	July 1, 1989

History - SB 239, Section 1: Defamation

Section 51-5-11 allows either party in an action for libel to introduce evidence that the plaintiff requested a retraction of the alleged libelous statement.[1] The section permits a defendant in a civil action for libel

1. O.C.G.A. § 51-5-11 (Supp. 1989).

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to plead certain facts which would prevent the award of punitive damages and possibly mitigate actual damages.[2] The law allows the defendant to show that (1) he made the libelous communication without malice,[3] (2) he made a retraction,[4] or (3) the plaintiff requested no retraction.[5] Upon the proof of one or more of the facts above, the court will require that the defendant pay only actual damages.[6] The proof of the retraction may also serve as evidence to mitigate actual damages.[7]

The courts, however, have interpreted this section to apply only when the defendant made the alleged libel in printed media.[8] The courts have, therefore, stated that section 51-5-11 does not apply if the defendant made the libelous statement in visual or sound media, thereby leaving a void in the statutory scheme.[9]

SB 239, Section 1: Defamation

The Act creates new section 51-5-12, which includes language similar to the existing section.[10] The Act applies "in any civil action for a defamatory statement which charges the visual or sound broadcast of an erroneous statement alleged to be defamatory . . . ."[11] The Act declares that it is relevant evidence that the plaintiff requested or failed to request a retraction.[12] Similar to the existing section applicable to print media,[13] the Act permits a defendant to make certain proofs to prevent the award of punitive damages and to mitigate actual damages.[14] The defendant may show: that he made the statement without malice;[15] that he corrected and retracted the libelous statement in a regular broadcast within three days after receipt of plaintiff's written demand for

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2. O.C.G.A. § 51-5-11(b) (Supp. 1989).
3. O.C.G.A. § 51-5-11(b)(1)(A) (Supp. 1989).
4. O.C.G.A. § 51-5-11(b)(1)(B) (Supp. 1989).
5. O.C.G.A. § 51-5-11(b)(2) (Supp. 1989).
6. O.C.G.A. § 51-5-11(c) (Supp. 1989).
7. O.C.G.A. § 51-5-11(b)(2) (Supp. 1989).
8. Williamson v. Lucas, 171 Ga. App. 695, 320 S.E.2d 800 (1984). The court in *Williamson* applied a plain meaning approach to the construction of O.C.G.A. § 53-5-11, noted that the statute used the terms "newspaper or other publication," stated that the retraction must be in the next "issue," and concluded that "it is clear that the legislature intended that the Act apply exclusively to newspapers and the printed media." *Id.* at 697, 320 S.E.2d at 802.
9. *Id.* at 698, 320 S.E.2d at 803.
10. *Compare* O.C.G.A. § 51-5-12 (Supp. 1989) *with* O.C.G.A. § 51-5-11 (Supp. 1989).
11. O.C.G.A. § 51-5-12(a) (Supp. 1989).
12. *Id.*
13. *See supra* text accompanying notes 1–8.
14. O.C.G.A. § 51-5-12(c) (Supp. 1989).
15. O.C.G.A. § 51-5-12(b)(1)(A) (Supp. 1989).

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retraction;[16] or that, if the plaintiff so requested, the defendant included, as part of the correction and retraction, a specific repudiation of the alleged defamatory communication on the same day as the retraction.[17] The defendant may also give proof that the plaintiff made no request for a retraction.[18] The Act mandates that the defendant will not pay punitive damages upon proof of any of the facts above.[19] The defendant may use proof of the retraction to mitigate actual damages.[20]

History of the Abusive Litigation Section

Before the passage of the Act, Georgia law concerning frivolous lawsuits rested in statutory and other judge-made sources. Section 9-15-14 permits a court, upon plaintiff's motion, to award attorney's fees and other reasonable costs of litigation.[21] Within two weeks following the effective date of section 9-15-14, the Georgia Supreme Court, in *Yost v. Torok*,[22] created the new tort of abusive litigation. This tort replaced the common law torts of malicious use of process and malicious abuse of process.[23] The court intended the tort of abusive litigation established by *Yost* to supplement the provisions of section 9-15-14.[24] Therefore, the court limited the remedies under *Yost* to damages other than the award of attorneys' fees and other tangible costs of litigation.[25]

Section 9-15-14 was to expire on July 1, 1989.[26] Therefore, commentators expressed concern that the legislature must enact a replacement statute

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16. O.C.G.A. § 51-5-12(b)(1)(B) (Supp. 1989). The Act requires that the retraction must be in "as conspicuous and public a manner as ... the alleged defamatory statement was broadcast." *Id.*

17. O.C.G.A. § 51-5-12(b)(1)(C) (Supp. 1989).

18. O.C.G.A. § 51-5-12(b)(2) (Supp. 1989).

19. O.C.G.A. § 51-5-12(c) (Supp. 1989).

20. *Id.*

21. O.C.G.A. § 9-15-14(a) (Supp. 1989). The statute permits the court to award, upon motion, "reasonable and necessary attorney's fees and expenses of litigation" to a party against whom were levied claims or defenses that a court could not reasonably be expected to accept. *Id.* The motion may be made within 45 days following the final disposition of the case. O.C.G.A. § 9-15-14(e) (Supp. 1989).

22. 256 Ga. 92, 344 S.E.2d 414 (1986).

23. Yost v. Torok, 256 Ga. at 95, 344 S.E.2d at 417. In order to prevent the "prospect of never-ending litigation," the court declared that the claim for abusive litigation be asserted as a compulsory counterclaim in the existing action. *Id.* at 96, 344 S.E.2d at 418.

24. *Id.* at 95, 344 S.E.2d at 417.

25. *Id.* Under *Yost* the plaintiff may recover damages for mental distress and/or nominal damages. *Id.*

26. 1986 Ga. Laws 1591.

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during the 1989 legislative session.[27] If the legislature did not enact a replacement statute, plaintiffs would not have a suitable vehicle to pursue the award of attorney's fees, because *Yost* expressly excluded such fees from its coverage.[28]

SB 239, Section 2: Abusive Litigation

The statutory tort of abusive litigation was initially proposed in HB 332.[29] That bill, as introduced, defined the tort of abusive litigation as "[a]ny person ... tak[ing] an active part in the initiation, continuation, or procurement of civil proceedings ... : (1) [w]ith malice; and (2) [w]ithout probable cause."[30]

The House Judiciary Committee offered a substitute version of HB 332.[31] The substitute added an extensive section of definitions not contained in the original bill.[32] The House Committee deleted the phrase "without probable cause" and inserted in its place the phrase "without substantial justification."[33]

Following the House vote, the sponsors requested and received a meeting with Georgia Supreme Court justices involved in the *Yost* decision.[34] Chief Justice Marshall and Justice Weltner expressed concern about the requirement of malice reflected in the bill.[35] They stated that the intent of *Yost* was to ensure that malice not be a prerequisite to a finding of liability.[36] The Senate Special Judiciary Committee postponed consideration of the bill to permit the meeting with the justices.[37] This

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27. The legislature, however, deleted the repealer provision in section 9-15-14 during the 1989 session. *See* 1989 Ga. Laws 437; *see also* Gruber, *Battling the Many-Headed Hydra: Abusive Litigation Law in Georgia*, 25 GA. ST. B.J. 65, 73 (1988) [hereinafter *Battling the Hydra*].

28. *See Battling the Hydra*, *supra* note 27, at 73.

29. Final Composite Status Sheet, Mar. 15, 1989.

30. HB 332, as introduced, 1989 Ga. Gen. Assem.

31. HB 332 (HCS), 1989 Ga. Gen. Assem.

32. *Compare* HB 332, as introduced, *with* HB 332 (HCS), 1989 Ga. Gen. Assem.

33. HB 332 (HCS), 1989 Ga. Gen. Assem. "Malice" was defined as:

> acting with ill will or for an unlawful purpose and may be inferred in an action if the party initiated, continued, or procured civil proceedings or process or used process for a purpose other than that of securing the proper adjudication of the claim upon which the proceedings are based.

Id. The term "without substantial justification" was defined as any proceeding, claim, defense, etc. which is frivolous, groundless in fact or law, or vexatious. *Id.*

34. Justice Charles L. Weltner and Chief Justice Thomas O. Marshall met with Representative Tommy Chambliss, House District No. 133, to discuss the pertinent provisions of the bill. *Lundy, Weltner, Legislator Meet on Yost Reform*, Fulton Co. Daily Rep., Mar. 10, 1989, at A1, col. 1 [hereinafter *Lundy*].

35. *Id.*

36. *Id.*

37. *Id.*

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delay prevented the Senate from voting the bill out of the Committee.[38]

To save the bill, the House added it as section 2 to SB 239 as a floor amendment during the last week of the session.[39] SB 239, containing only the "defamacast" provisions, had already been passed by the Senate.[40] The House returned SB 239 to the Senate with the abusive litigation amendment. Upon review, senators expressed concern over the incorporation of the malice requirement, and passage of the amended SB 239 appeared doubtful.[41]

During the waning hours of the session,[42] a conference committee agreed on the language of section 2, and both houses adopted the bill.[43] The final version retained the substance of the House committee substitute. The definition of the tort remains unchanged;[44] a person must pursue civil proceedings against another with malice and without substantial justification.[45]

The Act makes several departures from the *Yost* rule. The proceeding forming the basis of the claim must be terminated.[46] *Yost* required the plaintiff to file the claim as a compulsory counterclaim.[47] Therefore, the plaintiff in a *Yost* claim had to file the claim before the termination of the initial action.[48] Thus the Act's provisions result in the loss of one of *Yost*'s hallmarks: the judicial economy resulting from one proceeding to hear both the substantive issues and the abusive litigation claim.

The statutory tort of abusive litigation requires the party intending to assert the claim to file written notice of the claim with the opposing party.[49] If the plaintiff terminates the underlying suit within thirty days after such notification, or before any ruling on the underlying proceeding, the termination is a complete defense to the abusive litigation claim.[50] Proof of the conclusion of the underlying action in favor of the defendant

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38. *Id.*
39. *Id.*
40. The bill in its initial form had been passed by the Senate on Feb. 10, 1989. Final Composite Status Sheet, Mar. 15, 1989.
41. *Lundy, supra* note 34.
42. *Id.*
43. Final Composite Status Sheet, Mar. 15, 1989.
44. The full text of section 51-7-81 reads:

> Any person who takes an active part in the initiation, continuation, or procurement of civil proceedings against another shall be liable for abusive litigation if such person acts:
> (1) With malice; and
> (2) Without substantial justification.

O.C.G.A. § 51-7-81 (Supp. 1989).

45. O.C.G.A. §§ 51-7-80 to -85 (Supp. 1989).
46. O.C.G.A. § 51-7-84(b) (Supp. 1989).
47. Yost v. Torok, 256 Ga. at 96, 344 S.E.2d at 418.
48. *Id.*
49. O.C.G.A. § 51-7-84(a) (Supp. 1989).
50. O.C.G.A. § 51-7-82(a) (Supp. 1989).

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is also a complete defense to the abusive litigation claim.[51] The defendant may assert good faith as an affirmative defense.[52]

Prior to the Act, the law required that the plaintiff employ *Yost* to recover damages other than attorney's fees and costs. The plaintiff was required to rely on section 9-15-14 to recover fees and costs. The Act allows the plaintiff to recover all damages proven by the evidence, including fees and costs.[53] If the plaintiff claims damages only for fees and costs, however, the Act requires that the plaintiff use the machinery of section 9-15-14.[54]

Thus, although the type of damages to be sought are the same, the procedural methods which must be used may vary. A person seeking damages under section 9-15-14 must assert relief by motion within forty-five days of the termination of the action underlying the claim for relief.[55] The Act permits a plaintiff to assert a claim within one year following the termination of the underlying action.[56] The Act states that if a plaintiff files a motion under section 9-15-14, the plaintiff is not barred from later asserting a claim for relief under the Act. Any ruling made under section 9-15-14, however, is "conclusive as to the issues resolved therein."[57]

The Act appears to relegate *Yost* to historical footnotes. A significant unanswered question, however, is whether the Act will run afoul of the Georgia Constitution. The state constitution requires that "no bill shall pass which refers to more than one subject matter."[58] SB 239 addresses abusive litigation and defamation. Georgia courts construe the constitution to require that an act include only subjects which have a logical connection with one another.[59] For example, the supreme court invalidated an act which provided for a state tax on motor vehicles

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51. O.C.G.A. § 51-7-82(c) (Supp. 1989). Cases have construed *Yost* to require that the suit eventually terminate in favor of the *Yost* claimant. *See, e.g.*, Rothstein v. I.F. Still & Co., 181 Ga. App. 113, 351 S.E.2d 523 (1986). However, when the plaintiff voluntarily discusses the suit after the defendant has filed a *Yost* counterclaim, the underlying suit need not terminate in favor of the *Yost* claimant. *See* Moore v. Memorial Medical Center, 258 Ga. 696, 373 S.E.2d 204 (1988); Chatham County Hosp. Auth. v. Mack, 185 Ga. App. 13, 363 S.E.2d 264 (1987).

52. O.C.G.A. § 51-7-82(b) (Supp. 1989). The Act requires a finding of malice to sustain the prima facie case, yet declares good faith to be an affirmative defense which the defendant must plead. *Id.* Apparently, the Act places the burden of proving the subjective state of mind of the defendant simultaneously on both the defendant and the plaintiff.

53. O.C.G.A. § 51-7-83(a) (Supp. 1989).

54. O.C.G.A. § 51-7-83(b) (Supp. 1989).

55. O.C.G.A. § 9-15-14(e) (Supp. 1989).

56. O.C.G.A. § 51-7-84(b) (Supp. 1989).

57. O.C.G.A. § 51-7-83(c) (Supp. 1989). The Act does not specify whether the term "issues" as employed in this subsection includes the amount of damages, factual findings made by the court in ruling on the motion, or both.

58. GA. CONST. art. III, § 5, ¶ 3.

59. Crews v. Cook, 220 Ga. 479, 139 S.E.2d 490 (1964).

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operating as rolling stores, because the Act also included a provision for counties to levy taxes on such businesses.[60] Therefore, the Act may be vulnerable to a constitutional challenge. If the Act fails such a challenge, *Yost* may be resurrected.

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60. Black v. Jones, 190 Ga. 95, 8 S.E.2d 385 (1940).

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