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CIVIL PRACTICE Dismissed Actions Which May Be Recommended in Federal Court: Provide a Limitation on Time to File Motion for Attorney's Fees in Dismissed Cases Arising from the Exercise of Right of Freedom of Speech or Right to Petition the Government for Redress of Grievances; Provide for Attorney's Fees for Dismissed Cases Arising Out of the Performance of a Judicial Officer's Duties

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CIVIL PRACTICE

***Dismissed Actions Which May Be Recommended in Federal Court:
Provide a Limitation on Time to File Motion for Attorney's Fees in
Dismissed Cases Arising from the Exercise of Right of Freedom of
Speech or Right to Petition the Government for Redress of
Grievances; Provide for Attorney's Fees for Dismissed Cases
Arising Out of the Performance of a Judicial Officer's Duties***

CODE SECTIONS:	O.C.G.A. §§ 9-2-61, 9-11-11.1 (amended), 9-15-15 (new)
BILL NUMBER:	HB 1730
ACT NUMBER:	843
GEORGIA LAWS:	1998 Ga. Laws 862
SUMMARY:	The Act changes the language in the Georgia Code providing for the renewal of dismissed cases. The Act also provides that motions requesting attorney's fees in cases arising out of a defendant's exercise of free speech or right to petition the government for redress of grievances must be filed within forty-five days after the final disposition of the case. Finally, the Act provides that a plaintiff is liable for all attorney's fees arising out of a successful defense for the performance of a judicial officer's official duties.
EFFECTIVE DATE:	July 1, 1998

Introduction

The purpose of the Act is to prevent frivolous lawsuits brought against judges.¹ The Act evolved, in part, in the aftermath of cases in which pro se litigants sued judges who had rendered verdicts against

1. See Record of Proceedings in the Senate Judiciary Committee (Mar. 11, 1998) [hereinafter Record of Proceedings I] (remarks by Sen. Walker) (available in Georgia State University College of Law Library). See generally HB 1730, as introduced, 1998 Ga. Gen. Assem.

them² and, in part, from a fear of a tidal wave of litigation from unhappy or unsatisfied plaintiffs or defendants.³

The Act seeks to prevent frivolous lawsuits against judicial officers acting in their official capacity by holding a plaintiff liable for attorney's fees and costs if the action is brought for purposes of delay or harassment or if the action lacked substantial justification.⁴ HB 1730 underwent several changes, including several floor amendments and substitutes in committee proceedings.⁵ For example, HB 1730, as introduced, only addressed the issue of attorney's fees for dismissed actions against judicial officers, whereas the Act expands its coverage to address the renewal of a case after dismissal as well as claims arising from the expression of free speech or the right to petition the government.⁶

Definitions

The Act provides that a plaintiff is liable for attorney's fees and costs if a case brought against a judicial officer is resolved in favor of the defense and if "the court finds that an attorney or party brought an action that *lacked substantial justification* or that the action, or any part of the action, was interposed for delay or harassment."⁷ The Act defines "lacked substantial justification" as "substantially frivolous, substantially groundless, or substantially vexat[ious]."⁸ Further, the Act defines judicial officers as justices and judges of the appellate courts of Georgia as well as judges of the superior, state, probate, juvenile, magistrate, and municipal courts of Georgia.⁹

2. See Telephone Interview with Rep. Mack Crawford, House District No. 129 (July 9, 1998); Telephone Interview with Judge Stephanie Manis (Aug. 3, 1998); Telephone Interview with Rep. Larry Walker, House District No. 141 (July 13, 1998).

3. See Record of Proceedings in the Senate Judiciary Committee (Mar. 10, 1998) [hereinafter Record of Proceedings II] (available in Georgia State University College of Law Library).

4. See O.C.G.A. §§ 9-2-61, 9-11-11.1, 9-15-15 (Supp. 1998).

5. Compare HB 1730, as introduced, 1998 Ga. Gen. Assem., with HB 1730 (SCSFA), 1998 Ga. Gen. Assem., and O.C.G.A. §§ 9-2-61, 9-11-11.1, 9-15-15 (Supp. 1998).

6. Compare HB 1730, as introduced, 1998 Ga. Gen. Assem., with O.C.G.A. §§ 9-2-61, 9-11-11.1, 9-15-15 (Supp. 1998).

7. O.C.G.A. § 9-15-15 (Supp. 1998) (emphasis added).

8. *Id.*

9. See *id.*

*HB 1730**As Introduced*

HB 1730, as introduced, awarded attorney's fees and costs to judicial officers when actions against them were disposed of in their favor unless the plaintiff could prove that the filing of the action was "justified by an objectively reasonable belief that there was a substantial likelihood of success in the action."¹⁰ The "substantial likelihood of success" language was later changed to "lacked substantial justification" by a floor amendment to a Senate Committee substitute bill.¹¹ This language was changed in the Senate Judiciary Committee because of a challenge that the standard of an "objectively reasonable belief that there was a substantial likelihood of success" was too high.¹² The members of the Senate Judiciary Committee wanted to make the standard in HB 1730 consistent with the frivolous litigation statute and wanted to make it clear that a mechanism would be available for punishing those filing frivolous lawsuits.¹³

House Judiciary Committee Substitute

HB 1730 was first assigned to the House Judiciary Committee, which made several changes.¹⁴ The Committee deleted language from the preamble, added juvenile court judges to those judicial officers included under the bill, and excluded quo warranto or mandamus actions from the actions against judicial officers covered by the bill.¹⁵ Further, while the original bill provided for the complaint to be presented to a judge of the court for review, the Committee preempted a possible conflict of interest by adding the following language: "other than the judge who is the defendant in the civil action. If no such judge exists then the chief judge of a judicial circuit adjacent to the judicial circuit where the civil action is to be filed shall be presented

10. HB 1730, as introduced, 1998 Ga. Gen. Assem.

11. *Compare* HB 1730, as introduced, 1998 Ga. Gen. Assem., *with* HB 1730 (SCSFA), 1998 Ga. Gen. Assem.

12. *See* Record of Proceedings I, *supra* note 1. This standard was challenged by Sen. David Ralston, House District No. 51. *See id.*

13. *See* Telephone Interview with Sen. Clay Land, Sen. District No. 16 (July 10, 1998)

14. *Compare* HB 1730, as introduced, 1998 Ga. Gen. Assem., *with* HB 1730 (HCS), 1998 Ga. Gen. Assem.

15. *Compare* HB 1730, as introduced, 1998 Ga. Gen. Assem., *with* HB 1730 (HCS), 1998 Ga. Gen. Assem.

with the initial pleading.”¹⁶ Finally, the Committee deleted an entire subsection from the original bill, which had provided instructions for how to plead if the filing was not denied.¹⁷

House Floor Amendment

The House passed a floor amendment to the House Judiciary Committee’s substitute that differed only slightly from the Committee’s version.¹⁸ The word “not” was deleted from the provision “the clerk of court shall *not* file the matter but shall present . . . to a judge of the court . . .”¹⁹ This provision assures that the claim will, in fact, be filed with the court.²⁰ The only additional modification made by the floor amendment changed language relating to the filing of a pleading. The floor amendment replaced the “order denying the filing of the pleading” and “order denying filing” language with “order dismissing the pleading.”²¹

16. HB 1730 (HCS), 1998 Ga. Gen. Assem.

17. Compare HB 1730, as introduced, 1998 Ga. Gen. Assem., with HB 1730 (HCS), 1998 Ga. Gen. Assem. The deleted subsection read as follows:

(e) If the judge does not enter an order denying filing as provided in subsection (d) of this Code section, then the judge shall enter an order conditionally or unconditionally allowing filing. The judge shall as a part of such order condition the filing of the matter upon the plaintiff’s provision of adequate security to ensure that funds will be available to satisfy the obligations of attorney’s fees and expenses provided for in this Code section, unless the judge finds that such requirement would unconstitutionally deprive a party of access to the courts or would otherwise be unjust, in which case the order shall unconditionally allow filing. Where a conditional order is entered, the security required may be in the form of payment of funds into the registry of the court, the escrow of funds, or such other form as deemed appropriate by the court. If the plaintiff complies with the requirement of security in a conditional order or if an order unconditionally allowing filing is entered, the matter shall be filed by the clerk and proceed in the same manner as other civil actions. If a plaintiff elects not to comply with the requirement of security in a conditional order, the action shall not be filed and the conditional order shall be appealable in the same manner as an order dismissing the action.

HB 1730, as introduced, 1998 Ga. Gen. Assem.

18. Compare HB 1730 (HCS), 1998 Ga. Gen. Assem., with HB 1730 (CSFA), 1998 Ga. Gen. Assem.

19. Compare HB 1730 (HCS), 1998 Ga. Gen. Assem. (emphasis added), with HB 1730 (CSFA), 1998 Ga. Gen. Assem.

20. See HB 1730 (CSFA), 1998 Ga. Gen. Assem.

21. Compare HB 1730 (HCS), 1998 Ga. Gen. Assem., with HB 1730 (CSFA), 1998 Ga. Gen. Assem.

Senate Judiciary Committee Substitute

HB 1730 went through its most significant changes in the Senate.²² The Senate Judiciary Committee discussed both the standard for dismissing a case and the method for assigning cases to a judge.²³ The Committee offered a substitute that differed substantially from the House version.²⁴ Along with a change in the preamble, lawmakers made significant changes to the language of two sections of HB 1730, as well as the addition of two new sections.²⁵

First, the Committee completely changed the language of the bill regarding the standard for dismissing a case.²⁶ The Committee substitute added language that excluded from the Act “action[s] brought under Title 42, Section 1983 of the United States Code.”²⁷ Additionally, as discussed above, the Committee substitute changed the standard for dismissing a case against a judicial officer from “substantial likelihood of success” to “lacked substantial justification.”²⁸ This new standard was not as high as the “substantial likelihood of success” standard and was changed partly out of fear that valid claims might not survive such a stringent standard.²⁹

Second, the Committee substitute changed the procedure for assigning claims against judicial officers to judges.³⁰ The House version of HB 1730 provided for presenting the case to a judge other than the defendant or, if none existed, to a judge in an adjacent

22. Compare HB 1730 (CSFA), 1998 Ga. Gen. Assem., with HB 1730 (SCSFA), 1998 Ga. Gen. Assem., and O.C.G.A. §§ 9-2-61, 9-11-11.1, 9-15-15 (Supp. 1998).

23. See Record of Proceedings I, *supra* note 1; Record of Proceedings II, *supra* note 3.

24. Compare HB 1730 (CSFA), 1998 Ga. Gen. Assem., with HB 1730 (SCSFA), 1998 Ga. Gen. Assem.

25. Compare HB 1730 (CSFA), 1998 Ga. Gen. Assem., with HB 1730 (SCSFA), 1998 Ga. Gen. Assem.

26. Compare HB 1730 (CSFA), 1998 Ga. Gen. Assem., with HB 1730 (SCSFA), 1998 Ga. Gen. Assem.

27. HB 1730 (SCSFA), 1998 Ga. Gen. Assem. This additional clause was suggested by a representative from the ACLU during the Senate Judiciary Committee meeting on March 10, 1998. See Record of Proceedings II, *supra* note 3 (remarks by an ACLU Representative).

28. Compare HB 1730 (SCSFA), 1998 Ga. Gen. Assem., with HB 1730 (CSFA), 1998 Ga. Gen. Assem.

29. See Record of Proceedings II, *supra* note 3.

30. Compare HB 1730 (SCSFA), 1998 Ga. Gen. Assem., with HB 1730 (CSFA), 1998 Ga. Gen. Assem. The Committee substitute only addressed claims against judicial officers that were not actions for quo warranto, mandamus, or actions brought under 42 U.S.C. § 1983. See HB 1730 (SCSFA), 1998 Ga. Gen. Assem.

judicial circuit.³¹ Conversely, the Senate Committee substitute provided that the complaint or initial pleadings be presented “to the district court administrator for the judicial circuit where the action was filed, [for the administrator] to assign to a superior court judge of that circuit”³² and provided that if the action was filed against a judge or justice of an appellate court, the chief judge of that court should assign the action to a member of that court.³³

Third, the Committee substitute amended Code section 9-11-11.1 by adding new subsection (f).³⁴ Subsection (f) provided for attorney’s fees and expenses in cases arising from the exercise of the right to free speech and the right to petition the government for redress of grievances.³⁵ The General Assembly passed Code section 9-11-11.1 in 1996.³⁶ Code section 9-11-11.1 provides that in all cases arising out of an act that could reasonably be construed as an act in furtherance of the right of free speech or an act to petition the government, the party asserting the claim, as well as his or her attorney of record, must file a written verification with the pleadings.³⁷ This verification must certify: (1) that the party has read the claim and, to the best of his or her knowledge, believes that the claim is grounded in fact and warranted by existing law or that a good faith argument exists for a change in the law; (2) that the act in question is not a privileged communication; and (3) that the plaintiff has not brought the claim in order to harass or suppress a person’s right to free speech.³⁸ Further, Code section 9-11-11.1 defines “acts in furtherance of free speech” and the right to petition the government, and it provides that discovery and hearings shall be stayed upon a motion for dismissal, which must be heard within thirty days of service unless emergency matters

31. See HB 1730 (CSFA), 1998 Ga. Gen. Assem.

32. HB 1730 (SCSFA), 1998 Ga. Gen. Assem.

33. See *id.*

34. See O.C.G.A. § 9-11-11.1(f) (Supp. 1998); HB 1730 (SCSFA), 1998 Ga. Gen. Assem. This later became section 2 of HB 1730, as passed, 1998 Ga. Gen. Assem. See 1998 Ga. Laws 862, § 2, at 863.

35. See HB 1730 (SCSFA), 1998 Ga. Gen. Assem. The provision was added as new section 2 to the bill and the language added to Code section 9-11-11.1 reads as follows: “Attorney’s fees and expenses under this Code section may be requested by motion at any time during the course of the action but not later than 45 days after the final disposition, including but not limited to dismissal by the plaintiff, of the action.” *Id.*

36. See 1996 Ga. Laws 260, § 1, at 261-62.

37. See *id.* at 261 (codified at O.C.G.A. § 9-11-11.1(b) (Supp. 1996)). This provision remains unchanged. See 1998 Ga. Laws 862.

38. See 1996 Ga. Laws 260, § 1, at 261-62 (codified at O.C.G.A. § 9-11-11.1(b) (Supp. 1996)). This provision remains unchanged. See 1998 Ga. Laws 862.

require otherwise.³⁹ Additionally, Code section 9-11-11.1 provides a list of all communications that are deemed privileged by referencing Code section 51-5-7.⁴⁰ The Act amends Code section 9-11-11.1 by providing that attorney's fees and expenses may be requested when a case arising from the exercise of the constitutional rights to free speech or to petition the government has reached its final disposition.⁴¹

Finally, the Committee substitute added a new section that amended Code section 9-2-61, relating to renewal of a case after dismissal.⁴² Code section 9-2-61, adopted in 1967, provides that a dismissed case that is renewed within six months stands on the same footing as it originally stood before dismissal.⁴³ Therefore, if a case is renewed pursuant to Code section 9-2-61, the case will relate back to its original filing date.⁴⁴ In 1985, the General Assembly amended subsection (a) to comply with federal standards and to make sure cases dismissed without prejudice for lack of subject matter jurisdiction could be reviewed in another court.⁴⁵ In 1990, an additional amendment provided a procedure for renewing a case that was dismissed without prejudice for lack of subject matter jurisdiction.⁴⁶ The current Senate Committee substitute simply changed a portion of the language added in the 1985 amendment.⁴⁷ The 1985 amendment allowed renewal of a civil action after dismissal "if permitted by the federal rules of civil procedure"; the Committee substitute struck that language and permitted renewal after dismissal "unless prohibited by federal law."⁴⁸

39. 1996 Ga. Laws 260, § 1 (codified at O.C.G.A. § 9-11-11.1(c)-(d) (Supp. 1996)). This provision remains unchanged. *See* 1998 Ga. Laws 862.

40. *See* 1996 Ga. Laws 260, § 2, at 262-63 (codified at O.C.G.A. § 51-5-7 (Supp. 1996)). This provision remains unchanged. *See* 1998 Ga. Laws 862.

41. *See* O.C.G.A. § 9-11-11.1 (Supp. 1998). This provision was added in the Senate Committee substitute floor amendment as section 1 and the text remained unchanged in the final version of the bill but became section 2. *Compare* HB 1730 (SCSFA), 1998 Ga. Gen. Assem., *with* 1998 Ga. Laws 862.

42. *See* HB 1730 (SCSFA), 1998 Ga. Gen. Assem.; O.C.G.A. § 9-2-61 (Supp. 1998).

43. *See* 1967 Ga. Laws 226, § 38, at 224 (formerly found at O.C.G.A. § 9-2-61 (Supp. 1967)).

44. *See id.*

45. *See* 1985 Ga. Laws 1446, § 1, at 1447 (formerly found at O.C.G.A. § 9-2-61(a) (1985)).

46. *See* 1990 Ga. Laws 876, § 1, at 876 (formerly found at O.C.G.A. § 9-2-61(a) (1990)).

47. *See* HB 1730 (SCSFA), 1998 Ga. Gen. Assem.

48. *Compare* HB 1730 (SCSFA), 1998 Ga. Gen. Assem., *with* O.C.G.A. § 9-2-61(a) (Supp. 1998).

The Act

The Act is substantially similar to the Senate Judiciary Committee substitute.⁴⁹ Other than the addition and modification of language in the preamble and introductions of certain sections, the only other change altered the order in which the sections appear in the Act.⁵⁰ The section amending Code section 9-2-61 became section 1 of the Act, the section amending Code section 9-11-11.1 became section 2 of the Act, and the section amending Code section 9-15-15 became section 3 of the Act.⁵¹

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49. Compare HB 1730 (SCSFA), 1998 Ga. Gen. Assem., with O.C.G.A. §§ 9-2-61, 9-11-11.1, 9-15-15 (Supp. 1998).

50. Compare HB 1730 (SCSFA), 1998 Ga. Gen. Assem., with 1998 Ga. Laws 862.

51. Compare HB 1730 (SCSFA), 1998 Ga. Gen. Assem., with 1998 Ga. Laws 862.