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COMMENTARY

Forward into the Past: Georgia's "New" Statutory Tort of Abusive Litigation

Georgians can take some measure of justifiable pride in those old Confederate legislators who, in those halcyon days over in Milledgeville just before Longstreet gave Pickett that fateful nod, read the pulse of their times in adopting the malice-centered Code section 2883,¹ the state's first general abusive litigation statute. Over a hundred years later, the same sort of contemporaneous thinking characterized the 1986 Georgia legislature's initiative in enacting O.C.G.A. section 9-15-14. Inspired by federal court experience with amended Federal Rule of Civil Procedure 11, this 1986 statutory experiment used objective standards to curtail the phenomenon of abusive tactics in the courts of this state.

So what happened in 1989? Until the adoption of O.C.G.A. sections 51-7-80 to -85 ("Article 5") in the last minutes of the 1989 regular session of the General Assembly, Georgia's statutory pattern of abusive litigation controls formed a relatively well-balanced and cohesive, even if still embryonic and developing, approach to the reduction of the evil it addressed. Two legislative acts—O.C.G.A. sections 13-6-11, 9-15-14(a), and 9-15-14(b)—struck directly at the heart of abusive litigation in this state by isolating the interests impacted by abusive court tactics and advancing legislative responses appropriate to them.

Institutional concerns touching on the efficient and unimpeded operation of the court system as a whole underlie the provisions of section 9-15-14(a). The terms of that statute mandate a virtually automatic shifting of attorney's fees, costs, and expenses of litigation onto a party asserting a claim or defense found to be devoid of "any justiciable issue of law or fact." Conceptually akin to the "loser-pays-all" approach dominant in the civil law nations of Western Europe, the fee-shifting device of section 9-15-14(a) is objective in nature and almost administrative in application.

The "bad faith" of the abusive litigator, or his relative ability to bear the financial burden of sanctions for his conduct, has no bearing on the question of liability under the statutory criterion of section 9-15-14. Both the mandatory character of the statute and its objective standard of liability were the subjects of special attention of the Georgia Court of Appeals in *Ferguson v. City of Doraville*,² where the court applied these features of the act with a vengeance. Whatever the substantive merits

1. The statute appears in the current Code as O.C.G.A. § 13-6-11 (Supp. 1989).

2. 186 Ga. App. 430, 367 S.E.2d 551 (1988).

of the statute, the Georgia Court of Appeals in *Ferguson* provided dramatic proof of the clarity of the policy underlying it.³

Personal misconduct, reflected in a statutory requirement for proof of "bad faith," is the legislative target of section 13-6-11. This statute, providing for a retrospective specific deterrence of abusive litigation through the imposition of judicial sanction, focuses strictly on past individual misbehavior in the prosecution of a claim or defense, or—as the statute phrases it—where the litigant has acted in "bad faith," been "stubbornly litigious," or caused the other party "unnecessary trouble or expense." It subordinates and even displaces the collective concerns which are paramount in the fee shifting technique of section 9-15-14(a). The immediate interests addressed in section 13-6-11 are the party's "good faith" or "bad faith," his "ill will" or "reckless and wanton disregard" of the consequences of positions taken in litigation.

The narrow intent of section 13-6-11 is not, as it is with fee shifting, necessarily to improve the administration of justice in the courts or to discourage similar future behavior on the part of other litigants. The purpose of the law is, baldly stated, to punish.⁴

First adopted in 1863 and carried forward through successive codes into the modern era, section 13-6-11 has been amended only once in order to eliminate its original restriction to contract cases.⁵ Judicial decisions have liberalized its usefulness in other respects.⁶ Even in the face of the narrow constraints on section 13-6-11 as originally enrolled, it has never been the source of significant policy confusion in this state.

General deterrence is, though weakly stated in its language, the major policy thrust of section 9-15-14(b). Where specific deterrent statutes like section 13-6-11 are past-oriented in their punishment of prior misconduct, general deterrent laws like section 9-15-14(b) are more directly concerned with the discouragement of similar behavior by others in the future.

Ideally then, laws aimed at general deterrence should address the habitual residents of the courthouse—the plaintiffs' and defense bar—and not their transient, sojourning clients. Section 9-15-14(b) makes a good beginning in this direction by providing sanctions for peculiarly lawyer-oriented forms of misbehavior: maintaining claims or defenses lacking "substantial justification"; interposing claims or defenses for

3. *Ferguson v. City of Doraville*, 186 Ga. App. at 437, S.E.2d at 557. The court in *Ferguson* notes that "good faith in a subjective sense" was no defense to a claim asserted under section 9-15-14. *Id.* at 437, 367 S.E.2d at 557.

4. *Ballenger Corp. v. Dresco Mechanical Contractors, Inc.*, 156 Ga. App. 425, 274 S.E.2d 786 (1980).

5. See 1984 Ga. Laws 22.

6. See *Ballenger Corp. v. Dresco Mechanical Contractors, Inc.*, 156 Ga. App. 425, 274 S.E.2d 786 (1980) (even though the terms of section 13-6-11 limit it to use by plaintiffs, it is nevertheless available in some situations to defendants in counterclaims); *Derrickson v. Kristal*, 148 Ga. App. 320, 251 S.E.2d 170 (1978) (despite the section's reference to the imposition of its sanctions by a jury, the judge may award them in a bench trial).

purposes of delay or harassment; or unnecessarily expanding litigation by other "misconduct," such as abuse of discovery procedures.

A major weakness of section 9-15-14(b) lies in the absence from its terms of any professionally related sanctions such as reprimand, suspension, or disbarment.⁷ Despite this flaw, the general deterrent intent behind section 9-15-14(b) remains clear.

However imperfectly, however tentatively, the amalgam of sections 13-6-11, 9-15-14(a), and 9-15-14(b) equipped this state with a spectrum of remedial law, forming the nucleus of a balanced policy arsenal with which to combat abusive litigation in the courts of Georgia. The introduction of the new statutory tort of abusive litigation at the end of the 1989 legislative session, however, raises profound questions as to the clarity of Georgia's policy toward misconduct in her courts.⁸ Article 5 recasts the entire body of pre-existing abusive litigation law in Georgia into one primarily committed to the achievement of but a single, predominant policy objective—that of specific deterrence and specific deterrence only.

If we learned anything on the long trail that led from the 1863 adoption of section 13-6-11 to the enactment of section 9-15-14 in 1986, it was the futility of attempting to realize broad, expansive social and policy goals by means of statutory tools designed only to punish individual wrongdoers. The 1986 legislation enacting section 9-15-14 achieved significant change in the Georgia law of abusive litigation. This abrupt redirection of our law rejected personal fault, evidenced by bad faith and malice, as the sole conceptual bedrock of remedies for the reduction of abusive litigation.

Article 5 does not advance this progression. It returns us to a more primitive stage in the evolution of our law in this critical field, the one which was the predominant policy objective in 1863 with the adoption of section 13-6-11.

Every recovery under the 1989 statute is expressly conditioned upon a showing of personal malice of the offending party.⁹ The requirements of the new law have disastrous implications for the goals of general deterrence and fee-shifting as means of improvement in the judicial system as a whole and the trial bar in particular. Compounding this policy fracture, however, is the statute's illogical juxtaposition of malice, arguably the most blatantly subjective standard known to the law, with another, "without substantial justification,"¹⁰ which has its historical origins and policy roots in the objective standards of both section 9-15-14(b) and its model, Federal Rule of Civil Procedure 11. This legislative fusion of subjective and objective liability criteria serves only to muddy

7. Significantly, Federal Rule 11 has spawned a host of such lawyer-oriented punishments. See *Thomas v. Capital Sec. Servs., Inc.*, 836 F.2d 866, 878 (5th Cir. 1988).

8. See O.C.G.A. §§ 51-7-80 to -85 (Supp. 1989).

9. O.C.G.A. § 51-7-81(1) (Supp. 1989).

10. See O.C.G.A. § 51-7-81(2) (Supp. 1989).

the policy goals served by the legislation and makes uncertain the future application of the 1989 Act in the hands of the courts of this state.

The new statutory tort is not intended to attain, nor does it foster collaterally or incidentally, the broad social goals of a fee-shifting statute. By requiring a separate trial for enumerated forms of misconduct, it is at total odds with the non-judgmental, administrative nature of a true fee-shifting statute.

Nor is the statute well-calculated to achieve the ends of an effective general deterrent. Its definitional provisions and operative conditions of liability make no pretense at distinguishing between lawyer and lay person. It applies to both a rigid criterion of liability—the malice branch—which will, in all but the most unusual of cases, be found to exist only in the client. Moreover, the statute makes no effort to fashion any penalties having special meaning to the lawyer, imposing penalties on both the lawyer and the lay person without distinction.¹¹

In its upcoming 1990 session, the General Assembly would do well to rethink its current position regarding statutory resolutions to the problem of abusive litigation in Georgia. Section 13-6-11 should be strengthened and made the primary statutory vehicle under Georgia law to accomplish the specific deterrence of abusive litigation. Its malice standard should be preserved and case law modifications to the statute which have, over time, extended the statute beyond its original statutory confines should be incorporated into the section.

Access to the revised section should be available to plaintiffs and defendants equally, without recourse to the irksome counterclaim now required of defendants by judicial decision.¹² An amendment to the 1989 Act should specifically empower the court to make an award under its provisions without the intervention of a jury. The legislature should make certain through explicit language that section 13-6-11 is available in all civil actions. Most significantly, the section should be amended to allow specifically the recovery of attorney's fees and costs under its provisions and, because general tort damages are most appropriate as a response to individual, personal misconduct, the section should permit recovery of these damages as well.

The fee-shifting attributes of section 9-15-14(a) should be legislatively reinforced to capitalize on the broader, societal benefits available in this approach to the reduction of abusive litigation. The legislature should underscore the mandatory nature of an award under the statute by making clear that trial judges must, as a matter of normal course, transfer fees, expenses, and costs of litigation to a litigant whenever the statutory standard of liability is met. The standard itself, the complete absence of any justiciable issue of law or fact, should be

11. See O.C.G.A. §§ 51-7-81, -83 (Supp. 1989).

12. See *supra* note 6 and accompanying text.

legislatively purged of any lingering suggestion of fault or personal culpability as an element of its composition. This change would ensure that the judiciary will apply the standard as the objective yardstick that it is intended to be.

The single greatest deficiency of section 9-15-14(b) as a general deterrent against abusive litigation is the manner in which the statute extends its reach to include lawyers and professional kinds of misconduct peculiar to litigation and trial tactics. The overall efficiency of the code section in responding to lawyer misbehavior in this regard could be enhanced by focusing the authority of the trial courts on offending attorneys.

The amendment should make clear that trial lawyers bear a unique and special burden in the elimination of abusive litigation. This message is not now emphatically apparent in any Georgia abusive litigation statute. The current language of section 9-15-14(b) suggests that lawyers and nonlawyers alike share an equal risk of penalty flowing from the commission of the same sorts of misconduct. The legislature should underscore the potential liability of lawyers for indulgence in abusive tactics by making attorneys the subject of special sanctions. These sanctions should be separate from the general provisions of the 1989 Act.

The present language of the Act, which lumps lawyers and litigants together and tars them with the same brush, has the inevitable effect of diminishing the attorney's special sense of responsibility for the proper conduct of civil litigation, as well as the immediacy of the liability potential which abuse of litigation should entail. The present terms of section 9-15-14(b) make a start in this regard by pointing specifically to discovery abuse as the kind of misbehavior that falls under the ban of the section. The legislature would do well to consider the extension of this statutory prohibition to improper or negligent document certification, somewhat along the lines of amended Federal Rule 11.

Expansion of the bar's awareness of potential penalties for abusive conduct in litigation would also be advanced through a legislative enumeration of sanctions especially imposable on members of the bar. These must be keyed to their professional standing as attorneys and officers of the court and their relationship to the legal profession.

The legislature should repeal O.C.G.A. sections 51-7-80 to -85.

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