Georgia State University Law Review

Volume 2
Issue 2 *Spring/Summer 1986*

Article 39

9-1-1985

Yost v. Torok: Must the Attorney Withdraw Before Any Hearing on an Abuse of Process Claim?

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COMMENTARY

Yost v. Torok: Must the Attorney Withdraw Before Any Hearing on an Abuse of Process Claim?

In its 1986 session, the General Assembly enacted O.C.G.A. § 9-15-14 to deter the filing of groundless lawsuits and other abusive litigation practices. The new law provides that a judge shall award attorney's fees and expenses to the prevailing party in an action if the court finds that the losing party's claim, defense, or other position showed "such a complete absence of any justiciable issue of law or fact that it could not reasonably be believed that a court would accept" it. The law also gives the judge discretion to award attorney's fees and expenses if it finds the claim or defense "lacked substantial justification," or was "interposed for delay or harassment," or if an attorney or party "unnecessarily expanded the proceeding by other improper conduct, including, but not limited to, abuses of discovery procedures."

Last June, in *Yost v. Torok*, 256 Ga. 92, 344 S.E.2d 414 (1986), the Georgia Supreme Court weighed in with its own sanction against abusive litigation practices. In *Yost,* the court reformed and merged the old common law torts of malicious use and abuse of process into a single tort. The court adopted the language of O.C.G.A. § 9-15-14 to define the reformed tort. Thus a party who has grounds for an award of attorney's fees and expenses under § 9-15-14, also, by definition, has a claim for the tort of abuse of process. A party may recover special damages and, "where there is either willfulness, or wanton and reckless disregard of consequences which is the equivalent of willfulness," damages for mental distress.

There are two important differences between a motion for attorney's fees and expenses under § 9-15-14 and the reformed abuse of process tort. First, under § 9-15-14, the judge, and only the judge, decides whether to make the award. The *Yost* abuse of process claim, on the other hand, "must be pleaded as a compulsory counterclaim or compulsory additional claim" and upon disposition of the underlying action, the claim must be heard "immediately by the same fact finder—that is by the judge or jury of the underlying action." Second, under § 9-15-14, the judge may assess the award against the party, the attorney, or both. A *Yost* abuse of process

claim can be brought only against the party and not the attorney.

The *Yost* case quickly generated controversy and confusion among the bar. Many questions have been raised concerning the reformed tort but none are as immediate as the simple issue: Must an attorney who represented his client in the underlying action withdraw from representation prior to a post-trial hearing on an abuse of process claim? The answer appears to be "Yes."

An attorney should withdraw from representation when it appears he will be called as a witness on behalf of or against his client or when continued representation would involve a conflict of interest between the attorney and the client. These problems confront the attorney in a "*Yost* hearing."

The post-trial hearing will involve inquiry into some or all of the following issues: did the claim or defense lack substantial justification, was it interposed for delay or harassment, were there abuses of discovery or other litigation procedures, was there willfulness in any of these offenses? Since many of these issues involve inquiries into why the attorney conducted the litigation as he did, the attorney's testimony will be required.

As set forth in State Bar Rule 3-105 (EC 5-9): "The roles of an advocate and of a witness are inconsistent; the function of an advocate is to advance or argue the case of another, while that of a witness is to state facts objectively." (See also DR-102).

Complicating the matter further, if a party is found liable for abuse of process and believes that liability was caused by his attorney's bad advice or conduct of the litigation, a malpractice action may follow. This possibility creates a conflict of interest that may compromise the attorney's loyalty to his client. The attorney arguably is concerned not only with defending his client against the abuse of process claim but also with creating a record that will not expose him to liability should the client lose and seek indemnification in a subsequent malpractice suit.

For example, suppose the abuse of process claim asserts that the opposing party willfully brought a particular claim that lacked substantial justification. It will be highly relevant to ask the attorney what advice he gave the client before the claim was filed. If he testifies that he did not inform his client that the proposed claim might be considered frivolous, he increases the chances that his client will escape a finding of "willfullness" but also increases the likelihood of being held liable in a subsequent malpractice action if the client is found liable for abuse of process. On the other hand, if he testifies that he fully informed the client of the frivolous nature

of the claim but the client insisted, he essentially assures a finding of willfulness and an award of maximum damages against his own client. Whatever his testimony, cross-examining the "attorney-witness" and arguing his credibility to the jury are problematic.

Nor would it resolve the problem to simply forbid calling the attorney to testify. This could deny the client his best witness since the attorney's testimony may be the most credible evidence the client has that he did not willfully bring a frivolous or vexatious claim. Moreover, forbidding the attorney's testimony does not resolve the conflict of interest problem. An attorney examining his client, or any other witness, on these issues, must be aware that in eliciting certain kinds of testimony, he may lay the foundation for a successful malpractice suit against himself.

The *Yost* case suggests no solution to these problems. Indeed, by stressing that the *Yost* hearing be held "immediately after" disposition of the underlying action before the same judge or jury, the court contemplates no change in counsel between these two stages of the proceedings. Nor does a hearing on a motion for attorney's fees and expenses under O.C.G.A. § 9-15-14 escape these ethical problems. The judge's power under the statute to assess either the party or the attorney, or both, with the attorney's fees and expenses of the opposing party invites some unseemly finger pointing between counsel and client. Perhaps the only way ultimately to eliminate the conflict of interest problems in these situations is to hold the attorney, and only the attorney, accountable for abuse of litigation. In the meantime, the Supreme Court needs to give guidance, and quickly, to trial lawyers and the trial bench on how to implement the *Yost* decision without entangling trial counsel in impossible conflicts of interest.

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