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CIVIL LITIGATION Cost of Frivolous Actions

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CIVIL PROCEDURE

Civil Litigation: Cost of Frivolous Actions

CODE SECTIONS:	O.C.G.A. §§ 5-6-35 (amended) and 9-15-14 (new)
BILL NUMBER:	HB 1146
ACT NUMBER:	1670
SUMMARY:	The Act allows for the award of reasonable attorney fees and expenses in any civil litigation against any party litigant or counsel, or both, for frivolous litigation. The Act provides for appeal by application.
EFFECTIVE DATE:	July 1, 1986; automatic repeal effective July 1, 1989

History

In 1983, the Federal Rules of Civil Procedure were amended to allow the federal courts to impose sanctions against parties or counsel who assert frivolous claims or defenses in any civil action.[1]

The change in the Federal Rules provided sanctions, which included attorney fees, as a remedy for the problem of frivolous civil actions. At common law, two civil actions were available for malicious civil litigation:

1. Fed. R. Civ. P. 11 provides in pertinent part:

> The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

This portion of Rule 11 was added in 1983 and "attempts to deal with the problem [of abusive litigation] by . . . expanding the equitable doctrine permitting the court to award expenses, including attorney fees, to a litigant whose opponent acts in bad faith in instituting or conducting litigation." Fed. R. Civ. P. 11 notes of advisory committee rules. *See, e.g.*, Roadway Express, Inc. v. Piper, 447 U.S. 752 (1980). In 1976, Congress enacted 42 U.S.C. § 1988 allowing attorney fees to be awarded to prevailing parties in certain federal civil rights cases. Although not specifically stated in 42 U.S.C. § 1988, the federal courts have basically allowed prevailing *plaintiffs* reasonable attorney fees. *See, e.g.*, Wallace v. King, 650 F.2d 529 (4th Cir. 1981) (plaintiffs only partially prevailed); Maine v. Thiboutot, 448 U.S. 1 (1980) (denial of welfare benefits). However, the courts denied these fees to prevailing *defendants* unless the plaintiff's case was found to be frivolous or malicious.

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malicious *use* of process[2] and malicious *abuse* of process.[3] Malicious *use* of process, a derivation of "malicious prosecution," consisted of "the malicious suing out of process without probable cause."[4] An essential element of malicious *use* of process is the termination of the proceeding in the plaintiff's favor.[5]

In Georgia common law, a subsequent action was required for malicious use of process after the termination of the first action.[6] There must be a use of the legal process for purposes other than the use intended by law.[7] An action for malicious use of process could not be asserted in a counterclaim.[8]

The second common law cause of action, malicious *abuse* of process, could arise only after a civil action had begun.[9] To state a claim for malicious *abuse* of process, the claimant was required to show "the existence of an ulterior motive, and an 'act in the use of the process not proper in the regular prosecution of the proceedings.' "[10] Although remedies were available in Georgia for failure to respond to discovery,[11] for frivolous appeals,[12] and as part of damages if bad faith was shown,[13] Georgia allowed no recovery of attorney fees unless the litigant seeking fees could state a claim of either malicious *use* of process or malicious *abuse* of process. There was no counterpart to the amended Rule 11, Federal Rules of Civil

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2. Malicious *use* of process is not codified in Georgia, but is derived from malicious prosecution, codified at O.C.G.A. § 51-7-40 (1982).

3. Malicious *abuse* of process is not codified in Georgia, but is discussed in Ferguson v. Atlantic Land & Development Corp., 248 Ga. 69, 71, 281 S.E.2d 545, 547 (1981). Proof of a motive, such as "an act . . . not proper in the regular prosecution of the proceeding" is essential. *Id.*

4. Metro Chrysler-Plymouth, Inc. v. Pearce, 121 Ga. App. 835, 837 n.2, 175 S.E.2d 910, 912 n.2 (1970); *see* Haverty Furniture Co. v. Thompson, 46 Ga. App. 739, 741, 169 S.E. 213, 215 (1933). Probable cause is lacking "when the circumstances are such as to satisfy a reasonable and prudent man that he had no ground for suing out the civil proceeding." *Id.* (citing Civil Code § 4440 (1910)).

5. *See* Florida Rock Industries v. Smith, 163 Ga. App. 361, 362, 294 S.E.2d 553, 555 (1982); *see also* Yost v. Torok, 256 Ga. 92, 344 S.E.2d 414 (1986) (no malicious use because a voluntarily dismissed counterclaim is not a termination in claimant's favor). Georgia imposed the additional limitation requiring "special damage". This "special damage" consists of "damages *other than* attorney fees and expenses of litigation; damages for mental distress, where there is either wilfulness, or wanton and reckless disregard of consequences . . . equivalent to wilfulness. . . ." *Yost*, 256 Ga. at 95, 344 S.E. 2d at 417.

6. Guth v. Walker, 92 Ga. App. 490, 493, 88 S.E.2d 821, 823 (1955).

7. *Metro Chrysler-Plymouth*, 121 Ga. App. at 837, 175 S.E.2d at 912.

8. *Id.* at 841, 175 S.E.2d at 915.

9. *See* Cooper v. Public Finance Corp., 146 Ga. App. 250, 254, 246 S.E.2d 684, 688 (1978).

10. *Yost*, 256 Ga. at 93, 344 S.E.2d at 415.

11. *See* O.C.G.A. § 9-11-37 (1982).

12. *See* O.C.G.A. § 5-6-6 (1982) (damages in appellate court for frivolous appeal) and § 5-3-31 (1982) (damages in superior court for frivolous appeal).

13. *See* O.C.G.A. § 13-6-11 (1982).

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Procedure in Georgia law.

The remedies for malicious use and abuse of civil process are derived from English law. Modern-day English law requires the loser to pay attorney fees and expenses of litigation in *all* civil actions.[14] This is contrary to the "American rule" that, absent a statute or an enforceable contract, all parties pay their attorney fees irrespective of the outcome.[15]

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The Act specifically permits a court to award reasonable attorney fees and litigation expenses to a party asserting a frivolous claim or position.[16] The award may be made against either a party or its attorney.[17] The fees and expenses are limited, however, to the reasonable amounts necessary for defending or asserting a party's rights.[18]

The court determines the amount of attorney fees without a jury. Any amount awarded is enforceable as a money judgment.[19] Appeal is by application to the Georgia Court of Appeals.[20]

Attorney fees and expenses may be imposed on a party, its counsel, or both, if the court finds that the legal action lacks substantial justification, or that its purpose was to delay or to harass, or that the party or its counsel unnecessarily prolonged the proceeding.[21] The Legislature defined "lacked substantial justification" as meaning "substantially frivolous, substantially groundless, or substantially vexatious."[22]

Attorney fees and expenses may not be assessed against a party or counsel when the party has made a good faith attempt to establish a new theory of law "if such new theory of law is based on some recognized precedential or persuasive authority."[23]

Judicial response to O.C.G.A. § 9-15-14 was reflected in the June 1986 decision of *Yost v. Torok*.[24] In *Yost* the Georgia Supreme Court analyzed the history of malicious *use* and *abuse* of process and discussed the inadequacy of these remedies at common law.[25] Relying on O.C.G.A. § 9-15-14, the court reformed the torts of malicious use and abuse of process to

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14. *See* Yost v. Torok, 256 Ga. at 94-95, 344 S.E.2d at 416-17.
15. *See, e.g.*, Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 257 (1975).
16. O.C.G.A. § 9-15-14(b) (Supp. 1986).
17. *Id.*; *compare* Fed. R. Civ. P. 11 (Supp. 1983).
18. O.C.G.A. § 9-15-14(d) (Supp. 1986).
19. O.C.G.A. § 9-15-14(f) (Supp. 1986).
20. O.C.G.A. § 5-6-35(10) (Supp. 1986).
21. O.C.G.A. § 9-15-14(b) (Supp. 1986).
22. O.C.G.A. § 9-15-14(b) (Supp. 1986).
23. O.C.G.A. § 9-15-14(c) (Supp. 1986).
24. 256 Ga. 92, 344 S.E.2d 414 (1986).
25. *Id.* at 93, 344 S.E.2d at 415-16.

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conform to the provisions of the new legislation and adopted the language of the Act as definitions for these torts.[26]

26. *Id.* at 95, 344 S.E.2d at 417. The Georgia Supreme Court, like the Legislature, limited the scope of the redefined tort of abusive litigation to claims or defenses first asserted on or after July 1, 1986, the effective date of the Act, retaining the common law for prior claims.

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