ABUSIVE LITIGATION

6 CLE Hours including
2.5 Ethics Hours | 6 Trial Practice Hours

Sponsored By: Institute of Continuing Legal Education
Who are we?

**SOLACE** is a program of the State Bar of Georgia designed to assist those in the legal community who have experienced some significant, potentially life-changing event in their lives. SOLACE is voluntary, simple and straightforward. SOLACE does not solicit monetary contributions but accepts assistance or donations in kind.

How does SOLACE work?

If you or someone in the legal community is in need of help, simply email SOLACE@gabar.org. Those emails are then reviewed by the SOLACE Committee. If the need fits within the parameters of the program, an email with the pertinent information is sent to members of the State Bar.

What needs are addressed?

Needs addressed by the SOLACE program can range from unique medical conditions requiring specialized referrals to a fire loss requiring help with clothing, food or housing. Some other examples of assistance include gift cards, food, meals, a rare blood type donation, assistance with transportation in a medical crisis or building a wheelchair ramp at a residence.

Contact SOLACE@gabar.org for help.
The purpose of the SOLACE program is to allow the legal community to provide help in meaningful and compassionate ways to judges, lawyers, court personnel, paralegals, legal secretaries and their families who experience loss of life or other catastrophic illness, sickness or injury.

TESTIMONIALS

In each of the Georgia SOLACE requests made to date, Bar members have graciously stepped up and used their resources to help find solutions for those in need.

A solo practitioner’s quadriplegic wife needed rehabilitation, and members of the Bar helped navigate discussions with their insurance company to obtain the rehabilitation she required.

A Louisiana lawyer was in need of a CPAP machine, but didn’t have insurance or the means to purchase one. Multiple members offered to help.

A Bar member was dealing with a serious illness and in the midst of brain surgery, her mortgage company scheduled a foreclosure on her home. Several members of the Bar were able to negotiate with the mortgage company and avoided the pending foreclosure.

Working with the South Carolina Bar, a former paralegal’s son was flown from Cyprus to Atlanta (and then to South Carolina) for cancer treatment. Members of the Georgia and South Carolina bars worked together to get Gabriel and his family home from their long-term mission work.

Contact SOLACE@gabar.org for help.
Dear ICLE Seminar Attendee,

Thank you for attending this seminar. We are grateful to the Chairperson(s) for organizing this program. Also, we would like to thank the volunteer speakers. Without the untiring dedication and efforts of the Chairperson(s) and speakers, this seminar would not have been possible. Their names are listed on the AGENDA page(s) of this book, and their contributions to the success of this seminar are immeasurable.

We would be remiss if we did not extend a special thanks to each of you who are attending this seminar and for whom the program was planned. All of us at ICLE hope your attendance will be beneficial as well as enjoyable. We think that these program materials will provide a great initial resource and reference for you.

If you discover any substantial errors within this volume, please do not hesitate to inform us. Should you have a different legal interpretation/opinion from the speaker’s, the appropriate way to address this is by contacting him/her directly.

Your comments and suggestions are always welcome.

Sincerely,

Your ICLE Staff

Jeffrey R. Davis
Executive Director, State Bar of Georgia

Tangela S. King
Director, ICLE

Rebecca A. Hall
Associate Director, ICLE
AGENDA

PRESIDING:  Frank J. Beltran, Program Co-Chair; The Beltran Firm, Atlanta
Kim M. Jackson, Program Co-Chair; Bovis Kyle Burch & Medlin LLC, Atlanta

7:30  REGISTRATION AND CONTINENTAL BREAKFAST (All attendees must check in upon arrival. A removable jacket or sweater is recommended.)

8:10  INTRODUCTION AND OVERVIEW OF STATUTES RELATING TO ABUSIVE LITIGATION
Frank J. Beltran
Kim M. Jackson

8:20  CLAIMS FOR ATTORNEY’S FEES AND EXPENSES UNDER OCGA §9-15-14
A. Statutory Framework and Operation of OCGA §9-15-14
B. OCGA §9-15-14 Damages – Only Attorney’s Fees and Costs
C. Examination of the Overlap Between OCGA §9-15-14 and OCGA §51-7-80
Christine L. Mast, Hawkins Parnell & Young LLP, Atlanta

9:05  RECOVERY OF ATTORNEY’S FEES UNDER OCGA §13-6-11
A. Bad Faith
B. Stubbornly Litigious
C. Unnecessary Trouble & Expense
D. Relationship of OCGA §13-6-11 to OCGA §9-15-14 and §51-7-80, et seq.
E. Relationship of OCGA §13-6-11 to OCGA §33-4-6 and OCGA §51-12-5, 5.1 and 6
F. Introduction of Normally Prohibited Settlement Negotiations via OCGA §13-6-11
G. Ethics Regarding Recovery of Attorney’s Fees
James W. Penland, Attorney at Law, Atlanta

9:50  BREAK

10:00  LEGISLATIVE CHANGES AND TECHNICAL DEFENSES
A. Overview and Examination of Any Legislation Relating to OCGA §9-15-14 and OCGA §51-7-80, et seq.
B. Technical Defenses:
   1. Defenses to frivolous litigation claims withdrawal, good faith, substantial justification
   2. Proper notice issues
   3. Statute of limitations issues
   4. Second opinion issues and defenses
Kim M. Jackson

10:45  FEE SHIFTING UNDER THE RULES OF CIVIL PROCEDURE
A. OCGA §9-11-68 and Offers of Settlement
B. Fed. R. Civ. P. 11 and Sanctions
C. Fed. R. Civ. P. 68 and Offers of Judgment
D. Other Rules
Hugh C. Wood, Wood & Meredith LLP, Tucker

11:25  DEFENDING CLAIMS AND GRIEVANCES
Brian R. Smith, The Smith Law Practice, Atlanta

11:45  LUNCH (Included in registration fee.)
AGENDA

12:10 PANEL ON ETHICALLY DEALING WITH THE ABUSIVE LITIGATOR
A. Related Ethics and Professionalism Issues as to Abusive Litigation Claims
B. Questions and Answers
Moderator: Julia A. Merritt, Cheeley Law Group LLC, Alpharetta
Panelists:
Robert D. Cheeley, Cheeley Law Group, LLC, Alpharetta
David F. Root, Carlock Copeland & Stair LLP, Atlanta
Frank J. Beltran

1:10 PERSPECTIVES OF OCGA §9-15-14 AND OCGA §51-7-80, ET SEQ.: ACTIONS FROM THE TRIAL BENCH; THE OCGA §9-15-14 EVIDENTIARY HEARING; LIMITS OF TRIAL COURT JURISDICTION
Hon. Christopher S. Brasher, Judge, Fulton County Superior Court, Atlanta

2:10 BREAK

2:20 PANEL ON FRIVOLOUS APPEAL PENALTIES UNDER GEORGIA COURT OF APPEALS RULE 15(b)
A. Provisions of Rule 15(b)
B. Elements of a Frivolous Appeal
   1. Absence of supporting law
   2. Failure to provide record or transcript on appeal
   3. Failure to cite facts or legal authority or make argument
   4. Misrepresentation of facts or law
   5. Obvious use of delaying tactics
C. Changes Over Time in Application of the Rule
D. When and Why the Rule is Applied
Moderator: Hon. Carla Wong McMillian, Judge, Court of Appeals of Georgia, Atlanta
Panelists:
Hon. Anne Elizabeth Barnes, Presiding Judge, Court of Appeals of Georgia, Atlanta
Hon. Amanda H. Mercier, Judge, Court of Appeals of Georgia, Atlanta
Hon. Brian M. Rickman, Judge, Court of Appeals of Georgia, Atlanta

3:05 ADJOURN
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Frank J. Beltran
Kim M. Jackson
CLAIMS FOR ATTORNEY’S FEES AND EXPENSES UNDER OCGA §9-15-14

A. Statutory Framework and Operation of OCGA §9-15-14

B. OCGA §9-15-14 Damages – Only Attorney’s Fees and Costs

C. Examination of the Overlap Between OCGA §9-15-14 and OCGA §51-7-80

Christine L. Mast, Hawkins Parnell & Young LLP, Atlanta
AWARDS OF ATTORNEY’S FEES AND LITIGATION EXPENSES

UNDER O.C.G.A. § 9-15-14: A PRIMER

February 14, 2019

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O.C.G.A. § 9-15-14 can be a powerful tool for deterring abusive litigation practices, as it requires the party abusing the process and/or its attorney to pay the attorney’s fees and litigation costs of the opposing party. The procedure for recovery of an award under this code section can be relatively inexpensive, and it is not typically complex. The statute vests the trial court with significant power to regulate and punish inappropriate litigation tactics, and to make the victim of such tactics whole. The purpose of an award under O.C.G.A. § 9-15-14 is not merely to deter litigation abuses, but also to compensate litigants who are forced to expend their resources in contending with abusive claims, defenses, or other positions. Ferguson v. City of Doraville, 186 Ga. App. 430, 367 S.E.2d 551 (1988), overruled on other grounds, Vogtle v. Coleman, 259 Ga. 115, 376 S.E.2d 861 (1989).


The authority to determine both the question of a party’s entitlement to fees under O.C.G.A. § 9-15-14 and the amount of any award rests solely with the trial court;


This paper is intended as a primer for the working of O.C.G.A. § 9-15-14, and we present it in six (6) parts. Part One addresses the applicability of O.C.G.A. § 9-15-14 to various types of actions. Next, in Part Two, we discuss the procedure for seeking an award under the statute. In Part Three, we consider who may be sanctioned or obtain an award. Part Four identifies the substantive components of a § 9-15-14 award. Part Five considers appropriate factors for determination of the amount of the award. In Part Six, we explore issues concerning the appeal of an award of attorney’s fees and litigation expenses.

I. SUBSTANTIVE AREAS OF O.C.G.A. § 9-15-14

A. Actions To Which The Statute Applies

By its own terms, O.C.G.A. § 9-15-14 applies to "any civil action in any court of record of this state." O.C.G.A. § 9-15-14(a). It applies to contract cases, tort cases, domestic relations cases, and all other actions at law or equity brought in the superior or state courts of Georgia.¹ The Supreme Court of Georgia has held that § 9-15-14 awards

¹ Notably, O.C.G.A. § 9-15-14 fee awards and not O.C.G.A. § 13–6–11 damages are appropriate where the respective rights of the parties to the action are established by a divorce decree which integrates a settlement agreement by reference. Longe v. Fleming, 318 Ga. App. 285, 261, 733 S.E.2d 792, 794 (2012) (holding that awards of attorney’s
are permissible in eminent domain actions, even though such proceedings are not ordinary lawsuits, due to the fact that these actions are civil in nature. DOT v. Woods, 269 Ga. 53, 494 S.E.2d 507 (1998). See also Lamar Co., L.L.C. v. Georgia, 256 Ga. App. 524, 568 S.E.2d 752 (2002); City of Griffin v. McKemie, 240 Ga. App. 180, 522 S.E.2d 288 (1999), rev’d, 272 Ga. 843, 537 S.E.2d 66, on remand, 247 Ga. App. 251, 543 S.E.2d 785 (2000). One can safely assume that O.C.G.A. § 9-15-14 will generally be an available remedy so long as the associated litigation bears the qualities of a civil action and the forum is appropriate.

because the claim at issue did not lack substantial justification; no discussion of inapplicability of statute to federal actions in opinion).

Similarly, O.C.G.A. § 9-15-14 will not authorize an award of attorney’s fees and expenses that were incurred in proceedings before federal courts. Rather, the application of O.C.G.A. § 9-15-14 is strictly limited to recovery of fees or expenses that were necessitated by proceedings in those courts of record where the Georgia Civil Practice Act applies. Harkleroad v. Stringer, 231 Ga. App. 464, 472, 499 S.E.2d 379, 386 (1998). This limitation was discussed in Huffman v. Armenia, 284 Ga. App. 822, 645 S.E.2d 23 (2007), where the Court of Appeals upheld an award of fees against an attorney who argued that a portion of the fees awarded against him by the trial court was incurred in a federal bankruptcy proceeding, and, thus, was improper. Examining the record, the Court found that the trial judge had ordered the appellant attorney to pay $32,000 in fees, that appellees had incurred approximately $52,000 in fees attributable to the improper actions of the attorney, and that slightly over $32,000 of those fees were incurred in the trial court. Since appellant attorney could not demonstrate that the trial court actually ordered him to pay fees incurred in federal proceedings, the Court of Appeals affirmed the trial court’s order. Id. at 829-30, 645 S.E.2d at 28-29. However, conduct taking place within related federal litigation conceivably could color the trial court’s assessment of the impropriety of a litigant’s actions in state court litigation and provide support for the imposition of an authorized award of fees and expenses incurred in a state court case.

By specific statutory provision, O.C.G.A. § 9-15-14 does not apply to actions in magistrate courts, although, in the event a case is appealed from magistrate court to
superior court and the appeal itself lacks substantial justification, the appellee may seek litigation expenses incurred below from the superior court. O.C.G.A. § 9-15-14(h).

Similarly, while a superior court may not award attorney’s fees and litigation expenses as a result of conduct that occurred during a proceeding before a worker’s compensation board, it may make an award for a frivolous appeal of that worker’s compensation board’s decision to the superior court. Unlike with magistrate court actions, however, this sort of award may only encompass the attorney’s fees and litigation expenses of the appeal and not those from the worker’s compensation proceeding. Contract Harvesters v. Clark, 211 Ga. App. 297, 439 S.E.2d 30 (1993).


As a general rule, if a superior court is sitting in an appellate capacity in any civil action, then it will be vested with authority to make an award of attorney’s fees and expenses under O.C.G.A. § 9-15-14, at least with regard to the appeal proceedings. Osofsky v. Bd. of Mayor & Comm’r, 237 Ga. App. 404, 515 S.E.2d 413 (1999). The basis for this is derived from the statutory text itself: the phrase “any civil action in any court of record” is not limited to causes of action initiated in a court of record where the Civil Practice Act applies, and nothing in the statutory language of O.C.G.A. § 9-15-14 limits its application to de novo appeals in the superior court, such as appeals from magistrate

The statute also does not contemplate recovery for pre-litigation activities, and any award thereunder may only encompass the attorney's fees and litigation expenses that are reasonable and necessary to the action itself.  Cobb County v. Sevani, 196 Ga. App. 247, 395 S.E.2d 572 (1990).


While abusive appeal sanctions are available, they are controlled by Supreme Court Rule 6, Court of Appeals Rule 15, and O.C.G.A. § 5-6-6.

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It should also be noted that an award against an attorney under O.C.G.A. § 9-15-14 is considered a sanction within the meaning of the exclusionary language in most insurance policies. Dixon v. Home Indem. Co., 206 Ga. App. 623, 426 S.E.2d 381 (1992). Though this may provide an insurer the basis to decline to step in to defend the attorney in responding to a fee motion, an attorney on the receiving end of such a motion nevertheless would be well-advised to notify his or her insurer to eliminate any notice issues if the motion should result in an award against the attorney’s client and in turn lead to a malpractice claim against the lawyer.

In 2001, the General Assembly added a provision to O.C.G.A. § 9-15-14 designed to enforce payment of § 9-15-14 sanctions while further deterring new filings of frivolous actions. Subsection (g) provides:

> Attorney’s fees and expenses of litigation awarded under this Code Section in a prior action between the same parties shall be treated as court costs with regard to the filing of any subsequent action. O.C.G.A. § 9-15-14(g).

Working in conjunction with O.C.G.A. § 9-11-41(d), this subsection precludes a repetitive litigant from refiling or renewing an action dismissed without prejudice without first satisfying an award of attorney’s fees made in the previous action. Though the section was applied to any dismissal without prejudice for a number of years, subsection (g) has been interpreted more recently to preclude refiling or renewal of an action without payment of fee awards only in cases where the litigant, rather than the trial court, is responsible for the dismissal of the prior action. Muhammad v. Massage Envy of Georgia, Inc., 322 Ga. App. 380, 382, 745 S.E.2d 650, 652 (2013).

In 2013, the Court of Appeals overruled its own precedent after determining that it had improperly applied O.C.G.A. § 9-15-14(g) in a prior decision. Id. In the 2004 case of Crane v. Cheeley, 270 Ga. App. 126, 605 S.E.2d 824 (2004), the appellate court
affirmed a trial court’s application of subsection (g) to preclude a pro se litigant from refiling a suit which had previously been dismissed by the trial court where there was no evidence that O.C.G.A. § 9-15-14 fees awarded against the litigant in the first suit had been paid. The Crane case was controlling precedent until the 2013 appeal of a trial court’s dismissal of a refiled suit under facts which were nearly identical to Crane. In Muhammad, the Court of Appeals determined for the first time that Crane had been wrongly decided. Muhammad, 322 Ga. App. at 382. Ultimately, this deviation from precedent turned upon the court’s reexamination of the language of O.C.G.A. § 9-11-41(d), the statute authorizing dismissal of refiled actions where court costs have not been paid: “...[i]f a plaintiff who has dismissed an action ... commences an action based upon or including the same claim against the same defendant, the plaintiff shall first pay the court costs of the action previously dismissed.” Id., quoting O.C.G.A. §9-11-41(d), emphasis in opinion. In Crane, it was the trial court, not the plaintiff, who dismissed the prior action; hence, “[b]y its terms ... O.C.G.A. § 9-11-41(d) had no application in Crane, and this Court erred in applying that statute...” Id. Under this line of reasoning, the Court of Appeals determined that the trial court erred in dismissing the plaintiff’s subsequently filed suit for nonpayment of § 9-15-14 fees. Id. This interpretation severely limits the efficacy of 9-15-14(g) to eliminate repeat litigators from filing the same claims over and over again, despite dismissals and fee awards.

3 But see Jarman v. Jones, 327 Ga. App. 54, 56, 755 S.E.2d 325, 328 (2014) (holding that the mere fact of the pendency of a § 9-15-14 motion in a case which is voluntarily dismissed pursuant to O.C.G.A. § 9-11-41 does not deprive a court of jurisdiction to hear the refiled claim. Where an award has not actually been made, costs have not actually been incurred within the meaning of the statute). Id.
B. Procedure For Seeking An Award Under O.C.G.A. § 9-15-14


In 1994, the General Assembly amended subsection (e) to allow an O.C.G.A. § 9–15–14 motion to be brought “at any time during the course of the action but not later than” 45 days after final disposition. That change in statutory language broadens its application so that if a party engages in abusive tactics during the course of a case, the opposing party may seek sanctions while the case remains pending. See Colvin v. Chrisley, 315 Ga. App. 486, 727 S.E.2d 232 (2012) (O.C.G.A. § 9–15–14 sanctions may be requested prior to parties' mutual dismissal of an underlying action). As a result of the amendment, discovery abuses may now be challenged during the pendency of an action and, if found to be abusive, may form the basis for an award. This expansion of the window of opportunity allowing motions for attorney's fees during the pendency of an action gives both the opposing party and the court a powerful weapon to deter dilatory litigation tactics and discovery abuse as they occur. Bouve and Mohr, LLC v. Banks, 274 Ga. App. 758, 618 S.E.2d 650 (2005) (denial of pretrial motion for attorney's fees regarding spoliation of evidence not premature; remanded for consideration on merits).

The phrase "final disposition" is synonymous with "final judgment" as that term is used in O.C.G.A. § 5-6-34(a)(1). Fairburn Banking Co. v. Gafford, 263 Ga. 792, 439 S.E.2d 482 (1994); Hill v. Buttram, 255 Ga. App. 123, 564 S.E.2d 530 (2002). In essence, any judgment sufficiently final to give a right of appeal is final for the purpose of determining if an O.C.G.A. § 9-15-14 motion is timely filed. For example, when a trial
court grants judgment for a defendant on one count of a multi-count complaint and expressly directs entry of a final judgment under O.C.G.A. § 9-11-54, the statute requires the defendant to move for a § 9-15-14 award, if at all, within 45 days of the entry of that judgment. Little v. GMC, 229 Ga. App. 781, 495 S.E.2d 572 (1997). For fees caused by conduct occurring after the final disposition, the motion can be brought afterward. See id. at 782, 495 S.E.2d at 573.

The 45-day window of opportunity does not begin to run with a voluntary dismissal without prejudice. Harris v. Werner, 278 Ga. App. 166, 168, 628 S.E.2d 230, 232 (2006); Meister v. Brock, 268 Ga. App. 849, 850, 602 S.E.2d 867, 869 (2004). A mere voluntary dismissal under O.C.G.A. § 9-11-41(a) is not final because the Code allows an action to be renewed after dismissal. “Final disposition does not occur until a second dismissal, expiration of the original applicable period of limitations, or six months after the discontinuance or dismissal, whichever is later.” Meister, 268 Ga. App. at 850, 602 S.E.2d at 869 (internal citations and quotations omitted). Otherwise, the window of opportunity to file a motion under O.C.G.A. § 9-15-14 could close while the case could still be renewed, and a litigant could lose the right to seek penalties after a dismissal that was only temporary. Id. See also Trotter v. Summerour, 273 Ga. App. 263, 614 S.E.2d 887 (2005).


A trial court may make an award under O.C.G.A. § 9-15-14 even while a case is on appeal. Avren v. Garten, 289 Ga. 186, 710 S.E.2d 130 (2011). In Avren, a mother appealed the trial court’s decision finding her in contempt of a divorce decree and dismissing her petition for contempt against the father. Id. While the mother was appealing the trial court’s substantive rulings, the father sought fees under O.C.G.A. § 9-15-14, and the trial court awarded him $16,864.50 in attorney’s fees. Id. at 189. The mother also appealed that order and contended that her appeal of the substantive issues deprived the trial court of jurisdiction over the father’s 9-15-14 motion. Id. at 190. However, the Court of Appeals disagreed. The Court noted that although a notice of appeal “deprives the trial court of the power to affect the judgment appealed,” “it does not deprive the trial court of jurisdiction of other matters in the same case not affecting the judgment on appeal.” Id. at 190. However, the Court did note that if it had disagreed with the trial court’s ruling on the substantive issues upon which the fee award was based (it did not in this case), then the trial court would have to re-visit the matter of the fee award. Id. at 191.

Hence, while a trial court may be authorized to make an O.C.G.A. § 9-15-14 award while an appeal is pending, that award may be subject to reversal or revision in the event the appeal is decided against the party in whose favor the award is granted. See
also Chatman v. Palmer, 328 Ga. App. 222, 761 S.E.2d 616 (2014), where the Court of Appeals determined that the trial court improperly entered a permanent custody modification order, and, as a result, vacated the trial court’s accompanying § 9-15-14 award “out of an abundance of caution,” finding that although the award may have been properly granted, reversal and remand was necessary because the award incorporated by reference the erroneous permanent custody order. As a practical matter, when sanctions are sought due to the lack of merit of part or all of the claims or defenses, trial courts typically wait to see what the appellate court will do with the appeal on the merits before ruling on a § 9-15-14 motion.

A significant distinction between a motion brought under O.C.G.A. § 9-15-14 and a cause of action for abusive litigation pursuant to O.C.G.A. § 51-7-80 et seq. is in the application of the renewal statute, O.C.G.A. § 9-2-61(a). A motion under O.C.G.A. § 9-15-14 is not a “case”, “action” or “cause of action” to which the renewal statute would apply. Therefore, a motion under O.C.G.A. § 9-15-14 timely filed within the allowed 45 days but once voluntarily dismissed or withdrawn may not be renewed by virtue of O.C.G.A. § 9-2-61 if done outside of the 45-day period. Condon v. Vickery, 270 Ga. App. 322, 606 S.E.2d 336 (2004). In Condon, the Court of Appeals specifically denounced the analysis in Hallman v. Emory University, 225 Ga. App. 247, 483 S.E.2d 362 (1997), as mistakenly importing into the motion procedure of O.C.G.A. § 9-15-14 some attributes of an independent lawsuit, which could include the possibility of renewal. The Condon court specifically held that the renewal statute does not apply to motions.

A party against whom sanctions are sought has a basic right to confront and challenge the evidence against him, including evidence of the reasonableness and necessity of the fees and expenses sought to be awarded. Where no evidentiary hearing
In addition, a hearing on the amount of the award alone is not sufficient. Wall v. Thurman, 283 Ga. 533, 661 S.E.2d 549 (2008). Rather, the court must hold an evidentiary hearing, after due notice that the court will consider an award of fees, to provide the party against whom fees are sought to confront and challenge the evidence regarding both (i) the need for and (ii) value of the legal services at issue. Williams v. Becker, 294 Ga. 411, 413, 754 S.E.2d 11, 13 (2014). Where a party seeking attorney fees fails to adequately present either of these essential elements of proof to support an award, the Court of Appeals generally vacates a judgment awarding fees and remands the case to the trial court to permit the party, if possible, to cure the error or the trial court to further examine the record and correct the defects in its findings. Driver v. Sene, 327 Ga. App. 275, 280, 758 S.E.2d 613, 617 (2014). Note that the evidentiary hearing requirement applies equally in cases where the court grants attorney’s fees sua sponte. Williams v. Cooper, 280 Ga. 145, 625 S.E.2d 754 (2006) (overruling Cohen v. Feldman, supra, to the extent that the opinion can be read to hold that no notice or hearing is required). If, however, attorney’s fees are denied, then a party cannot complain that he was deprived of oral argument on the issue. Evers, 277 Ga. at 132, 587 S.E.2d at 23.

(2012). Even so, the Court of Appeals has instructed that “it is good practice to make a specific request for a hearing in response to a motion for attorney fees, since that will remind the trial court of the hearing requirement and weigh against any finding that a hearing was waived.” Williams v. Becker, 294 Ga. 411 at footnote 2. Clearly, the safest course to preclude reversal on appeal is to insist upon a hearing, and to maintain such insistence up until the hearing actually takes place. Even where a party has insisted upon a hearing by written request filed with the clerk of court, the party’s subsequent acquiescence to the trial court’s consideration of a § 9-15-14 motion without a hearing, even if by oral agreement, could amount to a waiver of the right to an evidentiary hearing. Bankston v. Warbington, 319 Ga. App. 821, 822, 738 S.E.2d 656, 658 (2013).

While it is a best practice for the movant to file supporting affidavits setting forth fees and expenses in detail along with its motion seeking fees, failing to do so will not necessarily render the motion void on its face. Tavakolian v. Agio Corp., 304 Ga. App. 660, 663, 697 S.E.2d 233, 238 (2010); Note Purchase Co. of Ga., LLC v. Brenda Lee Strickland Realty, Inc., 288 Ga. App. 594, 654 S.E.2d 393 (2007). USCR 6.1 states that “every motion . . . when filed shall include or be accompanied by citations of supporting authorities and, where allegations of unstipulated fact are relied upon, supporting affidavits.” In Note Purchase, the motion had been filed by the end of the 45-day period, but an affidavit was not filed until two months later. The Court, citing its decision in Forest Lakes Home Owners, supra, held that it was up to the trial court to decide whether to consider such a late-filed affidavit, and that a late filing does not render the motion void ab initio. Similarly, in Tavakolian, an affidavit filed to support the requested fees after the motion, which was contained in a summary judgment motion,
was considered by the court in its sound discretion. 304 Ga. App. at 663, 697 S.E.2d at 237.

Presumably, however, the same logic could be used by the court in its discretion to refuse to consider testimony or “statements in place” by counsel at the evidentiary hearing itself. In Razavi v. Merchant, 330 Ga. App. 407, 765 S.E.2d 479 (2014), counsel for a party seeking a 9-15-14 award properly attached an affidavit as an exhibit to a motion for fees, and at the hearing on the motion, introduced an additional exhibit that gave “a better breakdown of all of the time and expense” that the attorney put into the case, along with a more specific itemization of the tasks to which hours billed and expenses had been directed. Id. Although the hearing transcript was included in the record on appeal, this additional exhibit was not, and the trial court did not recite the relevant portions of the exhibit in its order. Id. As a result, the fee award granted by the trial court was reversed and remanded for findings of fact, among other things, despite the moving attorney’s apparently thorough preparation for the hearing. Id. The lesson, therefore, is to file a complete affidavit to support any motion for fees, and to include in the affidavit (i) the amount of the fees sought; (ii) a statement that they were reasonable and necessary in the prosecution or defense of the case at issue; and (iii) to the extent possible, a specific indication as to the tasks associated with each billing entry to the trial court to identify how it apportioned its award of fees based on the opposing party’s sanctionable conduct. See also Gibson Law Firm, LLC v. Miller Built Homes, Inc., 327 Ga. App. 688, 691, 761 S.E.2d 95, 98 (2014). The movant should also ensure that any updated exhibits demonstrating fees and expenses incurred in the prosecution of the § 9-15-14 motion are tendered into evidence at the hearing.

Furthermore, even though a party may be safe in submitting a summary of the
hours worked and fees billed to the court pursuant to O.C.G.A. § 24-10-1006, the party seeking fees must also make the underlying billing statements available to the respondent for its review. Tafel v. Lion Antique Cars, Inc., 297 Ga. 334, 340, 773 S.E.2d 743, 748 (2015). This is necessary to ensure that the respondent has a meaningful ability to confront the evidence against it before an award is entered.

For the respondent, like any other motion, USCR 6.2, requiring the respondent to file a brief and evidence within thirty (30) days of the filing of a motion, applies to O.C.G.A. § 9-15-14 motions. Yet O.C.G.A. § 9-11-6(d) provides that affidavits opposing a motion “may be served not later than one day before the hearing.” The Civil Practice Act trumps the Uniform Rules if they conflict, as here. Russell v. Russell, 257 Ga. 177, 356 S.E.2d 884 (1987) (Uniform Rules yield to substantive law). Furthermore, as a practical matter, because the hearing is an evidentiary hearing, as opposed to merely an oral argument, and witnesses may testify in person, the court will accept evidence from the movant as well as opposing evidence from the respondent at the hearing. However, if the respondent files no response to a § 9-15-14 motion, the trial court does not err in refusing to permit testimony on behalf of the respondent at the hearing on the motion. Forest Lakes Home Owners Ass’n v. Green Indus., Inc., 218 Ga. App. 890, 463 S.E.2d 723 (1995).

When a Court decides to award fees, the order must state with specificity (a) that the award is being made under O.C.G.A. § 9-15-14 and (b) the facts and circumstances that give rise to the award. “If a trial court fails to make findings of fact sufficient to support an award of attorney fees under [O.C.G.A. § 9-15-14], the case must be remanded to the trial court for an explanation of the statutory basis for the award and any findings necessary to support it.” (Citation and punctuation omitted.) Hall v. Hall,
335 Ga. App. 208, 780 S.E.2d 787 (2015), quoting Holloway v. Holloway, 288 Ga. 147, 150, 702 S.E.2d 132 (2010); see also Cole v. Cole, 333 Ga. App. 753, 777 S.E.2d 39 (2015) (failure of the trial court to make findings of fact required remand); see also, Wilson v. Perkins, 344 Ga. App. 869, 811 S.E.2d 518 (2018) (the trial court’s award of attorney’s fees did not address identify the specific subsection of the statute under which it was awarding fees and no evidentiary hearing occurred); Jackson v. Brown, No. A18A2097, 2018 Ga. App. LEXIS 647 (December, 13, 2018) ; Gallemore v. White, 303 Ga. 209, 811 S.E.2d 315 (2018). However, an order that does not specify the subsection of the statute under which the court is awarding attorney’s fees will still be upheld as long as the language substantially tracks the wording of the statute. Belcher v. Belcher, 346 Ga. App. 141, 143, 816 S.E.2d 82, 84-85 (2018) (holding that the trial court’s order stating “a complete absence of any justiciable issue of law or fact” substantially tracked the wording of O.C.G.A. § 9-15-14 and therefore the trial court’s failure to specify the subsection of the statute did not constitute reversible error). Furthermore, when a court awards fees pursuant to multiple statutes (e.g. O.C.G.A. § 19-9-3 in child custody matters), the court must state with specificity the portion of the award that is made under §9-15-14 and the portion of the award made under another statute. Woodruff v. Choate, 334 Ga. App. 574, 780 S.E.2d 25 (2015); see also Borotkanics v. Humphrey, 344 Ga. App. 875, 811 S.E.2d 523 (2018). If the court fails to include this in its order, the matter will be remanded for clarification. Id.

The lack of substantive detail in a trial court’s order is also an issue when the trial court merely awards a “lump sum” of fees to the moving party. City of Albany v. Pait, 335 Ga. App. 215, 780 S.E.2d 103 (2015); see also Belcher v. Belcher, 346 Ga. App. 141, 816 S.E.2d 82 (2018); Moore v. Hullander, 345 Ga. App. 568, 814 S.E.2d 423 (2018);
Morton v. Macatee, 345 Ga. App. 753, 815 S.E.2d 117 (2018). In Pait, the Court of Appeals held that “lump sum or unapportioned attorney fees awards are not permitted in Georgia” and the “trial court’s order [must] show the complex decision making process necessarily involved in reaching a particular dollar figure” for a fee award to be valid. But the trial court must also “articulate why the amount awarded was [the amount in the order] as opposed to any other amount.” See Fedina v. Larichev, 322 Ga. App. 76, 81, 744 S.E.2d 72, 77 (2013). To put it simply, the trial court must “show its work” in detail for a fee award to be upheld under O.C.G.A. § 9-15-14.

No fees may be assessed unless the trial judge makes an independent determination of both the reasonableness and necessity of the fees. If no evidence is introduced from which the trial court can make such a determination, no award may issue. Note Purchase, 288 Ga. App. 594, supra; Duncan v. Cropsey, 210 Ga. App. 814, 437 S.E.2d 787 (1993); Bankston v. Warbington, 319 Ga. App. at 822-23, supra. The trial court’s order also must specify whether the award is made under the mandatory provisions of § 9-15-14(a) or the discretionary provisions of § 9-15-14(b). See Driver v. Sene, 327 Ga. App. 275, 279, 758 S.E.2d 613, 617 (2014) (holding “[w]here there is more than one statutory basis for the attorney-fee award and neither the statutory basis for the award nor the findings necessary to support an award is stated in the order and a review of the record does not reveal the basis of the award, the case is remanded for an explanation of the statutory basis for the award...”); Wilson v. Wilson, 282 Ga. 728, 653 S.E.2d 702 (2007); In re Serpentfoot, 285 Ga. App. 325, 646 S.E.2d 267 (2007); Interfinancial Midtown, Inc. v. Choate Constr. Co., 284 Ga. App. 747, 752-53, 644 S.E.2d 281, 286 (2007); Note Purchase, 288 Ga. App. 594, supra; Boomershine, 232 Ga. App. 850, supra.
In recent years, the Court of Appeals has continued to maintain its notably stringent position as to the requirement of specificity in orders awarding fees under § 9-15-14, vacating many such fee awards and remanding the case(s) to the trial court when express indication as to the statutory basis for the award is absent from the face of the order(s). McClure v. McCurry, 329 Ga. App. 42, 765 S.E.2d 30 (2014); Driver v. Sene, 327 Ga. App. 275, 758 S.E.2d 613 (2014); Bethelmie v. Heritage Place, LLC, 325 Ga. App. 655, 754 S.E.2d 624 (2014); Fulton County School Dist. v. Hersh, 320 Ga. App. 808, 815, 740 S.E.2d 760, 765 (2013); Ware v. American Recovery Solution Services, Inc., 324 Ga. App. 187, 193, 749 S.E.2d 775, 780 (2013); Kinsala v. Hair, 324 Ga. App. 1, 3, 747 S.E.2d 887, 889-90 (2013).

“[S]pecificity in the award is important because the standards of appellate review are different under each subsection . . . .” Hersh, 320 Ga. App. at 815. However, it is clear from a collective assessment of the recent appellate decisions in this regard that substance trumps form with regard to the requisite specificity. In Williams v. Warren, 322 Ga. App. 599, 602, 745 S.E.2d 809, 811 (2013), the trial court’s failure to specify the subsection under which an award of fees was made was not fatal to the award even though “such specificity is normally required,” because the trial court’s findings as set forth in the order awarding fees “substantially tracked” O.C.G.A. § 9-15-14(a). Id. See also McCarthy v. Ashment-McCarthy, 295 Ga. 231, 234, 758 S.E.2d 306, 308 (2014) (holding that a trial court’s order explicitly specifying that an award was made pursuant to O.C.G.A. § 9-15-14 because appellant husband lacked substantial justification to refuse to honor a prior agreement was sufficiently specific, despite failing to indicate the subsection under which the award was made); Fulton County v. Hersh, 320 Ga. App. at footnote 5 (recognizing that failure to specify subsection may not be fatal when requisite
findings of fact provide necessary support for an award of fees); Patterson v. Hragyil, 322 Ga. App. 329, 333, 744 S.E.2d 851, 854 (2013) (where an order denying attorney’s fees that improperly specified the subsection under which fees were requested was reversed for unrelated reasons, the Court of Appeals recognized “[t]here is no magic in nomenclature, and we judge ... orders not by their name but by their function and substance...”). Of course, as the Court of Appeals’ willingness to examine the substance of an order is not certain, the best practice for a movant is to encourage and assist the trial court in ensuring that any order contains a plain and definite statement as to the statutory subsection under which the fee award is made.

An order’s “generalized reference to unidentified positions and defenses” lacking substantial justification will not pass muster in the appeals court. Razavi v. Merchant, supra (a trial court’s order stating only that “the count set forth in [plaintiff’s] complaint alleging quantum meruit lacked substantial justification” without accompanying factual findings to “underlay that conclusion” was insufficient to support an award of fees under O.C.G.A. § 9-15-14(b)); 4 DeKalb County v. Adams, 263 Ga. App. 201, 204, 587 S.E.2d 302 (2003) (internal citations omitted). Nor will a trial court’s “purported findings [which are] entirely too vague and conclusory to permit any meaningful appellate review” survive challenge. Reynolds v. Clark, 322 Ga. App. 788, 790, 746 S.E.2d 266, 4

4 Compare McCarthy v. Ashment-McCarthy, 295 Ga. 231, 234, 758 S.E.2d 306, 308 (2014), where the Court of Appeals rejected appellant husband’s contention that trial court’s order awarding fees to wife failed to include appropriate findings of fact where the order stated merely that “Husband lacked substantial justification to refuse to honor a prior agreement that the parties reached in open court” without identifying the statutory subsection under which the award was made.

C. To And Against Whom Awards May Be Made

An award under O.C.G.A § 9-15-14(a) is made to "any party" against whom the abusive position has been asserted. While only parties to the action may seek an award of fees under this subsection, any aggrieved party may recover such an award. The statute is meant to deter frivolous or abusive defenses to the same extent as frivolous or abusive claims. Even an award against a prevailing party is authorized if the prevailing party improperly expanded the proceedings or otherwise violated the statute. Betallic, Inc. v. Deavours, 263 Ga. 796, 439 S.E.2d 643 (1994).

In Heiskell v. Roberts, 295 Ga. 795, 764 S.E.2d 368 (2014), a former judge filed suit against a county and its commissioner, alleging that he had been underpaid for the 15 month period that he held office, and the county responded by filing several counterclaims. On appeal from cross-motions for summary judgment, the Court of Appeals found that the trial court erred in failing to grant summary judgment to the county as to the plaintiff judge’s original complaint. 295 Ga. at 800. Despite the determination that the county should prevail as a matter of law on the plaintiff judge’s original claim, the Court of Appeals nonetheless upheld an award of fees to the judge under O.C.G.A. § 9-15-14(a) for the defense of the county’s counterclaims against him. Id. While the county argued on appeal that the 9-15-14 award to the judge was improper because the county was not a proper defendant as to his original claim as set forth in the
complaint, the Court of Appeals disagreed, recognizing “[t]he statute does not exclude frivolous claims asserted by a party that believes it should not have been named in the lawsuit.” 295 Ga. at 804. Since the county was a plaintiff with respect to the counterclaims it brought against the judge, the award of fees to the judge was proper even though the claim by the judge against the county which initiated the litigation failed as a matter of law. See also Robinson v. Glass, 302 Ga. App. 742, 691 S.E.2d 620 (2010) (where a 9-15-14 award to an attorney who lost a mandamus action against a clerk of court was upheld on appeal due to the trial court’s determination that the clerk had unnecessarily expanded the proceedings and had denied such conduct in her pleadings).

In the rare situation where the defending party was paying for counsel for the plaintiff, the trial court may not award fees to the defending party for money spent to provide counsel for the plaintiff. O’Neal v. Crawford Cty., 339 Ga. App. 687, 792 S.E.2d 498 (2016). In O’Neal, the coroner of Crawford County sought an increase in his budget, a nicer office, home internet service, and telephone service to be paid by Crawford County. The County took his requests under advisement. During such time, the coroner requested that the County approve funding for an independent attorney so that the coroner could potentially bring a mandamus action against the County. The Board of Commissioners voted to approve the hiring of the attorney, and it paid fees directly to the attorney.

The coroner then filed a mandamus action. He sought “contingent expenses, a vehicle, a secure office, and internet, telephone, and fax services at his home” and cited a local statute as authority. The County moved for summary judgment. The trial court granted the motion, and “invited the County to seek attorney fees” under O.C.G.A. § 9-
15-14. The County did so and requested both the fees for defending the action and fees for the attorney it provided to the coroner. The trial court granted the motion, and the coroner appealed.

On appeal, the Court of Appeals rejected the fee award against the coroner for his own counsel. The Court of Appeals cited O.C.G.A. § 9-15-14(d) which states that fees awarded “shall not exceed amounts which are reasonable and necessary for defending or asserting the rights of a party.” [Emphasis added]. Thus, the Court reasoned that the plain language of the statute did not allow for recoupment of fees paid to a plaintiff’s counsel by a defendant.

The fact that a party’s attorney’s fees are borne primarily by an insurer or other non-party does not prevent an award under O.C.G.A. § 9-15-14. In Long v. City of Helen, the Supreme Court found that reasonable and necessary fees and expenses borne by a party’s insurer, friend, relative, or other non-party would not preclude an award of those fees and expenses under O.C.G.A. § 9-15-14. Long v. City of Helen, 301 Ga. 120, 799 S.E.2d 741 (2017). Such a finding is consistent with the purpose of the statute, which is to punish and deter litigation abuses.

A 2007 opinion from the Court of Appeals hinted that perhaps attorney’s fees could be awarded to non-parties under O.C.G.A. § 9-15-14(b), which does not contain the restrictive “any party” language contained in subsection (a). When reviewing an award to a non-party under subsection (b), the Court vacated the award not because it was made to a non-party, but rather because the requirement for a hearing had not been met. Slone v. Myers, 288 Ga. App. 8, 653 S.E.2d 323 (2007). However, in 2012, the Court of Appeals expressly held that attorney fees and expenses under O.C.G.A. § 9–15–14 may be awarded only to a party. Reeves v. Upson Reg’l Med. Ctr., 315 Ga. App. 582,
The Court noted specifically that it “overrule[d] Slone to the extent that it holds otherwise.” Id. at 587. Earlier this year, the Supreme Court closed the door on awards of fees under this Code Section to anyone other than one who was a party at the time of the allegedly abusive conduct in Workman v. RL BB ACQ I-GA CVL, LLC, 303 Ga. 693, 814 S.E.2d 696 (2018).

An expert witness may not rely upon O.C.G.A § 9-15-14 to compel the payment of his fees after the dismissal of the action, but rather must proceed by separate suit. Ramos v. Vourtsanis, 187 Ga. App. 69, 369 S.E.2d 344 (1988). It has also been held that a § 9–15–14 motion is not properly brought by an estate after the executor's death where no successor representative had been substituted as a party. McCarley v. McCarley, 246 Ga. App. 171, 539 S.E.2d 871 (2000).

Similarly, the award may be made only against attorneys who have represented parties to the action. Thus, an insurance company that controls the defense of a personal injury action may not be sanctioned under O.C.G.A. § 9-15-14 for abusive litigation. Allstate Ins. Co. v. Reynolds, 210 Ga. App. 318, 436 S.E.2d 57 (1993). An attorney who withdraws from litigation prior to its conclusion may nonetheless be sanctioned under O.C.G.A. § 9-15-14 after his withdrawal. Gibson Law Firm, LLC v. Miller Built Homes, Inc., 327 Ga. App. 688, 761 S.E.2d 95 (2014); Andrew, Merritt, Reilly & Smith, LLP v. Remote Accounting Solutions, Inc., 277 Ga. App. 245, 626 S.E.2d 204 (2006). In such cases, the fact that the movant has voiced no objection to the attorney’s withdrawal will not be construed as the movant’s waiver of the right to seek fees from the attorney. Id. at 247.

Since sanctions may only be awarded against a party or its attorney, the trial court is without authority to impose the sanctions of attorney’s fees or litigation
expenses against an alleged "alter ego" of a corporate plaintiff. Steven E. Marshall, 

Under the mandatory provisions of O.C.G.A. § 9-15-14(a), the award may be 
made against the frivolous party, the party’s attorney or both “in such manner as is just.” 
Subsection (b) permits awards against attorney, client, or both as well. It appears that if 
a case is legally frivolous, e.g. lacks a justiciable issue of law, it could be argued that it 
would be appropriate to sanction the attorney but not the party. The party should have 
the right to rely upon his or her attorney to determine the legal import of a given set of 
facts. But see Bircoll v. Rosenthal, 267 Ga. App. 431, 600 S.E.2d 388 (2004); In Re 
Singleton, 323 Ga. App. 396, 744 S.E.2d 912 (2013). Pro se litigants who are not 
attorneys cannot recover attorney fees under O.C.G.A. § 9-15-14 because of the lack of 
any meaningful standard for calculating the amount of the award. Chrysler Financial 

If an award is made against both the party and the attorney, such award may be 
treated as a joint and several judgment. “As joint tortfeasors, the…judgment debtors 
[are] equally liable to contribute.” Gerschick v. Pounds, 262 Ga. App. 554, 586 S.E.2d 
22 (2003), overruled on other grounds, VATACS Group, Inc. v. HomeSide Lending, 
Inc., 281 Ga. 50, 635 S.E.2d 758 (2006), overruled in part on other grounds, Marsh v. 
Clarke County Sch. Dist., 292 Ga. 28, 732 S.E.2d 443 (2012). An award may be made 
against both an attorney and his law firm as well under O.C.G.A. § 9-15-14. Andrew, 
626 S.E.2d 204 (2006). See also, Gibson Law Firm, LLC v. Miller Built Homes, Inc., 
327 Ga. App. 688; 761 S.E.2d 95 (2014) (overturning an award of fees against a law firm
because the award was not supported by the facts - not because it is improper to sanction the firm itself under 9-15-14).


As indicated generally above, the language of O.C.G.A. § 9-15-14 lays out the elements of a claim for attorney’s fees and/or litigation expenses explicitly. The statute includes both a mandatory and a permissive award of fees.

1. The Mandatory Award

O.C.G.A. § 9-15-14(a) provides as follows:

In any civil action in any court of record of this state, reasonable and necessary attorney's fees and expenses of litigation shall be awarded to any party against whom another party has asserted a claim, defense, or other position with respect to which there existed such a complete absence of any justiciable issue of law or fact that it could not be reasonably believed that a court would accept the asserted claim, defense, or other position. Attorney's fees and expenses so awarded shall be assessed against the party asserting such claim, defense, or other position, or against that party's attorney, or against both in such manner as is just.

Thus, an award under O.C.G.A. § 9-15-14(a) is mandatory ("shall be awarded") if the court finds that a party has asserted a position "with respect to which there existed such a complete absence of any justiciable issue of law or fact that it could not reasonably be believed that a court" would accept the position. *Cavin v. Brown*, 246 Ga. App. 40, 538 S.E.2d 802 (2000); *Fabe v. Floyd*, 199 Ga. App. 322, 405 S.E.2d 265
A 2013 appellate decision indicates that when a request for fees under subsection (a) is made with regard to a claim of fraud brought by an opposing party, and the party asserting the fraud claim presents no evidence to show that such claim has merit, the latter is liable for fees under subsection (a) as a matter of law, and the trial court errs by not awarding them (assuming they have been requested). Omni Builders Risk v. Bennett, 325 Ga. App. 293, 297, 750 S.E.2d 499, 503 (2013). This is true even when the party asserting the fraud claim voluntarily dismisses it before the award is made. Id.

2. The Discretionary Award


The court may assess reasonable and necessary attorney's fees and expenses of litigation in any civil action in any court of record if, upon the motion of any party or the court itself, it finds that an attorney or party brought or defended an action, or any part thereof, that lacked substantial justification or that the action, or any part thereof, was interposed for delay or harassment, or if it finds that an attorney or party unnecessarily expanded the proceeding by other improper conduct, including, but not limited to, abuses of discovery procedures available under Chapter 11 of this title, the "Georgia Civil Practice Act." As used in this Code section, "lacked substantial justification" means substantially frivolous, substantially groundless, or substantially vexatious.

Thus, a permissive award against a party or an attorney is authorized if one of three criteria is met:

1) the action brought or defended, or any part thereof, lacked substantial justification. A position or action lacks substantial justification if it is "substantially frivolous, substantially groundless or substantially vexatious";
2) the action, or any part thereof, was interposed for delay or harassment; or
3) the party or attorney unnecessarily expanded the proceedings by discovery abuse or otherwise.

3. The Good Faith Exception

The threat of sanctions for abusive litigation has the potential to chill actions that push the limits of the law. In crafting O.C.G.A. § 9-15-14, the General Assembly was mindful that the law is never static, and that only by bringing actions or defenses not heretofore recognized may the law evolve and improve. Hence, in order to prevent stagnation of the law, therefore, the General Assembly included section (c) which states as follows:

No attorney or party shall be assessed attorney’s fees as to any claim or defense which the court determines was asserted by said attorney or party in a good faith attempt to establish a new theory of law in Georgia if such new theory of law is based on some recognized precedential or persuasive authority.

Thus, neither a party nor an attorney will be sanctioned for "pushing the envelope" as long as the theory of law is supported by "precedential or persuasive" authority. While cases interpreting what constitutes precedential or persuasive authority are scarce, it would seem that the following would qualify:

1) a dissent by one or more members of the Georgia Court of Appeals or the Georgia Supreme Court advancing the position asserted;
2) cases from federal court applied to Georgia procedural questions or to analogous substantive questions;
3) cases from other states, particularly when a trend in the development of the law is shown; and
4) positions taken by commentators in law review articles, books or other legal papers.

In order to avoid sanctions under the "law development" provision of O.C.G.A. § 9-15-14(c), it may also be helpful to acknowledge to the trial court early in the proceeding that the action is an attempt to expand, alter, or create new law or legal theories in Georgia. However, this provision is not without limitations. In Caudell v. Toccoa Inn, Inc., 261 Ga. App. 209, 585 S.E.2d 180 (2003), the Court of Appeals upheld an award against an attorney under § 9-15-14(a) despite the fact that the party against whom the award was made had attempted to establish a new theory of law. The Caudell Court reasoned that the “attempt to establish a new theory of law would have required complete circumvention of a [preexisting] statute, leaving it without effect.” 261 Ga. App. at 210. Hence, litigants seeking to avoid sanctions under the “law development” provision of the statute should tread lightly in cases where governing law explicitly runs contrary to the “new” position being developed.

4. What Exactly Is Sanctionable Conduct?

Other than the statutory language, few precise guidelines exist regarding what is and is not sanctionable conduct. The case law often fails to set forth with precision the conduct that was sanctioned. Decisions dealing with awards under the mandatory subsection (a), in particular, are relatively few in number. While the decisions are usually fact specific, one can draw a few general guidelines from the reported cases.

Awards of fees are permitted for conduct occurring during the litigation, and not for conduct pre-dating the initiation of the action. Regan v. Edwards, 334 Ga. App. 65, 778 S.E. 2d 233 (2015). In Regan, an ex-wife provided written notification to her ex-husband that she intended to move with the couple’s two sons to Massachusetts. The
ex-husband then filed a petition to modify the custody and child support agreements. The parties agreed to a mediation and came to an agreement regarding custody and child care costs; however, after the mediation the ex-wife refused to agree to a formal entry of the purported agreement. *Regan*, 334 Ga. App. at 66. The ex-husband moved to enforce the settlement and for attorney’s fees. The trial court granted both motions. *Id.*

The ex-wife contended that the trial court erred by awarding attorney’s fees under O.C.G.A. § 9-15-14 because “the conduct precipitating the award occurred prior to the initiation of the litigation.” The Court of Appeals agreed. *Id.* In so holding, the Court of Appeals noted that the court’s order granting fees was based on the finding that “there was ‘no basis’ for [the ex-wife’s] planned move to Massachusetts.” *Id.* at 67. Thus, the Court held, the trial court abused its discretion by granting a motion for fees for litigation that occurred prior to litigation. *Id.*

What is also clear is that a party is not entitled to an award of attorney's fees simply because it prevailed in the case or because it had to resort to motions to compel in discovery. *Glynn-Brunswick Mem'l Hosp. Auth. v. Gibbons*, 243 Ga. App. 341, 530 S.E.2d 736 (2000). In order to receive an award, it must be found that there was "no justiciable issue of law or fact" under O.C.G.A. § 9-15-14(a) or that one of the three criteria of O.C.G.A. § 9-15-14(b) has been met. Thus, a prevailing party is not perforce entitled to an award, *Hyre v. Paxson*, 214 Ga. App. 552, 449 S.E.2d 120 (1994), nor does the fact that summary judgment was granted to a party entitle that party to an award of attorney's fees and litigation expenses. *Brown v. Kinser*, 218 Ga. App. 385, 461 S.E.2d 564 (1995). However, a trial court’s award of fees under O.C.G.A. § 9-15-14 to a party whose motion for summary judgment was denied must be vacated except in unusual
cases where the trial judge could not, at the summary judgment stage, foresee facts authorizing the grant of attorney’s fees. Porter v. Felker, 261 Ga. 421, 405 S.E.2d 31 (1991).

So long as there is some evidence from which a jury could find for the plaintiff, a defense verdict does not warrant imposition of fees. Rental Equip. Group, LLC v. MACI, LLC, 263 Ga. App. 155, 587 S.E.2d 364 (2003). In the MACI case, the court denied summary judgment and directed verdict motions by the defendants on plaintiff’s fraud claim. After receiving a defense verdict, the individual defendants moved for fees under both subsections of § 9-15-14. Presumably, the same evidence that precluded dismissal by the court defeated the claim under (a) and was sufficient to pass the “any evidence” standard on appeal. Fees were denied under (b) based on the conclusion by the jury that an allegedly “nonbinding” letter of intent became a binding contract and subject to promissory estoppel, thus supporting a verdict against Rental Equipment Group but not the individuals. The individual defendants based their fee application on the unenforceability of the letter. The Court found some evidence that could have supported a verdict, though the jury found for defendants. See also McClure v. McCurry, 329 Ga. App. 342, 765 S.E.2d 30 (2014), footnote 5, citing Porter v. Felker, supra.

An award of attorney’s fees is not justified where there is arguable legal support for the position taken. Ellis v. Johnson, 263 Ga. 514, 435 S.E.2d 923 (1993); see also Michelman v. Fairington Park Condominium Ass’n, Inc., 322 Ga. App. 316, 744 S.E.2d 839 (2013). In Ellis, losing candidates in an election brought an action contesting the results of an election contending that there was error in the vote count. The contest was based on a statutory provision that had never been interpreted by the court. The trial
court found against the contest and awarded attorney’s fees under O.C.G.A. § 9-15-14(a). The Supreme Court reversed, finding that the plaintiffs’ interpretation of the election contest statute was arguable and that no award of attorney’s fees was justified. See also Kendall v. Delaney, 283 Ga. 34, 656 S.E.2d 812 (2008); Harrison v. CGU Ins. Co., 269 Ga. App. 549, 604 S.E.2d 615 (2004); Morrison v. J.H. Harvey Co., 256 Ga. App. 38, 567 S.E.2d 370 (2002) (dicta suggests slight evidence withstanding summary judgment does not preclude award if defense verdict); see also Gibson Const. Co. v. GAA Acquisitions I, LLC, 314 Ga. App. 674, 725 S.E.2d 806 (2012) (attorney’s fee award improper when no Georgia appellate court previously had considered whether the statutes that require the recording of a security deed also require the recording of an agreement modifying a security deed); see also Riddell v. Riddell, 293 Ga. 249, 251, 744 S.E.2d 793, 795 (2013) (attorney fees award improper where motion for new trial which trial court found “was done so to cause unnecessary delay in the Court proceedings” was filed in reliance of appellate authority supporting the arguments in the motion); see also Dunwoody Plaza Partners LLC v. Markowitz, 346 Ga. App. 516, 816 S.E.2d 450 (2018) (attorney fee award improper because there was a justiciable issue as to whether abusive litigation notice letters were properly served); but see Fulton County v. Lord, 323 Ga. App. 384, 746 S.E.2d 188, 197 (2013) (where attorney fee award under subsection (a) was upheld because the position taken by the non-movant was “not even remotely supported by the significant amount of precedent on this particular issue.”)

Awards are permitted in election contests, but only in appropriate circumstances. Davis v. Dunn, 286 Ga. 582, 690 S.E.2d 389 (2010). In Davis, petitioner filed an action contesting the results of a county’s judicial election. The petitioner claimed that the number of votes cast in the election exceeded the number of registered voters in the
county.  Id.  286 Ga. App. at 583, 690 S.E.2d at 391. But, rather than presenting evidence to cast doubt on the vote counting in the election, the petitioner relied on trial court website data irrelevant to miscounting of votes. Id. Thus, the trial court granted fees to opposing counsel and the Supreme Court upheld the grant of fees. In response to a dissent authored by Justice Benham, joined by Justice Hunstein, the Court rejected the assertion that Ellis v. Johnson, supra, stood for the proposition “that any time a party raises a statutory interpretation issue that has not previously been analyzed by any court, an award of attorney fees” was not warranted. Id. 286 Ga. at 584, 690 S.E.2d at 392. “In order to make some sort of exception prohibiting the award of attorney fees pursuant to O.C.G.A. § 9-15-14 in judicial election contests, this Court would have to . . . graft a legislative exception onto O.C.G.A. § 9-15-14 that simply does not exist.” Id. 286 Ga. at 586, 690 S.E.2d at 393.

The Court of Appeals reversed an award of attorney’s fees against the administratrix of an estate who had brought suit against another estate to set aside a quitclaim deed that her decedent had executed. Doster v. Bates, 266 Ga. App. 194, 596 S.E.2d 699 (2004). The plaintiff had instituted the suit solely in her representative capacity. The award of fees, which was imposed against plaintiff as administratrix and individually, was reversed. The court stated that whether the claims ultimately lacked merit was not the appropriate standard. The issue, rather, was whether the claim either had factual merit or presented a justiciable issue. In Doster, the plaintiff had legitimate concerns regarding the decedent’s mental capacity to engage in certain transactions. Of importance to the court was the fact that the plaintiff instituted the action as administratrix of the estate and that she owed a fiduciary duty to the estate. Therefore, the plaintiff was arguably “duty-bound to pursue the cause of action.” Id. at 196, 596
S.E.2d at 701. Had she not pursued the action, she would have potentially exposed herself to a claim by the estate.

The Court of Appeals has also reversed the award of attorney’s fees against a husband and wife who sued a church bishop who had engaged in a lengthy sexual relationship with the wife. Brewer v. Paulk, 296 Ga. App. 26, 673 S.E.2d 545 (2009). The husband and wife filed suit against the bishop based on his breaching a fiduciary duty to the wife by engaging in a more than decade long sexual relationship with her, and the husband also sued for loss of consortium based on the relationship. Reversing the trial court, the Court of Appeals held that sanctions were not appropriate because there was evidence from which a factfinder could find that the bishop had a confidential relationship with the wife and owed her a duty of good faith and loyalty. Also, there was evidence that the bishop exerted influence over the will, conduct, and interest of the wife. Based on the existence of triable issues, fees should not have been imposed as a result of the trial court’s disposition of the husband and wife’s claims as a matter of law. Id. See also Fox v. City of Cumming, 298 Ga. App. 134, 679 S.E.2d 365 (2009) (holding that an award of attorney’s fees is not appropriate when a litigant is arguing a reasonable interpretation of law based on the plain language of a statute); but see Dallow v. Dallow, 299 Ga. 762, 791 S.E.2d 20 (2016) (holding that wife was entitled to attorney’s fees under O.C.G.A. § 9-15-14 where the husband expanded the divorce proceedings by, among other things, filing five motions to dismiss and by serving wife with 517 requests for admission).

Even when the appellate court has previously rejected a party’s argument, the argument does not necessarily lack substantial justification for purposes of O.C.G.A. § 9-15-14 considerations. In DeKalb County v. Adams, 263 Ga. App. 201, 587 S.E.2d 302
(2003), an order granting fees to prison inmates was reversed. The trial court specified a single position that lacked substantial justification because the argument itself was rejected in an earlier appeal, but the Court of Appeals reversed upon finding that the assertion of such position did not automatically call for sanctions under subsection (b). See also Brown v. Gadson, 298 Ga. App. 660, 680 S.E.2d 682 (2009) (rejecting award of attorney’s fees where there was no Georgia law on point as to whether a contract between parents giving a sperm-donating father no legal rights or obligations for his child was enforceable). See also Renton v. Watson, 319 Ga. App. 896, 904, 739 S.E.2d 19, 27 (2013) (rejecting award of attorney’s fees where the plaintiff/non-movant attached a superior court order from a different case involving different parties to her response to the defendant/movant’s motion for fees under § 9-15-14(a) “[b]ecause another superior court had already accepted the same legal theory advanced by [the plaintiff] in this case, she could have reasonably believed that a court would accept her ... claim.”)

Of course, in situations where precedent involving similar facts and law is stacked against the plaintiff, an award under the statute may be appropriate, especially where the offending party’s conduct clearly communicates an abusive quality. For example, an award of attorney’s fees under the statute was upheld on appeal where the party knew that he had not obtained personal service on the appellees and, nevertheless, persisted in pursuing the action. Sawyer v. Sawyer, 253 Ga. App. 619, 560 S.E.2d 86 (2002). This maxim applies with equal force against defendants who take positions that are frivolous. For example, a debtor who continued to deny liability for liquidated damages, despite lack of legal or factual basis to do so, was properly sanctioned under the statute. Franklin Credit Mgmt. Corp. v. Friedenberg, 275 Ga. App. 236, 620 S.E.2d 463 (2005);
see also Pacheco v. Charles Crews Custom Homes, Inc., 289 Ga. App 773, 658 S.E.2d 396 (2008) (awarding defendant attorney’s fees because plaintiff knew of the exculpatory release before filing suit and failed to produce any evidence to void the release); see also Heiskell v. Roberts, supra; McLendon v. McLendon, 297 Ga. 779, 781, 778 S.E.2d. 213, 216 (2015) (holding that where wife’s motion for new trial lacked substantial justification and was filed “at least in part” to delay the payment of child support, sanctions were appropriate).

In the case of Southland Outdoors, Inc. v. Putnam County, 265 Ga. App. 399, 593 S.E.2d 940 (2004), the Court of Appeals reversed a decision to deny a motion for attorney’s fees because the denial was not supported by the evidence. In Southland, a zoning commission voted to revoke plaintiff’s building permit, and plaintiff filed a petition for mandamus seeking to require the county to reissue it. At the hearing on plaintiff’s petition, the county presented no evidence, and the trial court ruled in plaintiff’s favor. Subsequently, Southland moved for attorney’s fees contending that the county’s defense was so lacking in merit as to warrant sanctions under O.C.G.A. § 9-15-14(a) and (b). At the hearing on the motion for attorney’s fees, the evidence showed that (i) the commissioners were unable in their depositions to articulate a legally cognizable reason to justify the permit revocation; and (ii) the chairman of the Board of Commissioners stated “the County Commission really would prefer to make the courts the bad guys rather than themselves.” Id. at 401, 593 S.E.2d at 942 (internal citations omitted). As before, the county also presented no evidence to refute the request for attorney’s fees. Id. Taking these factors into account, the Court of Appeals reversed the denial of the attorney’s fees and remanded for further proceedings.
An award of attorney’s fees is justified when the party’s own evidence flatly contradicts the position asserted by that party. *Cavin v. Brown*, 246 Ga. App. 40, 538 S.E.2d 802 (2000); see *Omni Builders Risk v. Bennett*, 325 Ga. App. 293, 297, 721 S.E.2d 563 (2013) (the trial court erred when it denied defendant’s motion for attorney’s fees because the plaintiff failed to produce any evidence to prove that her claim had merit and the plaintiff’s own testimony showed that her claim was meritless); see also *Durrance v. Schad*, 345 Ga. App. 826, 815 S.E.2d 164 (2018) (trial court erred in denying attorney’s fees because the defendant admitted that he had no basis for his claims). In *Cavin*, the defendant asserted in defense to a claim for child support debts that he had conveyed his property to his girlfriend in exchange for forgiveness of notes owed to the girlfriend. However, in the face of these contentions, the defendant testified that no consideration or value was given for the property and that, in reporting the transfer to taxing authorities, he certified it as a gift. Further, despite a subpoena for the promissory notes, the defendant destroyed the alleged notes by tearing them up into small, illegible pieces. The Court of Appeals upheld the trial court finding that the defense could not possibly be believed, thus justifying the fee award under O.C.G.A. § 9-15-14(a).

Plaintiffs in a construction dispute were sanctioned appropriately where they filed an action seeking to declare unconstitutional portions of Georgia’s arbitration statute that permitted their arbitrator to set the hearing venue. They also challenged an inspection of their house during the arbitration and appealed the loss of a trespass claim. However, they presented “no factual or legal issues even approaching any of the statutory grounds for vacating the award” of the arbitrator. The trial court awarded


If a litigant and his counsel could have discovered “with a minimum amount of diligence” before filing suit that his claims lacked a substantial basis, an award of attorney’s fees is appropriate. Bircoll v. Rosenthal, 267 Ga. App. 431, 437, 600 S.E.2d 388, 393 (2004); see also Omni Builders Risk v. Bennett, 325 Ga. App. 293, 750 S.E.2d 499, 503 (2013). In Bircoll, controlling authority in existence for at least seven months prior to the Bircolls’ filing defeated their claim. Further, two critical documents which showed that the claims were in fact groundless were in the possession of plaintiffs long before the suit was filed. The plaintiffs claimed that they did not realize until depositions were taken that their claims were not supported and they then voluntarily dismissed the case. However, the court noted “the relevant inquiry is not what the parties learned or suspected after filing suit. We focus, rather, on whether [the plaintiffs] could have determined before filing suit that the claims against [the defendants] were groundless.” Id. at 436-37, 600 S.E.2d at 393.

At least one case suggests that pursuing a defense in the absence of authority may subject the party or attorney to sanctions. Sun-Pac. Enter., Inc. v. Girardot, 251 Ga. App. 101, 553 S.E. 2d 638 (2001) (although defendant claimed it was justified based on a dearth of authority on the asserted defense, defendant also took unreasonable factual positions and failed to produce a witness to contradict plaintiff). It is important to note, however, that the statute is not intended to prevent litigants from bringing cases of first impression. In Shoenthal v. DeKalb County Employees Retirement System Pension
Board, the court found an absence of case law regarding a particular statute did not mean that the plaintiff’s claims suffered a complete absence of any justifiable issue of law or fact. Shoenthal v. DeKalb Cty. Emps. Ret. Sys. Pension Bd., 343 Ga. App. 27, 805 S.E.2d 650 (2017). Rather, the absence of case law meant that the issue was one of first impression. Id. at 31. The court noted that “O.C.G.A. §9-15-14(a) is intended to discourage the bringing of frivolous claims, not the presentations of questions of first impression about which reasonable minds might disagree or the assertion of novel legal theories that find arguable, albeit limited, support in existing case law and statutes.” Id. at 32.

Refusing to settle a case will not warrant an award of attorney’s fees where the party is at least partially successful in the case. See Glaza v. Morgan, 248 Ga. App. 623, 548 S.E.2d 389 (2001). In other words, since the party prevailed on some portion of his claim, his conduct in ignoring settlement offers and refusing to make reasonable counteroffers was not “substantially vexatious” under O.C.G.A. § 9-15-14(b). However, rejecting settlement offers may be taken into consideration on such motions. See Carson v. Carson, 277 Ga. 335, 588 S.E.2d 735 (2003).

“The mere fact that a defendant’s action has caused an issue which later requires litigation to correct does not in and of itself provide a basis for the award of attorney fees.” Bowen v. Laird, No. A18A0915, 2018 Ga. App. LEXIS 622 (October 20, 2018). In 1998, Bowen purchased land from Laird and Bowen conveyed an 8.45 acre parcel to Laird. However, Bowen unintentionally conveyed the same 8.45 acre parcel to another buyer in February 2000. Id. Laird then filed a quiet title action and made a claim for attorney fees and costs under O.C.G.A. § 9-15-14. Id. The jury awarded Laird attorney fees for unnecessary trouble and expense because it was Bowen’s multiple conveyances
that required Laird to file the lawsuit. Id. However, the Court held that causing unnecessary trouble and expense refers to a situation in which a plaintiff sues where no bona fide controversy exists, and this case involved a bona fide controversy as to the title of the 8.45 parcel due to the duplicative conveyances. Id.

Unnecessary expansion of proceedings by a party, even if that party was justified in bringing the claim, provides a basis for an award of attorney's fees. Lamar Co., L.L.C. v. Ga., 256 Ga. App. 524, 568 S.E.2d 752 (2002). In Lamar, the state filed a condemnation petition against an owner and lessee, Lamar Company. Lamar incurred expenses for a hearing and subsequent appeal. The state then chose to negotiate a settlement with the owner which required termination of Lamar's lease, extinguishing its interest in the property, and then dismissed its petition, leaving Lamar with nothing but its litigation costs. The court noted that “the state likely was motivated by financial concerns, rather than a desire to foist unnecessary litigation expenses on Lamar,” but “in assessing fees under O.C.G.A. § 9-15-14(b), a court need not find that a party acted in bad faith.” Id. 256 Ga. App. at 526, 568 S.E.2d at 754. Such tactics, however, do authorize a conclusion “that the state’s methods constituted a misuse of its eminent domain power, which unnecessarily expanded the proceedings without substantial justification.” Id. See also, Shiv Aban, Inc. v. Ga. DOT, 336 Ga. App. 804, 784 S.E.2d 134 (2016) (holding that award of fees against the DOT in a condemnation proceeding was justified where the DOT used a flawed appraisal to improperly lower the value of the condemned property).

A recent Court of Appeals opinion upheld the grant of attorney’s fees in a particularly egregious case. In Cohen v. Rogers, the trial court issued a twenty-two page order, detailing more than forty findings of fact supporting its award of attorney’s fees

Some of the specific sanctionable conduct included filing a duplicative lawsuit in Fulton County when a lawsuit was already pending in Cobb County, filing a police report on behalf of his client for sexual assault against the defendant after the commencement of litigation and while the parties were having discussions about sealing the record, and failing to inform the opposing party’s counsel about the police report. *Id.* at 149. The court found that such actions amounted to conduct designed to harass and to unnecessarily expand the proceedings. *Id.*

The court in *Bienert v. Dickerson*, 276 Ga. App. 621, 624 S.E. 2d 245 (2005), awarded over $41,000 in attorney’s fees and expenses to the losing party based, in part, upon numerous instances of improper conduct that unnecessarily expanded the proceedings. The court’s findings included:

1. Plaintiffs’ counsel failed to turn over key evidence, engaged in ex parte communications with a judicial mediator, and failed to identify and turn over expert reports prior to mediation, all of which resulted in sanctions and fines.

2. After the trial court closed discovery . . . counsel for plaintiffs still sent out additional discovery requests . . . causing further litigation and cross-motions for sanctions.

3. Plaintiffs’ counsel filed redundant counts and amendments, even after the court had already ruled on them.

4. Plaintiffs’ counsel surreptitiously and unethically taped conversations between himself and defense counsel, and then refused requests for the tapes, requiring extensive correspondence and briefing on the issue.

5. Plaintiffs’ counsel made disparaging comments, engaged in vitriolic language in many of his briefs, and frequently misstated the record, all of which required the trial court and opposing counsel to spend time correcting or responding to same.

*Id.* 276 Ga. App. at 626-627.
In contrast, in *Dodson v. Walraven*, 318 Ga. App. 586, 734 S.E.2d 428 (2012), the Georgia Court of Appeals reversed a trial court’s $5,000 award under O.C.G.A. § 9–15–14(b) because there was no evidence showing that a party’s conduct resulted in extra litigation; it was a case of no harm, no foul. The trial court’s order was based on a finding that a father unnecessarily expanded divorce proceedings by taking a position that lacked substantial justification — not paying child support during the time period after DNA identified him as a child’s father and before being specifically ordered to pay such support by the court. *Id.* at 432. The Court of Appeals reversed the award, however, because the mother had never moved for a temporary order of support after learning the results of the DNA test and, thus, was never forced to engage in unnecessary litigation to resolve the father’s failure to pay support.

In *In re Estate of Holtzclaw*, 293 Ga. App. 577, 667 S.E.2d 432 (2008), the Court of Appeals reversed a probate court’s finding that the estate, as opposed to the executor, was liable under O.C.G.A § 9-15-14. The probate court specifically found that the executor kept the estate open without a legitimate reason and disregarded court orders. *Id.* at 579, 667 S.E.2d at 434. Consistent with the findings, it was error to assess attorney fees against the estate. *Id.* See also *In Re Estate of Zeigler*, 295 Ga. App. 156, 671 S.E.2d 218 (2008) (upholding an award of litigation expenses when both the former executrix and her attorney conducted themselves in a manner to prolong the administration of the estate so as to give the former executrix the opportunity to sell the house and remove it from the estate’s assets). Note that counsel, not a party, shouldered all of blame for the misconduct identified by the court in the *Zeigler* case. Cf. *Ford v. Hanna*, 293 Ga. App. 863, 668 S.E.2d 271 (2008) (finding that Plaintiff “unnecessarily expanded the litigation without justification by denying that she was represented by the
attorney who accompanied her to the initial hearing and announced the settlement agreement, and by refusing on this basis to recognize the agreement").

However, a party’s partial success on motions that allegedly caused unnecessary expense required reversal of an award. *Fox-Korucu v. Korucu*, 279 Ga. 769, 621 S.E.2d 460 (2005). Though the trial court stated that a party’s post-trial motion was “frivolous and unnecessarily expended the proceedings in this case,” the Supreme Court held that the trial court’s decision to grant the party a portion of the relief she requested in that very motion was “irreconcilably at odds with its decision to award attorney fees based on the purported frivolousness” of the motion. Notably, the party’s brief in support of the offending motion was only two pages, and the court concluded that the unsuccessful part of motion could not have caused unnecessary expense. Cf. *Mondy v. Magnolia Advanced Materials, Inc.*, 303 Ga. 764, 815 S.E.2d 70 (2018) (recusal motion sufficient on its face to warrant referral to another judge for hearing and decision still justified attorney fees where allegations were invented and lacked supporting evidence).

Similarly, the Court of Appeals reversed a grant of attorney’s fees against a Plaintiff for suing the wrong defendant. In *Wallace v. Noble Village at Buckhead Senior Housing Inc.*, 292 Ga. App. 307, 664 S.E.2d 292 (2008), Plaintiff suffered a broken femur at an assisted living facility in Buckhead. Between the injury and filing of the complaint, the facility changed ownership. The complaint alleged that the new owner was responsible for the injuries, despite documentation exchanged pre–suit to indicate otherwise. In reversing the trial court’s abusive litigation award, the Court of Appeals found that there was not a complete absence of a justiciable issue on liability. In addition to conflicting documents provided by a non-party on ownership, counsel for Plaintiff had a duty to inquire further for competent evidence to determine whether the
representations in the documents exchanged pre-suit were competent. Id. at 311, 664 S.E.2d at 296. Plaintiff dismissed Defendant only after it filed admissible evidence on ownership as part of its motion for summary judgment. The Court of Appeals reasoned that the imposition of attorney fees here would have been unreasonable and harsh. Id.

Trial misconduct may lead to imposition of sanctions, as the Court of Appeals suggested in Sangster v. Dujinski, 264 Ga. App. 213, 590 S.E.2d 202 (2003). There, the Court considered whether a new trial was required due to plaintiff’s counsel’s “persistent attempts . . . to inject into [the jury’s] deliberations irrelevant and prejudicial matters, including those forbidden by an order in limine.” Id. at 218, 509 S.E.2d at 206. The Court found that a mistrial was the only remedy for counsel’s tactics, reversing and remanding the case for new trial. Further, the Court remanded for reconsideration of a § 9-15-14 motion. The behavior discussed in the opinion could well have constituted “improper conduct” under (b). See also, Connolly v. Smock, 338 Ga. App. 754, 791 S.E.2d 853 (2016) (holding that award of fees was proper where a party attempted to place evidence of bad character of the opposing party into the record through testimony after having been admonished not to do so).

Subsection (b) specifically cites to discovery misconduct as a basis for sanctions. In Carson v. Carson, supra, the Supreme Court affirmed an award of fees against a husband in a divorce action for such conduct. The trial court properly found that he had “refused to comply with wife’s multiple requests for production of documents, filed extraordinary motions, rejected multiple settlement offers, and moved to reopen discovery six months after it had concluded.” See also Tavakolian v. Agio Corp., 304 Ga. App. 660, 697 S.E.2d 233 (2010) (holding that an award of fees was appropriate where a party refused to answer requests for admission); MARTA v. Doe, 292 Ga. App. 532, 664
S.E.2d 893 (2008) (affirming a denial of attorney’s fees since there was no expansion of the proceedings when a key document was destroyed before Plaintiff propounded discovery).

In 2018, the Supreme Court settled any issue regarding the applicability of the statute to abusive conduct among parties during post-judgment discovery. The Court of Appeals had first considered the unique question two years ago in RL BB ACQ I-GA CVL, LLC v. Workman, and the court found that O.C.G.A. § 9-15-14 did not apply to post-judgment discovery disputes. RL BB ACQ I-GA CVL, LLC v. Workman, 341 Ga. App. 127, 134, 798 S.E.2d 677, 683 (2017), reversed in part and aff’d in part, Workman v. RL BB ACQ I-GA CVL, LLC 303 Ga. 693, 814 S.E.2d 696 (2018); see also, CEI Servs. v. Sosebee, 344 Ga. App. 508, 811 S.E.2d 20 (2018), overruled, Workman, supra. Applying the plain language of the statute, the Court of Appeals found that post-judgment discovery occurs after the underlying civil action has concluded, and therefore, any conduct that occurs in post-judgment discovery is not part of the underlying lawsuit and, indeed, cannot even begin until after a judgment is entered. Id. See also Rocker v. First Bank of Dalton, 343 Ga. App. 501, 806 S.E.2d 884 (2017) (vacating an order for attorney’s fees that included fees for conduct in a post-judgment discovery dispute on the grounds that the court did not hold a hearing, and noting the Supreme Court was considering in the Workman appeal the question of whether 9-15-14 applied at all to post-judgment discovery disputes).

The Georgia Supreme Court took up the issue in 2018. Workman v. RL BB ACQ I-GA CVL, LLC, 303 Ga. 693, 814 S.E.2d 696 (2018). The high court reversed the portion of the lower court’s decision that held that the statute does not apply to post-judgment discovery proceedings. Id. 303 Ga. at 697, 814 S.E.2d at 699. The Supreme
Court held, while it must strictly construe the language of the O.C.G.A. §9-15-14, interpreting the statute to mean that a lawsuit concludes at judgment is an “unreasonably narrow reading” of the language. Id. 303 Ga. at 696, 814 S.E.2d at 698. As such, expenses and fees are recoverable under the statute in post-judgment proceedings. Id. 303 Ga. at 697, 814 S.E.2d at 699. The Court of Appeals then vacated Divisions 1 and 6 of its original opinion and adopted the Supreme Court’s opinion as its own. RL BB ACQ I-GA CVL, LLC v. Workman, No. A16A1512, 2018 Ga. LEXIS 642 (Nov. 20, 2018).

E. The Amount Of The Award

An award under O.C.G.A. § 9-15-14 may not exceed the amounts which are reasonable and necessary for defending or asserting the rights of a party. O.C.G.A. § 9-15-14(d). The Code Section may not be used to seek an award for damages other than attorney's fees and litigation expenses. If damages other than fees and expenses are to be sought, a litigant should avail himself of the provisions of O.C.G.A. § 51-7-80, et seq. O.C.G.A. § 9-15-14, however, is the exclusive remedy for abusive litigation when the only damages sought or incurred are litigation expenses and attorney’s fees. O.C.G.A. § 51-7-83.5

In Sharp v. Green, Klosik & Daugherty, 256 Ga. App. 370, 568 S.E.2d 503 (2002), the Court of Appeals highlighted the distinction between O.C.G.A. § 9-15-14 and § 51-7-83. In Sharp, the plaintiff’s claim for abusive litigation under O.C.G.A. § 51-7-80 et seq. was summarily dismissed. On appeal, plaintiff contended that he had met the requirement of § 51-7-83(b) merely by pleading punitive damages, intentional infliction

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of emotional distress and RICO. The Court of Appeals rejected the argument, stating “the pleadings alone will not support the abusive litigation claim if the damages other than attorney’s fees and costs do not survive summary judgment.” Id. 256 Ga. App. at 373.

In Condon v. Vickery, 270 Ga. App. 322, 606 S.E.2d 336 (2004), the Court of Appeals clarified that a lawsuit contemplated by O.C.G.A. § 51-7-80 is appropriate in only two circumstances:

When the allegedly abusive civil litigation occurs in a court other than one of record, or when the allegedly abused litigant can prove special damages in addition to the costs and expenses of litigation and attorney’s fees. In either of those circumstances, the statutory scheme contemplates an independent lawsuit, including a summons and complaint, and, presumably, the right to a jury trial.

Id. at 327, 606 S.E.2d at 340 (emphasis added). To prevail, special damages must be proved.

However, in Coen v. Aptean, Inc., 346 Ga. App. 815, 816 S.E.2d 64 (2018), Coen asserted a claim for abusive litigation under O.C.G.A. § 51-7-80, but because Coen had previously filed a motion for attorney’s fees and expenses under O.C.G.A. § 9-14-15 in the underlying lawsuit, he could not seek fees and expenses as part of the independent statutory claim for abusive litigation in the new lawsuit. Id. at 820-21. The Court held that Coen was not required to plead special damages to support his abusive litigation claim. Id. Ga. App. at 821, 816 S.E.2d at 72. The Court held that he could pursue general damages for mental distress under O.C.G.A. 51-12-6 if the opposing party’s conduct was malicious, willful or wanton. Id.

A party against whom a motion for attorney’s fees and litigation expenses is filed has a right to challenge the reasonableness and necessity of the fees and expenses at an

At the hearing, “each attorney for whose services compensation is sought must provide admissible evidence of fees in the form of personal testimony, or through the testimony of the custodian of the applicable billing records, as an exception to the hearsay exclusion.” *Oden v. Legacy Ford-Mercury,* 222 Ga. App. 666, 669, 476 S.E.2d 43, 46 (1996). An attorney’s statement in her place, as an officer of the court, regarding attorney’s fees, coupled with documentary evidence, has been held sufficient to support an award. *Tahamtan v. Chase Manhattan Mortgage Corp.,* 252 Ga. App. 113, 555 S.E.2d 76 (2001); see also *Ellis v. Stanford,* 256 Ga. App. 294, 568 S.E.2d 157 (2002) (stating that testimony of associate plus “prebills” were sufficient evidence); *but see Note Purchase,* *supra* (stating that affidavits in support of motion must be filed with the motion).

What is reasonable and necessary will, of course, depend on the nature and facts of the individual case, the degree of work required by the assertion of the frivolous position, and the skill, and experience of the attorney performing the work (and therefore the reasonableness of the fee charged). However, a court is not limited to the amount of *actual* fees paid to counsel. *Hindu Temple and Community Center v.*
Raghunathan, 311 Ga. App. 109, 117, 714 S.E.2d 628, 634 (2011). Should the Court find that the “reasonable” amount of fees exceeds what counsel has actually been paid, the Court may actually award an aggrieved party more in fees than were actually paid to its attorney. Id. See also Jones v. Unified Gov’t of Athens-Clarke County, 312 Ga. App. 214, 718 S.E.2d 74 (2011) (holding that an award of fees for $225 and $200 per hour to county-paid attorneys was not unreasonable even though the attorneys were salaried, not paid hourly, and even though the award exceeded what the county actually pays for the attorneys’ time). This authority could also curtail the defense that the movant’s counsel was doing the work gratis.

Evidence must be presented from which the trial court can “determine what portion of the total amount of attorney time and litigation expenses was attributable to the pursuit or defense of claims for which attorney fees are recoverable....” Id. The trial court must apportion fees between those incurred in defending against the claims deemed frivolous and those fees incurred in defending against non-frivolous claims; “lump sum” awards are not permitted. Hoard v. Beveridge, 298 Ga. 728, 730, 783 S.E.2d 629, 631 (2016); Butler v. Lee, 336 Ga. App. 102, 783 S.E.2d 704 (2016); Hardman v. Hardman, 295 Ga. 732, 763 S.E.2d 861 (2014); Trotman v. Velociteach Project Mgmt., 311 Ga. App. 208, 715 S.E.2d 449 (2011); Roylston v. Bank of Am., N.A., 290 Ga. App. 556, 660 S.E.2d 412 (2008); Franklin Credit Mgmt. Corp. v. Friedenberg, 275 Ga. App. 236, 620 S.E.2d 463 (2005); Trotter v. Summerour, 273 Ga. App. 263, 266, 614 S.E.2d 887, 890 (2005). The trial court's order must show on its face the “complex decision making process necessarily involved in reach a particular dollar figure.” City of Albany v. Pait, supra; Gibson Law Firm, LLC v. Miller Built Homes, Inc., 327 Ga. App. 688, 691, 761 S.E.2d 95, 98-99 (2014). The Court of Appeals insists that the trial court “identify which billing entries and specific amounts pertained to the unsuccessful efforts [of movants] and were being subtracted from the overall attorney fees total . . . so as to reach the [final] amount,” stating “[w]e need such detail for proper review.” Razavi v. Merchant, supra. The trial court’s failure to specify how it apportioned fees and expenses between the sanctionable and non-sanctionable conduct often results in a remand back to the trial court with instruction. See e.g. id. (noting
In the case of frivolous renewal actions, the fees and expenses associated with defending the frivolous claims brought in the original suit are recoverable in a motion filed after dismissal of the renewed suit. Trotter, supra. The deadline to file a motion for fees for time expended on a voluntarily dismissed suit does not begin to run until the “final disposition” of the renewed suit; thus, a motion timely filed after final disposition of the renewed action may recover the earlier incurred attorney’s fees. Id. See also Moore v. Harris, 201 Ga. App. 248, 410 S.E.2d 804 (1991) (upholding fees award in second suit that included fees and expenses incurred during original suit later voluntarily dismissed).


On appeal, the Court of Appeals reversed the judgment notwithstanding the verdict stating that there was some evidence from which a jury could have found bad faith pursuant to O.C.G.A. § 13-6-11. Id. at 296. Based on that ruling, the Court of Appeals upheld the denial of the award under O.C.G.A. § 9-15-14, as an additional award of attorney’s fees would have constituted an impermissible double recovery. Id. The Court of Appeals relied on Georgia Northeastern Railroad v. Lusk, 277 Ga. 245, 246, 587 S.E.2d 643, 644 (2003), for the proposition that a “plaintiff is entitled to only one recovery and satisfaction of damages, because such recovery and satisfaction is deemed to make the plaintiff whole.”

Finally, the attorney’s fees and litigation expenses incurred in bringing the motion are recoverable. O.C.G.A. § 9-15-14(d). As with any other fees, they must be based on evidence presented and demonstrating that they were reasonable and necessarily incurred in bringing the fee motion. In Cohen v. Rogers, the defendant filed a renewed motion for fees after his original motion for fees was vacated and remanded. Cohen v. Rogers, 341 Ga. App. 146, 798 S.E.2d 701 (2017). The court granted the renewed motion for fees. Id. The court noted that, pursuant to O.C.G.A. § 9-15-14(d), had the defendant not been successful in his renewed motion for fees, he would not have
been entitled to fees for the work he spent in pursuing the motion. *Id.* Because the court granted the renewed fee motion, the defendant had in fact obtained an order of the court pursuant to O.C.G.A. § 9-15-14 and was thus entitled to an award of attorney’s fees in obtaining that order. *Id.*

F. Appellate Issues

One does not have the right to appeal an award as a matter of right. By statute, O.C.G.A. § 5-6-35(a)(10), awards of attorney’s fees and litigation expenses are subject to the two-step discretionary appeal process. The size of the award has no effect on the requirement that O.C.G.A. § 5-6-35 procedure be followed. *See, e.g., Capricorn Sys., Inc. v. Godavarthy,* 253 Ga. App. 840, 560 S.E.2d 730 (2002).

Where a direct appeal as a matter of right under O.C.G.A. § 5-6-34 has been properly filed, a party aggrieved by an O.C.G.A. § 9-15-14 award may also seek relief from that award on the direct appeal. *Rolleston v. Huie,* 198 Ga. App. 49, 400 S.E.2d 349 (1990), *overruled in part,* *Sewell v. Cancel,* 295 Ga. 235, 759 S.E.2d 485 (2014). *See O.C.G.A. § 5-6-34(d).* The combining of a motion under § 9-15-14 with a motion made under § 51-7-83(b) also may provide a technique for obtaining review of the decision on the motion as a matter of right. *Hallman v. Emory Univ.,* 225 Ga. App. 247, 483 S.E.2d 362 (1997). In order to take advantage of the technique approved in *Hallman,* however, one must have fully complied with the notice provisions of O.C.G.A. § 51-7-84. The *Hallman* analysis of the procedure in O.C.G.A. § 9-15-14 as part of O.C.G.A. § 51-7-83(b) has been criticized by the appellate courts, so reliance on this should be with caution. *See, e.g., Condon v. Vickery,* 270 Ga. App. 322, 606 S.E.2d 336 (2004).

The standard of review of awards under O.C.G.A. § 9-15-14 depends on whether the award is based on the mandatory provisions of (a) or the discretionary provisions of
(b). In either case, the trial court's ruling is entitled to great deference. That deference is justified because the trial court is most familiar with the underlying litigation, the tactics employed, the positions asserted, as well as the reasonableness of the fee request.


If the order does not include express findings of fact that the allegedly abusive position presented "a complete absence of any justiciable issue of law or fact that it could not reasonably be believed that a court would accept the position," then no award under O.C.G.A. § 9-15-14(a) is authorized. Citizens for Ethics in Government v. Atlanta Development Authority, 303 Ga. App. 724, 737, 694 S.E.2d 680, 692 (2010). Similarly, if the order does not include a finding of fact of at least one of the criteria of O.C.G.A. § 9-15-14(b) (lacked substantial justification, interposed for delay or harassment, unnecessarily expanded proceedings), then no award under that provision is justified. Id. Under either provision, the court's order must find as a fact that the amount awarded was reasonable and necessary. If a trial court issues an award under both subsections O.C.G.A. § 9-15-14 (a) and (b), an appellant must address both grounds on appeal. Prime Home Props., LLC v. Rockdale County Bd. Of Health, 290 Ga. App. 698, 660 S.E.2d 44 (2008).

II. CONCLUSION

The use of O.C.G.A. § 9-15-14 to shift the cost of litigation to the abusive litigator is a useful deterrent to frivolous actions, defenses, and litigation tactics. The statute gives the trial court broad powers to sanction abusive litigators and their lawyers. Though frivolous and abusive litigation continues to be a problem, the growing body of case law confirming the legitimacy of such sanctions in a variety of instances will hopefully serve to reduce the frequency of sanctionable conduct among litigants and counsel. For now, however, the number of § 9-15-14 motions filed each year is increasing steadily, so attorneys in all practice areas are well-advised to stay up to speed on the developing law in this area, both to avoid being sanctioned for their own conduct and that of their clients during litigation and to prepare themselves to take advantage of
opportunities to recoup fees for clients who have fallen victim to abusive litigation tactics.
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RECOVERY OF ATTORNEY’S FEES UNDER OCGA §13-6-11
A. Bad Faith
B. Stubbornly Litigious
C. Unnecessary Trouble & Expense
D. Relationship of OCGA §13-6-11 to OCGA §9-15-14 and §51-7-80, et seq.
E. Relationship of OCGA §13-6-11 to OCGA §33-4-6 and OCGA §51-12-5, 5.1 and 6
F. Introduction of Normally Prohibited Settlement Negotiations via OCGA §13-6-11
G. Ethics Regarding Recovery of Attorney’s Fees

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ATTORNEY FEES
UNDER O.C.G.A. §13-6-11

2019

(Updated February 5, 2019)

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# ATTORNEY FEES UNDER O.C.G.A. §13-6-11

2019

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This paper covers cases decided through February 5, 2019.
ATTORNEY FEES UNDER O.C.G.A. §13-6-11

James W. Penland, Attorney at Law


The expenses of litigation generally shall not be allowed as a part of the damages; but where the plaintiff has specially pleaded and has made prayer therefore and where the defendant has acted in bad faith, has been stubbornly litigious, or has caused the plaintiff unnecessary trouble and expense, the jury may allow them. (Orig. Code 1862, §2883; Code 1868, §2891; Code 1873, §2942; Code 1882, §2942; Civil Code 1895, §3796; Civil Code 1910, § 4392; Code 1933, §20-1404; Ga. L. 1984, p.22, §13. O.C.G.A. §13-6-11.)

General Considerations.

O.C.G.A. §13-6-11 is Georgia’s expression of the American Rule for the award of attorney’s fees and other expenses of litigation.¹ The American Rule is that a party may not recover the expenses for defending or prosecuting a suit from the opposing party unless authorized by a specific statute.² O.C.G.A. § 13-6-11 is Georgia’s general statute providing prevailing plaintiff’s recovery of their expenses of litigation.

The Georgia rule, though complex, may be simply stated as follows:

Each litigant bears its own litigation expenses unless the defendant has acted badly and the plaintiff wins, in which case,

¹The cases under O.C.G.A § 13-6-11 often refer to “attorney’s fees” instead of “expenses of litigation.” For the purpose of convenience in this discussion, the terms are used interchangeably since both fees for attorneys and other litigation expenses are subject to the same rules for their award. Likewise, the case law refers to "attorney's fees" and "attorney fees" interchangeably. Both usages seem correct. However, the most recent appellate cases in Georgia use the term “attorney fees” most often.
the defendant may bear the litigation expenses if the trier of fact so decides.


In all cases where a litigant seeks to recover attorney fees and expenses of litigation, a litigant must establish a legal basis for the claim. The legal basis may arise out of statute or contract. While statutory exceptions to Georgia’s general rule for attorney fees exist under many other statutes, this paper focuses on the general rule expressed in O.C.G.A. §13-6-11.


**The rule and the exceptions.**

The Code section has a general rule and an exception, four operative requirements to trigger the exception, and three clauses describing the conduct of the defendant that triggers the exception:

I. **[General Rule] Each litigant bears its own expenses**

II. **[Exception] Unless:**

1. [Operative Rule 1] "Plaintiff has specially pleaded"
2. [Operative Rule 2] "Plaintiff has made prayer therefor"
3. [Operative Rule 3] "The defendant has acted"
   a. [Conduct clause 1] "in bad faith,"
   b. [Conduct clause 2] "has been stubbornly litigious, or"
c. [Conduct clause 3] "has caused the plaintiff unnecessary trouble and expense"

4. [Operative Rule 4] "the jury may allow them."

Georgia law is clear that each party bears its own litigation expenses unless the case fits within some contractual or statutory exception. Judges cannot simply decide to tax a party's expenses to the other party on a whim or arbitrary decision to make things fair. For example, a trial court cannot summarily award attorney fees to a litigant for merely opposing a motion or litigating a case. Kyle v. King, 138 Ga. App. 612, 226 S.E.2d 767 (Ga. App., 1976); Madden v. Bellew, 195 Ga. App. 131, 393 S.E.2d 31 (Ga. App., 1990).


Application of the “Unless” Exception in General — "The defendant has acted badly."

To recover expenses of litigation under O.C.G.A. §13-6-11, the plaintiff must first prevail in the action and also must prove the defendant has acted badly or improperly in any one of the manners described in the Code section.
There is no absolute right to §13-6-11 attorney fees no matter how badly the defendant acted. An award under O.C.G.A. § 13-6-11 is entirely discretionary to the trier of facts. Just because all of the facts justifying attorney fees are proven, the trier of fact is not required to award attorney fees. See, Davis v. Walker, 288 Ga. App. 820, 655 S.E.2d 634 (Ga. App., 2007). "[I]t is for the jury to determine whether there was a bona fide controversy, unless the facts preclude such a finding as a matter of law." (Citation and punctuation omitted.) Webster v. Brown, 213 Ga. App. 845, 846 (2) (446 S.E.2d 522) (1994). " Nash v. Studdard, 670 S.E.2d 508, 294 Ga. App. 845 (Ga. App., 2008). Likewise, it is a matter for the jury to determine if there is sufficient bad faith to authorize attorney fees.

Timing of the bad conduct—§13-6-11 applies only to acts occurring prior to filing.

O. C. G. A. § 13-6-11 provides a remedy only for act occurring prior to the filing of the case, or, in limited instances where defendant’s conduct with respect to the subject transaction, but not the litigation practices, continues during the litigation. “The bad faith authorizing recovery under OCGA § 13-6-11 relates to the defendant’s conduct during the subject transaction prior to litigation, not to conduct in defending the litigation.” Chong v. Reebaa Const. Co., Inc., 665 S.E.2d 435, 292 Ga.App. 750 (Ga. App., 2008). Misconduct during the litigation is exclusively regulated by Georgia’ abusive litigation statutes. The terms “stubbornly litigious” and “unnecessary trouble and expense” refer to pre-filing conduct and do not refer to the manner in which the case is litigated after the case is filed. It would be error to grant O.C.G.A. § 13-6-11 fees and expenses based upon

Of course, if bad acting occurs during the litigation, the amount of the O.C.G.A. § 13-6-11 claim may be increased because the work attributed to the prevailing claim may be more.
**Requirement of success.**


If a plaintiff brings multiple causes of action and prevails on less than all of the causes, the only attorney fees recoverable are those based upon the expense of proving the successful causes of action. A plaintiff is entitled to recover attorney’s fees only for that portion of the fees which is allocable to the attorney’s efforts to prosecute a successful claim against a defendant."

If a claim fails on motion for summary judgment, the O.C.G.A. §13-6-11 claim based upon the failed claim must also fail and the summary judgment should also include a dismissal of the O.C.G.A. §13-6-11 claim. *City of Gainesville v. Waldrip*, 811 S.E.2d 130, 133 (Ga. App., 2018)

In a case where election of remedies is required, attorney fees are not available based upon the mooted remedy. *Barnett v. Morrow*, 196 Ga. App. 201, 396 S.E.2d 11 (Ga. App., 1990). The idea of a “count” in a complaint should not necessarily be equated with a “cause of action.” The inquiry of what claims prevailed should be to go to the essence of the prevailing claim rather than the form of the pleading to determine if the cause of action that prevailed is the one on which the fees and expenses were incurred.

**Plaintiff Requirement and Availability of O.C.G.A. §13-6-11 to Defendants.**


It was well established in common law that a person could not sue another for suing him unless the original suit was frivolous. *Sledge v. Mclaren*, 29 Ga. 64 (Ga., 1859). This idea survives in O.C.G.A. § 13-6-11 in its applicability only to plaintiffs. The fundamental principle, still viable today was set forth in *Story v. Kemp*, 51 Ga. 400 (Ga., 1874) “

The most that can, even in abstract justice, be contended for by the defendant is, that as the heirs have damaged him by bringing a suit against him, in which they failed, he has an action on the case against them for the damages.
But does not the law furnish the measure of damage for such a suit in ordinary cases, to-wit: the costs? Could justice be said to be free if every suitor was to be subject to damage if he failed in his suit? By ancient custom every suitor failing in his claim is liable to be mulct in the costs of his adversary as well as his own, but this is the farthest that has ever been allowed for simple failure. In England this included attorney's cost, fees allowed by law to them as officers of court. But our law has abolished such fees and costs, and in doing so has furnished no means by which the defendant is to be reimbursed for counsel fees in ordinary cases. If it could be shown that a suit was frivolous and malicious, an action on the case might lie. In some cases our statutes allow damages where either party acts merely to delay the other, *and this is, doubtless, in analogy to the action on the case for a frivolous and malicious suit. This right is no hindrance to a wide open door of the courts, since freedom of access is perfectly consistent with a penalty if this right be abused causelessly and frivolously and in bad faith. Under the facts set forth, even a right of action on the case is not made out, since the fundamental element of an action for bringing a suit is not charged, to-wit: that the suit was frivolous and malicious. Perhaps it was brought in good faith under a mistake or misapprehension of law and fact. We think there is no law, and ought to be none, giving an action on the case for damages for such a suit. Such a law would be a bar to the "open court,” provided for by the constitution, and be bad public policy.” (Emphasis added, Note the shades of O.C.G.A. § 9-15-14 included here.)

This policy clearly deprives defendants of a route to recover attorney fees based upon adherence to a conscious policy of keeping the courts open and free. That rationale does not exist where there is a truly independent counterclaim arising from different facts because the counterclaimant would have been able to bring the suit in another case. The joinder of the truly independent and non-compulsory counterclaim is simply a matter of

Section 13-6-11 does not provide a plaintiff with coverage of its defense costs. A plaintiff who is a counterclaim defendant cannot recover attorney fees for successfully defending against the counterclaim. *Emerson v. Brookmere Homeowners Ass'n, Inc.* (Ga. App., 2011). Similarly, the defendant cannot recover for the costs of defending against the plaintiff's complaint, but may only recover the expenses incurred in prosecuting its independent counterclaims. *Eways v. Georgia R.R. Bank*, 806 F.2d 991 (11th Cir. 1986).

In considering whether a defendant is entitled to make a claim for §13-6-11 attorney fees, caution should be exercised because law is not clear as to how “independent” a counterclaim must be to support an attorney fee award. OCGA § 13-6-11 does not permit the recovery of expenses incurred in defending a lawsuit. The defendant is only eligible to recover those expenses incurred in prosecuting an independent counterclaim. “The award of expenses of litigation under OCGA § 13-6-11 can only be
recovered by the plaintiff in an action under the language of the statute; therefore, the
defendant and plaintiff-in-counterclaim cannot recover such damages where there is a
compulsory counterclaim. See Alcovy Properties v. MTW Investment Co., supra at 104
Graybill v. Attaway Constr. & Assocs., LLC (Ga. App., 2017); HA&W Capital Partners,
LLC v. Bhandari, 816 S.E.2d 804 (Ga. App., 2018); Travelers Prop. Cas. Co. of Am. v.

If the counterclaim fails, there cannot be an award of attorney fees to defendant-

"Stubborn Litigiousness" and " Unnecessary Trouble and Expense" Are
Merged Into One Rule

The fundamental rule of the Stubborn Litigiousness and Unnecessary Trouble and
Expense prongs were long ago set forth in Tift v. Towns, 63 Ga. 237 (Ga., 1879), “No man
is bound to forego litigation at the expense of yielding rights apparently well founded,
much less those which prove to be so founded in the end. Where there is a bona fide
controversy for the tribunals to settle, and the parties cannot adjust it amicably, there
should be no burdening of one with the counsel fees of the other, unless there has been
wanton or excessive indulgence in litigation.” "It may be assumed that every suit causes
the plaintiff some trouble and expense, but this is not what the statute has in mind. One
of the provisions of the Bill of Rights contained in the Constitution of this State declares
that 'No person shall be deprived of the right to prosecute or defend his own cause in any
of the courts of this state, in person, [or] by attorney, or both.' This is a privilege to the
defendant as well as to the plaintiff. Where there is a bona fide controversy for the tribunals to settle, and the parties cannot adjust it amicably, there should be no burdening of one with the counsel fees of the other, unless there has been wanton or excessive indulgence in litigation." Rogers v. Moore, 207 Ga. 161, 60 S.E.2d 369 (1950); Auto-Owners Ins. Co. v. Hale Haven Props., LLC, 815 S.E.2d 574, 584 (Ga. App., 2018). Thus, if the defendant has a bona fide defense to the plaintiff’s claim, there can be no litigation expense award for "unnecessary trouble and expense." Where there is a bona fide controversy and no bad faith, the defendant’s constitutional right to defend precludes an attorney fee award. Bush v. Northside Trucking, Inc., 252 Ga.App. 729, 556 S.E.2d 909 (Ga. App., 2001); Marshall v. King & Morgenstern, 272 Ga. App. 515, 520(3), 613 S.E.2d 7 (Ga. App., 2005); Bowen v. Laird A18A0915 (Ga. App., 2018).

Case law has separated the three types of bad acts into two types of cases: The "bad faith" cases of Conduct Clause 1 are separated as one type. The “stubbornly litigious” of Conduct Clause 2 and the “unnecessary trouble and expense” Conduct Clause 3 cases are grouped into a second, separate type. There is no real distinction between the treatment and meaning of the terms in conduct clauses 2 and 3, “stubbornly litigious” and “unnecessary trouble and expense. Jeff Goolsby Homes Corp. v. Smith, 168 Ga. App. 218, 308 S.E.2d 564 (Ga. App., 1983)

Plaintiff need only establish the existence of one of these conditions to recover attorney fees. Any one will do. Gordon v. Ogden, 154 Ga. App. 641, 269 S.E.2d 499 (Ga. App., 1980); National Serv. Indus., Inc. v. Hartford Accident & Indem. Co., 661 F. 2d 458 (5th Cir. 1981).

The existence of a bona fide controversy defeats a “stubbornly litigious unnecessary trouble and expense” type of cases. However, if there is bad faith in the

“The recovery of attorney's fees is not authorized for unnecessary trouble or expense or for stubbornly litigiousness if the evidence shows that a genuine issue or a genuine disputed issue existed between the parties whether of law or of facts as to liability, amount of damages, or any of the other issues in the case.” *Lowery v. Roper*, 293 Ga. App. 243, 246, 666 S.E.2d 710 (Ga. App., 2008) *Memar v. Jebraeilli*, 303 Ga. App. 557, 694 S.E.2d 172 at 694 S.E.2d 177 (Ga. App., 2010); *Auto-Owners Insurance Company v. Crawford*, 240 Ga.App. 748, 525 S.E.2d 118 (Ga. App., 1999); *Gaston v. Mullins*, 168 Ga.App. 371, 372(1), 309 S.E.2d 166 (Ga. App., 1983). That is a very practical principle, for were it otherwise, the task of separating out the litigation expense relating exclusively to the points which should have been conceded without lawsuit would itself be costly, time-consuming, and frequently impossible. *Candler v. Wickes Lumber Co.*, 195 Ga.App. 239, 393 S.E.2d 99 (Ga. App., 1990).

In “stubbornly litigious” cases, where no bad faith is in play, the primary fact question to be decided is whether or not there is a genuine controversy. "A recovery for stubborn litigiousness or causing unnecessary trouble and expense is authorized if no bona fide controversy or dispute existed as to the defendant's liability." *Wilen v. Murray*, 292 Ga. App. 30, 33 (2) (663 SE2d 403) (2008). [Where there is no question of bad faith,]"[A]torney fees are not authorized under OCGA § 13-6-11 if the evidence shows that a genuine dispute exists - whether of law or fact, on liability or amount of damages, or on any comparable issue." *M & H Constr. Co. v. North Fulton Dev. Corp.*, 238 Ga. App. 713, 714 (1) (519 S.E.2d 287) (1999).
Generally, where there is a bona-fide dispute as to any issue, that dispute defeats a stubbornly litigious claim. For example, where a purchaser sues to recover damages for breach of contract or, in the alternative, to obtain specific performance, and where there is no bona fide dispute as to the existence of the indebtedness, but there is a bona fide dispute as to the claim for specific performance, it cannot be said that the seller has been stubbornly litigious. *Gaston v. Mullins*, 168 Ga. App. 371, 309 S.E.2d 166 (Ga. App., 1983).

While the general rule is that any bona fide dispute precludes a §13-6-11 award, several cases have allowed an award in the special case of an auto accident where there is no dispute about the existence of liability and damages in some amount where liability was denied initially, but its existence was clearly and always known to the defendant. See *i.e.*, *Daniel v. Smith*, 266 Ga. App. 637, 597 S.E.2d 432 (Ga. App., 2004). A "so sue me" attitude authorizes the imposition of fees. A defendant without a defense may still gamble on a person's unwillingness to go to the trouble and expense of a lawsuit; but there will be, as in any true gamble, a price to pay for losing. The question of whether there was a bona fide controversy is for the jury "unless the facts preclude such a finding as a matter of law." *Webster v. Brown*, 213 Ga. App. 845, 846 (2) (446 SE2d 522) (1994). A dispute as to liability, "the raising at trial of a dispute as to the amount of liability, without more, will not satisfy the bona fide controversy requirement." *Delta Air Lines v. Isaacs*, 141 Ga. App. 209, 211-212 (3) (233 SE2d 212) (1977); *Layer v. Clipper Petroleum*, Inc. (Ga. App., 2012). A “so-sue-me” attitude forcing a plaintiff to litigate when no bona fide controversy exists causes unnecessary trouble and expense instead of instead of settling claim or fulfilling promises to plaintiff supports an attorney fee claim. *Kroger Co. v. Walters* (Ga. App., Case No. A12A1637, November 29, 2012); *Rogers v. Georgia Ports*

The failure to follow an alternative dispute option such as “arbitration” does not mean that a party was “stubbornly litigious.” Witty v. McNeal Agency, Inc., 239 Ga. App. 554, 521 S.E.2d 619 (Ga. App., 1999).


**Bad Faith, Fraud, and Deceit.**

"Bad faith" attorney fees are awarded when the defendant acted in bad faith in the transactions out of which the case arose. "Bad faith" under this section refers to conduct occurring at a time prior to the institution of the action. Brannon Enter, Inc. v. Deaton, 159 Ga. App. 685, 285 S.E.2d 58 (Ga. App., 1981). In contract cases, the bad faith can
occur in either the making or the performance of the contract or both events. *Canty Building Contractors v. Garrett +Machine & Construction., Inc.*, 270 Ga. App. 871, 608 S.E.2d 280 (Ga. App., 2004) Where the defendant’s work was unacceptable and defendant failed to fulfill its promises to remedy problems, "bad faith" attorney fees cannot be grounded on the conduct of the defendant in defending the case. *Trader's Ins. Co. v. Mann*, 118 Ga. 381, 45 S.E. 426 (Ga., 1903); *Brown v. Baker*, 197 Ga. App. 466, 398 S.E.2d 797 (Ga. App., 1990). The "bad faith" referred to in the Code section refers solely to the "bad faith" of the defendant in the underlying transaction. The "bad faith" in this context is not the refusal to pay, but "bad faith" conduct in the transaction out of which the cause of action arose. *Fine & Block v. Evans*, 201 Ga. App. 294, 411 S.E.2d 73 (Ga. App., 1991). The scope of evidentiary inquiry on the bad faith issue is limited to the formation and performance of the contract and the cause of the breach. Bad faith evidence should be admissible if it pertains to how the parties conducted themselves in relation to the subject matter of the transaction up until the time of the filing of the lawsuit.

"Bad faith" is not defined in O.C.G.A. § 13-6-11. There is no Pattern Jury Instruction defining "bad faith", though the term appears several times in the Pattern book. The Georgia definition of "bad faith" is a matter of common law and standard statutory construction of the plain meaning of the term. O.C.G.A. §1-3-1. *Blacks Law Dictionary* defines bad faith to mean "the opposite of 'Good Faith', generally implying or involving actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motives."

*Black's Law Dictionary*, Rev. 4th ed. 1968, p. 176. In excess of twenty appellate cases have
used the Black’s Law Dictionary definition in ruling on O.C.G.A. § 13-6-11. "Good Faith" is defined in the analogous abusive litigation chapter or the Code at O.C.G.A. §51-7-80(4):

"Good faith," when used with reference to any civil proceeding, claim, defense, motion, appeal, or other position, means that to the best of a person's or his or her attorney knowledge, information, and belief, formed honestly after reasonable inquiry, that such civil proceeding, claim, defense, motion, appeal, or other position is well grounded in fact and is either warranted by existing law or by reasonable grounds to believe that an argument for the extension, modification, or reversal of existing law may be successful."

Case law suggests bad faith is not simply bad judgment or negligence, but it imports a dishonest purpose or some moral obliquity, and implies conscious doing of wrong, and means breach of known duty through some motive of interest or ill will. It may be found in defendant's dealings in carrying out the provisions of the contract, that is, in how defendant acted in his dealing with the plaintiff. *Burlington Air Express v. Ga.-Pacific Corp.*, 217 Ga.App. 312, 313, 457 S.E.2d 219 (Ga. App., 1995). Bad faith other than mere refusal to pay a just debt is sufficient, provided it is not prompted by an honest mistake as to one's rights or duties but by some interested or sinister motive. *Citizens & Southern Trust Co. v. Hicks*, 216 Ga.App. 338, 339(2), 454 S.E.2d 207 (Ga. App., 1995). Defendants can be held liable for attorney fees if they committed the breach in bad faith. It equated this with sinister motive. Bad faith prompted by some interested motive is also sufficient. *Jennings Enterprises, Inc., v. Carte*, 224 Ga.App. 538, 481 S.E.2d 541 (Ga. App., 1977); *Glen Restaurant, Inc., v. West*, 173 Ga. App. 204, 325 S.E.2d 781 (Ga. App., 1984).


"Evidence that [Defendant] entered into the agreements with no present intention of keeping them [is] sufficient to authorize the charge and the recovery of attorney fees for bad faith." *Gaines v. Crompton & Knowles Corp.*, 380 S.E.2d 498, 503 (Ga. Ct. App. 1989)." *Rigby v. Philip Morris U.S., Inc.* (S.D. Ga., CV 513-110 March 19, 2015) In *Parks v. Breedlove*, 241 Ga.App. 72, 526 S.E.2d 137 (Ga. App., 1999), the Court of Appeals found support for a bad faith claim wherein a homeowner refused to pay for construction of a new home. The homeowner claimed that the work was not done properly and refused to pay. After negotiations, the builder and homeowner agreed that the builder would withdraw from the project, waive his contractors fee, ensure that the house passed rough inspection, and provide the homeowner with a list of all subcontractors and suppliers who provided work of materials for the project in exchange for an agreed upon payment to the builder. The builder then did everything required of him. The homeowner then hired an engineer who found some problems with the construction. The homeowner did not have the problems repaired or ask the county inspectors to re-inspect. Instead, they paid the engineer to do redesign for aesthetic reasons. The builder was not paid. The Court of Appeals found these facts sufficient to support an inference by the jury that the homeowner’s refusal to pay the builder was not based on an honest belief that the expenses were not actually or necessarily incurred or that they had been defrauded. This was sufficient to support a finding of bad faith.

In *City of Hoschton v. Horizon Communities*, 287 Ga. 567, 697 S.E.2d 824 (Ga., 2010), the City of Hoschton adopted an ordinance that imposed upon Horizon the duty to design and develop a sewage pumping station, the obligation to dedicate the pumping
station to the city, and the responsibility to pay all costs for infrastructure sewer improvements serving the Horizon’s Brook Glen subdivision. In return, the ordinance granted Horizon the right to recoup from the city its investment in that portion of the pumping station intended to serve other developments and properties and imposes upon the city the concomitant obligation to reimburse Horizon for its investment from sewer connection and tap fees. Horizon thus had a clear legal right to reimbursement, a right violated by the city’s steadfast refusal to reimburse Horizon. Evidence of the city's refusal to reimburse Horizon and its efforts to force Horizon to surrender its rights under the ordinance was sufficient to support the trial court’s finding that the city acted in bad faith sufficient to support an O.C.G.A. § 13-6-11 award.


In a case by a real estate broker, where the evidence showed that the landlord and the tenant deliberately excluded the broker from the final lease negotiation to avoid paying commissions, the Court of Appeals affirmed a finding of bad faith. Centre Pointe Investments, Inc. v. Frank M. Darby Co., 249 Ga. App. 782, 549 SE2d 435 (Ga. App., 2001).

The failure to abate a nuisance of excess flow of water and debris from a golf course development constituted bad faith sufficient to support an award of attorney fees. Foxchase, L.L.L.P. v. Cliatt, 254 Ga. App. 239, 562 S.E.2d 221 (Ga. App., 2002). Similarly, the City of Gainesville was hit with bad faith attorney fees when the city failed to maintain
the drainage system that serviced their property and caused repeated flooding that constituted an abatable nuisance. *City of Gainesville v. Waters*, 258 Ga. App. 555, 574 S.E.2d 638 (Ga. App., 2002) Acceptance and retention of payment for trees wrongfully cut from a neighbor’s land during logging operations that cut some trees from the neighbor’s land while the landowner was logging his own land supported an award for bad faith attorney fees. *Jones v. Cenza*, 287 Ga. App. 806, 572 S.E.2d 362 (Ga. App., 2002).

Compliance with industry standards by a defendant does not absolutely preclude an award of 13-6-11 attorney fees if the evidence shows "willful misconduct, malice, fraud, oppression, or that entire want of care which would raise the presumption of a conscious indifference to the consequences." Evidence that a defendant who, after assuring local residents that the plant would be "as unobtrusive as possible, did nothing to ameliorate the consequences of excessive noise emanating from its equipment was sufficient to send the issue of bad faith attorney fees to the jury. *Oglethorpe Power Corp. v. Estate of Forrister* (Ga. App., 2015).

An example of a case finding acts not to be "bad faith" is *Macon-Bibb County Water & Sewerage Auth. V. Tuttle/White Constructors, Inc.*, 530 F. Supp. 1048 (M.D. Ga. 1981), where disagreement as to certain terms and conditions of a contractual relationship was found not sufficient to evidence any bad faith. Failure to pay a debt because of an honest mistake as to contract terms is not bad faith and is not stubborn litigiousness. *M & H Construction Co., Inc. v. North Fulton Development Corp.*, 238 Ga.App. 713, 519 S.E.2d 287 (Ga. App., 1999); *C & H Development, LLC v. Franklin County*, 670 S.E.2d 491, 294 Ga. App. 792 (Ga. App., 2008).


Under OCGA § 13-6-11, an estate beneficiary may recover expenses of litigation from an executor who has acted in bad faith, has been stubbornly litigious, or has caused the plaintiff unnecessary trouble and expense. Evidence that an executor breached a fiduciary duty from a motive of self-interest is a sufficient basis for an award under this Code section. *In re Estate of Zeigler*, 671 S.E.2d 218, 295 Ga. App. 156 (Ga. App., 2008).

Disregard of a neighbor’s property rights may also support a bad faith award. In *Baumann v. Snider*, 243 Ga.App. 526, 532 S.E.2d 468 (Ga. App., 2000), an upstream landowner’s development of property created increased runoff in disregard of downstream owner’s complaints was sufficient for bad faith attorney fees.

O.C.G.A. § 13-6-11 constitutes a vehicle for the collection of attorney fees” even when only a federal law claim for damages is submitted to the finder of fact. *Nissan Motor*

**Mistake**

“Honest mistake” is a defense to a claim of bad faith. Acts can result from mistaken understandings of law that are motivated by a good faith belief that one has a right to do something and those acts may constitute interference, but the interference is not actionable because of the good faith in the mistake. The mistake is not equal to malice. See, Taylor v. Super Discount Market, Inc., 212 Ga. App. 155, 157, 441 SE2d 433 (Ga. App. 1994); Michaels v. Gordon, 211 Ga. App. 470, 473, 439 S.E.2d 722 (Ga. App. 1993). “Bad judgment or negligence without more does not amount to bad faith.” Benton Express, Inc. v. Royal Ins. Co. of America, 217 Ga. App. 331, 337, 457 SE2d 566 (Ga. App. 1995).

**Mere Negligence**

Effect of Refusal to Pay Debt.

The Supreme Court and the Court of Appeals are in conflict as to whether the mere refusal to pay a claim results in attorney fees.

It is well established that the mere failure to pay a just debt is insufficient to support an award of attorney fees under OCGA § 13-6-11. "M & H Constr., 238 Ga. App. at 715 (1)." Puckette v. John Bailey Pontiac-Buick-GMC Truck, Inc., Court of Appeals of Georgia, A11A0954, July 25, 2011. The Supreme Court stated in Pferdmengs, Preyer & Co. v. Butler Stevens & Co., 117 Ga. 400, 48 S.E. 695 (Ga., 1903), "The only unnecessary trouble and expense shown by the evidence was the fact that defendants had refused to pay without suit. If this would be sufficient to authorize a finding for attorney fees, we see no reason why the plaintiff in every case should not recover attorney fees. The Code has never been so construed. Where there is no bad faith, there must be something more than being put to the expense of a suit to authorize the plaintiff to claim attorney fees as a part of his damages." This old case has continuing viability. It has never been reversed and has been cited by the Supreme Court in Town of Cimax v. Burnside, 150 Ga. 556, 104 S.E. 435, 437 (Ga. 1920); Mallard v. Curran, 123 Ga. 872, 51 S.E. 712 (Ga. 1905); and in Latham v. Falulk, 265 Ga. 107, 454 S.E.2d 136 (Ga., 1995).

The Court of Appeals cases take a stricter approach, allowing attorney fee awards in cases where there is no denial of liability where the plaintiff sues. Under the Supreme Court's view, the mere refusal to pay a disputed claim is not the equivalent of stubborn litigiousness or the causing of unnecessary trouble and expense. Buffalo Cab Co. v.
Williams, 126 Ga. App. 522, 191 S.E.2d 317 (Ga. App., 1972); D. H. Overmeyer Co. v. Nelson-Brantley Glass Co., Inc., 119 Ga. App 599, 168 S.E.2d 176 (Ga. App., 1969); Palmer v. House, 133 Ga. App. 619, 212 S.E.2d 2 (Ga. App., 1974). For the Court of Appeals, however, the failure to pay an undisputed claim is the equivalent of causing the plaintiff unnecessary trouble and expense. Brannon Enterprises, Inc., v. Deaton, 159 Ga. App. 685, 285 S.E.2d 58 Ga. App., (1981); Crotty v. Crotty, 219 Ga. App. 408, 465 S.E.2d 517 (Ga. App., 1995). The Court of Appeals did not address the "something more than being put to the trouble of suit," found in the Georgia Supreme Court Pferdmengs, Preyer & Co. v. Butler Stevens & Co. line of cases. In Fresh Floors, Inc., v. Forrest Cambridge Apartments, L.L.C., 257 Ga. App. 270, 570 S.E.2d 570, at 592 (Ga. App., 2002), the Court of Appeals reversed a default judgment denying attorney fees pointing out that “when a case is in default “the plaintiff is entitled to judgment ‘as if every item and paragraph of the complaint or other original pleading were supported by proper evidence’” In Fresh Floors, the plaintiff had plead facts sufficient to support a finding of bad faith. In McLeod v. Robbins Associates, 260 Ga. App. 347, 579 S.E.2d 748 (Ga. App., 2003), being broke and unable to pay supports an award of attorney’s fees. As always, it is more expensive not to have enough money to pay one’s expenses.

An unjustified refusal to pay will support attorney fees. In Graves v. Diambrose, 243 Ga.App. 802, 534 S.E.2d 490 (Ga. App., 2000), a builder’s refusal to make admitted repairs supported bad faith attorney fee award. In Plemons v. Weaver, 243 Ga.App. 464, 533 S.E.2d 747 (Ga. App., 2000), the Court of Appeals affirmed an award of attorney fees in a contractor’s action against a chicken farmer for breach of contract to remove debris following storm damage. The farmer’s refusal to pay according to the oral agreement was
not based on any honest mistake regarding contractual duties, but rather, constituted breach of contract in bad faith.

Insistence of protracting litigation instead of reasonably trying to settle a case prior to suit can support attorney fees under the stubbornly litigious prong. In *Charter Drywall Atlanta v. Discovery Tech.*, 610 S.E.2d 147, 271 Ga. App. 514 (Ga. App. 2005), rather than negotiate for some payment other than the full contract price after being fired for doing substandard work, defendant took the matter "personally" and vowed to engage in protracted litigation. There was no bona fide controversy as to defendant's failure to complete the work adequately, and it was undisputed that plaintiff offered to pay defendant the difference between the original contract price and the cost of hiring a new contractor to complete defendant's unfinished work. Evidence of defendant's insistence on pursuing protracted litigation even in the absence of such controversy thus supported the trial court's decision to award attorney fees to plaintiff.

**What is Not Actionable.**


Actions of other parties cannot be imputed to a defendant to cause the defendant to bear the fees caused by another person or party. “bad faith of a third party that was not ordered by, approved of, or otherwise ratified by the defendant cannot be imputed to him

What is Recoverable Under O.C.G.A. § 13-6-11.


The section is not limited to the recovery of attorney fees and costs alone. Instead, it incorporated the broader term, expenses of litigation. All expenses of the litigation proximately related to the pending claim should be recoverable, including expenses of in-house counsel and travel necessitated by the litigation. Salsbury Labs, Inc. v. Merieus Labs, Inc., 735 F. Supp 1555 (M.D. Ga. 1989), aff’d., 908 F.2d 706 (11th Cir. 1990). Section 13-6-11 attorney fees should bear post-judgment interest as part of the original debt. As a result, the court should properly apply post-judgment interest to the award of attorney fees. Davis v. Whitford Properties, Inc., 282 Ga. App. 143, 637 S.E.2d 849 (Ga. App., 2006).

This section is inapplicable where the attorney fees sought arise out of a separate legal proceeding. Expenses of a prior proceeding cannot be recovered in a subsequent proceeding under O.C.G.A. §13-6-11. Randolph v. Merchants & Mechanics Banking & Loan Co., 58 Ga. App. 566, 199 S.E. 549 (Ga. App., 1938); Easley v. Clement, 259 Ga. 107,


For example, in *United Companies Lending Corp. v. Peacock*, the plaintiff prevailed only on one count of a six-count complaint. The plaintiff proved the lump amount of fees and expenses incurred to work on all six counts of the complaint, but did not prove the amount of attorney fees attributable solely to the claim on which they prevailed. The Supreme Court reversed and remanded for a hearing to limit the award of attorney fees to the amount based upon the prevailing claim. In *Huggins v. Chapin*, 233 Ga.App. 109, 503 S.E.2d 356 (Ga. App., 1998), the Court of Appeals reversed and remanded an attorney fee case arising under the Georgia Securities Act O.C.G.A. § 10-5-
14(a) for additional findings of fact or another hearing to separate out the attorney fees associated with the prevailing claims.

The strict rule requiring the party seeking fees and who has the burden of proof to the hours that are recoverable from those hours not recoverable, segregating the fees attributable of successful claims from the unsuccessful has an exception. Fee separation is not required if the evidence shows that the claims were so "intertwined" that work performed in connection with other claims was "necessary as well" for the claim on which fees were allowed. *Huggins v. Chapin*, 233 Ga. App. 109, 110 (503 SE2d 356) (1998). The technical elements of an “intertwined” case are discussed in detail in *Eagle Jets, LLC v. Atlanta Jet, Inc.* (Ga. App., 2018) which is a must-read for any counsel involved in proving or disproving an “intertwined” case.

The rule against using guesswork as a basis for awarding damages is long-established and set forth as early as 1911 in *Nat'l Refrigerator & Butchers' Supply Co v. Parmalee*, 72 S.E. 191, 9 Ga.App. 725 (Ga. App., 1911). *Nat'l Refrigerator* remains the primary precedent and is often cited up to the present in a broad spectrum of damage cases. The rule against guesswork stated in full:

Where a party sues for specific damages, he has the burden of showing the amount of the loss, and of showing it in such a way that the jury may calculate the amount from the figures furnished, and will not be placed in the position where their allowance of any sum would be mere guesswork. However, the party does not lose his right of action for the damage because he cannot furnish exact figures. It is often the case that witnesses are called on to testify to the weight of a thing, though they have never weighed it, or to testify to length of time, though they have kept no count of the days or hours, or to testify to value, which is usually a matter of opinion. In all these cases, in the absence of more accurate source of inquiry being available, the
witness states his best judgment, and this is regarded as being of evidentiary value. The jurors are not bound to accept the estimate or best judgment of a witness; but they may do so. If the witness be one of the parties, and he gives his estimate in the form of a maximum and a minimum (as where he says it was not less than so much and not more than so much), that estimate which is most unfavorable to the witness should be taken, in the absence of other testimony. In all cases the witnesses are subject to thorough cross-examination as to the basis on which they have formed judgment, and if the cross-examination discloses that what purports to be an estimate or statement of judgment based on observation is nothing more than a mere guess, the jury should disregard it entirely.

In attorney fee cases, the “more accurate source of inquiry” should be available in the form of written time records. Fundamentally, in attorney fee cases, written time records are a practical necessity. In 4WD Parts Center, Inc., v. Mackendrick, 260 Ga. App. 340, 579 S.E.2d 772 (Ga. App., 2003), the prevailing attorney stated in his place the number of years he had been sworn to practice law, his billing rate, the number of hours already spent on the case, and the number of unbilled hours, but anticipated hours required by the case. He further stated that the fees incurred were reasonable. His award was vacated and remanded because he offered no billing records or any other evidence describing with any particularity how he spent this time and whether the time awarded was spent on the issues that prevailed. The court's award was improperly based on guesswork and the case had to be remanded for an evidentiary hearing.

**Recovery by parties representing themselves.**

The entitlement to fees and expenses for a party providing self-representation depends on the professional status of whether the party is a licensed attorney or not. A *pro-se* litigant who is not an attorney cannot recover O.C.G.A. §13-6-11 attorney fees.

**Jury-Court Determinations.**

Operative Rule 4 "the jury may allow them."

Section 13-6-11 Attorney fees are discretionary. The trier of fact for the main case determines the attorney fees issues along with deciding the plaintiff's or independent counterclaimant’s main case. If the case is tried by the judge, the judge decides. In a jury trial, the jury decides. Covington Square Assoc. LLC v. Ingles Markets, Inc., 287 Ga. 445, 696 S.E.2d 649 (Ga., 2010). The current practice is to send the question to the jury if there is any question of fact at all. "Even slight evidence of bad faith can be enough to create an issue for the jury." McRae, Stegall, Peek & Co. v. Georgia Farm Bureau Mut. Ins. Co. (Ga. App., Case No. A12A0248, AD-012 June 29, 2012).

Where is not an issue, “and the only asserted basis for a recovery of attorney fees is either stubborn litigiousness or the causing of unnecessary trouble and expense,” an award of attorney fees will not be permitted if there is a “bona fide controversy” between the parties, but it is up to the jury to determine whether there was a bona fide controversy, unless the facts preclude such a finding as a matter of law.” It is not a good argument that a bona fide controversy exists in a case, precluding the award of attorney fees, because the
trial court submitted the case to the jury, rather than summarily adjudicating the contractual questions at issue. Such an argument ignores the plain language of OCGA § 13-6-11, which provides that a jury may allow an award of attorney fees if the jury finds that the defendant's conduct warrants such an award. The statute, therefore, contemplates that the facts in any given case may support an award of attorney fees, even if the case is resolved at trial, rather than by summary adjudication. A judge is not barred from submitting the question of attorney fees to a jury, simply because the trial court has allowed a jury to decide other factual issues in the case. This is particularly true where the plaintiff never seeks summary adjudication by motion for summary judgment or motion for directed verdict. *Jones v. Forest Lake Vill. Homeowners Ass'n, Inc.*, 304 Ga.App. 495, 696 S.E.2d 453 (Ga. App., 2010) Ultimately, though, even though the jury awards fees, on review by appeal, the appellate court will look at the matters tried to determine whether as a matter of law a bona fide controversy existed or not and whether there was any evidence of bad faith. See, for example, *Christie v. Rainmaster Irr., Inc.*, 682 S.E.2d 687, 299 Ga. App. 383 (Ga. App., 2009)

Although the statute indicates that it is the jury that determines the issues under O.C.G.A. § 13-6-11, an examination of the cases indicates that the trier-of-fact is determined by the type of case and whether the case itself requires a jury. There are several equity or injunction cases where the issue is tried by the court in a bench trial. *See, i.e., Rice v. Lost Mountain Homeowners Assoc.*, 604 S.E.2d 215, 269 Ga. App. 351 (Ga. App., 2004). Likewise, there are many, many contract and tort cases where the case says that the issue is one for the jury. *See, i.e., Kent v. Brown*, 274 Ga. 849, 561 S.E.2d 89 (Ga. 1999). Thus, it appears that the real rule for who is the trier-of-fact is that the case type is the determinant of whether the issue is tried by judge or jury. If the main case has
a jury right, then there is a right to a jury trial on both the entitlement attorney fees and amount, otherwise, not.

In the federal courts sitting in diversity jurisdiction, it has not been specifically decided whether there is a right to a trial by jury for any issues of attorney fees under O.C.G.A. § 13-6-11. In *Columbus Mills, Inc. v. Freeland*, 918 F.2d 1575 (11th Cir. 1990), the Court of Appeals for the Eleventh Circuit found that no right to a jury trial existed under common law in corporate dissenter’s rights cases similar to the attorney fee statute of former Ga. Code Ann. Sec. 14-2-251(g) that was the basis of the case and found that federal, not state law controlled the decision as to a right to a trial by jury. While this case is dicta with relation to O.C.G.A. § 13-6-11, it may foreshadow how the Eleventh Circuit would rule.

**Pleading and Practice—"...where the plaintiff has specially pleaded and has made prayer therefore..."**

**Race to the Courthouse**

In many disputes, both parties have claims against each other in a transaction and both parties may have valid claims that the other has acted in bad faith sufficiently to support bad faith attorney fees. Since only the plaintiff is entitled to get §13-6-11 fees and expenses and the defendant is not entitled to get any §13-6-11 attorney fees on a compulsory counterclaim, the statute creates a race to the courthouse. Thus, a client sensing litigation should seriously consider trying to sue first. Failure to win the race can be costly and winning the race prevents the opponent from tagging the litigant with fees.
Pleading Requirements--Ante Litem

When suing a municipal corporation protected by O.C.G.A. § 36-33-5, for personal injuries or damages to tangible real or personal property, the proper ante-litem notice must be given or the case will be dismissed. Dover Realty Co v. City of Jackson, 243 Ga.App. 464, 533 S.E.2d 747 (Ga. App., 2000). However, the ante litem requirement set forth in division 1 of Dover Reality has been expressly overruled by Greater Atlanta Homebuilders Ass’n v. City of McDonough, 322 Ga.App. 627, 745 S.E.2d 830 (2013) that holds O.C.G.A. § 36-33-5 does not apply to cases not involving injuries to the person or [tangible] property damage.

Pleading Requirements--Complaint


The best practice is clearly to allege the facts as separate paragraphs that constitute the bad faith or show true lack of a bona-fide controversy. The prayer should specifically demand the recovery of fees pursuant to O.C.G.A. §13-6-11 separately for each count. A general prayer for "such other just and equitable relief as the court may deem proper" is

In Daniels v. Price Communications Wireless, Inc., 254 Ga. App. 559, 562 S.E.2d 844 (Ga. App., 2002), the Court of Appeals affirmed the denial of Section 13-6-11 attorney fees for failure of pleading. The plaintiff had included a paragraph in the prayer reading “[a]ttorney fees and costs of litigation.” A general request for attorney fees without reference to O.C.G.A. § 13-6-11 and the pleading of the facts supporting the criteria required by the statute is insufficient to support an attorney fee award. The facts supporting the attorney fee award should explicitly be tied to the attorney fee claim.

An award of attorney fees is “clearly erroneous” where the plaintiff fails to plead with the requisite specificity. O.C.G.A. § 9-11-8(a)(2)(B) requires a demand for judgment for the relief to which the pleader deems himself or herself entitled. The failure to plead the requisite facts necessary to sustain attorney fees in the complaint, in the demand clause, and finally, in the pretrial order is probably fatal to a O.C.G.A. § 13-6-11 claim.

In federal court, the allegation, "Defendants have acted in bad faith, have been stubbornly litigious, and have caused Plaintiffs undue and unnecessary trouble and expense in terms of O.C.G.A. § 13-6-11 and Plaintiffs are entitled to an award of reasonable attorney fees and their costs and expenses." Without any specific factual allegations supporting their claim is the definition of a conclusory allegation, and supports a motion to dismiss this claim under F.R.Civ. P. 12. Kinard v. Gallina (S.D. Ga., CV 616-040, May 18, 2017 at p. 16.) In Ahmed ex rel. Her Minor Children A.F. v. Air France-Klm (N.D. Ga., 2016), the court reversed an attorney fee award where there was a prayer, but no discernable allegation of facts to support the attorney fee claim and no fact statement in the complaint was tied to the claim for attorney fees.
Motion Practice—Getting Attorney Fees upon failure to file an answer.

O.C.G.A. § 9-11-12 requires the timely filing of responsive pleadings. O.C.G.A. 9-11-55 provides that the case is in default by reason to file an answer or if the case is put into default for some other reason, such as sanctions, then the plaintiff is entitled to verdict and judgment by default as if every item and paragraph of the complaint or other original pleading were supported by proper evidence, without the intervention of a jury with, unless the action is one ex delicto or involves unliquidated damages. However, the amount of the attorney fees is not liquidated and must be proven at a hearing. Even on default, the trier-of-fact for the amount of the fees may award a zero amount under “the jury may allow them” clause of the statute. When something “may” be allowed, it also “may” not.

If a plaintiff in its original complaint puts the defendant on notice that it is seeking attorney fees and expenses under OCGA § 13-6-11 as part of the relief prayed for in the case, and if a default judgment is subsequently entered against the defendant for failing to answer the complaint, then the plaintiff is entitled to an award of attorney fees and expenses as a matter of law from the defendant having caused unnecessary trouble and expense. See Fresh Floors v. Forrest Cambridge Apartments, 257 Ga. App. 270, 272 (570 SE2d 590) (2002); Floyd v. First Union Nat. Bank of Ga., 203 Ga. App. 788, 792 (3) (417 SE2d 725) (1992); Hartford Ins. Co. v. Mobley, 164 Ga. App. 363 (297 SE2d 312) (1982) (physical precedent only); Brannon Enterprises v. Deaton, 159 Ga. App. 685, 686-687 (285 SE2d 58) (1981), However, if the claim for attorney fees is made in an amendment to the original complaint, the matter is not proven because no response is required for an amendment and the averments therein are deemed denied, so that where the O.C.G.A. § 13-6-13 is raised by amendment the entitlement to the award must also be proven.
Water's Edge Plantation Homeowner's Ass'n, Inc. v. Reliford (Ga. App., 2012). In the event a defendant, though in default, has placed damages in issue by filing a pleading raising such issue, either party shall be entitled, upon demand, to a jury trial of the issue as to damages.

Motion Practice—Motions for Summary Judgment or Directed Verdict.


This rule that only the trier-of-fact can award attorney fees applies even if the liability is admitted in a Request for Admission under F.R.Civ.P. Rule 36. “In other words, regardless of whether the facts are undisputed, the Court is without power to award attorney's fees. Thus, the question of Auto-Owners' entitlement to attorney's fees and costs and the amount, if awarded, will be presented to a jury to decide.” Auto-Owners Life Ins. Co. v. Burnett, USDC MDGA CA No. 5:14-CV-96 (MTT) May 6, 2015. The same rule would presumably apply under O.C.G.A. §9-11-36.

The denial of a bad faith award also cannot be decided by summary judgment except in the rarest of cases. Only in the rare case where there is absolutely no evidence to support the award of expenses of litigation would the trial court be authorized to grant summary adjudication on such issues. Mariner Health Care Mgmt. Co. v. Healthcare, 306 Ga.App. 873, 703 S.E.2d 687 (Ga. App., 2011).

Whether a plaintiff has “met any of the preconditions for an award of attorney fees and litigation expenses set forth in OCGA § 13–6–11 is solely a question for the jury. Both the liability for and amount of attorney fees pursuant to OCGA § 13–6–11 are solely for the jury's determination. Royal v. Blackwell, 289 Ga. 473, 712 S.E.2d 815 (Ga., 2011). “Where there is at least some evidence to support a claim for attorney fees under OCGA § 13-6-11, the trial judge is bound to submit the issue to the jury.” Henderson v. Sugarloaf Residential Prop. Owners Ass'n, Inc. (Ga. App., A12A2055, DO-094, March 20, 2013).

O.C.G.A. § 13-6-11 attorney fees cannot be awarded by directed verdict. “[I]t has long been held ... that in suits where the expenses of litigation might be recovered as part of the damages, it is error for the trial court to direct a verdict therefor. The matter of such


While a judge cannot grant O.C.G.A. § 13-6-11 as a matter of law, a judgment can deny them as a matter of law on summary judgment or on directed verdict if there is no entitlement to the recovery. “'[o]nly in the rare case where there was absolutely no evidence to support the award of expenses of litigation would the trial court be authorized to grant summary adjudication on such issues.” American Medical Transport Group v. Glo-An, supra. See also Brito v. Gomez Law Group, 289 Ga.App. 625, 628(2), 658 S.E.2d 178 (Ga. App., 2008).’” Covington Square Assoc. LLC v. Ingles Markets, Inc., 287 Ga. 445, 696 S.E.2d 649 at 696 S.E.2d 651 (Ga., 2010); Mariner health Care Mgmt. Co. v. Sovereign Healthcare, LLC, Ga. App. Cases A10A1642 and A10A1679, October 28, 2010.

Under certain circumstances, the court may make a pretrial determination of attorney's fee issues. In a case where there is no issue of bad faith, the court may reject an attorney fee claim if the evidence presented on motion for summary judgment demonstrates a bona-fide controversy. Grange Mutual Casualty Co. v. Kay, 264 Ga. App.
139, 589 S.E.2d 711 (Ga. App., 2003). The Appellate courts, however, are quite attentive to insuring that if there is any evidence of bad faith, the jury should decide the issue instead of the judge. In Fertility Technology Resources, Inc. v. Lifetek Medical, Inc., 282 Ga. App. 148, 637 S.E. 2d 844 (Ga. App., 2006), a summary judgment for attorney's fees based upon the existence of evidence of bad faith arising out of the intentional tort of interference with contract was set aside because the issue of bad faith had not yet been decided by the jury. Because the intentional torts of procuring a breach of fiduciary duty and misappropriation of trade secrets remained for the jury's consideration, the claim for attorney fees rooted in bad faith concerning those actions should have also been left for the jury. It was premature, and thus error, to grant summary judgment on this issue altogether." Id. Accordingly, the trial court's order in this regard was reversed. See also, Insight Technology, Inc. v. Freightcheck, 280 Ga. App. 19, 633 S.E.2d 373 (Ga. App., 2006)

Disclosure of records and expert opinions


Since billing records are generally admissible, unless some privilege is established, they should also be discoverable within the O.C.G.A. §9-11-26. Billing records may contain work product matters that should not be disclosed to the opponent. Under O.C.G.A. §9-11-26(b)(3), “, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.” See, Brown v. Howard (Ga. App., Case No. A15A1000, October 16, 2015.) However, if too much is redacted from the billing records, there may not be enough evidence to establish the fees as in the case. In Leon v. Monterrey Mexican Rest. of Wise, Inc., 305 Ga.App. 222, 699 S.E.2d 423 (Ga. App., 2010) the lawyer redacted too much and the Court of Appeals reversed the attorney fee award.

As noted elsewhere in this paper, testimony about the reasonableness and necessity of attorney fees is a matter of expert opinion. This places the attorney’s opinions and records within the experts category under both state and federal discovery Rules. The requirement invokes the expert disclosure rules of Rule 26. O.C.G.A. §9-11-26 subsections (b)(4) and (e)(1)(b) and the corresponding rules of F.R.Civ.P Rule 26 require the disclosure and supplementation of information regarding expert witnesses and the failure to properly disclose or supplement may subject a party to sanctions under both the federal and State Rules 37. Logistec USA, Inc. v. Daewoo International Corp., USDC, SDGA CA 2:13-cv-27 June 17, 2015.

Generally, the party may obtain discovery about the expert, but must a reasonable fee for the time spent in responding pay the expert for the time spent providing the discovery by that expert. Arguably, a party seeking the opposing attorney’s expert opinions on his fees in a state case by deposition or document requests must pay for it.
subject to the party’s right to determine the reasonableness of the charges. See, O.C.G.A. §9-11-26(b)(4)(A)(ii). In a federal case, under F.R.Civ.P. Rule 26(b)(4)(E), the party must pay the expert expenses of preparing and attendance at a deposition.

**Pleading Requirements-Pretrial Order**


**Preparing for trial**

The proof must be matched to the claim. An award of attorney fees is determined upon evidence of the reasonable value of the professional service underlying the claim for attorney fees. A court may consider a contingent fee agreement and the amount it would have generated as evidence of usual and customary fees in determining both the reasonableness and the amount of an award of attorney fees. The court may determine the amount of the award of attorney fees on the basis of hourly rates. The trial court is not bound by the fee contract between the parties. *Southern Cellular v. Banks*, 209 Ga. App. 401, 433 S.E.2d 606 (Ga. App., 1993). Basic steps to prepare to present a case for attorney fees are:

1. Assemble the basic information.
2. Fee Agreement
3. Time keeping records
4. Checks, bills and invoices for expenses paid
5. Copies of bills sent to the client
6. Client statement showing amounts paid and still owing
7. A copy of the court’s docket
8. A listing of discovery prepared, pleadings, letters, and other evidence of work done.
9. A list of all of the timekeepers as witnesses. (Make sure they are listed on the pre-trial as witness on attorney fees.)

**Trial Presentation-At the Start**

Make sure the case is reported in case it is necessary to appeal the result. In *Performance Mechanical Co. v. Heat Transfer Control, Inc.*, 247 Ga.App. 436, 543 S.E.2d 808 (Ga. App., 2000), the losing defendant contended there was insufficient evidence of bad faith to support claim of attorney fees. There was no trial transcript. The Court of Appeals affirmed because it must assume in the absence of a trial transcript that the evidence supports the verdict.

Make sure you have your billing records and other evidence prepared for presentation. If you have a summary exhibit, make sure you have all of the originals that support it. Make sure you know the evidence rule for the admission of each piece of your evidence. *White v. Dillworth*, 178 Ga. App. 226, 342 S.E.2d 709 (Ga. App., 1986). Review the rules of evidence carefully, particularly those for business records.
Trial-Presentation of Evidence and Proving the Fees.

In a jury case, the issue of attorney fees is a question of fact and must be presented to the jury before the jury is authorized to grant any fees. *Stargate Software International, Inc. v. Rumph*, 224 Ga. App. 873, 878, 482 S.E.2d 498, 503 (Ga. App., 1997). The actual amount of the litigation expenses applying to the prevailing claims must be proven, including the precise dollar amount and the elements of reasonableness and necessity. Estimates are not sufficient. *Prainito v. Smith* (Ga. App., 2012)

The evidence of §13-6-11 attorney fees must be presented as a part of the Plaintiff's primary case. Fees awardable under section 13-6-11 are an element of "actual damages" and are therefore subject to the evidentiary standards of proof that are required to sustain any general damage claim--evidence. Plaintiff must make out a proper case for litigation expenses, which must be supported by evidence. *Davis v. Foman*, 144 Ga. App. 14, 240 S.E.2d 383 (Ga. App., 1979). As a matter of timing of the trial of the attorney fees issue, the evidence should be submitted as a part of the trial of the main case and the issue should be submitted to the jury. A ruling on attorney fees is premature prior to the time the issue of damages goes to the jury. See, *East Beach Properties, Ltd., v. Taylor*, 250 Ga. App. 798, 552 S.E.2d 103 (Ga. App., 2001). Only the jury or the court sitting as trier of fact may award O.C.G.A. § 13-6-11 fees. *Covington Square Assoc.s v. Ingles Mkt.S Inc.*, 287 Ga. 445, 696 S.E.2d 649 (Ga., 2010). While the trial court is authorized to award reasonable attorney fees based on its expertise, there must be some evidence to support the court's award. *Sheppard v. Sheppard*, 229 Ga. App. 494, 229 S.E.2d 240 (Ga. App., 1997).
While there are many statutes authorizing the imposition of attorney fees, all of them seem to use the same principals of evidence and procedure to determine if fees may be imposed. In order for a party to prove up attorney fees to be charged against an opposing party under the Georgia statutes allowing attorney fees, the party must produce admissible evidence to prove each item of the fee in accordance with the requirements of O.C.G.A. Title 24 Evidence. See, O.C.G.A. §24-1-2. An award of attorney fees is to be determined upon evidence of the reasonable value and necessity of the professional services which underlie the claim for attorney fees. The amount of the award is that amount which will recompense the harmed party for the actual amount of fees incurred that are compensable under a strict construction of the applicable statute. *Southern Cellular Telecom v. Banks*, 209 Ga.App. 40, 403, 433 S.E.2d 606, 608 a (Ga. App. 1993) an O.C.G.A. §13-6-11 case; *Ga. Dep’t of Corr. v. Couch*, 295 Ga. 469, 759 S.E.2d 804 (Ga. 2014) an O.C.G.A. §9-11-68 case.

**The basic proof is based upon the facts.**

The basic facts that must be proven by admissible evidence in attorney fee cases to establish the amount of fees to be awarded are as follows:

The terms of the fee contract with the client.

The time spent as the basis for the award.

The reasonableness of the amount of time spent.

The necessity of the time spent.

These four required elements of proof and decision will each be addressed as separately.

The primary principle controlling the grant of any award is that the trier-of-fact, be it jury or court, must exercise sound discretion in making the award and must make
its decision based upon the proper application of the statute granting the fees and proper application of the rules of evidence in setting forth the factual basis underlying the award. That sound discretion must be based upon the actual evidence submitted and cannot be awarded without sufficient evidence of the value of the services being admitted. Perhaps the most common reason for an attorney fee award being reversed is that the appellate court examines the evidence and makes a determination that it is insufficient for the appellate court to make a determination as to the reasonableness or necessity of the attorney fees awarded or that sufficient findings explaining the award were not made. See, i.e. *Hercules Automotive, Inc. v. Hayes*, 389 S.E.2d 571, 194 Ga.App. 135 (Ga. App., 1989); *Williams v. Becker*, 294 Ga. 411, 754 S.E.2d 11 (Ga., 2014).

Proof of the terms of the fee contract with the client.

The purpose of an attorney fee award is to compensate the party for fees necessarily expended to prosecute or defend all or part of the party’s case recoverable under an attorney fee statute authorizing an award. *Ga. Dep’t of Corr. v. Couch*, 295 Ga. 469, 759 S.E.2d 804, 810 (Ga., 2014) (O.C.G.A. §13-6-11 “award “is not intended to penalize or punish, but to compensate an injured party for the costs incurred as a result of having to seek legal redress for the injured party’s legitimate grievance”); *In re Estate of Holtzclaw*, 667 S.E.2d 432, 434, 293 Ga.App. 577 (Ga. App., 2008) “[T]he purpose of an award of attorney fees under OCGA § 9-15-14 is to deter litigation abuses as well as to compensate the party put to additional expense.”; See, *Jones v. Jones*, 632 S.E.2d 121 (Ga., 2006)

As an aside and a bit off topic, alimony fees under O.C.G.A. §19-6-2 attorney fees are part of alimony and are awarded under the reasons supporting alimony to insure a party’ adequate support of the spouse and children.; *Finch v. Finch*, 213 Ga. 199, 201, 97 S.E.2d 576 (Ga., 1957) “Such payments irrespective of the specific expense they satisfy,
whether food or attorney fees, are all alimony, and are embraced in that term.” Generally, the compensation awarded belongs to the client, not to the lawyer except in domestic relations cases where the lawyer owns the fees.

The client’s obligation to pay fees is determined by the fee agreement. To prove what is owed, the contract terms of the fee agreement must be proven because it determines the cap amount of the liability. In no case should the court-awarded fee exceed the fee set forth in the agreement reached by the attorney and his client. There does not appear to be a Georgia case on this point, but the limitation applies in our sister states and the logic of the principle is sound. See, *Florida Patient’s Compensation Fund v. Rowe*, 472 So.2d 1145, 10 Fla. L. Weekly 249 (Fla., 1985); *Rosenberg v. Levin*, 409 So.2d 1016 (Fla., 1982); *Chambliss, Bahner and Crawford v. Luther*, 531 S.W.2d 108 (Tenn. App., 1975); *Standard Guar. Ins. Co. v. Quanstrom*, 555 So.2d 828, 831 (Fla., 1990) Thus, if the client is not obligated to pay a fee, no fee should be recoverable because there is nothing to recompense. If a fee agreement is based on the amount the court might award and nothing is due unless the court makes an award, the court should award nothing because the client is not obligated to pay anything and there is nothing to reimburse. See, *Tetrault v. Fairchild*, 799 So. 2d 226 (Fla. App., 2001) (“What if the parties’ contract, ..., provides that plaintiff will pay a contingency portion of the recovery or the amount awarded by the court, whichever is greater? It is stating the obvious to say that this is a sham agreement.”)

Proof of the fee agreement follows the same rules as for any other contract. If the fee agreement is an oral agreement, then the agreement may be proven by oral evidence. Generally, the Georgia Bar Rules encourage a written fee agreement. Contingency fee agreements must be in writing. Under the Bar Rule 1.5(b), the fee agreement should be
“preferably in writing”. Contingency contracts must be in writing. Bar Rule 1.5 If the fee agreement is written, then the original fee agreement itself must be produced unless non-production can be excused under some exception to the Best Evidence Rule. The Best Evidence Rule is codified at O.C.G.A. §24-10-1001 to §24-10-1008. O.C.G.A. §24-10-1002 states, “To prove the contents of a writing, recording, or photograph, the original writing, recording, or photograph shall be required.” Oral testimony as to the terms of the written agreement should not be allowed. Oral evidence as to the terms of a written contract is inadmissible. Mitchell v. Backus Cadillac-Pontiac, Inc., 618 S.E.2d 87 at 95, 274 Ga. App. 330 at 337 (Ga. App., 2005); Sanchez v. Atlanta Union Mission Corp., 329 Ga.App. 158, 764 S.E.2d 178 (Ga. App., 2014). If oral testimony is admitted, it is controlled by the Parol Evidence Rule. The Parol Evidence Rule is codified at O.C.G.A. §24-3-1 to §24-3-10.

The petitioner for fees must prove the actual cost of the matter.

There is a classic aphorism attributed to Abe Lincoln, “A lawyer’s time and his advice is his stock in trade.” The first step for a merchant to do to get paid is to list out what has been sold in some sort of bill or invoice. Like a merchant, to get paid, the lawyer must first make a listing of the time spent on the task based upon personal knowledge with the lawyer standing as a witness.

In proving up attorney fees, the party must establish the time spent and expenses incurred in connection with the case as the first step in establishing an amount due. Thus, the party must prove up the chargeable hours spent by the attorney’s organization. While it is not possible to prove the number of hour spent with the exactitude like that required
for a merchant to count the number of loaves of bread sold, the party must prove up a minimum number of chargeable hours spent as a starting point to begin the calculation of the amount due.

Proof of the chargeable hours requires admissible evidence no different than that to prove any other act of a person. It requires admissible evidence, introduced upon the personal knowledge of a witness, sworn before the court. The proof of the actual cost may be proven by properly admitted business records or upon the personal knowledge of witnesses.

Properly admitted business records, submitted upon the personal knowledge of the testifying attorney may be used to prove the actual cost of the matter. *Santora v. American Combustion, Inc.*, 485 S.E.2d 34, 225 Ga.App. 771 (Ga. App., 1997) The testifying attorney must have personal knowledge of the work done by non-testifying attorneys. In *First Union Nat. Bank v. Davies-Elliott, Inc.*, 215 Ga.App. 498, 503(1)(b), 452 S.E.2d 132, 138 (1994), no billing records were introduced; the case was taken on a contingency basis, and the testifying lead counsel had no personal knowledge of the work done by other attorneys and the attorney fee award was reversed. If the testifying attorney does not have personal knowledge, then the testimony of what the other legal professionals did is mere hearsay and has no probative value. O.C.G.A. §24-8-801, et seq.; *Mitcham v. Blalock*, 214 Ga.App. 29, 32(2), 447 S.E.2d 83 (1994); *First Union Nat. Bank of Georgia v. Davies-Elliott, Inc.*, 452 S.E.2d 132, 138, 215 Ga.App. 498 (Ga. App., 1994).

When the amount is not proven by properly admitted business records, to prove up a time entry in a bill sufficiently for it to be included in the court’s calculation, the individual person who did the work must testify as to what was done during the time increment of the entry based upon their personal knowledge. *Oden v. Legacy Ford*-
At a hearing held to determine the amount of attorney fees recoverable, "each attorney for whose service compensation is sought must provide admissible evidence of fees in the form of personal testimony, or through the testimony of the custodian of the applicable billing records, as an exception to the hearsay exclusion. See OCGA § 24-3-1."

Proof of work done by someone other than the testifying professional may be on the personal knowledge of the witness if the witness has personal knowledge of another's work. Santora v. American Combustion, Inc., supra at 485 S.E.2d 34 at 39, “Moreover, although some of the work billed was that of associates and paralegals, lead counsel testified on her deposition that she supervised them and had personal knowledge of and was very familiar with the work they were doing.”

**The proof must delineate the time spent on issues that are chargeable from those that are not and tie the chargeable time to the statute.**

The proof must also delineate the time spent on the chargeable matters. Only that portion of the fees incurred in the whole case that are covered by the applicable attorney fee statute may be awarded. For example, in O.C.G.A. 13-6-11 cases, the fees may only be awarded for work on prevailing claims. United Companies Lending Corp. v. Peacock, 267 Ga. 145, 475 S.E.2d 601 (Ga., 1996); Leon v. Monterrey Mexican Rest. of Wise, Inc., 305 Ga.App. 222, 699 S.E.2d 423, 428 (Ga. App., 2010) In O.C.G.A. §9-15-14 cases, the fees may only be awarded for litigation expenses proximately caused by the sanctionable conduct. Hardman v. Hardman, 295 Ga. 732, 740 (4) (763 SE2d 561) (2014); Connolly v. Smock (Ga. App., 2016). In O.C.G.A. §9-11-68 cases, fees may only be awarded for the
fees and expenses from the date of the rejection of the offer of settlement through the entry of judgment. *Ga. Dep't of Corr. v. Couch*, 295 Ga. 469, 759 S.E.2d 804, 817 (Ga., 2014). Time entries must clearly distinguish between matters for which attorney fees may be awarded and matters for which attorney fees may not be awarded.

Time entries consisting of simple statements that a conference was held, a letter was written, a telephone call was made, or research was conducted are insufficient evidence and do not contain sufficient particularity to permit the court to distinguish between time and expenses attributable to the claims covered by the attorney fee rule and time and expenses attributable to other matters and claims not within the controlling rule and cannot support an attorney fee claim. *Southern Cellular Telecom v. Banks*, 209 Ga.App. 401, 433 S.E.2d 606, 607 (Ga. App., 1993), “Such broad statements fail to demonstrate the function or substance of the task with sufficient particularity to permit the court to distinguish between time and expenses attributable to the successful fraud claim and time and expenses attributable to her other unsuccessful claims.” In *Campbell v. Bausch*, 195 Ga.App. 791, 792(2) (b), 395 S.E.2d 267 (1990) and *Santorum, supra*, (The billing records were sufficiently detailed to supported the attorney fee award.) *Paul v. Destito*, 550 S.E.2d 739, 250 Ga. App. 631 (Ga. App., 2001); *Paul v. Destito*, 550 S.E.2d 739, 250 Ga. App. 631 (Ga. App., 2001) (No time or billing records were introduced.)

**The fee petitioner must prove the time spent on the work was reasonable within the context of the dispute.**

Proof must be submitted that work performed was reasonable under the circumstances of the case. The test of reasonableness is two-fold: was it reasonable to do the work done and was the time spent doing the work reasonable? Factors to be
considered in determining the reasonableness of a fee include the following: the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; the likelihood that the acceptance of the particular employment will preclude other employment by the lawyer; the fee customarily charged in the locality for similar legal services; the amount involved and the results obtained; the time limitations imposed by the client or by the circumstances; the nature and length of the professional relationship with the client; the experience, reputation, and ability of the lawyer or lawyers performing the services; and whether the fee is fixed or contingent. Ga. Rules of Professional Responsibility, Rule 1.5(a); Wehunt v. Wren's Cross of Atlanta Condominium Ass'n, Inc., 332 S.E.2d 368, 372, 175 Ga.App. 70 (Ga. App., 1985) (The court used Rule 1.5 to determine that the fees awarded were adequately proven and reasonable when measured under Rule 1.5(a).) Gray v. King, 270 Ga.App. 855, 608 S.E.2d 320 (Ga. App., 2004) Case remanded because there was no testimony that the fees were reasonable; Redwine v. Windham, 237 Ga.App. 149, 151, 513 S.E.2d 13 (1999) (trial court was authorized to direct verdict against appellant's claim for attorney fees because no evidence showed that legal expenses claimed were a reasonable value for professional services rendered).

**The fee petitioner must prove the time spent on the work was necessary within the context of the dispute.**

To obtain a fee award, the fee applicant must prove necessity. Rogers v. Rogers, 103 Ga. 763, 30 S.E. 659 (Ga., 1898) (Too many attorneys for the job.) Reasonableness and necessity are two different issues. In the context of representing a client, it may be
reasonable for an attorney to do things not truly necessary to the case. For example, an investigation might be commenced that might disclose a third party who might have some liability, but the investigation might not be directly associated with the prosecution against the chargeable party. The obligation under the fee contract is limited by reasonableness, while the liability of the opposing party is limited by the combined requirements of reasonableness and necessity.

In abusive litigation cases, causation for the work must be proven as a part of proving necessity. The applicant must prove that the extra or excessive work was necessitated by the specific wrongful acts of the respondent. Connolly III et al. v. Smock. A16A0741 (September 30, 2016)

In testifying, an attorney proving fees should not lump everything together. The testifying attorney has the burden to segregate out the work that is recoverable from the work that is not recoverable. If the fees are lumped, the appellate court may find insufficient evidence to support an award. Premier Cabinets, Inc. v. Bulat, 261 Ga. App. 578, 583 S.E.2d 235 (Ga. App., 2003). But, see Scriver v. Lister, 235 Ga. App. 487, 510 S.E.2d 59, (Ga. App., 1999.). On an award of $35,000 attorney fees on a judgment with actual damages of $278,622, and punitive damages of $500,000, the Court of Appeals found an award of attorney fees supported by the evidence upon testimony from the Plaintiff and the statement in place by counsel. Counsel had stated “that through almost ten years of protracted litigation and the earlier appeal process, Plaintiff has incurred $35,000 in attorney fees.” 235 Ga. App. at 489.

submitted a slip listing of work done, but items were lumped together so that the court could not practically separate out the attorney fees incurred on the prevailing claim.

In *First Bank v. Dollar*, 159 Ga. App. 815, 285 S.E.2d 203 (Ga. App., 1981), the Court of Appeals reversed an attorney fee award based solely on the testimony of the Plaintiff/Appellee. Appellant did not contest the sufficiency of the evidence of the statutory prerequisite to an award of attorney fees (bad faith, stubborn litigiousness, causing appellee unnecessary trouble and expense), but maintained that Appellee’s testimony that he had agreed to pay his attorneys "[a] third on contingency on the tax", was not sufficient proof of the legal fees to support an award. The court held that "An attorney cannot recover for professional services without proof of their value," citing *Price v. Mitchell*, 154 Ga.App. 523(6), 268 S.E.2d 743 (Ga. App., 1980). Generally, a party will proffer the opinion testimony of his present counsel and sometimes that of other attorneys in an effort to show what constitutes a reasonable attorney fee in light of the litigation history of the case. See, *Bankers Health Life Ins. Co. v. Plumer*, 67 Ga.App. 720(2), 21 S.E.2d 515 (Ga. App. 1942). A party’s testimony as to the "approximate" cost of legal fees is insufficient. *Price v. Mitchell*, supra. Inasmuch as Appellee’s testimony alone did not give the jury sufficient basis upon which to award a reasonable amount for attorney fees, it was error to enter judgment on the jury’s award of attorney fees. In *Patton v. Turnage*, 260 Ga. App. 744, 580 S.E.2d 604 (Ga. App. 2003), the Court of Appeals reversed an attorney fee award based upon a fifteen percent contingency fee because there was no evidence presented that the percentage amount was the usual and customary fee for the work or that the contingency fee was a valid indicator of the value of the professional services rendered.
In *Hall v. Robinson*, 165 Ga. App. 410, 300 S.E.2d 521 (Ga.App. 1983), the Court of Appeals affirmed a case, finding that there was competent evidence establishing the reasonable value of Appellee’s attorney fees. Appellee’s counsel stated in her place the amount of time she had put in the case and her hourly rate, which she felt to be reasonable for an attorney of her experience. Appellant did not cross-examine Appellee’s counsel or challenge her testimony in any other manner. The Court of Appeals found her testimony sufficient to establish the reasonable value of Appellee’s attorney fees under *Altamaha Convalescent Center v. Godwin*, 137 Ga.App. 394, 397, 224 S.E.2d 76 (Ga. App., 1979).

The proof required falls under two basic categories: proof of what was done, specifically connecting what was done with the prevailing claim for which fees are claimed and proof of reasonableness and necessity. The failure to prove reasonableness will likely be fatal to an award on appeal. *Hagan v. Keyes*, Ga. App. Case No. A14A1742. September 29, 2014.

Since a plaintiff may not recover for the expense of defending a counterclaim, abandoned claims, or extraneous work, special care should be taken to explicitly tie the evidence submitted to the specific claims tried. *Lineberger v. Williams*, 195 Ga. App. 186, 189, 393 S.E. 2d 23, 26 (Ga. App., 1990). The proof must be matched to the prevailing claim. In *Williamson v. Harvey Smith Inc.*, 246 Ga.App. 745, 542 S.E.2d 151 (2000), the Court of Appeals reversed a $38,000 Award of bad faith attorney fees to defendant on a counterclaim because the defendant failed to present evidence from which the jury could determine what portion of the total amount of attorney time and litigation expenses was attributable to the counterclaim. The defendant had produced sufficient evidence of a bad faith attorney fee claim on the counterclaim, but sought to recover all of his attorney
fees. Thus, the defendant lost all fees because counsel failed to produce proper expense records and to clearly delineate what work was done for what claim.


Counsel may present their attorney fees by "stating them in their place" as long as the opposing party does not object and as long as the attorney puts his actual time records into evidence. It has long been the law that "[w]here counsel [make] statements in their place, they may be received without verification unless the same is required by the opposing party at the time." *Caldwell v. McWilliams*, 65 Ga. 99, 101(3) (GA., 1880). See also *Cross v. Cook*, 147 Ga.App. 695, 696(3), 250 S.E.2d 28 (Ga. App., 1978), in which it was stated that "[a]ttorneys are officers of the court and their statements in their place, if not objected to, serve the same function as evidence. [Cits.]"

Care, however, must be taken by the attorney stating the attorney fees in his place to fully cover the evidentiary pre-requisites of the claim, including the amount of time spent, the nexus and apportionment between the time spent and the prevailing claims, and most importantly, that the fees are reasonable and necessary. In a dissenting opinion in Lawrence v. Direct Mortgage Lenders Corp., 254 Ga. App. 672, at 685, 563, S.E.2d 533 at 543 (Ga. App., 2002) where attorney fees were allowed. Judge Eldridge pointed out that [P]laintiff’s counsel testifies about the hours worked, the amount per hour, and what the work was for but failed to testify that the attorney fees were reasonable, such attorney fees are not recoverable.” This dissent should be taken as a warning that the plaintiff’s counsel must fully state all of the facts necessary to support an attorney fee award when he states his fees.

The failure to submit testimony about reasonableness, even if all other elements are proven, will result in a reversal of the fee award. Gray v. King, 270 Ga. App. 855, 608 S.E. 2d 320 (Ga. App., 2004). Likewise, where there are multiple claims, fees awarded pursuant to OCGA § 13-6-11 must be apportioned to those attorney fees attributable to claims on which the plaintiff prevailed. Savannah Yacht Corp. v. Thunderbolt Marine, 676 S.E.2d 728, 297 Ga. App. 104 (Ga. App., 2009)

Once a party prevails on a cause of action (claim) there is no further dividing or fees between what worked and did not work with respect to evidence on that specific
claim. In *State, Dept. of Transp. v. Douglas Asphalt Co.*, 297 Ga. App. 470, 677 S.E.2d 699 (Ga. App., 2009) the trial court was reversed for excluding evidence on the costs of testing where the tests were not allowed into evidence on a cause of action on which the Plaintiff prevailed. The court held that once the threshold for awarding the [prevailing party's] expenses of litigation as compensation for [the other party's] stubborn litigiousness or causing unnecessary trouble or expense has been reached, there is no requirement that the jury to pro-rate fees between various aspects of a discrete cause of action. Accordingly, the trial court erred in excluding evidence of attorney fees on the rejected evidence on the ground that DOT cannot recover such fees incurred in developing the excluded testing evidence. The evidence of expenses should have been allowed.

In *Smith v. Travis Pruitt & Associates, P.C.*, 265 Ga. 347, 455 S.E.2d 586 (Ga. 1995), the Supreme Court reversed a case in which Appellee's counsel stated in his place that fees in the case "will exceed ten thousand dollars." Although counsel proposed submitting to the trial court documentation of what has been done in the case and how that figure was arrived at, no such documentation was present in the record and there was no evidence of the number of hours spent on the case or the hourly fee charged, no testimony from other attorneys or other evidence to show what constituted a reasonable attorney fee in light of the litigation history of the case. "In short, the conclusory testimony of [appellee's] counsel is the only evidence of attorney fees, and it is insufficient." *Hughes v. Great Southern Midway, Inc.*, 265 Ga. 94(1), 454 S.E.2d 130 (Ga. App., 1995).

Good billing records are essential to proof of attorney fees. Good objections and cross examination may prevent introduction of bad billing records. Billing records are subject to the same rules as any other evidence. Billing records are subject to the hearsay
rule. There must be a proper foundation laid for the records, either based upon the personal knowledge of their preparer or qualification as a business record. The business record exception the hearsay rule (O.C.G.A. §44-3-14) will not automatically make a billing statement into evidentiary support for the proof of the reasonableness and necessity of an attorney work. Confusion results in this area based upon at least one previous case concerning an award of attorney fees which indicates that a supervisor's testimony as to the amount, necessity, and reasonableness of the time spent by his employees is sufficient to establish the amount of the attorney fee award. See, Santora v. American Combustion, Inc., 225 Ga. 771, 485 S.E.2d (Ga. App., 1997). Conversely, other cases indicate that it is not sufficient for only the lead attorney on a case to testify as to the time spent by the others who worked on the case. See e.g., Southern Company v. Hamburg, 220 Ga. App. 834, 470 S.E.2d 467 (Ga. App., 1996); Southern Cellular Telecom v. Banks, 209 Ga.App. 401, 433 S.E.2d 606 (Ga. App., 1993). The question that arises is whether it was the intention of the court in Santora to carve a new exception to the hearsay rule in cases such as this, or whether the facts of the Santora case indicated to the court that the supervisor worked so closely on every part of the case that he or she actually had personal knowledge of the time spent by other employees. The cases do not clearly state how much hearsay is allowable in these attorney fee cases. Elbow to elbow work may equate to personal knowledge of another's work.

Under common time-keeping practices, attorneys prepare paper time slips that are later edited, collated, and summarized into billing reports and bills. Under this practice, the time slips are the true business record of original entry. The bills and reports are only summaries. Under the rules of evidence, summaries are admissible only if the underlying records are present in court. The issue of the admission and evidentiary value of

In *Paul v. Destito*, 250 Ga. App. 631, 550 S.E.2d 739, (Ga. App., 2001), the Court of Appeals reversed and remanded a j.n.o.v. of a $90,000 attorney fee award that was not properly supported by detailed testimony and billing records sufficient for a jury to reasonably calculate the litigation expenses and to separate the expenses associated with the claim and the counterclaim. The Court of Appeals found that even if the jury had no basis to reasonably calculate litigation expenses, defendants were not entitled to judgment on the claim. The proper remedy is for the trial court to conduct a hearing on
the issue of attorney fees and expenses. The Court of Appeals reversed and remanded for
the attorneys fee hearing.

Careful attention should be paid to the Best Evidence Rule. O.C.G.A. §24-5-4 provides that the best evidence which exists of a writing sought to be proved shall be produced, unless its absence shall be satisfactorily accounted for. If the only record brought to the court is a copy of the client's bill summarizing the time slips, the document should be rejected under the Best Evidence Rule unless a satisfactory explanation for the absence of the underlying documents is made. A similar issue to this arose in White v. Dillworth, 178 Ga. App. 226, 342 S.E.2d 709 (Ga. App., 1986). In that case, a dentist sought to introduce into evidence a purported summary of information concerning his patients and their payment status. The summary was compiled from daily work logs which in turn were created from the records of the individual patients. White, 342 S.E.2d at 710-711. The trial court sustained a best evidence objection to these records. Determining that the original patient records were the primary source of the information contained in the summaries which the dentist sought to introduce, the Court of Appeals determined that the summaries were indeed secondary evidence and inadmissible absent a showing that the primary evidence was inaccessible. Attention should also be paid to O.C.G.A. §§ 24-5-25 and 24-5-26 that state the rules for introducing copies of records.

The requirement that the plaintiff prove the necessity and reasonableness of the attorney fees sought necessitates testimony from plaintiff's counsel. Only the attorney who did or closely supervised the work has true personal knowledge of whether the work was necessary. Likewise, unless two attorneys are working literally elbow to elbow, only the attorney doing the work has personal knowledge of his own work.
This testimonial necessity places the attorney in a difficult practical and ethical position, that of being both advocate and witness. It also gives the adversary attorney a good chance to discredit plaintiff’s counsel if the attorney can be impeached in any way. This is a great time for the defendant’s attorney to use plaintiff’s billing records, correspondence, and pleadings to highlight unreasonable positions, excessive fees, and unclean hands of the plaintiff perpetrated by the plaintiff’s attorney. At the same time, the defendant’s attorney intimate knowledge of the rationale for the defense may make the defense attorney a key witness for the defense to justify a litigation strategy and to prove the existence of a bona fide controversy. All attorneys must be wary of the statutes and Canons of Ethics relating to attorneys taking the witness stand.

**Bifurcation of the proof between the main trial establishing liability and a special hearing determining the amount of the fees is allowable.**

In trying a case, it may make sense to divide the section 13-6-11 issues between a determination by the trier-of-fact of the entitlement to the fees during the main case and holding a separate attorney fee hearing to determine the amount of fees in a separate trial segment once liability is determined in the initial verdict. This practice has been followed in the federal court. Bifurcation of a trial is within the sound discretion of a court. See, *Paine v. Nations*, 283 Ga. App. 167, 168-169 (Ga. App. 2006) Now, the practice is

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3 It is amazing, sometimes, to compare billing records with output, particularly for such simple line items as cover letters transmitting pleadings or correspondence. Q. Did you really charge your client $75.00 for this three line cover letter written by your secretary? If the counsel answers, “No, I did some other things during those eighteen minutes”, she has discredited her billing records. If she says, “yes,” most lay people will think she is overcharging his client and charging for work done by someone else.

Case No. A14A0233, April 21, 2014.

**Trial Motions-Motion for Directed Verdict**

If the claimant has failed to prove the case during the evidence phase of the case, a motion for directed verdict may be made. *Marta v. Mitchell*, 289 Ga. App. 1, 659 S.E.2d 605 (Ga. App., 2007). "The standard for granting motions for directed verdict and for j.n.o.v. is the same. They may be granted only when no conflict exists in the evidence and the evidence presented, with all reasonable inferences therefrom, demands a particular verdict."... "An award of attorney fees under OCGA § 13-6-11 will be affirmed if there is any evidence to support it." *City of Lilburn v. Astra Group, Inc.*, 649 S.E.2d 813 (Ga. App., 2007).

**Trial Presentation-Verdict Form**

An award of attorney fees under O.C.G.A. § 13-6-11 requires a special verdict form. Use of a general verdict is error. See, *Marta v. Mitchell*, 289 Ga. App. 1, 659 S.E.2d 605 (Ga. App., 2007). However, if an objection to the verdict form prior to its submission to the jury or to the form of the verdict after the verdict is rendered; any deficiency may be deemed waived. *Parks v. Breedlove*, 526 S.E.2d 137, 241 Ga. App. 72 (Ga. App., 1999); *Premier Cabinets, Inc. v. Bulat*, 261 Ga. App. 578, 583 S.E.2d 235 (Ga. App., 2003). In preparing the verdict form, if there are multiple parties, some of whom acted with bad faith and others did not, the form should provide for a specific amount of attorney fees to be paid to each separate party. See, *Callaway v. Garner*, Ga. App. Case A13A2150, March 15, 2014.
Trial Presentation- Requests to Charge

The jury must be properly instructed for the fee award to stand. In order to obtain a proper jury instruction, the requested charge must be timely submitted. Uniform Superior Court Rule 103, Parkside Center, Ltd. v. Chicagoland Vending, Inc., 250 Ga. App. 607, 552 S.E.2d 557 (Ga. App., 2001). The plaintiff must request the fees and the court must charge the statute or the elements of recovery set forth in the statute before the court is authorized to submit the issue of attorney fees under O.C.G.A. §13-6-11 to a jury. MTW Investment Co. v. Alcovy Properties, Inc., 228 Ga. App., 491 S.E.2d 460 (Ga. App., 1997).

The jury must be charged on the issue. The Pattern Jury charge is:

The expenses of litigation are not generally allowed as a part of the damages. But, if the defendant has acted in bad faith or has been stubbornly litigious, or has caused the plaintiff unnecessary trouble and expense, you may allow them. You should determine from the evidence the attorney fees (or other expense) if any, as will be allowed. O.C.G.A. §13-6-11 (Suggested Pattern Jury Instructions, Volume I: Civil Cases, Third Edition, p. 93.)

This charge carries some ideas that are different from the precedent set forth in Thomas v. Dumas, 207 Ga. 161, 60 S.E.2d 356 (Ga., 1950) that allows recovery on all three prongs. Though it is in the official pattern charge book, this charge seems substantially incomplete and worthless in presenting the jury with a meaningful understanding of the nuances of the law on attorney fees.

The Georgia Supreme Court approved the charge in Spring Lake Property Owners Ass’n, Inc. v. Peacock, 390 S.E.2d 31, 260 Ga. 80 (Ga., 1990) that stated:
Where there is a bona fide controversy for the tribunals to settle and the parties cannot adjust it amicably, there should be no burden of one with the counsel fees of the other unless there has been wanton or excessive indulgence in litigation.

Generally expenses of litigation including attorney fees are not allowed as a part of damages unless the defendant has acted in bad faith, has been stubbornly litigious or has caused Plaintiff unnecessary trouble or expense.

If the evidence shows that a genuine dispute exists whether of law or fact attorney fees are not authorized.

Good practice would be to create additional charges to refine the issues of the particular case, emphasizing definitions of the terms in the charge. In particular, a defendant should include a charge to the effect that the existence of a bona fide controversy precludes the "unnecessary trouble and expense and stubbornly litigious" award. In a "bad faith" case, the law applying to bad faith should be given. A definition of "bad faith" should be given. After that an appropriate charge explaining the application of "bad faith" conduct to entitlement to attorney fees in a "bad faith" contract case should be requested. The holding in Young v. A. L. Anthony Grading Co., 225 Ga. App. 592, 593, 484 S.E.2d 318 (Ga. App., 1997) might be an appropriate charge in many cases:

Bad faith warranting an award of attorney fees must have arisen out of the transaction on which the cause of action is predicated. It may be found in carrying out the provisions of the contract, that is, in how defendant acted in his dealing with the plaintiff. Bad faith other than mere refusal to pay a just debt is sufficient, provided it is not prompted by an honest mistake as to one's rights or duties but by some interested or sinister motive. So, defendants can be held liable for attorney fees if they committed the breach in bad faith.
In an intentional tort case, a charge to the effect that the intent involved in the commission of an intentional tort constitutes sufficient bad faith to support an award under the "bad faith" prong of the statute should be given. A proper charge would be, "Every intentional tort entitles a person so wronged to recover the expenses of litigation including attorney fees." See, Stargate Software International, Inc. v. Rumph, 224 Ga. App. 873, 878, 482 S.E.2d 498, 503 (1997) and Bibb Distributing Co. v Stewart, 238 Ga.App. 650, 519 S.E.2d 455 (Ga. App., 1999).

In addition, charges should be submitted concerning any defenses to the claim such as unclean hands of the plaintiff if fitted to the facts.

Post-Trial Motions—Motion for Directed Verdict

If the party attorney fails in the task of properly proving its attorney fees during the evidence phase of the trial, a motion by the defendant is appropriate after the close of the evidence. Motions for directed verdict are appropriate when the facts and law show the existence of real disputes. Williams Tile & Marble Co., Inc. v. Ra-Lin & Assoc., 206 Ga. App. 750, 752, 426 S.E.2d 598 (Ga. App., 1992). It is proper for a judge to refuse to submit an "unnecessary trouble and expense and stubbornly litigious" issue to the jury when a real controversy exists. If the defense attorney fails to raise the issue of whether a proper evidentiary showing has been made at trial during the trial, the issue cannot be considered on appeal. Owens v. McGhee & Oxford, 238 Ga.App. 497, 518 S.E.2d 699 (Ga. App. 1999).

Careful attention must be paid to making objections to the verdict form and the verdict prior to the time the jury is released or rights may be waived. Remanding to the
Court of Appeals in *Benchmark Builders Inc. v. Schultz*, 289 Ga. 329, 711 S.E.2d 639 (Ga., 2011), the Georgia Supreme Court reiterated that a party does not waive an objection to a verdict that is void, as opposed to voidable, by failing to object to the verdict form or the verdict as rendered before the jury is released. See *Anthony v. Gator Cochran Constr., Inc.*, 288 Ga. 79, 80, 702 S.E.2d 139 (2010). The Court stated that an award of attorney fees but no other damages or affirmative relief under a statute that authorizes an award of attorney fees to the “prevailing party” is illegal and void, not merely erroneous and voidable. Accordingly, to the extent that the attorney fees award to the plaintiff who was not awarded any damages was based on OCGA § 13–6–11, the Court of Appeals erred in relying on waiver to affirm the award.

**Post-Trial—Findings of Fact**

Findings of fact are required in judge tried cases. The court must make findings of law and fact to support the award. See, O.C.G.A. §9-11-52 The findings should be be inclusive and thorough enough to afford an intelligent review. *Donaldson v. Hopkins*, 209 S.E.2d 131, 132 Ga.App. 713 (Ga. App., 1974). The findings should state the statutory basis for the award and the application of the statute to the facts, including determinations of the reasonableness and necessity of the fees. Otherwise, the case is subject to remand requiring the court to make the necessary statutory findings. *Thrasher-Starobin v. Starobin*, Supreme Court of Georgia, case number S16A0537, April 4, 2016.

If a case is tried at a bench trial, special care must be taken to preserve all avenues of appeal by doing everything possible to insure that proper findings of fact are entered in the case. OCGA § 9-11-52 (c) provides:
Upon motion made not later than 20 days after entry of judgment, the court may make or amend its findings or make additional findings and may amend the judgment accordingly. . . . When findings or conclusions are not made prior to judgment to the extent necessary for review, failure of the losing party to move therefor after judgment shall constitute a waiver of any ground of appeal which requires consideration thereof.

Thus, an appellant who intends to argue that the trial court's findings are inadequate or incomplete waives that argument by failing to make the post-judgment motion referenced in OCGA § 9-11-52 (c). *Hampshire Homes v. Espinosa Const. Services*, 655 S.E.2d 316, 288 Ga.App. 718 (Ga. App., 2007).

In federal diversity practice in rendering a determination on an award of attorney fees and expenses under O.C.G.A. § 13-6-11, a district court is required to document the basis of its decision with sufficient particularity for the appellate court to review the legal and factual basis of the decision. “A prerequisite for our review of an attorney's fee award is that the district court's opinion must have explained the reasons for the award with 'sufficient clarity to enable an appellate court to intelligently review the award.' *King v. McCord*, 621 F.2d 205, 207 (5th Cir.1980); *King v. McCord*, 707 F.2d 466 (11th Cir. 1983).” *N.A.A.C.P. v. City of Evergreen, Ala.*, 812 F.2d 1332, 1335 (11th Cir. 1987).


While the Georgia case law is not specific in its requirements as the form findings must take, it is clear that the only compensable work is work performed on prevailing
claims that was reasonable and necessary and the court must explain its decision with enough detail to allow the appellate court to have an understanding of the legal and factual basis of the award. In contrast, the federal courts in this circuit are generally required to follow the boundaries set forth in Johnson v. Highway Express, 488 F.2d 714, 717-19 (5th Cir. 1974 in making attorney fee determinations. See, Assoc. of Disabled Americans v. Neptune Designs Inc., No. 05-14539, fn. 1 (11th Cir. 2006. While Johnson has not specifically been adopted by the Georgia courts, the Johnson approach is practically similar to the procedure followed by the Georgia court system.

Special Defenses and Cases.

Lack of clean hands on the plaintiff’s part authorized the trial court to exercise its inherent discretion and decline to award attorney fees. If the plaintiff has acted in bad faith, has been stubbornly litigious, or has caused unnecessary trouble and expense, such factor may be considered by the trial court and will, either standing alone, or in conjunction with other operable facts, constitute some evidence to support a denial of the request for attorney fees. Crotty v. Crotty, 219 Ga. App. 408, 465 S.E.2d 517 (Ga. App., 1995).

Attorney fees cannot be awarded in a declaratory judgment action because the purpose of the action is "to settle and afford relief from uncertainty and insecurity with respect to rights, status and other relations." O.C.G.A. §9-4-1. Thus, the plaintiff must plead the fact that “a bona fide controversy exists” as the foundation of the action. The existence of that controversy in a declaratory judgment action precludes plaintiff from

A great disparity between the amount sought by the plaintiff and the actual recovery may preclude a recovery under O.C.G.A § 13-6-11.

Counties are subject to O.C.G.A. § 13-6-11 and are not immune. In *Unified Government of Athens-Clark County*, 250 Ga. App. 432, 551 S.E.2d 798 (Ga. App., 2001, cert. den. 11/30/2001), the Court of Appeals affirmed a bad faith attorney fee award arising out of a contract between Athens-Clark County and a developer in which the County failed timely to build a road to a water plant because the county staff was attending to “day to day” matters they deemed to be more pressing, without telling developer and thereby purposefully breached the contract. Counties that act in bad faith are subject to having to pay attorney fees. *Irwin County v. Owens*, 256 Ga. App. 359, 568 S.E.2d 578 (Ga. App., 2002).

**Introduction of Normally Prohibited Settlement Negotiations via O.C.G.A. §13-6-11.**

In trying the issue of attorney fees, the issue of reasonableness of attorney fees may be affected by the settlement posture of the case. It may be important to the jury to know if one side has made settlement offers that reasonably should have ended the case earlier. A plaintiff’s unreasonable refusal to settle may make taxing of subsequent fees unreasonable. Conversely, the defendant’s refusal to settle on any terms may be proof of the necessity and reasonableness of plaintiff’s fees. The parameters of admissibility were controlled by the former O.C.G.A. § 24-3-37 is now replaced by O.C.G.A. §24-4-408 that is crafted on the existing case law and states.
Section 24-4-408 Evidence, conduct or statements in compromise negotiations

(a) Except as provided in Code Section 9-11-68, evidence of:

(1) Furnishing, offering, or promising to furnish; or

(2) Accepting, offering, or promising to accept a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount shall not be admissible to prove liability for or invalidity of any claim or its amount.

(b) Evidence of conduct or statements made in compromise negotiations or mediation shall not be admissible.

(c) This Code section shall not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations or mediation. This Code section shall not require exclusion of evidence offered for another purpose, including, but not limited to, proving bias or prejudice of a witness, negating a contention of undue delay or abuse of process, or proving an effort to obstruct a criminal investigation or prosecution.

Even in a "bad faith" case, the O.C.G.A. §24-4-408 normally prevents the introduction of negotiations seeking a compromise of a dispute from being admissible in evidence. The purpose of this Code section is to encourage settlements and protect parties who freely engage in negotiations directed toward resolution of lawsuits. Computer Communications Specialists, Inc. v. Hall, 188 Ga. App. 545, 373 S.E.2d 630 (Ga. App., 1988). There is a distinction between an offer or proposition to compromise a doubtful or disputed claim under this section and an offer to settle upon certain terms a claim that is unquestioned. The offer of compromise is protected and the offer of settlement is not. An admission made in an offer to settle will be admissible while one made in an offer to

Evidence of offers of compromise may be admitted by necessity. "In all cases where the object sought to be proved can be proved without violation of a rule of evidence designed to prohibit prejudice, it should be done so, or where the merit of the evidence clearly outweighs its prejudice." *Fred F. French Mfg. Co. v. Long*, 169 Ga. App. 702, 314 S.E.2d 666 (Ga. App., 1984). "However where the evidence is necessary for some permissible purpose, and the object is not provable by some available means, it is not error to allow otherwise inadmissible evidence. See *Gordon v. Gordon*, 133 Ga.App. 520(1), 211 S.E.2d 374 (Ga. App., 1974)." *Holbrook Contracting, Inc. v. Tyner*, 181 Ga. App. 838, 354 S.E.2d 22 (Ga. App., 1987). Thus, if the proffered evidence of negotiations meets these tests, it should be admitted. In *Progressive Life Ins. Co. v. Smith*, 71 Ga. App. 157, 30 S.E.2d 411 (Ga. App., 1944), the Court held that a conversation between an attorney for the beneficiary and a proper official of the company is admissible for the purpose of illustrating the good or bad faith of the company in refusing to pay the amount claimed, where the evidence negates a claimed effort to compromise. In *Fenters v. Fenters*, 238 Ga. 131, 231 S.E.2d 741 (1977). In *U-Haul Co. v. Ford*, 171 Ga. App. 744, 320 S.E.2d 868 (Ga. App., 1984), evidence that the plaintiff, in attempting to discuss her claims arising out of an automobile collision, could not get a response from the defendant insurer, though not proper evidence under O.C.G.A. § 24-3-37, were properly admitted under O.C.G.A. § 13-6-11 to show that the defendant acted improperly.

While there seem to be exceptions under O.C.G.A. §24-4-408, discussions and disclosures made during formal Alternative Dispute Resolution proceedings seem to be
completely protected from being used as evidence. See Georgia ADR Rule VII and Uniform Rules for Dispute Resolution Program Rule 6.

On the other hand, if the discussion or compromise outside of formal dispute resolution process is relevant to another issue, it may well be admissible at trial under O.C.G.A. §24-4-408(c). See, AGIO Corp. v. Coosawattee River Resort Assn., Ga. App. Case No. A14A0479 decided July 15, 2014.

The ultimate lesson is that when you make an offer of compromise, no matter what language or verbiage stating the communication is “privileged as settlement discussion” or that it is not admissible into evidence is included in the communication, the trier-of-fact may see it, so be very careful as to what is said or written.

On Appeal

No discretionary application is required to appeal a fee award made under OCGA § 13-6-11 as long as the matter is appealable as a matter of right. The right to appeal a 13-6-11 case depends on the appealability of the underling main case and follows the regular appellate statutes, rules, and procedures. See, Tanner Med. Ctr., Inc. v. Vest Newnan, LLC, 811 S.E.2d 527, fn.2 (Ga. App., 2018). No application for discretionary appeal is required to appeal a post-judgment attorney fee award by the superior court unless that award is made pursuant to OCGA § 9-15-14. See Kraft v. Dalton, 249 Ga. App. 754, 755, n. 2, 549 S.E.2d 543 (2001); On appeal, the Georgia appellate courts try to remedy trial errors when possible. “When a party seeking attorney fees has failed to present an essential element of proof, but the trial court nevertheless awarded attorney fees, we have consistently reversed or vacated that portion of the judgment awarding the attorney fees and remanded the case to the trial court to hold an evidentiary hearing to allow the party,

On appeal the "any evidence" rule applies to factual determinations. *Paine v. Nations*, 283 Ga. Ap. 167 Ga. App., (2006); *Bourke v. Webb et al*, 277 Ga. App. 749 (Ga. App., 2006); *Spring Lake Property Owners Ass’n v. Peacock*, 260 Ga. 80, 390 S.E.2d 21 (Ga., 1990). "When a trial court sits as both judge and jury, the court's findings of fact are binding on appeal, and, unless wholly unsupported or clearly erroneous, will not afford a basis for reversal. On appeal, this court must not substitute its judgment for that exercised by the trial court when there is some support for the trial court's conclusion. Our duty is not to weigh evidence *de novo*, but [merely to] determine if there is any evidence that supports the judgment below. Even in the face of conflicting evidence, the trial court's judgment will be upheld as long as there is 'any evidence' to uphold the lower court's determination." (Citations and punctuation omitted.) *Edwards v. Wilson*, 185 Ga.App. 514, 515(1), 364 S.E.2d 642. "*Jennings Enterprises, Inc., v. Carte*, 224 Ga.App. 538, 481 S.E.2d 541 (Ga. App., 1977).

In federal court, if a party consents to an attorney fee award as part of the judgment, it cannot be appealed because if a litigant does not contest the entitlement or appropriateness of the award before the district court, neither issue may be raised on appeal. *Keybank Nat'l Ass'n v. Hamrick* (11th Cir. Case No. 12-15498, August 8, 2014)
Interaction with Other Attorney’s Fee Provisions.

Relationship of O.C.G.A. § 13-6-11 to O.C.G.A. § 9-11-68

In the 2005 tort reform legislation, a new code section 9-11-68 was added to the Georgia Code that imposes attorney fees on a party who fails to accept a settlement offer if the party does not best the offer at trial. The new code section also greatly modifies the provisions of O.C.G.A. § 9-15-14 and § 51-7-80.

O.C.G.A. § 9-11-68 reads as follows:

§ 9-11-68 Settlement offers

(a) At any time more than 30 days after the service of a summons and complaint on a party but not less than 30 days (or 20 days if it is a counteroffer) before trial, either party may serve upon the other party, but shall not file with the court, a written offer, denominated as an offer under this Code section, to settle a tort claim for the money specified in the offer and to enter into an agreement dismissing the claim or to allow judgment to be entered accordingly. Any offer under this Code section must:

(1) Be in writing and state that it is being made pursuant to this Code section;

(2) Identify the party or parties making the proposal and the party or parties to whom the proposal is being made;

(3) Identify generally the claim or claims the proposal is attempting to resolve;

(4) State with particularity any relevant conditions;

(5) State the total amount of the proposal;

(6) State with particularity the amount proposed to settle a claim for punitive damages, if any;

(7) State whether the proposal includes attorney's fees or other expenses and whether attorney's fees or other expenses are part of the legal claim; and
(8) Include a certificate of service and be served by certified mail or statutory overnight delivery in the form required by Code Section 9-11-5.

(b) (1) If a defendant makes an offer of settlement which is rejected by the plaintiff, the defendant shall be entitled to recover reasonable attorney’s fees and expenses of litigation incurred by the defendant or on the defendant’s behalf from the date of the rejection of the offer of settlement through the entry of judgment if the final judgment is one of no liability or the final judgment obtained by the plaintiff is less than 75 percent of such offer of settlement.

(2) If a plaintiff makes an offer of settlement which is rejected by the defendant and the plaintiff recovers a final judgment in an amount greater than 125 percent of such offer of settlement, the plaintiff shall be entitled to recover reasonable attorney’s fees and expenses of litigation incurred by the plaintiff or on the plaintiff’s behalf from the date of the rejection of the offer of settlement through the entry of judgment.

(c) Any offer made under this Code section shall remain open for 30 days unless sooner withdrawn by a writing served on the offeree prior to acceptance by the offeree, but an offeror shall not be entitled to attorney’s fees and costs under subsection (b) of this Code section to the extent an offer is not open for at least 30 days (unless it is rejected during that 30 day period). A counteroffer shall be deemed a rejection but may serve as an offer under this Code section if it is specifically denominated as an offer under this Code section. Acceptance or rejection of the offer by the offeree must be in writing and served upon the offeror. An offer that is neither withdrawn nor accepted within 30 days shall be deemed rejected. The fact that an offer is made but not accepted does not preclude a subsequent offer. Evidence of an offer is not admissible except in proceedings to enforce a settlement or to determine reasonable attorney’s fees and costs under this Code section.

(d) (1) The court shall order the payment of attorney’s fees and expenses of litigation upon receipt of proof that the judgment is one to which the provisions of either paragraph (1) or paragraph (2) of subsection (b) of this Code section apply; provided, however, that if an appeal is taken from such judgment, the court shall order payment of such attorney’s fees and expenses of litigation only upon remittitur affirming such judgment.

(2) If a party is entitled to costs and fees pursuant to the provisions of this Code section, the court may determine that an offer was not made in good faith in an order setting forth the basis for such a determination. In such case, the court may disallow an award of attorney’s fees and costs.

(e) Upon motion by the prevailing party at the time that the verdict or judgment is rendered, the moving party may request that the finder of fact
determine whether the opposing party presented a frivolous claim or defense. In such event, the court shall hold a separate bifurcated hearing at which the finder of fact shall make a determination of whether such frivolous claims or defenses were asserted and to award damages, if any, against the party presenting such frivolous claims or defenses. Under this subsection:

(1) Frivolous claims shall include, but are not limited to, the following:

(A) A claim, defense, or other position that lacks substantial justification or that is not made in good faith or that is made with malice or a wrongful purpose, as those terms are defined in Code Section 51-7-80;

(B) A claim, defense, or other position with respect to which there existed such a complete absence of any justiciable issue of law or fact that it could not be reasonably believed that a court would accept the asserted claim, defense, or other position; and

(C) A claim, defense, or other position that was interposed for delay or harassment;

(2) Damages awarded may include reasonable and necessary attorney’s fees and expenses of litigation; and

(3) A party may elect to pursue either the procedure specified in this subsection or the procedure specified in Code Section 9-15-14, but not both.

The appellate courts have rendered several decisions on O.C.G.A. § 9-11-68, two of which are important for this paper.

In Fowler Properties, Inc. v. Dowland, 646 S.E.2d 197 (Ga., 2007), the Georgia Supreme Court declared O.C.G.A. § 9-11-68 unconstitutional to the extent that it has retrospective operation. Smith v. Baptiste, 287 Ga. 23, 694 S.E.2d 83 (Ga., 2010) found it constitutional for non-retrospective operation.

In McKesson Corp. v. Green, 648 S.E.2d 457 (Ga. App., 2007), Defendant made a settlement offer pursuant to O.C.G.A. § 9-11-68. The time for acceptance of the offer ran
out. After the case was set for trial and plaintiff had lost several important motions, the plaintiff dismissed the case voluntarily pursuant to O.C.G.A. § 9-11-41 and refiled in another court. Defendant filed a motion objecting to the plaintiffs' voluntary dismissal without prejudice, contending that the dismissal should be with prejudice because it violated the purposes of the expert witness statute and constituted "forum shopping." Defendant also moved the court to award it attorney fees and costs under OCGA § 9-11-68, the proffer of settlement statute. The trial court denied both motions, and Defendant appealed.

The Court of Appeals ruled that OCGA § 9-11-68 (b) (1) "provides that a defendant whose settlement offer is rejected shall recover attorney fees and expenses of litigation "if the final judgment is one of no liability or the final judgment obtained by the plaintiff is less than 75 percent of such offer of settlement." The trial court in this case entered no final judgment within the meaning of the statute, and therefore did not err in denying this motion. A right to dismiss voluntarily without prejudice would be meaningless if doing so would trigger the payment of the defendant's attorney fees. Without explicit language establishing that the legislature intended to excise a plaintiff's right to dismiss in this manner, this court will not engraft such an intention into the statute."

The clear lesson from *McKesson v. Green* is that if you are a plaintiff facing a serious threat of a O.C.G.A. § 9-11-68 liability, a dismissal under O.C.G.A. § 9-11-41(a) will extinguish liability prior to entry of a final judgment.

If the new O.C.G.A. § 9-11-68 is read together with O.C.G.A. § 13-6-11, it would appear that both the winner and the loser could collect attorney fees. Take the situation in which the plaintiff would be entitled to § 13-6-11 fees, but failed to better a § 9-11-68
offer. It would appear that the amount of the award would be reduced by the amount of the defendants fees recoverable under § 9-11-68. There appears to be nothing in the new code section that is a repealer of § 13-6-11 or that would defeat the existing rationale for the existing code section it is simply another avenue to obtain fees. See, Smith v. Baptiste, 287 Ga. 23, 694 S.E.2d 83 (Ga., 2010).

In any case, O.C.G.A § 9-11-68 turns all litigants into bookies betting on substantial uncertainties.

**Contractual provisions for attorney fees.**


The assessment of attorney fees for the enforcement of notes and mortgages, and leases is determined by O.C.G.A. § 13-1-11. The issue of whether the application of O.C.G.A. § 13-1-11 and O.C.G.A. § 13-6-11 is mutually exclusive is dependent upon the relationship between the contractual attorney fee provision invoking O.C.G.A. §13-1-11 and the relief actually sought in the lawsuit.

While §13-6-11 is the codification of the Common Law, §13-1-11 modifies the common law and each fully covers the type of case to which it applies, at least for cases where there is no bona-fide controversy. This makes sense in “no bona-fide controversy cases” because leases, checks, notes and other evidences of indebtedness under the Uniform Commercial Code are generally unconditional promises to pay. In cases of default, most often there is no bona-fide controversy about the debt, only a refusal or inability to pay. To allow O.C.G.A. § 13-6-11 damages in note cases where there is an unconditional promises to pay would obviate the limitations provided in O.C.G.A. § 13-1-11.

However, there may be situations where true bad faith exists that would support §13-6-11 attorney fees where there is also a section 13-1-11 attorney fee provision in place. Since the amount of O.C.G.A. §13-1-11 fees are quite limited and the section only controls the specific debt being collected and no other issues in the case such as fraud in the procurement of a loan, it seems that §13-6-11 should be applicable under the policy of the section to compensate for the wrongdoing.

In the 2018 case, Eagle Jets, LLC. v. Atlanta Jet, Inc. A18A1194 (Ga. App., 2018) a case involving a contract with a O.C.G.A. §13-1-11 provision, the court explained “Eagle Jets argues that the statutory term "evidence of indebtedness" should be broadly construed to apply to any contract creating an obligation to pay money, including the
APA. Eagle Jets relies on *Radioshack Corp. v. Cascade Crossing II, supra*, in which the Supreme Court ruled that the term "has reference to any printed or written instrument . . . which evidences on its face a legally enforceable obligation to pay money." (Citation and punctuation omitted.) 282 Ga. at 846. But even if the APA constitutes "evidence of indebtedness," the statute explicitly applies "only where attorney fees were incurred in the collection of a 'note or other evidence of indebtedness' upon maturity and default." (Footnotes omitted.) *Colonial Bank v. Boulder Bankcard Processing*, 254 Ga. App. 686, 689 (5) (563 SE2d 492) (2002); *see also Boddy Enterprises v. City of Atlanta*, 171 Ga. App. 551, 553 (320 SE2d 374) (1984) (statute "was intended to apply only in default situations where an indebtedness is collected by or through an attorney after maturity") (punctuation omitted). Long before this lawsuit was filed, Eagle Jets paid its contractual debt to Atlanta Jets by remitting the helicopter purchase price. Thus, this litigation was not an attempt to collect on a defaulted debt after maturity, and OCGA § 13-6-11 has no application here.

Thus, it would seem that §13-6-11 attorney fees should be recoverable under the “bad faith” prong of the statute if the case is anything more than the collection of a simple debt.

**Section 13-6-11 does not apply in domestic relations cases. O.C.G.A. §19-6-2.**


Code sections 13-6-11, 9-15-14, and 51-7-81 are all mechanisms for moving the burden of attorney fees to another party. Code sections 9-15-14 and 51-7-81 are the primary provisions penalizing abusive litigation, that is, conduct that occurs during the pendency of a lawsuit. O.C.G.A §51-7-80(1) and (2). By operation of O.C.G.A. §51-7-85, no claim other than as provided in Article 51-7 or in Code Section 9-15-14 shall be allowed, whether statutory or common law, for the torts of malicious use of civil proceedings, malicious abuse of civil process, nor abusive litigation, provided that claims filed prior to such date shall not be affected. Article 51-7 is the exclusive remedy for abusive litigation.

O.C.G.A. §13-6-11 applies only to conduct occurring prior to the litigation. It is this exclusivity, decreed by §51-7-85, that creates the clear line between the remedies for pre and post-filing conduct that makes §13-6-11 applicable only to pre-filing conduct and §9-15-14 and §51-7-81 applicable only to post-filing conduct. Conduct occurring during the litigation is covered by O.C.G.A. §9-15-14 (a) and (b) or §51-7-82. *Stone v. King*, 196 Ga. App. 251, 395 S.E.2d 45 (Ga. App., 1990).

The exclusive remedy provision of §51-7-85 seems to be in literal conflict with O.C.G.A. §9-11-68(e) that clearly refers to the conduct of frivolous defenses *during* the time frame defined by §51-7-80 (2) and (3). As of this date, no cases have been found that address the apparent conflict.

By the practical operation of the statute that requires that the trier of fact assess attorney fees as a part of the main case, §13-6-11 can only collect attorney fees for the time up to the evidence phase of the trial. Sections 9-15-14 and 51-7-81 are decided later so
they may cover time for post-trial work. Thus, there is overlap between the fees that may be captured. The damages in all of these sections are compensatory and it is simple logic that one can only recover the same damages once from the defendant even if there are multiple grounds under which the fees may be captured.

There is also a liability coverage overlap between O.C.G.A. § 13-6-11 and the abusive litigation sections. The "stubbornly litigious - unnecessary trouble and expense" "no bona fide controversy" prong of O.C.G.A. § 13-6-11 seems to cover some of the same conduct as the "complete absence of any justiciable issue" language of O.C.G.A. § 9-15-14 from the instant when the case is first filed. The conduct may, under certain facts, include the "without substantial justification" conduct described in O.C.G.A. §51-7-81(2). No court has yet addressed the interaction between these provisions with respect to a case with no defense or a default. Does the submission of evidence of attorney fees and award or denial of an award under O.C.G.A. §13-6-11 collaterally estop a later claim in the case for the same fees under O.C.G.A. §9-15-14 or O.C.G.A. §51-7-81? In *Walker v. McLarty*, 199 Ga.App. 460, 405 S.E.2d 294 (Ga.App. 1991), the Court of Appeals affirmed a summary judgment denying a claim for abusive litigation in a prior case because the trial judge found that the denial of a summary judgment in the earlier case resulted in a collateral estoppel of appellant's claim in the case at bar. Considering *Walker* with O.C.G.A. §§51-11-5 and 9-2-44,4 collateral estoppel and *res judicata* are affirmative

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4 **O.C.G.A. §9-2-44. Effect of former recovery; pendency of former action.**
(a) A former recovery or the pendency of a former action for the same cause of action between the same parties in the same or any other court having jurisdiction shall be a good cause of abatement. However, if the first action is so defective that no recovery can possibly be had, the pendency of a former action shall not abate the latter.
(b) Parol evidence shall be admissible to show that a matter apparently covered by the judgment was not passed upon by the court.
defenses and must be properly raised in the pleadings and pretrial order. O.C.G.A. §9-11-8(c); O.C.G.A. §9-11-9(e), and O.C.G.A. §9-11-16.

**Relationship of O.C.G.A. §13-6-11 to O.C.G.A. §33-4-6.**


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**O.C.G.A. § 51-11-5. Former recovery and pendency of another action.**

Former recovery and the pendency of another action are good defenses in tort actions and are subject to the same rules as when applied to contracts.

5 **33-4-6 Liability of insurer for damages and attorney's fees.**

In the event of a loss which is covered by a policy of insurance and the refusal of the insurer to pay the same within 60 days after a demand has been made by the holder of the policy and a finding has been made that such refusal was in bad faith, the insurer shall be liable to pay such holder, in addition to the loss, not more than 25 percent of the liability of the insurer for the loss and all reasonable attorney's fees for the prosecution of the action against the insurer. The amount of any reasonable attorney's fees shall be determined by the trial jury and shall be included in any judgment which is rendered in the action; provided, however, the attorney's fees shall be fixed on the basis of competent expert evidence as to the reasonable value of the services based on the time spent and legal and factual issues involved in accordance with prevailing fees in the locality where the action is pending; provided, further, the trial court shall have the discretion, if it finds the jury verdict fixing attorney's fees to be greatly excessive or inadequate, to review and amend the portion of the verdict fixing attorney's fees without the necessity of disapproving the entire verdict. The limitations contained in this Code section in reference to the amount of attorney's fees are not controlling as to the fees which may be agreed upon by the plaintiff and his attorney for the services of the attorney in the action against the insurer. (Ga. L. 1872, p. 43, § 1; Code 1873, § 2850; Code 1882, § 2850; Civil Code 1895, § 2140; Civil Code 1910, s 2549; Code 1933, § 56-706; Code 1933, § 56-1206, enacted by Ga. L. 1960, p. 289, § 1; Ga. L. 1962, p. 712, § 1.)

The same rule applies in uninsured motorist claims. An insured is entitled to recover damages from the UM insurer for bodily injury, death, or property damage. Notably, however, the UM statute makes no provision for the recovery of attorney fees and expenses against an UM insurer based upon the tortfeasor's stubborn litigiousness or bad faith conduct. The only provision for attorney fees and expenses for uninsured motorist cases is found in OCGA § 33-7-11 (j), which pertains to the UM insurer's bad faith failure to pay a claim.” Smith v. Stoddard, 669 S.E.2d 712, 294 Ga. App. 679 (Ga. App., 2008)


O.C.G.A. §§51-12-5, 5.1, and 6 provide the remedies of punitive and exemplary damages. Attorney fees and expenses of litigation are not punitive or exemplary damages but stand alone and are regulated by § 13-6-11. Dodd v. Slater, 101 Ga. App. 358, 114 S.E.2d 167 (Ga. App., 1960). Individual damage items, such as punitive damages awarded as additional damages or expenses of litigation, do not provide the requisite support for each other. They are recoverable only in cases where other elements of damages are

**Georgia Materialman’s Lien Statute - O.C.G.A. § 44-6-361.**


Congress enacted several exceptions to § 727(b)’s general rule of discharge of debts in bankruptcy. 11 U.S.C. § 523(a)(6) is an exception that excludes discharge of a debt that results from "willful and malicious injury by the debtor to another entity or to the property of another entity." Arguably, the conduct that establishes the bad faith prong of section 13-6-11 could be interpreted to be willful and malicious injury sufficient to prevent the discharge of a section 13-6-11 award. Three bankruptcy cases considered whether O.C.G.A. §13-6-11 bad faith attorney fee awards are debts that may be excepted from the discharge pursuant to 11 U.S.C. §253.

Two Northern District of Georgia Bankruptcy Court case directly addressed bad faith attorney fees and excepted bad faith attorney fees from being discharged. *In Tenet S. Fulton, Inc. v. Demps (In re Demps)* (Bankr. N.D. Ga., 2014), Bankruptcy Judge Wendy L. Hagenau held that an arbitrator’s award of O.C.G.A. §13-6-11 attorney fees based upon malicious and bad faith conduct was non-dischargeable in bankruptcy. *In Hot Shot Kids Inc. v. Pervis (In re Pervis)* (Bankr. N.D. Ga., 2014), Judge Hagenau awarded O.C.G.A.
§13-6-11 bad faith attorney fees as part of a substantive creditor claim tried in connection with a complaint to determine the dischargeability of a debt. Pursuant to 11 U.S.C. §523.

In the Southern District, the case *Pioneer Constr., Inc. v. May (In re May)* (Bankr. S.D. Ga., 2014) the court acknowledged “that an award of attorneys' fees under O.C.G.A. § 13-6-11 may establish malice under 11 U.S.C. § 523(a)(6)”, but concluded that the plaintiff did not prove that the debtor’s acts out of which the attorney fee award arose met of requirements of 11 U.S.C. §523 (a)(6) sufficiently malicious to deny the discharge of the debt.


**Relationship of O.C.G.A. 13-6-11 and 28 U.S.C. §1332 as a basis for federal diversity jurisdiction.**

Second, attorney's fees generally may not be included in determining the amount in controversy unless the award of fees is authorized by statute or contract. *Smith v. GTE Corp.*, 236 F.3d 1292, 1305 (11th Cir. 2001). Under Georgia law, the expenses of litigation generally shall not be allowed as a part of the damages; but where the plaintiff has specially pleaded and has made prayer therefor and where the defendant has acted in bad faith, has been stubbornly litigious, or has caused the plaintiff unnecessary trouble and expense, the jury may allow them. “Here, First State Bank has specifically pleaded a minimum of $3,900.00 in attorney's fees for the Defendants’ alleged bad faith and
stubbornly litigious actions. First State Bank has also produced affidavit testimony that it has incurred $4,525.00 in attorney's fees for the preparation and filing of its complaint in this case. (Doc. 13-1 at ¶ 7). The Defendants do not suggest First State Bank has failed to allege this amount in good faith. Thus, First State Bank's request for attorney's fees clearly counts toward the amount in controversy requirement. See Townsend v. Monumental Life Ins. Co., 2007 WL 1424660, at *4 (N.D. Ga.) (counting the plaintiff's request for attorney's fees pursuant to O.C.G.A. § 13-6-11 toward the amount in controversy requirement). Therefore, First State Bank is seeking a recovery of at least $77,883.83.”

First State Bank of Nw. Ark. v. McCelland Qualified Pers. Residence Trust (Civil Action No. 5:14-CV-130 (MTT). M.D. Ga., May 27, 2014) However, a reasonable amount and factual basis of anticipated attorney fees must be expressly claimed in support of diversity jurisdiction. The court will not speculate as to the possible amount of attorney fees. OYCE Holdings LLC v. United Way, U.S. District Court, N.D.Ga. Civil Action Number 1:14-CV-668-TWT, October 1, 2014.

**Adjudicating Code Section § 13-6-11 (and in preparing orders).**

Adjudication of O.C.G.A. § 13-6-11 requires careful attention to procedure, the statute, and the rules of evidence. Judges and law clerks should read the statute. The issue should not be considered lightly. Errors on the issue of attorney fees result in a surprising number of reversals and remands each year at the appellate level. Most of the reversals are caused by a failure of the judge to handle the evidentiary issues, either by improperly granting a summary judgment or by failing to require proper adherence to the

At the beginning of the trial, the court should determine whether the issue is properly before the court. Are sufficient facts alleged in the Complaint or Counterclaim to raise the issue of attorney fees? Does the *ad damnum* clause contain a proper prayer for attorney fees?

Is the issue properly set forth in the pretrial order?


In the evidentiary phase of the trial, care must be taken that the defendant has an adequate opportunity to cross-examine the plaintiff’s evidence. Often attorneys are hesitant to cross-examine their opposing counsel and do not take their opportunity to do so. It is good practice for the judge to inquire if the defendant wishes to cross-examine the evidence and make any waivers explicit and on the record to prevent later claims that the defendant was not allowed to cross-examine.

Very special care must be made to make sure that the attorney fee claims are supported by first hand evidence and not by hearsay. The cases are clear that unless an attorney worked elbow to elbow with another attorney on a case, an attorney cannot testify as to time spent by another attorney or as to the reasonableness or necessity of another's work without falling afoul of the hearsay rules. Attention must be given to the best evidence rule. A good practice would be to let everyone know at the pretrial conference that the judge will require strict adherence to the rules of evidence on attorney
fees so everyone can be prepared to have all of the necessary attorney witnesses in the courtroom at the appropriate time.

Facts supporting the statutory basis of the claim must be presented by proper evidence. What conduct is the basis for the action? Is it bad faith, no bona fide defense, or both? When did the predicate conduct occur? Be careful to exclude evidence of conduct that occurred after the filing of the case. Such conduct is simply irrelevant and is punished by the sanctions against abusive litigation, not O.C.G.A. § 13-6-11.

If the case is bench tried, use the statute to formulate the findings of fact. Make a specific finding for each clause and rule. Remember that O.C.G.A. § 13-6-11 is a statute that punishes misconduct. If there is no misconduct, no fees should be granted. Be sure to list the specific acts that constitute the predicate misconduct. List the evidence proving the acts.

A failure to provide very explicit details in the order granting fees may cause an award to be reversed. In Franklin Credit Management Corporation v. Friedenberg, 620 S.E.2d 463, 275 Ga. App. 236 (Ga. App., 2005), “[T]he trial court's order failed to show the complex decision making process necessarily involved in reaching a particular dollar figure and failed to articulate why the amount awarded was $40,000 as opposed to any other amount. While the court may well have engaged in such a process, it was not reflected in the award or the record. The trial court simply did not provide this Court with a yardstick by which we may judge whether the award is reasonable. The award at least appeared to be based upon guesswork, a result not authorized under our law and the case was reversed for findings. “

If the case is tried before a jury, charge the statute. The issue must be decided as a part of the main case and the jury verdict. It is crucial that the jury not just award a lump
sum including damages and attorney fees. Special interrogatories setting forth the special or nominal damages separate and apart from the attorney fee amount must be submitted to the jury or the award will be reversed. **Whitaker v. Houston County Hospital Authority**, 613 S.E.2d 664, 272 Ga. App. 870 (Ga. App., 2005) Solicit additional charges that conform to the facts of the case. Insure that there are proper verdict forms suited to the issues.

### Conclusion

O.C.G.A. § 13-16-11 can be a minefield for both judges and litigants. Often attorney fees can be the lion’s-share of a verdict. The Code section is highly technical and requires careful attention if the facts of the case support the inclusion of the claim in the case. The section must be pled, proven, and defended carefully, conforming to the rules of evidence. Awards under this Code section can be very large. The remedy of damages under O.C.G.A. § 13-6-11 should be treated as a major issue on equal standing with any other count of the complaint. Attorney fee issues should be adjudicated and litigated in the very same careful manner as the main cause of action is handled. Attorneys who pay close attention to the Code section will certainly have a major advantage over those who think the Code section is a side chapter to the case. Those who fail to take the Code section seriously run a tremendous risk of failure, whether as plaintiffs seeking an award, as defendants opposing an award, or as judges avoiding reversals.

The final advice:

**O.C.G.A. § 13-6-11 IS SERIOUS BUSINESS.**

**KEEP DETAILED TIME RECORDS!**
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Mr. Penland is an experienced legal counsellor, litigator, and advocate for his clients. Admitted to the State Bar of Georgia in 1975, he has worked closely counselling and protecting clients for over 42 years. Mr. Penland is an active trial attorney who has handled hundreds of complex civil litigation matters, including jury trials, bench trials, appeals, and complex negotiations since 1975. Mr. Penland has been counsel in cases in courts from the county and city court level, through the Georgia and federal courts, and all of the way up to the United States Supreme Court. Mr. Penland's special talent is in representing individuals and businesses in matters involving complex legal and financial issues with difficult emotional issues between the parties, such as high stakes partnership disputes, probate battles, and business disputes.

Among the many types of cases Mr. Penland has handled are cases involving real estate, domestic relations, divorce, probate, contracts, torts, software technology, internet law, trademarks, copyright, and intellectual property disputes. Mr. Penland has developed effective procedures for managing cases having high volumes of documentary evidence using powerful case and document management software he developed over the years and customizes for the needs of the individual case.

Mr. Penland is a recognized litigator, speaker, and authority on the law and procedure of Attorney Fees and Abusive Litigation in Georgia, including matters arising under O.C.G.A. §13-6-11, §9-15-14, and attorney fees arising in domestic relations and probate cases. As a lawyer's lawyer, he has litigated and consulted on attorney fee issues at the trial level and handled appeals in the appellate courts. He is often hired by other lawyers to help them with attorney fee and Abusive Litigation issues for their clients, serving in the capacity as consulting co-counsel or as an expert witness. Mr. Penland has represented both individuals and attorneys in Abusive Litigation cases. Mr. Penland is the author of “Attorney,Fees,under,O.C.G.A.,§13-6-11”, an authoritative treatise on Attorney Fee rules and practice in Georgia.

Mr. Penland became a lawyer when he was admitted to the State Bar of Georgia on June 12, 1975.

EDUCATION

Juris Doctor, Emory University, Atlanta, GA, 1975 Bachelor of Arts (Economics Major), Emory University, Atlanta, GA, 1972.

COURT ADMISSIONS

Federal Courts
United States Supreme Court
United States Court of Appeals for the 11th Circuit
United States District Court for the Northern District of Georgia
United States District Court for the Middle District of Georgia

Georgia Courts
Supreme Court of Georgia
Court of Appeals of Georgia
All Georgia Superior Courts and other state and local trial courts.
Community Service

Mr. Penland serves actively in his community. Mr. Penland is active in his church and has coached neighborhood sports teams. Mr. Penland has been active serving in the Boy Scouts as a Cubmaster, Assistant Scoutmaster, and Troop Committee Chairman. He is an Eagle Scout. Mr. Penland is licensed by the Federal Communications Commission as an Extra Class Amateur Radio (Ham radio) Operator with the call sign N4RAR. He is active in serving the community as an amateur radio operator and a leader of Amateur Radio groups. He is the DeKalb County Emergency Coordinator for the DeKalb Amateur Radio Emergency Service (ARES). ARES serves by providing emergency communications support to the Georgia Emergency Management Agency, the DeKalb County Emergency Agency, and the Georgia Hospital Association as a part of a nationwide network of emergency radio operators. He also teaches radio classes to help people gain their FCC Amateur Radio Licenses.

Family

Mr. Penland is a life-long resident of DeKalb County and has been married to Ruth Primm for nearly thirty years. He has two grown daughters and two grown sons.
10:00  LEGISLATIVE CHANGES AND TECHNICAL DEFENSES

A. Overview and Examination of Any Legislation Relating to OCGA §9-15-14 and OCGA §51-7-80, et seq.

B. Technical Defenses:
   1. Defenses to frivolous litigation claims withdrawal, good faith, substantial justification
   2. Proper notice issues
   3. Statute of limitations issues
   4. Second opinion issues and defenses

Kim M. Jackson
DEFENDING THE ABUSIVE LITIGATION CLAIM (2015)

O.C.G.A. § 51-7-80 ET SEQ.

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DEFENDING THE ABUSIVE LITIGATION CLAIM
O.C.G.A. § 51-7-80 et seq.

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1. Introduction

A. Common Law Abusive Litigation Claims

Under the common law, abusive litigation was a tort action, brought as a separate lawsuit. The claim sounded in malicious use of process or malicious abuse of process, and had to be made within two years of the final termination of the underlying proceeding. Daniel v. Georgia R.R. Bank & Trust Co., 255 Ga. 29, 31, 334 S.E.2d 659, 661 (1985). The focus of the common law claim was narrow: (1) did the defendant in the abusive litigation claim have probable cause to initiate civil process in the underlying lawsuit; and (2) did the defendant in the abusive litigation claim use civil process for an improper purpose. Yost v. Torok, 256 Ga. 92, 93, 344 S.E.2d 414, 415 (1986) (citing Ferguson v. Atlantic Land & Dev. Corp., 248 Ga. 69, 71, 281 S.E.2d 545 (1981)).

In 1986, Georgia’s legislature enacted O.C.G.A. § 9-15-14 (“9-15-14”). This procedure provided a new remedy to combat the abusive litigant, but it created a slightly different standard, as explained earlier in this program, and limited damages to attorneys’ fees.

The Georgia Supreme Court then adjusted the common law abusive litigation claim to sound similar to the newly enacted legislation. Adopting the same terms used
in section 9-15-14(b), the Georgia Supreme Court merged common law malicious use of process and malicious abuse of process claims into the following claim:

Any party who shall assert a claim, defense, or other position with respect to which there exists such a complete absence of any justiciable issue of law or fact that it reasonably could not be believed that a court would accept the asserted claim, defense or other position; or any person who shall bring or defend an action, or any part thereof, that lacks substantial justification, or is interposed for delay or harassment; or any party who unnecessarily expands the proceeding by other improper conduct, including, but not limited to, abuses of discovery procedures, shall be liable in tort to an opposing party who suffers damage thereby.

Yost, 256 Ga. at 96, 344 S.E.2d at 417. A Yost common law abusive litigation claim and a 9-15-14 motion remained alternative procedures, though from 1986 to 1989 the common law claim and the statutory remedy had very similar elements.

B. The Abusive Litigation Statute Supercedes the Common Law

In 1989, the legislature again addressed abusive litigation concerns, this time by replacing the common law origins of the claim with legislation. With the enactment of O.C.G.A. § 51-7-80 et seq. (hereinafter referred to as “the abusive litigation statute” or “the statute”), all abusive litigation claims filed after April 3, 1989 were governed exclusively by the abusive litigation statute or 9-15-14. Litigants still had alternative procedures and remedies. One could file a lawsuit within one year of the final termination of the underlying proceeding, see O.C.G.A. § 51-7-84(b), or seek expedient relief through a 9-15-14 motion. The legislation also distinguished the claims by the available remedies: where the only damages were attorneys’ fees, 9-15-14 was the exclusive remedy. See, for a discussion of the differences, and when an “abusive litigation” claim pursuant to O.C.G.A. § 71-7-80 should be used, Condon v. Vickery, 270

C. The Abusive Litigation Statute

The abusive litigation statute revised the common law and Yost definitions of the claim. Pursuant to O.C.G.A. § 51-7-81,

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.

Instead of following the “interposed for delay or harassment” language employed in 9-15-14 and Yost, the legislature defined “malice” as follows:

“Malice” means acting with ill and for a wrongful purpose and may be inferred in an action if the party initiated, continued, or procured civil proceedings or process in a harassing manner or used process for a purpose other than securing the proper adjudication of the claim upon which the proceedings are based.

O.C.G.A. § 51-7-80(5). Furthermore,

“Wrongful purpose” when used with reference to any civil proceeding, claim, defense, motion, appeal, or other position results in or has the effect of:

(A) Attempting to unjustifiably harass or intimidate another party or witness to the proceeding; or

(B) Attempting to unjustifiably accomplish some ulterior or collateral purpose other than resolving the subject controversy on its merits.

O.C.G.A. § 51-7-80(8).
The second element of the statutory abusive litigation claim is very similar to the “lacks substantial justification” language of 9-15-14:

“Without substantial justification” when used with reference to any civil proceeding, claim, defense, motion appeal, or other position, means that such civil proceeding, claim, defense, motion, appeal or other position is:

(A) Frivolous;
(B) Groundless in fact or in law; or
(C) Vexatious.

O.C.G.A. § 51-7-80(7). There are two primary elements of the statutory tort of abusive litigation, one objective (“without substantial justification”) and one subjective (“malice”). The abusive litigation statute also introduced the concept of inferred malice into abusive litigation law.

In a departure from the common law claim, the legislature provided three defenses. See O.C.G.A. §§ 51-7-82(a)-(c). The first defense is procedural. A litigant may voluntarily withdraw, abandon, discontinue or dismiss the allegedly abusive position within 30 days after the mailing of the mandatory notice of claim letter or prior to a ruling of the trial court, whichever shall first occur. O.C.G.A. § 51-7-82(a); see O.C.G.A. § 51-7-84 (discussing the notice condition precedent). The second defense is substantive. A litigant acting in good faith shall not be liable. O.C.G.A. § 51-7-82(b). The third defense is a hybrid of procedure and substance. The litigant may avoid liability if he or she was substantially successful on the issue(s) forming the basis for the allegedly abusive position in the underlying civil proceedings. O.C.G.A. § 51-7-82(c). In addition to these defenses, there is also a specific notice provision, a defined statute of limitations, and an exclusive remedy provision.
The many built in, statutory defenses to an abusive litigation claim have created ample opportunity to defend abusive litigation claims at various stages of the proceedings. This is not surprising. The claim is considered one that is disfavored under the law. Land v. Boone, 265 Ga. App. 551, 552, 594 S.E.2d 741, 743 (2004). By following the legislation through its procedural and substantive elements and defenses, defendants in abusive litigation claims will often find many opportunities to prevail through dispositive motions.

II. The “Window of Opportunity” or “Repent Now And Be Forgiven” Defense

A. The Statute

O.C.G.A. § 51-7-82(a) provides:

It shall be a complete defense to any claim for abusive litigation that the person against whom a claim of abusive litigation is asserted has voluntarily withdrawn, abandoned, discontinued, or dismissed the civil proceeding, claim, defense, motion, appeal, civil process, or other position which the injured person claims constitutes abusive litigation within 30 days after the mailing of the notice required by subsection (a) of Code Section 51-7-84 or prior to a ruling by the court relative to the civil proceeding, claim, defense, motion, appeal, civil process, or other position, whichever shall first occur; provided, however, that this defense shall not apply where the alleged act of abusive litigation involves the seizure or interference with the use of the injured person’s property by process of attachment, execution, garnishment, writ of possession, lis pendens, injunction, restraining order, or similar process which results in special damage to the injured person.

In other words, unless the litigant has already been damaged by the seizure or interference with property rights resulting in special damages; the allegedly abusive litigant may, upon receiving prior notice of the allegedly abusive conduct, avoid liability by:
1. Voluntarily withdrawing, abandoning, discontinuing or dismissing the allegedly abusive position;

2. Within 30 days of the mailing of the statutory notice or prior to a ruling by the trial court relative to the alleged abusive position, whichever shall first occur.

Neither the common law claim nor 9-15-14 had this notice requirement, or the opportunity to reconsider and repent and avoid liability. Unfortunately, despite its many definitions, the abusive litigation statute failed to define the terms “withdrawn,” “abandoned,” discontinued” or “dismissed.” Despite arguments that may be made to the contrary, the cautious and repentant abusive litigant should only expect to rely on O.C.G.A. § 51-7-82(a) following an actual dismissal of the allegedly abusive claim.

B. Construing O.C.G.A. § 51-7-82(a)

1. Principles of Construction

Georgia’s appellate courts still have not actually construed O.C.G.A. § 51-7-82(a).

In Woodall v. Hayt, Hayt & Landau, 198 Ga. App. 624, 402 S.E.2d 359 (1991), the Court of Appeals faced facts upon which O.C.G.A. § 51-7-82(a) might have been applicable but held that the abusive litigation statute was not applicable because suit had been filed prior to the effective date of the statute. Id. at 626, 402 S.E.2d at 626. Similarly, in Williams v. Binion, 227 Ga. App. 893, 490 S.E.2d 217 (1997), the Court of Appeals, stated in dicta, without analysis, that an abusive litigation claim may not be brought if the offending party “abandoned” the offending claim or tactic. Id. at 894, 490 S.E.2d at 218.
Considering the dearth of authority directly interpreting O.C.G.A. § 51-7-82(a), the Court of Appeals has noted that the tort of abusive litigation should not be “extended beyond the plain and explicit statutory terms” because it is in derogation of the common law. *Kirsch v. Meredith*, 211 Ga. App. 823, 825, 440 S.E.2d 702, 709 (1994). For the same reasons, the abusive litigation statute should be “construed in order to accomplish its overriding purpose to give a prospective defendant the chance to change position and avoid liability.” *Paino v. Connell*, 207 Ga. App. 553, 554, 428 S.E.2d 446, 447 (1993) (quoting *Talbert v. Allstate Ins. Co.*, 200 Ga. App. 312, 314, 408 S.E.2d 125, 127 (1991)). Therefore, until a Georgia appellate court actually holds what may constitute an effective “withdrawal,” abandonment,” “dismissal,” or “discontinuance,” there is room for the defendant to argue that any meaningful change in position in the underlying claim satisfied the broad goals of O.C.G.A. § 51-7-82(a).

2. **Possible Interpretations**

Although not defined by the statute, the terms “withdrawn,” “abandoned,” “discontinued,” and “dismissed” have generally understood meanings, developed through common law or by other statutes, specific to the prosecution of claims.

a. **“Dismissed”**

“An action may be dismissed by the plaintiff, without order or permission of the court, by filing a written notice of dismissal at any time before the plaintiff rests his case.” O.C.G.A. § 9-11-41(a). These provisions apply equally to “any counterclaim, cross-claim, or third-party claim.” O.C.G.A. § 9-11-41(c). A dismissal may be filed with or without prejudice, “except that the filing of a third notice of dismissal operates as an
adjudication upon the merits.” *Id.* Upon the filing of a first or second voluntary
dismissal, the claims subject thereto:

> May be recommended in a court of this state or, if permitted
> by the federal rules of civil procedure, in a federal court
> either within the original applicable period of limitations or
> within six months after the discontinuance or dismissal,
> whichever is later, subject to the requirement of payment of
> costs in the original action as required by subsection (d) of
> Code Section 9-11-41; provided, however, if the dismissal or
> discontinuance occurs after the expiration of the applicable
> period of limitation, this privilege of renewal shall be
> exercised only once.

O.C.G.A. § 9-2-61(a).

A voluntary dismissal with prejudice operates as an adjudication on the merits
and clearly satisfies the change in position contemplated by O.C.G.A. § 51-7-82(a). Even
with the possibility of renewal, a dismissal without prejudice would also appear to
reflect the present intent to change the allegedly abusive position. Such a dismissal also
prevents the other side from having to engage in further defense measures in response
to the allegedly abusive claim or position. Unless an action or claim is actually renewed,
the filing of a Rule 41 written notice of dismissal within the time frame provided by
O.C.G.A. § 51-7-82(a) should provide a complete defense to a subsequent abusive
litigation claim. See Paino, 207 Ga. App. at 554, 428 S.E.2d at 447; see also Stocks v.
the Georgia Court of Appeals held that a voluntary dismissal without prejudice is not a
“final termination” capable of supporting an abusive litigation claim).

b. “Discontinued”

While “discontinuance” has a specific common law and statutory meaning with
respect to the prosecution of claims, that meaning does not translate well within the
context of the abusive litigation statute. See, e.g., Kraft v. Forest Park Realty & Ins. Co., 111 Ga. App. 621, 625, 142 S.E.2d 402, 406 (1965); cf, O.C.G.A. § 9-2-60(b). Any “discontinuance” within the context of O.C.G.A. § 51-7-82(a) must occur within 30 days, if not earlier, to insulate the discontinuing party from liability. Not prosecuting a claim for 30 days is hardly an effective way of changing course or curing the abusive conduct. Thus, applying the common law concept of a “discontinuance” to O.C.G.A. § 51-7-82(a) provides little guidance.

Statutory language should be construed to effectuate legislative intent and give meaning to the language. Thus, abusive litigation defendants may assume and argue that the term “discontinued” means something other than dismissal. For example, if there is evidence of a “stopping” or “interruption” of the allegedly abusive conduct, it can reasonably be argued that a practical change in position consistent with the legislature’s goal of allowing litigants to avoid liability has occurred. See Paino, 207 Ga. App. at 554, 428 S.E.2d at 447. For example, a party might stipulate to postpone or set aside the subject claims while related matters are being pursued, arguably curing the abusive conduct. Absent a subsequent attempt to litigate the “discontinued” claims prior to their final disposition, the complete defense of O.C.G.A. § 51-7-82(a) may be available based on such a stipulation or another form of meaningful voluntary inaction. It would stand to reason, however, that simply silently stopping pursuit of the allegedly abusive claims would not be sufficient.

c. “Abandoned”

A legal “abandonment” generally is defined as “[t]he surrender, relinquishment, disclaimer, or cessation of property or of rights. Voluntary relinquishment of all right,
title, claim and possession, with the intention of not reclaiming it.” Black’s Law Dictionary 2 (6th ed. 1990). An effective legal abandonment requires the intent to waive or relinquish a legal right and conduct consistent with that intent. In the context of abandoning claims, the Supreme Court ruled that the filing of a brief disclaiming one of two grounds for relief did not constitute an abandonment of the claim at issue when other grounds for relief were preserved. Murray Co. v. Pickering, 195 Ga. 182, 188, 23 S.E.2d 436, 439-40 (1942). Interestingly, the Supreme Court refused to comment as to whether the specific disclaimer of a legal position in a brief was an abandonment thereof. Id.; see United States v. Thevis, 84 F.R.D. 57, 72 (N.D. Ga. 1979) (abandonment requires conscious relinquishment), Thevis v. United States, 459 U.S. 825 (1982).

One must again assume that abandonment means something other than a filed, written dismissal. Applying general estoppel principles, any conscious declaration of the intent not to pursue or to otherwise disclaim an allegedly abusive position arguably should insulate a party from a subsequent claim. The best practice is to consciously consider this option during the window of opportunity stage. Absent such forethought at the time of notice, parties sued for abusive litigation should review their files carefully to determine whether any documents in the underlying matter may support an “abandonment” argument.

d. “Withdrawn”

A “withdrawal” generally describes the decision not to prosecute criminal charges against a party. Black’s Law Dictionary 1602 (6th ed. 1990). The abusive litigation statute does not apply to attempted criminal prosecutions. Thus, although the term presumably means something other dismissal, it is not clear what distinguishes it from
the other terms. The term appears to be a synonym for the terms “discontinuance” and “abandonment.”

3. "Within 30 Days of Mailing” or “Prior to a Ruling by the Court”

The abusive litigation statute defines the window of opportunity within which a party may take proactive steps to avoid liability as follows: “within 30 days after the mailing of the notice required by subsection (a) of Code Section 51-7-84 or prior to a ruling by the court relative to the civil proceeding, claim, defense, motion, appeal, civil process, or other position, whichever shall first occur . . . .” O.C.G.A. § 51-7-82(a).

There are two important points to be taken from this provision: (1) the 30-day window is triggered by the “mailing of,” and not the “receipt” of, the notice of abusive litigation – O.C.G.A. § 9-11-6 presumably would not apply; and (2) a ruling within the 30-day notice period removes the litigant’s subsequent right to dismiss, discontinue, abandon or withdraw the allegedly abusive position.

4. Damages and the Timing of Notice

Under 9-15-14, no notice is required before filing the motion. The abusive litigation statute does require notice and the opportunity to correct the conduct. There has not been an appellate decision about whether damages for abusive litigation relate back to the beginning of the abusive conduct, or start from the time period of notice. It is thus unanswered how damages might be affected by the timing of notice during the underlying abusive litigation. If notice of the allegedly abusive conduct is not provided until well into the litigation, after significant potential damages have already occurred, and the position is not abandoned, the difference in damages could be large. For example, notice could be mailed just prior to an expected ruling, thus limiting the
defendant’s time frame to repent and withdraw the claim. A litigant defending an abusive litigation claim under these circumstances should argue that the claimant’s attorneys’ fees and other damages incurred prior to the notice are barred. A claimant may also consider this risk, and has the option of pursuing all possible attorney’s fees pursuant to 9-15-14 without concern for a “timing of notice” defense. The downside is that the other damages are not available, and the claimant would be bound by the Judge’s ruling on the 9-15-14 motion. O.C.G.A. § 51-7-85.

5. Establish a Record

Whenever an attorney is served with an abusive litigation notice, that attorney should immediately advise the client of the notice and the risks of continuing with the allegedly abusive conduct or claim. Moreover, when it comes to defending the abusive litigation claim at the next level, regardless of the type of defenses that might be raised, it is extremely important to create a record. Thus, never let an abusive litigation notice go unanswered, and always answer in writing. If a party intends to “repent” and alter the litigation conduct, the safest response is to formally dismiss the abusive claim. In any event, any effort to apply the repent defense should be in writing and clear to the opposition. Should the attorney believe that there might be some exposure to the abusive litigation claim, but does not have enough information to either dismiss the claim or respond to the notice, he or she should put that in writing, and explain why more time is needed to respond. That attorney may not get to use the “window of opportunity” defense, but at least he or she will have evidence to help with the next defense discussed below.

III. The “Good Faith” Defense
A. The Statute

Although 9-15-14(c) addresses the good faith attempt to establish new or novel theories of the law, 9-15-14 does not specifically address good faith. In the abusive litigation statute, however, the legislature expanded the good faith defense to apply to all potentially abusive conduct. O.C.G.A. § 51-7-82(b) states:

It shall be a complete defense to any claim for abusive litigation that the person against whom a claim of abusive litigation is asserted acted in good faith; provided, however, that good faith shall be an affirmative defense and the burden of proof shall be on the person asserting the actions were taken in good faith.

O.C.G.A. § 51-7-80(4), defines good faith as:

“Good Faith,” when used with reference to any civil proceeding claim, defense, motion, appeal, or other position, means that to the best of a person’s or his or her attorney’s knowledge, information and belief, formed honestly after reasonable inquiry, that such civil proceeding, claim, defense, motion, appeal, or other position is well grounded in fact and is either warranted by existing law or by reasonable grounds to believe that an argument for the extension, modification, or reversal of existing law may be successful.

B. Proving Good Faith

1. Subjective Belief Not Enough

Good faith is clearly defined as an affirmative defense “and the burden of proof shall be on the person asserting the actions were taken in good faith.” O.C.G.A. § 51-7-82(b). There is certainly a subjective component within the definition of good faith. See O.C.G.A. § 51-7-80(4) (“... to the best of a person’s or his attorney’s knowledge, information and belief, formed honestly, after reasonable inquiry...”). Mere subjective belief alone, without accompanying objective evidence, is insufficient. Kirsch
v. Jones, 219 Ga. App. 50, 53, 464 S.E.2d 4, 7 (1995). In Kirsch, the facts were as follows: (1) On behalf of his clients, Kirsch sued Jones and Eastwood alleging that they committed legal malpractice by failing to place lis pendens notices on certain property on behalf of Exclusive Properties, Inc.; (2) Jones and Eastwood filed a third-party complaint against Kirsch alleging that he committed legal malpractice by failing to pursue post-judgment collection efforts on behalf of Exclusive Properties, Inc.; (3) the trial court granted summary judgment on the third-party claim to Kirsch, who the filed abusive litigation and defamation claims against Jones and Eastwood; (4) in support of their summary judgment motion, Jones and Eastwood submitted affidavits alleging that their third-party complaint was asserted in good faith; and (5) the trial court granted summary judgment to Jones and Eastwood, presumably based on those affidavits. Id. at 51-53, 464 S.E.2d at 6-7.

The Court of Appeals stated that Jones and Eastwood “would be entitled to summary judgment if the undisputed evidence proved that their pursuit of that third-party complaint was not malicious and was substantially justified.” Id. at 52, 464 S.E.2d at 7. Since the Court found an absence of a legal basis for the third-party complaint, the Court of Appeals determined that the “self-serving and conclusory” affidavits submitted by Jones and Eastwood could not support the trial court’s ruling in their favor. Id. at 53, 464 S.E.2d at 7 (holding the Jones and Eastwood sought to improperly substitute Kirsch as a defendant); accord Ferguson v. City of Doraville, 186 Ga. App. 430, 437, 367 S.E.2d 551, 557 (1988), overruled on other grounds by Vogtle v. Coleman, 259 Ga. 115, 376 S.E.2d 861 (1989) (interpreting 9-15-14, the Court of Appeals held that “while we have no reason to doubt that [Ferguson’s] pursuance of the present action has been
characterized by good faith in a subjective sense, we are left at the end with nothing which could be said to establish as a matter of law a reasonable or substantial justification of Ferguson’s claims.”). This interpretation is expected, as otherwise all abusive litigation claims would be subject to summary judgment motions absent affirmative evidence of actual malice.

Following Kirsch, the Court of Appeals was asked to review the denial of a summary judgment motion filed by an attorney accused of abusive litigation for including an adultery allegation in his client’s divorce action. In Kluge v. Renn, 226 Ga. App. 898, 487 S.E.2d 391 (1997), Taylor filed an adultery counterclaim against Kluge based exclusively on the facts provided to him by his client, Renn. After filing the otherwise unverified adultery counterclaim, Taylor served written discovery to confirm Renn’s allegations. Following an investigation that included the receipt of Kluge’s discovery responses, third-party testimony refuting the central facts contained in the adultery counterclaim, and Renn’s deposition, Taylor immediately withdrew the claim. In response to Kluge’s subsequent abusive litigation claim, Taylor predicted his summary judgment motion on his affidavit which described the facts support his “reasonable inquiry” and honest belief that Renn was telling the truth. Id. at 901-05, 487 S.E.2d at 395-97.

The Court of Appeals held that Taylor was entitled to summary judgment based on the undisputed objective evidence before the trial court, but it rejected the notion that subjective evidence alone is capable of supporting a dispositive motion predicated on good faith.

Although good faith is defined in subjective terms to the extent it refers ‘to the best of a person’s or his or her
attorney’s knowledge, information and belief, formed honestly, . . . [A]n attorney cannot establish that he or she acted in good faith by simply asserting a subjective, honest belief that a claim was well grounded in fact and warranted by existing law or by reasonable grounds to believe that an argument for changing the law may be successful.

Id. at 903, 487 S.E.2d at 396-97 (emphasis added). The Court of Appeals also noted that the same subjective evidence cannot alone pierce the elements of “malice” and “without substantial justification.” Id. at 903 n. 1, 487 S.E.2d at 496 n. 1 (while Taylor averred that he acted without malice and with substantial justification in honestly believing the facts told to him by Renn, the Court categorized his arguments as sounding in good faith).

2. Defining Objective Good Faith

In the most important aspect of the Kluge decision, the Court of Appeals clarified the objective component of “good faith” required to satisfy O.C.G.A. § 51-7-82(b):

The ‘reasonable inquiry’ requirement of § 51-7-80(4) is an objective good faith requirement which qualifies the definition and imposes a duty on attorneys to conduct a reasonable inquiry into the facts and law prior to initiating, continuing, or procuring a claim on behalf of a client. Accordingly, the applicable standard is what would be objectively reasonable for a competent attorney under the circumstances.

Id. Although a “reasonableness” standard evaluated by the “competent attorney under the circumstances” invites a swearing contest by experts, which usually results in jury questions, there are solid grounds for seeking summary judgment on this defense. The analysis applied in Kluge laid the groundwork. In evaluating the burden placed on attorneys before filing claims or taking positions in litigation, the Court of Appeals commented:
It may be reasonable under the circumstances for an attorney, after satisfying the reasonable inquiry requirement, to file a claim on behalf of a client based on facts which may not be sufficient to establish a triable issue, but do supply at least a colorable inference in support of the claim, and then pursue discovery or investigation to confirm whether or not a factual basis can be developed for continuing the claim . . . Of course, an abusive litigation claim would be appropriate where an attorney files a claim on behalf of a client without any factual or legal support or supported only by guess or sheer speculation, or in cases where a claim having arguable factual or legal support is filed in good faith for the purpose of pursuing discovery, but continued by the attorney after discovery reveals there is no basis for the claim.

Id. at 904, 487 S.E.2d at 397. Finding that Taylor filed the adultery claim based on the “colorable inference” provided to him by his client and discontinued the claim after conducting appropriate discovery, the Court of Appeals held that his conduct was objectively reasonable as a matter of law. Id. at 905, 487 S.E.2d at 398.

The “continuing duty to evaluate” and reasonable inquiry requirements announced in Kluge extend until the actual resolution of the allegedly abusive claims or positions. Kendrick v. Funderburk, 230 Ga. App. 860, 864-65, 498 S.E.2d 147, 151 (1998). While the determination of whether an action had basis in law at its inception “is a legal issue for the trial court,” subsequent disputed facts regarding the motives for the continuation of litigation will defeat a motion for summary judgment predicated on good faith. Id. at 865, 498 S.E.2d at 151 (inconsistent positions taken by the attorney defendant regarding her fee agreement with the plaintiff resulted in jury question). Likewise, a client relying on good faith must establish a continuing belief in her attorney’s representations and reasonable inquiries into the facts and law forming the basis of the allegedly abusive claim if the claim is continued after notice O.C.G.A. § 51-7-84. See e.g., Payne v. Kanes, 234 Ga. App. 524, 527-28, 507 S.E.2d 266, 269 (1999).
A 2007 Court of Appeals opinion expanded on this analysis. In Bacon v. Volvo Servs. Ctr., Inc., 2007 Ga. App. LEXIS 1207, 2007 Fulton Co. D. Rep. 3476 (2007), the Court held that summary judgment on the element of good faith could be established by showing “success” in certain stages of the underlying litigation. Although this subject is addressed in more detail below, in Bacon the underlying case had been brought by VSC against Bacon. VSC claims survived summary judgment, survived directed verdict, and VSC obtained a jury verdict. On appeal, however, the Court of Appeals reversed and found in favor of Bacon as a matter of law because VSC had failed to present evidence in support of its claims. The Court of Appeals held in Bacon that “given that VSC was successful at every stage of the litigation prior to the appeal, the trial court was authorized to determine as a matter of law that the company acted in good faith in filing and pursuing its claims.” Bacon, at *6. The lesson here seems obvious: it gets easier to prove good faith the more often the trial court commits reversible error in your favor.

3. Practice Issues
   a. Be Objective

   Subjective statements of good faith cannot support dispositive motions brought by attorneys accused of abusive litigation. At the same time, the Court of Appeals confirmed that claims supported by a “colorable inference” will not expose attorneys to liability as long as that “colorable inference” is followed by adequate discovery and investigation. Even though the question of objective reasonableness normally is to be decided by the jury except “in plain and palpable cases,” Id. (quoting Packwood Indus. v. John Galt Assoc., 219 Ga. App. 527, 529, 466 S.E.2d 226 (1995)), the Kluge opinion clearly favors the granting of dispositive motions upon a showing of adequate discovery
and investigation, and a *continued* willingness to reevaluate the viability of the allegedly abusive claims.

When abusive litigation cases focus on whether the conduct at issue was reasonably grounded in the facts, defendants should support their “good faith” summary judgment motions with affidavits or deposition testimony showing:

- The facts available at the time the claim or position was filed;
- The legal grounds for the claim given the available facts;
- The discovery and investigation taken to further assess the validity of the claim; and
- The decisions made based on the continued discovery and investigation of the claim.

Ideally, the record will also include a letter that the abusive litigation defendant drafted and served in response to the abusive litigation notice explaining the same facts, legal grounds, and any necessary investigation before a final decision could be made.

Defendants should consider submitting expert testimony on objective reasonableness with any summary judgment motion. At a minimum, this will place a burden on the claimant to locate a competing expert to avoid an easy summary judgment decision. Even without expert testimony, defendants nevertheless may rely on *Kluge* to argue that objective “good faith” may be decided as matter of law.

b. The Client as Defendant and Reliance on Counsel

Given that the Court of Appeals analyzed objective good faith from the perspective of attorneys in *Kluge*, it did not comment on how clients may establish good faith as a matter of law. Absent actual evidence of ill will or an improper purpose
capable of supporting an inference of malice (which naturally would defeat good faith), clients should follow the same defense strategy discussed above to present strong dispositive motions. Furthermore, borrowing from 9-15-14 case law, clients may have the additional “good faith” argument of reliance on counsel.

While reliance on the advice of counsel is not specified as a statutory defense or a component of good faith, the Court of Appeals has implicitly recognized reliance on counsel as complete defense to a 9-15-14 claim. In Seckinger v. Holtzendorf, 200 Ga. App. 604, 409 S.E.2d 76 (1991) (physical precedence), the Holtzendorfs filed a summary judgment motion attacking Seckinger’s abusive litigation counterclaim based on two theories: (1) the evidence supported their underlying fraud and conspiracy claims; and (2) their claims were brought pursuant to the advice of counsel. In support of their reliance on counsel argument the Holtzendorfs submitted an affidavit showing that they were not attorneys and did not have any legal training, they brought the fraud and conspiracy claims on the legal advice of counsel, and they were justified in relying on the advice of counsel because of counsel’s legal experience (city attorney, State Court Judge and a law assistant for the Georgia Court of Appeals). Id. at 606-07, 409 S.E.2d at 79. Accepting both arguments, the Court held that “the trial court was authorized to find as a matter of law that appellees had pierced an essential element” of appellant’s 9-15-14 claim. Id. But see, Bircoll v. Rosenthal, 267 Ga. App. 431, 437, 600 S.E.2d 388, 393 (2004) (“We find no controlling authority for the proposition that reliance on counsel’s advice insulates a party from sanctions under O.C.G.A. § 9-15-14” and noting that Seckinger was physical precedent only).
The good faith defense in O.C.G.A. § 51-7-82(b) parallels the good faith language in 9-15-14. There is no reason to believe that the courts will not accept reliance on counsel as a defense to abusive litigation claims. Where a client is not actively involved in deciding which claims to assert in a lawsuit, reliance on counsel may support a strong summary judgment motion and, at minimum, should appeal to a jury at trial. The effectiveness of this defense will depend on the sophistication and legal knowledge of the client. Moreover, some caution should be taken as the attorney-client privilege likely will be waived as to the subject matters at issue once reliance on counsel is asserted. Finally, following the holding in Payne, reliance on counsel cannot be used in any case involving questions of actual malice, i.e., when competent counsel is misled by his client due to ulterior motives.

C. The Elements of the Claim

Whereas the above discussion has focused on the good faith affirmative defense provided by O.C.G.A. § 51-7-82(b), the same factors also may be included in attacks on the Plaintiff's essential elements of “malice” and “without substantial justification.” Attorneys defending abusive litigation claims always should make plaintiffs supply evidence capable of supporting their claims. Defendants may be better served by attacking the elements, either in addition to, or in lieu of, dispositive motions on good faith.

1. “Malice”

In Owens v. Generali-U.S. Branch, 224 Ga. App. 290, 480 S.E.2d 863 (1997), Owens argued that Generali lacked any legal or factual basis for its prior subrogation claim. Id. at 290-91, 480 S.E.2d at 864. Specifically, in opposing Generali’s motion for
summary judgment, Owens argued that “there was ample binding statutory and case law precedent” prohibiting direct insurer tort actions for medical payments. Id. at 293, 480 S.E.2d at 866.

The Court of Appeals first held that whether a lawsuit “had a basis in law at the time it was filed is a question of law.” Id. Moreover, in affirming the summary judgment granted to Generali on the element of “without substantial justification,” the Court of Appeals specifically commented on the evidence required for an abusive litigation plaintiff to avoid summary judgment:

[I]n connection with Owens’ arguments as to malice and substantial justification, we note that she has not cited and we have not located in the record any instance of malice on behalf of appellees. . . . As Owens failed to show that appellees acted both with malice and without substantial justification in pursuing the underlying suit, . . . we cannot say the trial judge erred in granting summary judgment for appellees to Owens’ abusive litigation claim.

Id. at 294-95, 480 S.E.2d at 867. Even though Owens relied on existing case law as the basis for her abusive litigation claim, the Court of Appeals affirmed the trial court’s ruling based on her failure to oppose Generali’s motion for summary judgment with additional evidence. Interestingly, the Owens court failed to distinguish Kirsch. See Kirsch, 219 Ga. App. at 53, 464 S.E.2d at 7.

Following Owens, the Court of Appeals again rejected an abusive litigation claim premised only on the absence of legal authority supporting the underlying claim. See Backman v. Packwood Indus., Inc., 227 Ga. App. 416, 418-19, 489 S.E.2d 135, 137-38 (1997). Since Backman failed to oppose the motion for summary judgment with any evidence to support other elements, the Court of Appeals held “we further conclude that
it cannot be said that the [abusive claim] was done either with malice or without substantial justification.” Id. at 419, 489 S.E.2d at 138.

In 2004, the Court issued an important decision on the meaning of “malice.” In Land v. Boone, 265 Ga. App. 551, 594 S.E.2d 741 (2004), the Court of Appeals upheld summary judgment on Land’s abusive litigation claim on several grounds, including the lack of evidence in support of “malice.” Land contended that “Boone’s wrongful purpose was in seeking ‘to call Mr. Land [and others] to task, make them accept approbation, and apologize to [the] client’ and that Boone emphatically agreed ‘[a]bsolutely.’” Land, 265 Ga. App. at 553, 594 S.E.2d at 743. The Court held that a civil action that had a primary or significant purpose of obtaining an apology, or contrition, was not brought with malice. The Court reasoned, in part, as follows:

To seek to bring a tortfeasor to contrition or penitence is not a wrongful purpose in tort law, because tort law came into existence as a legal substitute for blood feuds by bringing the matter into court where the feud could be controlled. The tort law allows the conviction of the tortfeasor and punishment through a civil action with the imposition of damages in the way of monetary compensation to achieve this end as a substitute for the tortfeasor's apology and contrition.

Id. The Court also discussed other means by which these principles are affirmed by the civil tort system, including nominal damages for a legal harm and punitive damages as a means to punish. Id.

B. Without Substantial Justification

Whether a claim is without substantial justification is a question that begs for judicial determination, though it is not clear that this element is always a legal question. Certainly many cases are found to be substantially justified on different grounds.
In Petroleum Reality II, LLC v. Morris Manning & Martin, LLP, 317 Ga. App. 102, 728 S.E.2d 896 (2012), the Court of Appeals upheld the granting of a motion to dismiss an abusive litigation claim on the basis that the lis pendens filed on a piece of property could not be said to have lacked substantial justification. The complaint argued that the lis pendens was left on the property long after it had any viability because the underlying Florida litigation that affected the property had been dismissed. The defendant countered that the judgment remained non-final subject to appeal until the Florida litigation was final, and that the relevant order could not be appealed immediately. The Court of Appeals agreed, and found that given that the judgment remained non-final and subject to an appeal, the lis pendens did not lack substantial justification.

Other “rules of law” have been provided for determining whether a claim lacks substantial justification under either 51-7-82 or 9-15-14, and cases on both statutes should be useful as to this element. For example, an award of attorney's fees is not justified where there is arguable legal support for the position taken. Ellis v. Johnson, 263 Ga. 514, 435 S.E.2d 923 (1993). Also, even when the appellate court has previously rejected a party’s argument, the argument does not necessarily lack substantial justification and require an award of fees. DeKalb County v. Adams 263 Ga. App. 201, 587 S.E.2d 302 (2003). Furthermore, where there is no Georgia law directly on point on an issue, an award of fees is improper. See Brown v. Gadson, 298 Ga. App. 660, 680 S.E.2d 682 (2009). A statute that has never been interpreted should not, absent an argument that lacks any support or argument, should not result in an award of fees. Where an underlying claim involved these types of uncertainties, the lack of substantial justification should be subject to a defense as a matter of law.
C. Strategy

When those related, but not necessarily consistent, line of cases are considered, the following “rules of thumb” should govern the defense strategy:

- When an abusive litigation lawsuit is predicated on the absence of law supporting a claim or position, defendants should attack the elements of malice and without substantial justification. While plaintiffs should continue to rely on Kirsch, the decisions in Owens and Backman contradict the notion that an abusive litigation claim may survive summary judgment without addition evidence;

- When an abusive litigation lawsuit is predicated on the absence of facts supporting a claim or position, defendants should follow the framework set forth in Kluge for asserting a good faith defense;

- When an abusive litigation lawsuit is predicated on affirmative evidence of ill will or an improper purpose, defendants should tender expert testimony establishing the objective reasonableness of the claim or position asserted and focus on the element of without substantial justification; and

- If your client is a client (as opposed to an attorney), consider reliance on counsel;

- If the trial court errs as a matter of law in your favor, you may be handed a defense to “malice” based on Bacon v. Volvo Servs. Ctr., Inc.

IV. The “Substantial Success” Defense

A. The Statute

As the third statutory defense to an abusive litigation claim, O.C.G.A. § 51-7-82(c) provides: “It shall be a complete defense . . . that the person against whom a claim of abusive litigation is asserted was substantially successful on the issue forming the basis for the claim of abusive litigation in the underlying civil proceeding.” “Substantial success” is not defined. See O.C.G.A. § 51-7-80.

B. Possible Definitions of Substantial Success
1. **Defeating a Motion for Summary Judgment**

As the law currently stands, merely defeating a summary judgment motion is usually enough to claim “substantial success.” Since defeating a motion for summary judgment necessarily establishes that the underlying claim presented a genuine issue of material fact under existing law, abusive litigation defendants should argue that such a result insulates them from liability.

Without referencing O.C.G.A. § 51-7-82(c), the Court of Appeals first stated in dicta that withstanding a motion for summary judgment does not automatically provide a complete defense to an abusive litigation claim. *Ibrahim v. Talley & Assoc., P.C.*, 214 Ga. App. 609, 612, 448 S.E.2d 707, 710 (1994).

Assuming without deciding, that the documents which Ibrahim filed in response to the motion were properly before the court, there was no evidence that Talley... acted with malice and without substantial justification. Though we are mindful that Ibrahim’s motion for summary judgment in the underlying suit was denied, we make our determination here without being bound by that prior determination.

*Id.* at 612, 448 S.E.2d at 710.

By ruling that Ibrahim offered no evidence in support of the elements of “malice” and “without substantial justification,” the Court of Appeals was not required to comment on the potential effect of the trial court’s decision. See, e.g., *Talbert v. Allstate Ins. Co.*, 200 Ga. App. 312, 314, 408 S.E.2d 125, 127 (1991) (the Court of Appeals did not comment on the effect of the trial court’s denial of a motion for summary judgment when ruling that Talbert failed to provide proper notice to Allstate of his abusive litigation claim).
A more recent decision appeared to move the bar on substantial success. In *Davis v. Butler*, 240 Ga. App. 72, 522 S.E.2d 548 (1999), a legal malpractice action was brought against Davis with the supporting affidavit required by O.C.G.A. § 9-11-9.1. After the lawsuit was transferred to a new county, Davis and his firm moved for summary judgment and alleged that the malpractice action was brought “without substantial justification” and “with malice.” *Davis*, 240 Ga. App. at 72, 522 S.E.2d at 549. The trial court denied the motion for summary judgment, finding that genuine issues of material fact existed with respect to the lawyers’ services and management of client funds. *Id.* Thereafter, the lawsuit was dismissed without prejudice. *Id.* at 73, 522 S.E.2d at 549. Following this dismissal, the law firm filed a separate action under the abusive litigation statute and successfully moved for summary judgment before the trial court. *Id.*

When reviewing the trial court’s order granting summary judgment, the Court of Appeals focused on the element of “substantial justification,” instead of the defense of “substantial success.” *Id.* at 74, 522 S.E.2d at 550. Nevertheless, the Court specifically relied upon the survival of a motion for summary judgment before the trial court. Without citing to the dicta in *Ibrahim* or the Supreme Court opinion in *Porter* discussed below, the Georgia Court of Appeals held:

> Where the trial court finds in the alleged abusive litigation that such action withstands the attack by motion for summary judgment and is entitled to a trial by jury, although the plaintiff may lose at trial, such denial of summary judgment constitutes a legal determination that the action has substantial justification, because it is not groundless or frivolous and can proceed to jury trial. Thus, it was not groundless, frivolous, or vexatious in fact or in law.

*Id.* (emphasis added). While this holding appears to clearly state a rule, it has a caveat.
The precedent interpreting 9-15-14 supports generally the impact of surviving the summary judgment stage of litigation, though the Supreme Court did not support the dispositive claims of the Court of Appeals in Davis. In Porter v. Feller, 261 Ga. 421, 405 S.E.2d 31 (1991), the defendants unsuccessfully moved for summary judgment on Porter’s claims for fraud. Thereafter, the trial court granted the defendants’ motion for directed verdict on the fraud claim and awarded attorneys’ fees pursuant to section 9-15-14 because the claim apparently lacked substantial justification. The Court of Appeals reversed on the grounds that the survival of the summary judgment motion precluded as a matter of law the 9-15-14 award. The Supreme Court reversed this unyielding rule, though it did hold that “a trial court’s award to a party whose motion for summary judgment was denied must be vacated except in unusual cases where the trial judge could not at the summary judgment stage foresee facts authorizing the grant of attorneys’ fees.” Porter, 261 Ga. at 422, 405 S.E.2d at 33 (emphasis added); accord Hamm v. Willis, 201 Ga. App. 723, 727, 411 S.E.2d 771, 775 (1991) (“A review of the record demonstrates no evidence that the instant suit is such an ‘unusual case.’”); Felker v. Fenalson, 201 Ga. App. 207, 209, 410 S.E.2d 326, 328 (1991) (no evidence to support the unusual case contemplated by Porter); cf. Ansa Mufflers Corp. v. Worthington, 201 Ga. App. 602, 603-04, 411 S.E.2d 573, 575 (1991) (A motion for summary judgment which did not challenge the merits of the underlying claim “demonstrates the ‘unusual’ decision contemplated by the Supreme Court in Porter ....” Id.). See also Dills v. Bohannon, 208 Ga. App. 531, 533, 431 S.E.2d 123, 125-6 (1993)(holding that even though no summary judgment motion was filed, if the claim “would have survived
summary judgment” it could not be sanctioned under OCGA § 9-15-14 absent the special circumstances noted in Porter).

The latest word on this line of cases was in 2007 in the Court of Appeals opinion of Bacon v. Volvo Servs. Ctr., Inc., 2007 Ga. App. LEXIS 1207, 2007 Fulton Co. D. Rep. 3476 (2007). In Bacon, the plaintiff had, in the underlying litigation, moved for summary judgment and lost, moved for directed verdict and lost, and had a jury rule in favor of the defendant, Volvo. Bacon had prevailed, however, on appeal. Bacon v. Volvo Svc. Ctr., 266 Ga. App. 543, 544, 597 S.E.2d 440 (2004). Bacon then brought the abusive litigation claim. The trial court granted summary judgment to Volvo on the abusive litigation claim. The Court of Appeals affirmed. The Court made the following observations or holdings:

- Prevailing on summary judgment or on appeal does not automatically mean that the winner is entitled to fees for frivolous litigation under O.C.G.A. § 9-15-14 or 51-7-80 et seq.
- Having a summary judgment motion denied does not mean that the movant cannot prevail on an attorney’s fees claim, but the standard in Porter (“... the trial court may only award fees to a party whose motion for summary judgment was denied in an ‘unusual case’ where the trial judge could not foresee at the summary judgment stage the facts it later found authorized the fee award.”) applies.
- The trial court properly considered the procedural history of the case.

In one respect, this case does not seem that groundbreaking. The Court held that Bacon was prevented from prevailing on its abusive litigation claim unless he could show
something more than winning on appeal. That is not surprising. What makes this case important is that it establishes a rule that a trial court’s denial of summary judgment, directed verdict, and a jury award against the abusive litigation plaintiff will be defenses to an abusive litigation claim as a matter of law even if the trial court and jury verdict were in error as a matter of law. As discussed above, the Court went further to hold that this same procedural history (of trial court and jury error) established Volvo’s good faith defense as a matter of law.

Consider the opposite. What if the trial court had granted the summary judgment motion. Or the directed verdict motion. Or a JNOV. At what point would Bacon have still had a viable claim? Certainly, had the summary judgment motion been granted, and he could establish his elements with some evidence, his abusive litigation claim probably would have been permitted to continue to a jury trial. At least, the Court could not have granted summary judgment on the basis of his losing, in error, the summary judgment motion. Does this mean that a trial court’s incorrect rulings on legal, dispositive motions, will cause a party to lose as a matter of law an otherwise potential claim under O.C.G.A. § 9-15-14 or 51-7-80 et seq? It would appear so.

Based on the foregoing authority, the trial court’s denial of a motion for summary judgment is apparently treated as “substantial success” absent unusual circumstances. The application of this rule is quite friendly to the litigant that is willing to lie and thus avoid summary judgment. The Court of Appeals recognized this, in dicta, in Morrison v. J. H. Haney, Inc., 256 Ga. App. 38, 40, 567 S.E. 2d 370, 372 (2002). In Morrison, a dispute over the day of the incident was dispositive. The claimant testified as to a later date, and the defendant had overwhelming evidence of an earlier date, including the
plaintiff’s signature on dated medical records. Despite the overwhelming documentary and other evidence, the plaintiff’s testimony created a fact issue, though the Court stated that it “did not mean to imply that [the defendant] could not assert that [plaintiff’s] position backed substantial justification under [9-15-14].” Id. Maybe not, but the holding in Bacon would suggest otherwise.

The bottom line is that if your abusive litigation action involves a prior denial of summary judgment or a similar motion, a dispositive motion is potentially warranted. This would be so even if the trial court’s denial of the summary judgment motion was deemed to be error by an appellate court. There are some factors that might overcome that general rule, but they are few at this time.

2. Defeating a Motion for Directed Verdict

Like a motion for summary judgment, a motion for directed verdict “requires the trial court to determine whether the movant is entitled to a judgment as a matter of law on the facts established and whether there is a genuine issue as to any material fact.” Ansa Mufflers Corp., 201 Ga. App. at 604, 411 S.E.2d at 575. See also Bacon, supra.

When ruling on the validity of a criminal malicious prosecution claim, the Supreme Court held:

When the trial judge rules that evidence is sufficient as a matter of law to support a conviction (that is, sufficient to enable a rational trier of fact to find each and every element of the guilt of the accused beyond a reasonable doubt), we can see no reason why such a holding...should not suffice as to the existence of probable cause.


Following the same logic, the Court of Appeals held that the trial court’s denial of a motion for directed verdict, which required the submission of the case to the jury,
constituted “a ‘binding determination’ that the civil action against appellants did not lack substantial justification so as to render it frivolous, groundless or vexatious.” Biosphere Indus., Inc. v. Oxford Chem. Inc., 190 Ga. App. 613, 614-15, 379 S.E.2d 555, 556 (1989). In the specific context of 9-15-14, the Court of Appeals did not comment “whether the reasoning in Porter regarding rulings on motions for summary judgment is likewise applicable to rulings on motions for directed verdict....” Ansa Mufflers Corp., 201 Ga. App. at 604, 411 S.E.2d at 575.

Bacon, discussed above, also controls. In Bacon, the allegedly abusive litigant had survived both a summary judgment and a directed verdict/JNOV motion. The Court held that the procedural history as a whole justified summary judgment on the issue that the underlying case had substantial justification and established the good faith defense. The Court also pointed out that Bacon had failed to present any evidence of lack of substantial justification outside of Bacon’s victory on appeal in the underlying action. It did not matter to the court that the directed verdict/JNOV “victories” were deemed in error as a matter of law by the Court of Appeals.

It remains an open question whether other types of “success” might cut off liability for an abusive litigation claim. Examples to look for could include prevailing in a court annexed or court ordered non-binding arbitration or case evaluation.

3. Prevailing Before the Trial Court

If a party actually prevails at the trial court level and later is sued for abusive litigation, presumably as a result of a reversal on appeal, O.C.G.A. § 51-7-82(c) again provides a complete defense.
In *LoSonde v. Chase Mortgage Co.*, 259 Ga. App. 772, 577 S.E.2d 822 (2003), the Court of Appeals found that the abusive litigation defendant had prevailed in an underlying writ of possession litigation. That writ had not been appealed. Thus, the failure to prevail was a complete defense to the claim. *Id.* at 774, 577 S.E.2d at 824-25.

*Bacon v. Volvo Service Center*, 266 Ga. App. 543, 544, 597 S.E.2d 440 (2004), discussed in detail above, takes this line of thinking a step further and finds that prevailing in a jury trial, even if reversed on appeal, may be considered proof of substantial justification and good faith as a matter of law.

Also, this inference is reasonably made from case law interpreting 9-15-14. In *Colquitt v. Network Rental, Inc.*, 195 Ga. App. 244, 393 S.E.2d 28 (1990), Network Rental brought suit against Colquitt based on alleged breaches of various noncompetition clauses. In response thereto, Colquitt filed a counterclaim for attorneys’ fees. Although the trial court ruled that the noncompetition clauses at issue were enforceable and entered an injunction against Colquitt, the Supreme Court reversed. *Colquitt*, 195 Ga. App. at 245, 393 S.E.2d at 30. When ruling on Colquitt’s 9-15-14 claim, “[t]he trial court held that the fact that the restrictive covenant was eventually declared invalid did not mean the suit at its inception was ‘bereft of any justiciable issue.’” *Id.* at 393 S.E.2d at 30. Likewise, the Court of Appeals affirmed the trial court’s entry of summary judgment against Colquitt regardless of the ultimate decision of the Supreme Court: “Colquitt contends the trial court’s reliance on its original summary judgment order as establishing ‘substantial justification,’ which it labels as probable cause, was erroneous. It was not.” *Id.* at 246, 393 S.E.2d at 30.

4. **Conclusion**
These cases together lead us to a near bright line conclusion: absent largely undefined “unusual circumstances” or an adoption of the dicta in *Morrison*, (1) an abusive litigation claim cannot survive if the defendant’s abusive conduct survived summary judgment; (2) or if it survived directed verdict; (3) or if it prevailed in a jury trial, and (4) the former three points are true, even if the trial court committed error in allowing the claims to survive and is later reversed.

V. The Strict Notice Required by O.C.G.A. §51-7-84

A. The Statute

To enable the window of opportunity and repent and be forgiven defense discussed earlier in this paper, the legislature included a specific notice condition precedent in the abusive litigation statute:

As a condition precedent to any claim for abusive litigation, the person injured by such act shall give written notice by registered or certified mail or statutory overnight delivery or some other means evidencing receipt by the addressee to any person against whom such injured person intends to assert a claim for abusive litigation and shall thereby give the person against whom an abusive litigation claim is contemplated an opportunity to voluntarily withdraw, abandon, discontinue, or dismiss the civil proceeding, claim, defense, motion, appeal, civil process, or other position. Such notice shall identify the civil proceeding, claim, defense, motion appeal, civil process, or other position which the injured person claims constitutes abusive litigation.

O.C.G.A. § 51-7-84(a). Given the specificity of this provision, the Court of Appeals easily resolved the few cases raising an interpretation of O.C.G.A. § 51-7-84(a).

B. The Notice Decisions

In four decisions, the Court of Appeals has held that O.C.G.A. § 51-7-84(a) requires that an abusive litigation defendant be named in the notice letter as a party
from whom damages may be sought.  Talbert, 200 Ga. App. at 313-14, 408 S.E.2d at 126-27; accord Merchant v. Mitchell, 241 Ga. App. 173, 173, 525 S.E.2d 710, 711 (1999); Carroll Co. Water Auth. v. Bunch, 240 Ga. App. 533, 534, 523 S.E.2d 412, 413-14 (1999); Payne, 234 Ga. App. at 526, 507 S.E.2d at 268. Without notice of the threat of future litigation, the allegedly abusive litigant does not have ample notice of the need to reconsider his position as contemplated by O.C.G.A. § 51-7-84(a) and, thus, cannot later be sued.

Statutory notice may be provided to a party through his or her attorney.  See Owens, 224 Ga. App. at 293-94, 480 S.E.2d at 866. If the attorney fails to advise the client of the notice letter, the client has the potential remedy of holding the attorney responsible for any subsequent loss.

It has been implied that notice does not arise merely by including a warning of abusive litigation in the answer.  Langley v. National Labor Group, Inc., 262 Ga. App. 749, 753, 586 S.E.2d 418, 422 (2003). Of course, if properly served by certified or overnight mail, notice through a pleading could be possible.

In Sevostiyanova v. Tempest Recovery Serv., 307 Ga. App. 868, 705 S.E.2d 878 (2011), the claimant for abusive litigation contended that the defendant had abusively attempted to collect on a debt that had been discharged in bankruptcy. In what can only be labeled a notice argument that failed on every level, the argument was that the Bankruptcy clerk had given the defendant notice to not seek further collection efforts on debts subject to the bankruptcy and that the defendant could have changed its conduct within 30 days of said notice. The Court noted that a standard creditor notice during a Federal bankruptcy action did not provide notice that pursuing a state court collection
case could subject it to abusive litigation damages. There were likely several other deficiencies in the notice that the Court did not discuss.

It is also important to realize that notice is required in every abusive litigation action, even if there is no need to give 30 days to reconsider the litigation under O.C.G.A. § 51-7-82 (a). See, O.C.G.A. § 51-7-82(a) (no 30 day grace period for certain types of abusive litigation claims interfering with the use of property, e.g., garnishment, writ of possession or dispossessory actions); Sloan v. Myers, 288 Ga. App. 8, 11, 653 S.E.2d 323 (2007) (notice required where underlying action a “writ of possession” claim); LaSonde v. Chase Mtg. Co., 259 Ga. App. 772, 774, 577 S.E.2d 822 (2003) (notice required where underlying action a dispossessory action). A nice example of this rule is set forth in Baylis v. Daryani, 294 Ga. App. 729, 731, 669 S.E.2d 674 (2008). In Baylis, the Court of Appeals affirmed the dismissal of an abusive litigation claim in part because the alleged notice had not been given in the allegedly abusive litigation. Instead, the claimant was attempting to rely upon an abusive litigation notice given in an earlier lawsuit between the same parties. “Even assuming the validity of the notice given in the earlier case, it cannot satisfy the notice requirement in this case because Baylis was not given the opportunity to withdraw his complaint in this action. Thus, CI’s overly broad definition of “claim” is of no assistance in this matter.” Id.

VI. The Statute of Limitations for Abusive Litigation Claims

A. The Statute

The legislature limited the statute of limitation for an abusive litigation claim as compared to its common law predecessor which had a two year statute. “An action or claim under [the abusive litigation statute] requires the final termination of the
proceeding in which the alleged abusive litigation occurred and must be brought within one year of the date of final termination.” O.C.G.A. § 51-7-84(b). The legislation did not define the terms “final termination” or “proceeding” as used in O.C.G.A. § 51-7-84(b).

B. The “Final Termination of the Proceeding”

1. What is the “Proceeding”?

On its face, the abusive litigation statute requires that a claim be initiated after “the final termination of the proceeding in which the alleged abusive litigation occurred . . .” O.C.G.A. § 51-7-84(b). Moreover, liability may be imposed upon “any person who takes an active part in the initiation, continuation, or procurement of civil proceedings against one another. . .” O.C.G.A. § 51-7-81. As used in the liability section of the statute, “civil proceeding” refers to “any action, suit, proceeding, counterclaim, cross-claim, third-party claim, or other claim at law or in equity.” O.C.G.A. § 51-7-80(l).

While the abusive litigation statute repeatedly refers to claims initiated in the context of “litigation,” the use of the more generic term “proceeding” provides an argument to expand abusive litigation beyond simple civil lawsuits. Despite the arguable vagueness of “proceeding,” an abusive litigation claim may not be predicated on pre-litigation activity. Ward v. Coastal Lumber Co., Inc., 196 Ga. App. 249, 251, 395 S.E.2d 601, 603 (1990). While the specific basis of the abusive litigation claim was not explained, the Court of Appeals held: “The trial court correctly granted summary judgment in favor of appellee as to appellant’s abusive litigation claim. The allegations of Count Two of appellant’s claim do not state a viable claim for abusive litigation under O.C.G.A. 51-7-80 et seq. but relate solely to appellee’s pre-litigation actions.” Id. (citing
Cobb County v. Sevani, 196 Ga. App. 247, 248, 395 S.E.2d 572, 574 (1990) (pre-acquisition activities were irrelevant to an analysis of a 9-15-14 claim)).

Georgia’s appellate courts have not reviewed an abusive litigation claim filed immediately upon the termination of the “proceeding” held within an ongoing lawsuit but ending before the entirety of the civil action. O.C.G.A. § 51-7-84(b) plainly does not require that claims be brought after “the final termination of the lawsuit or civil action in which the alleged abusive litigation occurred.” Nonetheless, it is unlikely that Georgia courts would rule that an abusive litigation claim may be maintained prior to the final termination of the entire lawsuit or civil action. The abusive litigation statute, when read as a whole, intimates that claims brought under it will be litigated in a subsequent lawsuit. See O.C.G.A. §§ 51-7-82(b)-(c) (the defense of substantial success includes the phrase “underlying civil proceeding”); O.C.G.A. § 51-7-83(a) (“A plaintiff who prevails in an action under this article shall be entitled to...”) (emphasis added). Furthermore, to the extent that parties are compelled to seek recourse for frivolous conduct during litigation, 9-15-14 may be used.

One clarification of “proceeding” has been suggested, however, by the Court of Appeals. The Court of Appeals, in dicta, recently stated that an abusive litigation claim was more appropriate than a 9-15-14 motion where the claimant had special damages in addition to attorney’s fees, or where the abusive conduct occurred outside of a court of record. Condon v. Vickery, 270 Ga. App. 322, 606 S.E.2d 336 (2004) (noting that an abusive litigation claim is proper when the abusive conduct occurred in a court other than a court of record).
Nevertheless, until the appellate courts construe the term “proceeding” two additional arguments are available to abusive litigation defendants: (1) a ripeness challenge to premature claims filed before the final termination of the lawsuit; and (2) a statute of limitations challenge to claims filed more than one year after the discrete “proceeding” in which the allegedly abusive conduct occurred, to the extent that the conduct may be isolated to a given “proceeding.”

2. The “Final Termination”

An abusive litigation claim must be brought after the “final termination” of the proceedings. O.C.G.A. § 51-7-84(b). Given that litigation arguably may be terminated by, among other things, settlement, a voluntary dismissal with or without prejudice, a jury verdict, a judgment of the trial court, or an appellate ruling, the failure to define “final termination” is potentially troublesome.

An easy case arises when the allegedly abusive litigation is still proceeding with the same parties, and thus not terminated. Because the abusive litigation claimant must prevail, and the claim may only be brought after the “final termination” of the abusive proceeding, it follows that an abusive litigation claim cannot be brought as a counterclaim. Langley v. National Labor Group, Inc., 262 Ga. App. 749, 753, 586 S.E.2d 418, 422 (2003)

The Court of Appeals has adopted a narrow construction of the term “final termination” which significantly clarifies when abusive litigation claims must be brought. It might be said generally that “final termination means an adjudication on the merits so that the action cannot be recommenced.” Land v. Boone, 265 Ga. App. 551, 554, 594 S.E.2d 741, 744 (2004).
a. Dismissal Without Prejudice

In *Hallman v. Emory University*, 225 Ga. App. 247, 483 S.E.2d 362 (1997), the procedural posture of the case was as follows:

- Hallman filed an employment action against Emory and others, and immediately secured an interlocutory injunction;
- After Hallman avoided Emory’s attempt to take her deposition, Emory filed a motion to dismiss or, alternatively, to compel and impose sanctions;
- The trial court granted the motion to dismiss with prejudice and awarded attorneys’ fees to Emory;
- On a motion for reconsideration, the trial court modified its order to dismiss the case without prejudice;
- Within 45 days of the revised order, Emory filed a motion for attorneys’ fees pursuant to 9-15-14 and the abusive litigation statute; and
- The trial court entered an award of attorneys’ fees under the abusive litigation statute, finding that two counts of Hallman’s complaint were brought with malice.

*Id.* at 247, 483 S.E.2d at 364.

In response to Hallman’s appeal of the award of attorneys’ fees, Emory moved to dismiss the appeal on jurisdictional grounds, citing to authority under 9-15-14 prohibiting direct appeals of ancillary fee awards. *Id.* at 248, 483 S.E.2d at 364. Relying on O.C.G.A. § 51-7-83(b), which provides that abusive litigation claims for attorneys’ fees and expenses only shall be brought pursuant to the procedures provided in 9-15-14, the Court of Appeals held that the fee award to Emory was subject to a direct appeal. *Id.* at 248-49, 483 S.E.2d at 365. Therefore, the Court of Appeals treated the fee petition as an independent cause of action brought under the abusive litigation statute within the 45-day period provided by section 9-15-14. *Id.*
Next, the Court of Appeals turned to whether the fee award was entered after the final termination of the underlying proceeding. Recognizing that the trial court modified its order dismissing Hallman’s complaint from with prejudice to without prejudice, the Court first commented that “[u]nder O.C.G.A. § 51-7-84(b), a ‘final termination of the proceeding’ means that the case has been finally concluded and has nothing ancillary pending . . .” Id. at 249, 483 S.E.2d at 365. In determining that Emory’s action under the abusive litigation statute was not ripe, the Court held:

As an essential condition precedent to having a cause of action under O.C.G.A. § 51-7-80 et seq., there must be a ‘final termination of the proceeding,’ and not a dismissal of the action without prejudice, which action can be refiled timely, because then an abusive litigation action would be premature. [Cits. omitted] Final determination is by judgment or dismissal on the merits.

Id. at 250, 483 S.E.2d at 366 (emphasis added); accord Stocks v. Glover, 220 Ga. App. 557, 559, 469 S.E.2d 677, 679 (1996) (“[W]e conclude that the trial court properly dismissed Glover’s abusive litigation claim as premature since it was brought before the final termination of the proceeding. Stocks’ voluntary dismissal of her original action was not a ‘final termination’ of the proceeding for the purposes of this section.”); Florida Rock Indus., Inc. v. Smith, 163 Ga. App. 361, 362, 294 S.E.2d 553, 554 (1982) (a voluntary dismissal without prejudice is not a final termination for the purposes of a malicious prosecution claim “because it is not a judgment at law or dismissal reaching the substantive right to the cause of action”); compare Roberson v. Central Fidelity Bank, 190 Ga. App. 382, 383, 378 S.E.2d 698, 699 (1989) (“[a] ‘disposition’ for the purposes of a Yost [section 9-15-14] claim includes a voluntary dismissal without prejudice by the plaintiff under O.C.G.A. § 9-11-41(a).”

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By requiring a substantive ruling before an abusive litigation claim may proceed, the Court of Appeals followed the fundamental intent of the General Assembly in narrowly prescribing the independent tort of abusive litigation. At the same time, the holdings in Hallman and Stocks pose intuition problems with the plain language of O.C.G.A. § 51-7-82(a). In holding that a voluntary dismissal without prejudice cannot support an abusive litigation claim, a party conceivably may dismiss the allegedly abusive claim or position well beyond the 30-day “window of opportunity” contemplated in O.C.G.A. § 51-7-82(a). As long as the later dismissal is without prejudice, the prospective abusive litigation plaintiff is faced with a Hobson’s choice. First, he may file an immediate action and face a ripeness challenge pursuant to Hallman and Stocks. Alternatively, he may wait until the statute of limitations or renewal period expires to supply the “final termination” required by O.C.G.A. § 51-7-84(b). In some cases, litigation necessarily will drag on for interminable lengths of time before an abusive litigation lawsuit is procedurally viable. Absent clarification, a party receiving an abusive litigation notice letter arguably may use a dismissal without prejudice as an affirmative weapon against a future lawsuit.

b. Settlement

Without citing to the definition of “final termination” in Hallman, the Court of Appeals followed 9-15-14 precedent to hold that a settlement may not provide the final termination required to file an abusive litigation lawsuit. Kluge, 226 Ga. App. at 900-01, 487 S.E.2d at 394 (citing Hunter v. Schroeder, 186 Ga. App. 799, 800, 368 S.E.2d 561, 562 (1988)). Absent an unequivocal reservation of the claim, a settlement
precludes a subsequent abusive litigation action as a matter of law. 226 Ga. App. at 900-01, 487 S.E.2d at 394.

c. Jury Verdict

A jury verdict does not constitute a “final termination” of the proceedings because the trial court has the inherent authority to modify or set aside a verdict after it is rendered. Since a verdict standing alone does not deprive a party of its substantive right to pursue the cause of action or position alleged to be abusive, it would not satisfy the malicious prosecution standard set for final terminations. See Florida Rock Indus., Inc., 163 Ga. App. at 362, 294 S.E.2d at 554. Moreover, in dismissing a 9-15-14 claim premised on a favorable jury verdict, the Court of Appeals held that “the phrase ‘final disposition’ is synonymous with the phrase ‘final judgment’, ‘that is to say, where the case is no longer pending in the court below . . .’” Marshall v. Ricmar, Inc., 215 Ga. App. 470, 470, 451 S.E.2d 515, 515 (1994) (quoting Fairburn Banking Co., 263 Ga. at 794, 439 S.E.2d at 483).

C. The Effect of an Appeal on a Seemingly Final Termination

As briefly discussed above, a trial court judgment does not necessarily signal the final termination of the proceedings. Thereafter, litigants have an automatic right to appeal “final judgments” to the Court of Appeals or the Supreme Court, and, thereafter, may continue the appellate process. While a judgment entered by the trial court generally “is suspended when an appeal is entered within the time allowed,” Lexington Dev., Inc. v. O’Neal Constr. Co., Inc., 143 Ga. App. 440, 441, 238 S.E.2d 770, 771 (1977), Georgia courts have reached different results when analyzing the impact of an appeal on the ability of litigants to pursue 9-15-14 and common law malicious prosecution claims.

In Fairburn Banking Co. v. Gafford, 263 Ga. 792, 439 S.E.2d 482 (1994), the Supreme Court held that the phrase “final disposition of the action,” as used in 9-15-14, means the final judgment of the trial court regardless of the filing of a subsequent appeal. Id. at 793, 439 S.E.2d at 483. As the basis for its decision, the Supreme Court focused on four factors:

- Section 9-15-14 does not authorize the imposition of attorneys’ fees and expenses before an appellate court;
- An award under 9-15-14 is not limited to the party ultimately prevailing in initial phase of litigation, therefore eviscerating the need for the trial court to be sure which party will prevail;
- Trial courts have jurisdiction to consider ancillary matters following the filing of a notice of appeal subject to a later decision that the trial court overstepped its bounds; and
- Immediate review allows the finder of fact to consider section 9-15-14 claims while the “memory of events is still fresh.”

Id. Furthermore, the Supreme Court reached this conclusion despite explicitly recognizing that there may be a benefit to waiting for resolution for all appeals, because the appellate process might reverse the ruling upon which a 9-15-14 claim is based and thereby moot the claim. Id. [Note: Implicit in this statement is that an abusive litigation/9-15-14 claim would be invalid if the success by the claimant in the trial court were reversed, but the reversal of a decision in the trial court denying summary judgment apparently protects the abusive litigant from a claim.]

Georgia’s appellate courts have explicitly allowed for 9-15-14 motions to be held while a case’s substantive issues are being appealed. Avren v. Garten, 289 Ga. App. 186,
710 S.E.2d 130 (2011) In *Avren*, a mother appealed the trial court’s decision finding her in contempt of the divorce decree and dismissing her petition for contempt against the father. *Id.* While the mother was appealing the trial court’s substantive rulings, the father sought fees under O.C.G.A. § 9-15-14, and the trial court awarded him $16,864.50 in attorney’s fees. *Id.* at 189, 710 S.E.2d at 136. The mother also appealed the 9-15-14 order and contended that her appeal of the substantive issues deprived the trial court of jurisdiction over the father’s 9-15-14 motion. *Id.* at 190, 710 S.E.2d at 136. However, the Court of Appeals disagreed. The Court noted that although a notice of appeal “deprives the trial court of the power to affect the judgment appealed,” “it does not deprive the trial court of jurisdiction of other matters in the same case not affecting the judgment on appeal.” *Id.* at 190, 710 S.E.2d at 136. However, the Court did note that had it disagreed with the trial court’s ruling on the substantive issues on appeal upon which the fee award was based (which it did not in this case) then the Court would require the trial court to re-visit the matter of the fees awarded. *Id.* at 191, 710 S.E.2d at 137.

Conversely, the Court of Appeals held that the statute of limitations applicable to malicious prosecution claims begins to run at the entry of judgment if no appeal is timely filed. *Scott*, 168 Ga. App. at 816, 310 S.E.2d at 773. In *Scott*, the claimant was granted a directed verdict on August 19, 1980, and no appeal was taken. On August 31, 1992, the claimant instituted a malicious prosecution lawsuit outside of the two-year period calculated from the entry of the directed verdict, but within the two-year period calculated from when an appeal could have been filed. *Id.* Instead of immediately
looking to the date the directed verdict was entered, the Court of Appeals relied on the fact that no actual appeal was taken. \textit{Id.} at 816, 310 S.E.2d at 774.

If an appeal is filed during this 30-day period, the effect is to suspend the finality of the trial court's judgment. In other words, a 'judgment cannot be treated as final so long as either party has the right to have it reviewed by [an appellate court]. However, when no timely attempt is subsequently made to reverse the original judgment of the trial court, it becomes the conclusively final judgment of the case and the point of final termination of the proceedings.' \textit{Id.} at 816, 310 S.E.2d at 773.

\textbf{D. Appeals}

Where a case is taken up on appeal, and the appellate decision is a final decision, and not remanded for further proceedings, the appellate opinion is the final disposition. \textit{Wilson v. Hinely}, 259 Ga. App. 615, 578 S.E.2d 254 (2003). In \textit{Wilson}, the underlying case was resolved by an appellate opinion of the Court of Appeals issued February 17, 1999. An abusive litigation claim was filed on February 18, 2000. The claimant argued that the “final termination” triggering the statute of limitations was not the Court of Appeals opinion, but the issuance of the remittitur. The Court of Appeals disagreed, holding that when “a final judgment of the trial court is affirmed by this court, and not remanded to the trial court for further proceedings, the controversy is at an end; the rights of the parties, so far as they are involved in the litigation, are conclusively adjudicated.” \textit{Id.} at 616, 578 S.E.2d at 255-56 (quoting \textit{Optical of Monroeville, Inc. v. State Bd. Of Examiners in Optometry}, 219 Ga. 856, 857-58, 136 S.E.2d 371 (1964)).

For the foregoing reasons, the one-year statute of limitations applicable to abusive litigation claims should begin to run at the entry of a final judgment or, if an appeal is taken, at the entry of the final appellate decision.
VII. The Exclusive Remedy Defense

The abusive litigation statute was enacted to replace Yost and other common law claims.

On or after April 3, 1989, no claim other than as provided in this article or in Code Section 9-15-14 shall be allowed, whether statutory or common law, for the torts of malicious use of civil proceedings, malicious abuse of civil process, nor abusive litigation, provided that claims filed prior to such date shall not be affected. This article is the exclusive remedy for abusive litigation.

O.C.G.A. § 51-7-85. Any claims effectively sounding in abusive litigation must follow the procedures set forth in the statute regardless of the labels attached to them by plaintiffs.

The Court of Appeals applied this statute to affirm the trial court’s dismissal of a tortious interference with contract claim based on the filing of a *quo warranto* action. Phillips v. MacDougald, 219 Ga. App. 152, 156, 464 S.E.2d 390, 395 (1995). As an initial matter, the court held that “a claim for tortious interference with contractual relations cannot be predicated upon an allegedly improper filing of a lawsuit.” Id. Following O.C.G.A. § 51-7-85, Phillips was required to satisfy the condition precedents set forth in the abusive litigation statute regardless of his attempt to label his claim as sounding in tortious interference with contract. Id. at 157, 464 S.E.2d at 396. Since MacDougald presented evidence that Phillips failed to provide statutory notice of his “tortious interference” abusive litigation claim, the trial court appropriately granted summary judgment. Id.

This holding has been consistently upheld. Slone v. Myers, 288 Ga. App. 8, 11, 653 S.E.2d 323 (2007) (plaintiff failed to follow notice provisions of abusive litigation statute and could not proceed with claims for conspiracy, RICO, perjury, forgery and...
theft arising out of prior lawsuit); Nairon v. Land, 242 Ga. App. 259, 261, 529 S.E.2d 390 (2000) (plaintiff could not avoid requirements of abusive litigation statute by filing claims for negligent and intentional infliction of emotional distress resulting from a lawsuit).

The exclusive remedy provision should provide a defense to any number of claims, including emotional distress, tortious interference with contract and breach of contract claims, if they relate to the initiation and/or continuation of litigation.

VIII. The Other Damages Requirement

O.C.G.A. § 51-7-83(b) states as follows:

If the abusive litigation is in a civil proceeding of a court of record and no damages other than costs and expenses of litigation and reasonable attorney's fees are claimed, the procedures provided in Code Section 9-15-14 shall be utilized instead.

Thus, if the underlying proceeding took place in a court of record, O.C.G.A. § 51-7-83(b) requires that a claimant must allege and be entitled to recover damages in addition to attorneys’ fees in order to maintain an abusive litigation claim. Otherwise, the party seeking recovery for only attorneys’ fees must use the procedure provided by 9-15-14. This can serve as a defense to an abusive litigation claim. If the claim does not arise out of a court of record, e.g., the abusive litigation took place in Probate Court, then an abusive litigation claim is allowed. Condon v. Vickery, 270 Ga. App. 322, 327, 606 S.E.2d 336, 341 (2004) (noting that an abusive litigation claim is proper when the abusive conduct occurred in court other than a court of record).
Although the statute states only that damages other than attorneys fees must be “claimed,” the Court of Appeals has interpreted this to mean that such other damages must arise out of a viable claim. In Sharp v. Greer, Klosik & Daugherty, 256 Ga. App. 370, 568 S.E.2d 503 (2002), Sharp’s abusive litigation claim was brought along with claims for intentional infliction of emotional distress and RICO. The Court of Appeals held that the intentional infliction of emotional distress claims and RICO claims were properly dismissed from the case. Thus, Sharp’s only remaining claim was for attorneys’ fees and costs. The Court of Appeals held that the claimant was limited to a 9-15-14 remedy, and his abusive litigation claim was dismissed. Adding a count for punitive damages was not sufficient to overcome the other damages rule. Id. at 373, 568 S.E.2d at 506. Thus, when defending an abusive litigation claim, the ability to obtain partial summary judgment on claims for damages other than attorneys’ fees and costs could result in a dispositive motion on the abusive litigation claim.

Also, this rule could prove useful in obtaining a JNOV at trial even if other damages were presented to the jury. If one is defending a trial for abusive litigation, a special verdict form should be employed. If the jury verdict favors the plaintiff, but only awards damages for attorneys’ fees and costs, and not for other elements of damage claimed, presumably the defendant would be entitled to judgment.

In a manner consistent with the workers’ compensation subrogation cases, however, it will be important to make the jury itemize the various damages. Otherwise, the Court will likely conclude that the jury negotiated the total claim, and refuse to say that the award was just for attorneys’ fees if other damages might have been part of the general verdict.
IX. Victory In Prior O.C.G.A. § 9-15-14 Motion

O.C.G.A. § 51-7-83(c) provides as follows: “No motion filed under Code Section 9-15-14 shall preclude the filing of an action under this article for damages other than costs and expenses of litigation and reasonable attorney’s fees. Any ruling under Code Section 9-15-14 is conclusive as to the issues resolved therein.”

This statute has two important meanings. First, to the winner of a 9-15-14 motion, the amount of attorneys’ fees is set. An abusive litigation claim would still be permissible, but the recovery is limited to the “other damages” and cannot include an additional award of attorneys’ fees.

More importantly, for the loser of a 9-15-14 motion, despite the slight variations of language between the elements for the abusive litigation tort and the 9-15-14 motion, the denial of a 9-15-14 motion should preclude any claim under 51-7-80 et seq. This is confirmed by the recent opinion in Freeman v. Wheeler, 277 Ga. App. 753, 627 S.E.2d 86 (2006). In Freeman, the claimant brought a 9-15-14 motion in the initial medical malpractice litigation over the defendants’ use of the peer review privilege. The court denied the motion on its merits, finding that the defendants’ raising of the privilege was not sanctionable. Following the conclusion of the medical malpractice action, the claimant then brought an abusive litigation lawsuit. The Court of Appeals upheld the application of collateral estoppel based on the denial of the 9-15-14 motion. The Court held that the parties to both actions, and the allegedly abusive conduct alleged in both actions, were identical, and thus precluded by the prior ruling. The Court did not address whether the slight variation of the elements for among 9-15-14 (a), 9-15-14 (b) and 51-7-80 et seq. would affect the preclusion issue.
X. **Courts And Proceedings In Which Abusive Litigation Claim May Be Made**

As a general rule, the abusive litigation claim may be made if the underlying action arose in a court organized under the laws of the state of Georgia and existed as a “trial court.” In other words, abusive litigation claims may be made if the underlying action was brought Probate Court, Magistrate Court, State Court or Superior Court. An abusive litigation claim may not be made to recover damages for pre-suit attorneys’ fees, fees arising out of appeals before the Georgia Court of Appeals or Supreme Court of Georgia, or claims made in Federal Court. *Condon v. Vickery*, 270 Ga. App. 322, 327, 606 S.E.2d 336, 341 (2004) (noting that an abusive litigation claim is proper when the abusive conduct occurred in court other than a court of record); *Great Western Bank v. Southeastern Bank*, 234 Ga. App. 420, 507 S.E.2d 191 (1999) (Rule 11 is remedy for abusive litigation in Federal Courts; abusive litigation claim may not be made); *Ward v. Coastal Lumber Co., Inc.*, 196 Ga. App. 249, 251, 395 S.E.2d 601, 603 (1990) (abusive litigation may not be premised on pre-litigation activity);

XI. **Conclusion**

Given the number of defenses and open issues discussed throughout this paper, the tort of abusive litigation remains a virtual minefield for attorneys and litigants. As the Georgia appellate courts continue to issue decisions interpreting the abusive litigation statute, a number of rules of practice may be gleaned to guide the conduct of those involved in the all to contentious world of litigation. By following these rules, attorneys may provide their clients with valuable, cost-efficient services and avoid becoming defendants in future malpractice claims.
Accordingly, if you are an attorney that receives an abusive litigation letter during the course of litigation, follow these rules of thumb:

- Immediately provide your client with notice of the abusive litigation letter, in writing and, preferably, by certified or registered mail;
- Immediately provide your client with a status report on the facts and law analyzing the merits of the allegedly abusive claim or position;
- Confirm the facts provided by your client and known witnesses, and continue your “reasonable inquiry” into those facts;
- Secure a second opinion from members of your firm;
- Consult with the client about securing a second opinion from a respected attorney familiar with the subject matter at issue;
- Preferably with these additional opinions, advise your client on whether to continue litigating the allegedly abusive claim or position;
- Document, document, document – by all means, confirm your advice in writing, including the “pros” and “cons” discussed with your client;
- Advise opposing counsel in writing of your position without revealing your mental impressions; and
- If you continue to litigate, continue to investigate until the conclusion of the claim or position at issue.

If you are a client that receives notice of alleged abusive litigation, the fundamental rule of thumb is one of objective distrust. With a 30-day window of opportunity at your sole election, you need to evaluate the true value of the claim or position at issue, and the advice provided by your attorney with respect to that claim or position. Consider hiring another attorney to evaluate the claim or position. Consider whether you have been completely honest with yourself and your attorney. Most importantly, check your emotions at the door, as your emotions may result in years of unwarranted and costly litigation.
If you are an attorney defending an abusive litigation claim, presumably because one or more of the above rules were discarded somewhere along the way, consider these “phase one” options, preferably in their order of appearance:

- Review the abusive litigation notice letter to determine its sufficiency and, specifically, whether your client was named as a party from whom damages may be sought;
- Determine whether the plaintiff seeks damages other than attorneys’ fees so as to warrant a separate lawsuit, as opposed to a section 9-15-14 proceeding;
- Review the pleadings to determine whether a “final termination of the proceeding” has been secured by the plaintiff;
- Determine whether the “final termination of the proceeding” occurred within one-year of the inception of the current lawsuit;
- Determine whether the “final termination of the proceeding” was secured by a voluntary dismissal without prejudice, thereby triggering a ripeness challenge pursuant to Hallman and Stocks;
- Determine whether your client arguably took advantage of the 30-day window of opportunity defense provided in O.C.G.A. § 51-7-82(a) via any meaningful “discontinuance” of the proceedings;
- Determine whether the underlying claims survived a motion for summary judgment or more;
- Determine whether your case exclusively involves questions of law and, therefore, warrants an early motion for summary judgment that actually may be heard by the trial court; and
- Determine whether a reliance on counsel defense is feasible, especially considering the accompanying waiver of the attorney-client privilege.

Finally, if none of the more immediate defenses are available, consider your witness pool and potential expert witness testimony, and re-evaluate your fundamental belief in your client. If all else fails tee it up or consider settlement.

XI. **Abusive Litigation Statutes**

O.C.G.A. § 51-7-80 (2006)
§ 51-7-80. Definitions

As used in this article, the term:

(1) "Civil proceeding" includes any action, suit, proceeding, counterclaim, cross-claim, third-party claim, or other claim at law or in equity.

(2) "Claim" includes any allegation or contention of fact or law asserted in support of or in opposition to any civil proceeding, defense, motion, or appeal.

(3) "Defense" includes any denial of allegations made by another party in any pleading, motion, or other paper submitted to the court for the purpose of seeking affirmative or negative relief, and any affirmative defense or matter asserted in confession or avoidance.

(4) "Good faith," when used with reference to any civil proceeding, claim, defense, motion, appeal, or other position, means that to the best of a person's or his or her attorney's knowledge, information, and belief, formed honestly after reasonable inquiry, that such civil proceeding, claim, defense, motion, appeal, or other position is well grounded in fact and is either warranted by existing law or by reasonable grounds to believe that an argument for the extension, modification, or reversal of existing law may be successful.

(5) "Malice" means acting with ill will or for a wrongful purpose and may be inferred in an action if the party initiated, continued, or procured civil proceedings or process in a harassing manner or used process for a purpose other than that of securing the proper adjudication of the claim upon which the proceedings are based.

(6) "Person" means an individual, corporation, company, association, firm, partnership, society, joint-stock company, or any other entity, including any governmental entity or unincorporated association of persons with capacity to sue or be sued.

(7) "Without substantial justification," when used with reference to any civil proceeding, claim, defense, motion, appeal, or other position, means that such civil proceeding, claim, defense, motion, appeal, or other position is:

(A) Frivolous
(B) Groundless in fact or in law; or

(C) Vexatious.

(8) "Wrongful purpose" when used with reference to any civil proceeding, claim, defense, motion, appeal, or other position results in or has the effect of:

(A) Attempting to unjustifiably harass or intimidate another party or witness to the proceeding; or

(B) Attempting to unjustifiably accomplish some ulterior or collateral purpose other than resolving the subject controversy on its merits.

O.C.G.A. § 51-7-81 (2006)

§ 51-7-81. Liability for abusive litigation
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. § 51-7-82 (2006)

§ 51-7-82. Defenses

(a) It shall be a complete defense to any claim for abusive litigation that the person against whom a claim of abusive litigation is asserted has voluntarily withdrawn, abandoned, discontinued, or dismissed the civil proceeding, claim, defense, motion, appeal, civil process, or other position which the injured person claims constitutes abusive litigation within 30 days after the mailing of the notice required by subsection (a) of Code Section 51-7-84 or prior to a ruling by the court relative to the civil proceeding, claim, defense, motion, appeal, civil process, or other position, whichever shall first occur; provided, however, that this defense shall not apply where the alleged act of abusive litigation involves the seizure or interference with the use of the injured person's property by process of attachment, execution, garnishment, writ of possession, lis pendens, injunction, restraining order, or similar process which results in special damage to the injured person.

(b) It shall be a complete defense to any claim for abusive litigation that the person against whom a claim of abusive litigation is asserted acted in good faith; provided, however, that good faith shall be an affirmative defense and the burden of proof shall be on the person asserting the actions were taken in good faith.

(c) It shall be a complete defense to any claim for abusive litigation that the person against whom a claim of abusive litigation is asserted was substantially successful on the issue forming the basis for the claim of abusive litigation in the underlying civil proceeding.

O.C.G.A. § 51-7-83 (2006)

§ 51-7-83. Measure of damages

(a) A plaintiff who prevails in an action under this article shall be entitled to all damages allowed by law as proven by the evidence, including costs and expenses of litigation and reasonable attorney’s fees.

(b) If the abusive litigation is in a civil proceeding of a court of record and no damages other than costs and expenses of litigation and reasonable attorney’s fees are claimed, the procedures provided in Code Section 9-15-14 shall be utilized instead.

(c) No motion filed under Code Section 9-15-14 shall preclude the filing of an action under this article for damages other than costs and expenses of litigation and reasonable attorney's fees. Any ruling under Code Section 9-15-14 is conclusive as to the issues resolved therein.

O.C.G.A. § 51-7-84 (2006)
§ 51-7-84. Notice of claim asserted; when action must be brought

(a) As a condition precedent to any claim for abusive litigation, the person injured by such act shall give written notice by registered or certified mail or statutory overnight delivery or some other means evidencing receipt by the addressee to any person against whom such injured person intends to assert a claim for abusive litigation and shall thereby give the person against whom an abusive litigation claim is contemplated an opportunity to voluntarily withdraw, abandon, discontinue, or dismiss the civil proceeding, claim, defense, motion, appeal, civil process, or other position. Such notice shall identify the civil proceeding, claim, defense, motion, appeal, civil process, or other position which the injured person claims constitutes abusive litigation.

(b) An action or claim under this article requires the final termination of the proceeding in which the alleged abusive litigation occurred and must be brought within one year of the date of final termination.


§ 51-7-85. Exclusive remedy

On and after April 3, 1989, no claim other than as provided in this article or in Code Section 9-15-14 shall be allowed, whether statutory or common law, for the torts of malicious use of civil proceedings, malicious abuse of civil process, nor abusive litigation, provided that claims filed prior to such date shall not be affected. This article is the exclusive remedy for abusive litigation.
Kim M. Jackson

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10:45  FEE SHIFTING UNDER THE RULES OF CIVIL PROCEDURE
A. OCGA §9-11-68 and Offers of Settlement
B. Fed. R. Civ. P. 11 and Sanctions
C. Fed. R. Civ. P. 68 and Offers of Judgment
D. Other Rules
Hugh C. Wood, Wood & Meredith LLP, Tucker
Georgia's Offer of Settlement Statute (OCGA § 9-11-68): Revisions and Cases through 2018

Hugh C. Wood, Esq.
Georgia's Offer of Settlement Statute (OCGA § 9-11-68):  
Revisions and Cases through 2018

Hugh C. Wood, Esquire, Atlanta, Georgia.

I. OCGA § 9-11-68, Georgia's Offer of Settlement Statute

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VI. Conclusion
This paper will review George's offer of settlements Statute OCGA § 9-11-68. It will review the mechanics of the statute, the important subparts to the statute, the "good faith" defense in the statute and it will review the jury homolog or companion statute known as OCGA§ 9-15-14. This paper will review the most important cases of 2018, 2017, 2016 and 2015. It will review the potential introduction of insurance (or private contracts of payment) that exist in other states to allow plaintiff (or defendant) to shift the risk of the loss of attorney's fees to an insurer. It will review some of the larger issues associated with enforcing OCGA§ 9-11-68 motions and finally will review the determination that OCGA § 9-11-68 is substantive law in federal court.

I. OCGA § 9-11-68, GEORGIA’S OFFER OF SETTLEMENT STATUTE

A. The Offer of Settlement Statute: OCGA § 9-11-68

OCGA § 9-11-68. Offer of Settlement

(a) At any time more than 30 days after the service of a summons and complaint on a party but not less than 30 days (or 20 days if it is a counteroffer) before trial, either party may serve upon the other party, but shall not file with the Court, a written offer, denominated as an offer under this Code section, to settle a tort claim for the money specified in the offer and to enter into an agreement dismissing the claim or to allow judgment to be entered accordingly. Any offer under this Code section must:

(1) Be in writing and state that it is being made pursuant to this Code section;

(2) Identify the party or parties making the proposal and the party or parties to whom the proposal is being made;

(3) Identify generally the claim or claims the proposal is attempting to resolve;

(4) State with particularity any relevant conditions;

(5) State the total amount of the proposal;

(6) State with particularity the amount proposed to settle a claim for punitive damages, if any;

(7) State whether the proposal includes attorney’s fees or other expenses and whether attorney’s fees or other expenses are part of the legal claim; and
(8) Include a certificate of service and be served by certified mail or statutory overnight delivery in the form required by Code Section 9-11-5.

(b)(1) If a defendant makes an Offer of Settlement which is rejected by the plaintiff, the defendant shall be entitled to recover reasonable attorney’s fees and expenses of litigation incurred by the defendant on the defendant’s behalf from the date of the rejection of the Offer of Settlement through the entry of judgment if the final judgment is one of no liability or the final judgment obtained by the plaintiff is less than 75 percent of such Offer of Settlement.

(2) If a plaintiff makes an Offer of Settlement which is rejected by the defendant and the plaintiff recovers a final judgment in an amount greater than 125 percent of such Offer of Settlement, the plaintiff shall be entitled to recover reasonable attorney’s fees and expenses of litigation incurred by the plaintiff on the plaintiff’s behalf from the date of the rejection of the Offer of Settlement through the entry of judgment.

(c) Any offer made under this Code section shall remain open for 30 days unless sooner withdrawn by a writing served on the offeree prior to acceptance by the offeree, but an offeror shall not be entitled to attorney’s fees and costs under subsection (b) of this Code section to the extent an offer is not open for at least 30 days (unless it is rejected during that 30 day period). A counteroffer shall be deemed a rejection but may serve as an offer under this Code section if it is specifically denominated as an offer under this Code section. Acceptance or rejection of the offer by the offeree must be in writing and served upon the offeror. An offer that is neither withdrawn nor accepted within 30 days shall be deemed rejected. The fact that an offer is made but not accepted does not preclude a subsequent offer. Evidence of an offer is not admissible except in proceedings to enforce a settlement or to determine reasonable attorney’s fees and costs under this Code section.

(d)(1) The Court shall order the payment of attorney’s fees and expenses of litigation upon receipt of proof that the judgment is one to which the provisions of either paragraph (1) or paragraph (2) of subsection (b) of this Code section apply; provided, however, that if an appeal is taken from such judgment, the Court shall order payment of such attorney’s fees and expenses of litigation only upon remittitur affirming such judgment.

(2) If a party is entitled to costs and fees pursuant to the provisions of this Code section, the Court may determine that an offer was not made in good faith in an order setting forth the basis for such a determination. In such case, the Court may disallow an award of attorney’s fees and costs.

(e) Upon motion by the prevailing party at the time that the verdict or judgment is rendered, the moving party may request that the finder of fact
determine whether the opposing party presented a frivolous claim or defense. In such event, the Court shall hold a separate bifurcated hearing at which the finder of fact shall make a determination of whether such frivolous claims or defenses were asserted and to award damages, if any, against the party presenting such frivolous claims or defenses. Under this subsection:

(1) Frivolous claims shall include, but are not limited to, the following:

(A) A claim, defense, or other position that lacks substantial justification or that is not made in good faith or that is made with malice or a wrongful purpose, as those terms are defined in Code Section 51-7-80;

(B) A claim, defense, or other position with respect to which there existed such a complete absence of any justiciable issue of law or fact that it could not be reasonably believed that a Court would accept the asserted claim, defense, or other position; and

(C) A claim, defense, or other position that was interposed for delay or harassment;

(2) Damages awarded may include reasonable and necessary attorney’s fees and expenses of litigation; and (3) A party may elect to pursue either the procedure specified in this subsection or the procedure specified in Code Section 9-15-14, but not both. Added by 2005 Ga. Laws 1, § 5, eff. 2/16/2005.

B. The Mechanics of the Statute

O.C.G.A § 9-11-68(a): The statute applies only to tort cases. While this author is certain that some creative practitioners will attempt to expand the scope of this charming statute to probate, hybrid-contract actions and other actions, it by its language, presently only applies to “tort” actions. Thus, your case must have the prerequisite of a tort claim to be able to make an Offer of Settlement. [1]

With regard to timing, the offer may only be made thirty (30) days after the service of the summons and complaint (Note: it does not refer to the Answer, but only service) and not less than thirty (30) days before trial.

Assuming that your case has a tort claim and the offer is made within the proper timing parameters (thirty (30) days after service or thirty (30) days before trial) then it must contain the following elements:

O.C.G.A § 9-11-68(a)(1): It must be in writing and it must specifically state that it is made under the Offer of Settlement statute 9-11-68;
O.C.G.A. § 9-11-68(a)(2): It must particularly identify which parties are making the offer [assuming that there are multiple parties in addition to a simple plaintiff and defendant]; it must also identify the target of the offer;

O.C.G.A. § 9-11-68(a)(3): It must identify, generally, the claim or claims concerning which the Offer desired to settle; [2]

O.C.G.A. § 9-11-68(a)(4): The offer must “state with particularity any relevant conditions.” What is the legal meaning of “relevant conditions?” This definition escapes this author.

O.C.G.A. § 9-11-68(a)(5): The offer must state the total dollar ($) amount of the proposal.

O.C.G.A. § 9-11-68(a)(6): The offer must state with particularity the amount that offeror proposes to settle any punitive damage claim;

O.C.G.A. § 9-11-68(a)(7): The offer must state specifically whether it includes “attorney’s fees” and/or other expenses and whether attorney’s fees or other expenses are part of the underlying legal claim;

O.C.G.A. § 9-11-68(a)(8): The offer must include a certificate of service and be served by certified or statutory overnight delivery (read that UPS or FedEx) in the form required by O.C.G.A. § 9-11-5.

Under Section O.C.G.A. § 9-11-68 (c) any offer made must remain open for Thirty 30 days unless withdrawn in writing served on the Offerer prior to acceptance. [3]

O.C.G.A. § 9-11-68(b). Liability for a Rejected Offer. It is somewhat difficult to state the liability for a rejected offer, however:

If defendant makes an Offer and it is rejected, plaintiff must beat the offer at trial by, at least, 75% of the rejected offer or pay defendant’s attorney’s fees.

If plaintiff makes an Offer and it is rejected, defendant is not liable for plaintiff’s attorney’s fees unless plaintiff beats the rejected offer by 125% of the amount of the offer.

C. The Good Faith Defense

The statute appears to allow the trial Court, upon motion of the non-prevailing party under an Offer of Settlement, to request that the Court find that Offeror knew that Offer of Settlement was not made “in good faith”. O.C.G.A. § 9-11-68(d)(2). If the Court finds the offer was not made in good faith, then the Offer of Settlement is just considered either void or null.

OGCA § 9-11-68(e). The 1987 enactment of OCGA § 9-15-14 motion for attorney’s fees for frivolous litigation and claims was supposed to be the remedy enacted by the legislature which merged all common law claims of malicious abuse and malicious use of prosecution into one statute. However, since the enactment of OCGA § 9-15-14, we have seen the enactment of OCGA § 51-7-80 through 85 and now a jury-driven version of OCGA § 9-15-14. Under subparagraph (e) of OCGA § 9-11-68 a prevailing party at the end of a jury trial may move the Court to allow the jury (then impaneled) to hear a bifurcated discussion of whether the claims advanced by the non-prevailing party were frivolous, lacked substantial justification or were not made in good faith.

If the jury finds that those claims were made during trial were frivolous then and in that event the jury may proceed to award damages against the non-prevailing party pursuant to OCGA § 9-11-68(e). It is possible that a motion under subparagraph (e) may be made to the judge; however, it is clear that the General Assembly wanted to give the prevailing party the opportunity to present frivolous claims to the jury then impaneled.

A prevailing party may not use both OCGA § 9-15-14 and OCGA § 9-11-68(e) for the same factual conduct by the non-prevailing party.

II. GEORGIA CASES INTERPRETING OCGA § 9-11-68

A. 2018 Cases


Family of decedent brought action against bank and beneficiary of decedent’s estate after beneficiary cashed pre-signed checks of decedent at bank. After family rejected bank’s offer for settlement, the trial court denied bank’s motion for summary judgment, and the Court of Appeals reversed. Bank then sought recovery of fees and expenses. The trial court found that bank’s offer of settlement had not been made in good faith and declined to award bank fees and expenses. Bank appealed. *Synopsis, Coastal Bank, supra.* Vacated and Remanded.

In Richardson v. Locklyn, 339 Ga. App. 457, 459-61, 793 S.E.2d 640 (2016), this Court adopted Florida’s test for determining whether an offer of settlement was made in good faith. See also OTS, Inc. v. Weinstock & Scavo, P.C., 339 Ga. App. 511, 520 (8), 793 S.E.2d 672 (2016) (physical precedent only). In Richardson, we acknowledged that determining whether an offer was made in good faith rests on whether the offeror has a reasonable foundation on which to base the offer and that “[s]o long as the offeror has a basis in known or reasonably believed fact to conclude that the offer is justifiable, the good faith requirement has been satisfied.” (Citation omitted.) Richardson, 339 Ga. App. at 460, 793 S.E.2d 640. *Coastal Bank, supra, at.*

The trial court found that a $3,000.00 offer made in the face of a much larger dispute was not made in “good faith”. The Court of Appeals vacated and said wrote that
the trial court failed to take into account the Bank’s subjective believe that the Plaintiff’s case was baseless on lack of standing and no jurisdiction.

Trial court’s failure to weigh objective considerations against bank’s subjective beliefs when making determination that bank’s settlement offer was not made in good faith was abuse of discretion in action brought by family of decedent against bank and beneficiary of decedent’s estate after beneficiary cashed pre-signed checks of decedent at bank; although court made a passing reference to bank’s defense that family lacked standing, court failed to weigh the objective factors, such as family’s ability to settle after offer was made, against bank’s subjective belief in the strength of its no-standing defense. Headnote 3, Coastal Bank, supra.


Hillman, supra, takes us down the slippery slope (predicted by this author in 2007) that adds other claims to the OCGA § 9-11-68 matrix of settlement offers. OCGA § 9-11-68(a) states it may be used to “settle a tort claim for the money specified in the offer” it discusses “torts”, not contracts and no other claims. Hillman, supra, injects other claims into the claims that may fit within OCGA § 9-11-68.

Hillman, supra, shows how a rejecting a $4,000.00 offer can into a judgment against you for $120,559.75 (they asked for $144,826.59) in attorney’s fees. (Ouch). The real danger in Hillman, supra, (physical precedent only; Court of Appeals Rule 33.2(a)) is that OCGA § 9-11-68 offers many now include “claim for equitable relief”.

The Procedural history of this case is set forth in the first appeal of this matter in 2015:

[O]n September 6, 2013, the Hillmans filed suit against their next-door neighbors, Bord and Bondar, for injunctive relief, nuisance, trespass, negligence, negligence per se, intentional infliction of emotional distress, punitive damages, and attorney fees. The Hillmans alleged that certain actions of Bord and Bondar resulted in increased water runoff on the Hillmans’s land, which caused damage to their property. On October 16, 2013, Bord and Bondar answered and counterclaimed for injunctive relief, nuisance, trespass, negligence, negligence per se, tortious interference with business relations, slander and oral defamation, punitive damages, attorney fees and costs of litigation. Bord and Bondar alleged that when the Hillmans constructed a retaining wall, it caused water to back up onto Bord and Bondar’s property, which caused damage to the property, including, but not limited to, flooding in their basement.


The Court of Appeals reversed a grant of partial summary judgment and returned the case to the trial court for a jury trial. The jury entered a verdict for neighbors (Bord)
on plaintiff owners' claims and entered a jury verdict for plaintiff owners on neighbors' counterclaims. Plaintiff (Hillman) owners appealed. After the Court of Appeals affirmed trial court's denial of equitable relief, neighbors moved for attorney fees pursuant to statute governing attorney-fee awards related to rejected offers to settle tort claims. After hearing, the trial court granted the motion in part and awarded neighbors $120,559.75 in fees. Plaintiff owners appealed. It was Affirmed, Subject to Rule 33.2(a).

The Court of Appeals affirmed the award of $120,559.75, even though the rejected offer contained claims other than tort claims.

This ruling is novel in Georgia law and this author believes the correct holding was more correctly stated by J. Barnes in her Dissent.

Barnes, Presiding Judge, dissenting.

I respectfully dissent. Based on the statutory framework and the rule of strict construction applicable in this context, an offer to settle made pursuant to OCGA § 9-11-68 can encompass only tort claims for damages, and such an offer cannot be conditioned on the dismissal of claims for non-monetary relief. Because the appellees conditioned their offer of settlement on the dismissal of the appellants' claims for injunctive relief, the appellees' offer did not qualify as an offer to settle under the statute. Accordingly, the trial court's award of attorney fees and expenses under OCGA § 9-11-68 should be reversed.

The language and structure of OCGA § 9-11-68 reflect that the legislature contemplated that it would apply only to offers to settle tort claims for damages. OCGA § 9-11-68 (a) authorizes a party to serve on the other party “a written offer[ ] ... to settle a tort claim for the money specified in the offer and to enter into an agreement dismissing the claim or to allow judgment to be entered accordingly.” OCGA § 9-11-68 (b) then addresses the circumstances under which fee-shifting will be triggered by a rejected offer of settlement: a defendant who makes an offer is entitled to fees “if the final judgment is one of no liability or the final judgment obtained by the plaintiff is less than 75 percent of such offer of settlement,” OCGA § 9-11-68 (b) (1); a plaintiff who makes an offer is entitled to fees if “the plaintiff recovers a final judgment in an amount greater than 125 percent of such offer of settlement.” OCGA § 9-11-68 (b) (2).

OCGA § 9-11-68 “is in derogation of common law and must be strictly construed against the award of [attorney fees and costs].” (Citations and punctuation omitted.) Alessi v. Cornerstone Assoc., 334 Ga. App. 490, 493, 780 S.E.2d 15 (2015). OCGA § 9-11-68 therefore “must be limited strictly to the meaning of the language employed, and not extended beyond the plain and explicit terms of the statute.” (Citation and punctuation omitted.) Delta Airlines v. Townsend, 279 Ga. 511, 512 (1),
614 S.E.2d 745 (2005). Because the method of comparing the offer amount and the final judgment is monetary in nature, the triggering mechanism for fee-shifting under OCGA § 9-11-68 (b) is predicated on an offer to settle one or more tort claims for damages. And, given that there is no similar provision that addresses how to compare an offer of settlement to a judgment awarding non-monetary relief, OCGA § 9-11-68, strictly construed, applies only to offers seeking to settle tort damages claims.

Nor should the term "any relevant conditions" found in OCGA § 9-11-68 (a) (4) be construed broadly to permit an offer of settlement to condition acceptance of the offer on the dismissal of claims for non-monetary relief. Construing "any relevant conditions" in such an expansive manner would be inconsistent with the rule of strict construction and with the fee-shifting provisions of OCGA § 9-11-68 (b) discussed above. See Vollrath v. Collins, 272 Ga. 601, 604 (2), 533 S.E.2d 57 (2000) (provisions of a statute should be construed harmoniously rather than in a manner that would render them inconsistent and contradictory). An expansion of the statute to encompass offers that seek the dismissal of claims for non-monetary relief "must come from the legislature, as it alone is entrusted with the authority to amend existing laws." *491 Abdulkadir v. Slate, 279 Ga. 122, 124 (2), 610 S.E.2d 50 (2005).

In light of the foregoing, OCGA § 9-11-68 does not apply to an offer of settlement that, as in the present case, sought to condition acceptance of the offer on the dismissal of claims for an injunction. Notably, Florida courts have reached a similar conclusion in construing that state's offer of judgment statute, 1 see Diamond Aircraft Indus. v. Horowitch, 107 So.3d 362, 372-376 (Fla. 2013); Winter Park Imports v. JM Family Enterprises, 66 So.3d 336, 340-342 (Fla. Dist. Ct. App. 2011); Palm Beach Polo Holdings v. Equestrian Club Estates Property Owners Assoc., 22 So.3d 140, 143-145 (Fla. Dist. Ct. App. 2009), and we have looked to that state for guidance in applying OCGA § 9-11-68. See Richardson v. Locklyn, 339 Ga. App. 457, 459, 793 S.E.2d 640 (2016) (noting that "Georgia's offer of settlement statute, part of the Tort Reform Act of 2005, is modeled after Florida's offer of judgment statute," and "[w]e therefore look to our sister state for guidance in its application").

Accordingly, the appellants' offer of settlement did not qualify as an offer of settlement under OCGA § 9-11-68, and the trial court erred in awarding attorney fees and expenses to the appellants under the fee-shifting provisions of that statute. Because the majority concludes otherwise, I respectfully dissent.

820 S.E.2d 482, 490.

A. 2017 Cases

In Muskogee State Court Attorneys Lloyd Bell, Andrew Dodgen, David Schlacher, Michael Watson and Darren Summerville tried Williams v. Tidwell, State Court of Muskogee County, CAF No. SC14CV0882 to a $26 million jury verdict in the second week of December 2017.

Upon information, Plaintiff had forwarded Defendant hospital a $10 million demand prior to proceeding to the jury. That demand was rejected. Upon the recovery of $26 million by jury verdict, Plaintiffs moved to enforce the prior OCGA 9-11-68 Award before the same trier of fact (the sitting jury) pursuant to the bifurcation provisions of 9-11-68(e). Apparently, the hospital (upon information) only had $25 million worth of insurance and if the bifurcated jury found 40 percent of $25 million (apparently $1 million of the $26 million was previously paid) to be attorney's fees to be awarded to Plaintiff under OCGA 9-11-68(e) then $10 million of an Award would not be covered by insurance.

This was one of the most high-profile bif urcations that we have seen since the enactment of OCGA 9-11-68 almost 12 years ago.

OCGA 9-11-68 (e) Upon motion by the prevailing party at the time that the verdict or judgment is rendered, the moving party may request that the finder of fact determine whether the opposing party presented a frivolous claim or defense. In such event, the court shall hold a separate bifurcated hearing at which the finder of fact shall make a determination of whether such frivolous claims or defenses were asserted and to award damages, if any, against the party presenting such frivolous claims or defenses.


In Strategic Law, the Court of Appeals allowed OCGA 9 11 68 attorney's fees to be sought by the party seeking to enforce a breached consent order of payment. Apparently, the parties settled and entered into a payment agreement. Pain Management breached the agreement. Strategic Law then moved to enforce the breached consent order and sought attorney's fees. Pain Management stated that it was a “contract” matter and not subject to OCGA § 9 11 68. Strategic Law asserted that the underlying case was a tort and that 9-11-68 applied. The Court of Appeals agreed with Strategic Law and we now have a case of first impression that 9-11-68 can be used to enforce nonpayment of a consent order.

Stevens, supra, provide the Bar with another example of Plaintiff wins but loses $50,000.00 to Defendant. The case was a slip and fall case against Food Lion in Metro Atlanta. Stevens, the Plaintiff, sued Food Lion for slip and fall. Prior to trial, Food Lion offered $25,000.00 pursuant to OCGA 9-11-68. Plaintiff rejected that amount and went to trial and recovered $25,000.00. Plaintiff was found to be 30 percent negligent thus she only recovered $17,500.00. Food Lion moved to put on its attorney’s fees and expenses which totaled $62,675.70. The Court granted the motion under the “shall” language of OCGA 9-11-68. Thus, while Plaintiff had an actual proven slip and fall injury, she ended up owing Food Lion $45,175.70 for the trouble of processing the case through our current legal system. This case is yet another anomaly of why Plaintiff should settle or if plaintiff goes to a jury it must recover more than 125 percent of the rejected demand.


B. 2016 Cases

A hearing is now required on all OCGA § 9-11-68 awards (practical meaning)


The Richardson case, is a very substantial change in the interpretation of OCGA § 9-11-68. While it indicates on its face that a hearing is now required for a "nominal offer of judgment", (a good faith offer in Georgia) the practical interpretation is that a hearing now seems to be required on all OCGA § 9-11-68 awards.

In May 2014 Locklyn sued Richardson for damages arising out of a 2012 automobile accident. Locklyn sought recovery for her medical bills and other damages. During discovery Locklyn produced medical bills totaling approximately $19,000.00. After this production of bills, in July 2014, Richardson (the defendant) sent Locklyn a formal offer under OCGA § 9-11-68 to settle her claims for $12,500.00. Locklyn rejected the offer.

The jury returned a verdict for Locklyn in the amount of $6,948.25. That was substantially below the amount necessary to avoid paying defendant’s attorneys’ fees. Under prior analysis of OCGA § 9-11-68 the Richardson lawyers should simply prove up the amount of attorneys’ fees they incurred after the rejection of the 9-11-68 offer and obtain a court order for attorney’s fees against Locklyn.

However, the Court of Appeals, en banc Judge Boggs, adopted the State of Florida's analysis concerning whether an offer of judgment was made in good faith. He noted that our OCGA § 9-11-68 was patterned after a Florida statute FLA. Stat. § 768.79 -- Offer of Judgment and Demand for Judgment, the Florida statute. Florida’s
law apparently has developed to where a nominal offer of judgment under the Florida statute requires a hearing.

Richardson’s attorneys moved for their attorneys’ fees. The Trial Court, upon review of the information, denied Richardson’s motion for fees noting that the offer of $12,500.00 was less than the disclosed $18,927.25 medical bills and the Court noted that Richardson admitted liability for the accident. Upon those facts the Trial Court said that the offer could not have been made in good faith. Absent the ruling in Richardson v. Locklyn, it would appear that the courts simply award the attorneys’ fees.

After Richardson v. Locklyn, the court must hold a hearing concerning whether the offer to settle was made in good faith and the Georgia court, directing our courts to look to Florida law adopted the Florida test concerning objective good faith. A finding of good faith under Florida Law (now Georgia law) must determine: 1. Whether "the offer bore no reasonable relationship to the amount of damages or 2. a realistic assessment of liability, or 3. that the offer lacked the intent to settle the claim. Florida (and now Georgia) step away somewhat from the mechanical application of 9-11-68 and grant the trial court some flexibility in determining whether the offer was made in good faith.

While reasonable attorneys may differ concerning whether a hearing is required in all OCGA § 9-11-68 requests for fees, this author thinks that a hearing is now required. While Boggs’ opinion seems to limit to a determination of "good faith" offer, it would appear that the courts are headed to require a hearing in the same way that a hearing is now mandatory for an award under OCGA § 8-15-14 attorneys’ fees.

2. Here is the Florida Statute to which Judge Boggs referred:

**Fla. Stat. § 768.79 Offer of judgment and demand for judgment**

(1) In any civil action for damages filed in the courts of this state, if a defendant files an offer of judgment which is not accepted by the plaintiff within 30 days, the defendant shall be entitled to recover reasonable costs and attorney’s fees incurred by her or him or on the defendant’s behalf pursuant to a policy of liability insurance or other contract from the date of filing of the offer if the judgment is one of no liability or the judgment obtained by the plaintiff is at least 25 percent less than such offer, and the court shall set off such costs and attorney’s fees against the award. Where such costs and attorney’s fees total more than the judgment, the court shall enter judgment for the defendant against the plaintiff for the amount of the costs and fees, less the amount of the plaintiff’s award. If a plaintiff files a demand for judgment which is not accepted by the defendant within 30 days and the plaintiff recovers a judgment in an amount at least 25
percent greater than the offer, she or he shall be entitled to recover reasonable costs and attorney's fees incurred from the date of the filing of the demand. If rejected, neither an offer nor demand is admissible in subsequent litigation, except for pursuing the penalties of this section.

(2) The making of an offer of settlement which is not accepted does not preclude the making of a subsequent offer. An offer must:

(a) Be in writing and state that it is being made pursuant to this section.

(b) Name the party making it and the party to whom it is being made.

(c) State with particularity the amount offered to settle a claim for punitive damages, if any.

(d) State its total amount.

The offer shall be construed as including all damages which may be awarded in a final judgment.

(3) The offer shall be served upon the party to whom it is made, but it shall not be filed unless it is accepted or unless filing is necessary to enforce the provisions of this section.

(4) An offer shall be accepted by filing a written acceptance with the court within 30 days after service. Upon filing of both the offer and acceptance, the court has full jurisdiction to enforce the settlement agreement.

(5) An offer may be withdrawn in writing which is served before the date a written acceptance is filed. Once withdrawn, an offer is void.

(6) Upon motion made by the offeror within 30 days after the entry of judgment or after voluntary or involuntary dismissal, the court shall determine the following:

(a) If a defendant serves an offer which is not accepted by the plaintiff, and if the judgment obtained by the plaintiff is at least 25 percent less than the amount of the offer, the defendant shall be awarded reasonable costs, including investigative expenses, and attorney's fees, calculated in accordance with the guidelines promulgated by the Supreme Court, incurred from the date the offer was served, and the court shall set off such costs in attorney's fees against the award. When such costs and attorney's fees total more than the amount of the judgment, the court shall
enter judgment for the defendant against the plaintiff for the amount of the costs and fees, less the amount of the award to the plaintiff.

(b) If a plaintiff serves an offer which is not accepted by the defendant, and if the judgment obtained by the plaintiff is at least 25 percent more than the amount of the offer, the plaintiff shall be awarded reasonable costs, including investigative expenses, and attorney's fees, calculated in accordance with the guidelines promulgated by the Supreme Court, incurred from the date the offer was served.

For purposes of the determination required by paragraph (a), the term "judgment obtained" means the amount of the net judgment entered, plus any postoffer collateral source payments received or due as of the date of the judgment, plus any postoffer settlement amounts by which the verdict was reduced. For purposes of the determination required by paragraph (b), the term "judgment obtained" means the amount of the net judgment entered, plus any postoffer settlement amounts by which the verdict was reduced.

(7)(a) If a party is entitled to costs and fees pursuant to the provisions of this section, the court may, in its discretion, determine that an offer was not made in good faith. In such case, the court may disallow an award of costs and attorney's fees.

(b) When determining the reasonableness of an award of attorney's fees pursuant to this section, the court shall consider, along with all other relevant criteria, the following additional factors:

1. The then apparent merit or lack of merit in the claim.
2. The number and nature of offers made by the parties.
3. The closeness of questions of fact and law at issue.
4. Whether the person making the offer had unreasonably refused to furnish information necessary to evaluate the reasonableness of such offer.
5. Whether the suit was in the nature of a test case presenting questions of far-reaching importance affecting nonparties.
6. The amount of the additional delay cost and expense that the person making the offer reasonably would be expected to incur if the litigation should be prolonged.

(8) Evidence of an offer is admissible only in proceedings to enforce an accepted offer or to determine the imposition of sanctions under this section.

History. s. 58, ch. 86-160; s. 48, ch. 90-119; s. 1175, ch. 97-102.


The first Florida case which was the first to hold that a hearing must be held, under the Florida statute cited in Richardson, is Jaime Schapiro AIA & Assoc. v. Rubinson, 784 So. 2d 1135, 1137 (Fla. Dist. Ct. App. 2000). Holding: "However the trial court failed to hold a hearing and failed to require Rubinson to satisfy the burden of showing that the proposed settlement was not made in good faith.

While the trial court has the authority to make a determination that the offer was not made in good faith, here, as Rubinson concedes, a hearing should have been held. Thus, we remand for an attorney's fees hearing."


[T]he question of whether a proposal was served in good faith turns entirely on whether the offeror had a reasonable foundation upon which to make his offer and made it with the intent to settle the claim against the offeree should the offer be accepted." Wagner v. Brandeberry, 761 So.2d 443, 446 (Fla. 2d DCA 2000). However, "[i]n making this determination, the trial court is not restricted to the testimony of the offeror attesting to good faith; rather, the court may properly consider objective evidence of facts and circumstances that suggest whether the offeror made the offer with subjective good faith." Arrowood Indem. Co. v. Acosta, Inc., 58 So.3d 286, 289 (Fla. 1st DCA 2011).

Thus, the court should consider the following factors in determining the offeror's subjective good faith: the amount of the offer, the offeror's potential exposure, the complexity and closeness of the case, and the offeror's justification for the offer. id. at 290. The court should not consider the reasonableness of the offeree's rejection of the offer. TGI Friday's, Inc. v. Dvorak, 663 So.2d 606, 613 (Fla.1995) (noting that the fact that an offeree had a good reason to reject a low offer is not properly considered in the
determination of entitlement to fees but should be considered in determining the amount of fees).


*OTS, Inc. et al. v. Weinstock & Scavo, P. C. et al.* highlights the impact of Richardson v. Locklyn. In OTS, the Georgia Court of Appeals vacated the trial court's award of attorney fees, which the trial court awarded pursuant to OCGA § 9-11-68. The judgment was vacated with the instructions that the trial court, on remand, pursuant to Richardson, utilize Florida's test for determining whether the settlement offer was made in good faith. Notably, the court in OTS specifically mentioned that the trial court hold a hearing for this determination.

6. **Time Limit Federal Court.** Fourteen (14) days to Seek Fees

If attorney's fees are sought in federal court under O.C.G.A. § 9–11–68 (which is substantive law in federal court) they must be sought no later than fourteen (14) days after


In *Camacho v. NWIDE,* a case in the N.D. of Georgia, the court determined that the deceased motorist's estate could recover attorney fees pursuant to OCGA § 9-11-68. The court found that the estate's offer, which was made nearly sixty days after its complaint was filed, to settle for $4,583,000 was rejected in bad faith. The insurer, to whom the offer was made, did not respond to the offer, an act that resulted in four additional years of litigation. The underlying judgment was $5,730,000, which is just shy of 125% ($5,728,750) of the excess portion of the underlying judgment.

Camacho is useful because it highlights what argument will likely not work, for the court rejected Nationwide's argument that the estate's offer was made in bad faith. Nationwide argued that the plaintiffs "knew that a favorable verdict would net a judgment in excess of 125%" of the $4,583,000 offer so that "any verdict in their favor was guaranteed to secure fees under this statute." The court relied on the "purposes of the statute" to reject Nationwide's argument that the offer was made to strong arm Nationwide into settling or ceding liability. Quoting Smith v. Baptiste, 694 S.E.2d 83, 88 (Ga. 2010), "The clear purpose of this general law is to encourage litigants in tort cases to make and accept good faith settlement proposals in order to avoid unnecessary litigation." Noting this purpose, the court held that the settlement offer was not made in bad faith.
C. 2015 Cases


No OCGA § 9 11 68 awards in Arbitration. The case involved homeowners purchasing a house from Cornerstone Associates Inc. in Locust Grove, Georgia. The contractor purchase indicated that binding arbitration would be conducted before an arbitrator named by Cornerstone. The year before the arbitration Cornerstone offered the homeowners an OCGA § 9 11 68 offer of $3,000.00 to settle the claim. The homeowners proceeded to binding arbitration pursuant to the contract and recovered nothing as did Cornerstone. Both sides received nothing in arbitration. Based upon the fact that homeowner did not exceed or meet the $3,000.00 by 75 percent at the arbitration, Cornerstone brought a motion in the trial court for the $67,268.41 it had spent in defending the case. The Superior Court of Paulding County awarded the attorney’s fees pursuant to OCGA § 9 11 68 and homeowner appeal. The Court of Appeals and apparently what appears to be a case of first impression determined that OCGA § 9 11 68 attorney's fees apply only in the context of court driven civil litigation. The Court of Appeals reasoned that the statute should be granted in strict construction and 9 11 68 that the general assembly made no reference to alternative dispute resolution in the statute. Also, by the use of the word trial, the general assembly must have intended to exclude Award in arbitration. Thus, 9 11 68 does not apply in arbitration. [The underly case was discussed last year at Alessi, et al. v. Cornerstone Associates, Inc., 329 Ga.App. 420, 765 S.E.2d 630 (2014).]


Award Reversed for Vagueness. The Court of Appeals reversed a grant of OCGA § 9 11 68 to a shopping center mall operated that housed anchor store J. C. Penney in the amount of $24,696.28. While the corporation for the mall obtained summary judgment against a slip and fall plaintiff and the slip and fall plaintiff recovered nothing, the Court of Appeals held that the offer was too vague to be unenforceable. Particularly, the movant under OCGA § 9 11 68 sent an OCGA § 9 11 68 of settlement which referred to provisions of the complaint. Because the slip and fall plaintiff had filed a lengthy amended complaint the Court of Appeals held that the offer could not be accepted as written. This is yet another case that describes the importance of confirming the OCGA § 9 11 68 letter to the exact facts of the case in order to be enforced.


No Fee Hearing Required if not Requested. In an OCGA § 9 11 68 award of attorney’s fees in favor of Waffle House in the amount of $27,276.37, the Court of Appeals affirmed the award even though no evidentiary hearing was held. Generally, under OCGA § 9 11 68 (as is required under OCGA § 9 15 14 (a hearing is required pursuant to OCGA § 9 11 68 (e)). The Court of Appeals affirmed because the plaintiff Bell (against whom the award was made) failed to formally request a hearing in his
moving papers and waived it by the language of his motion. Thus, the fee award was
affirmed without a necessity of a hearing. [4]

II. INSURING AGAINST OCGA § 9-11-68

A. The Risk is Real: The Outcome Unpredictable

Consider the below outcome reported by the Daily Report. A fatal truck/tractor
trailer accident occurs in Emanuel County (County Seat is Swainsboro) in 2006.
Jurisdiction exists over defendant in DeKalb County. The case is worth trying (it is a
death case). Defense sends OCGA § 9-11-68 demand which is rejected. The case is
tried twelve (12) years after the accident. Defense verdict. Now the widow faces the
prospect of payment of a decade of defense attorney’s fees because of the verdict.

DeKalb Jury Finds No Liability by Trucker in Fatal Southeast Ga. Crash |
Daily Report | By Greg Land | August 28, 2018

The jury took about 45 minutes to find for the defense after a four-day trial
involving a 2006 wreck between a tractor-trailer and pickup truck at a rural
Emanuel County intersection.

Following a four-day trial, a DeKalb County jury took less than an hour to
find no liability on the part of a tractor-trailer driver who slammed into a
pickup truck at an intersection in southeast Georgia nearly 12 years ago,
 killing the other driver.

Lead defense lawyer Raymond Kurey of McMickle, Kurey & Branch
Alpharetta [Georgia] said there were no mediations and little settlement
discussion until about 40 days before trial, when he sent an offer of
settlement for $50,000, which was declined. Because of that, Kurey said
he and his co-counsel, firm associate Scott Zottneck, will likely seek
attorney fees from that point on under Georgia’s Offer of judgment statute.

Lead plaintiff’s attorney Brian “Buck” Rogers of Fried Rogers Goldberg
said his client, the wife of the deceased driver, has not decided whether to
appeal or file posttrial motions. Rogers tried the case with Alice Rodriguez
of Peachtree City’s Rodriguez & Associates. According to Kurey and
court filings, 56-year-old Beverly Pool Jr. was driving a Chevrolet 1500
pickup truck pulling a work trailer when he attempted to cross Ga. 4, a
divided, four-lane roadway in Emanuel County near Swainsboro. Poole
was on Ga. 57 and had to go through a stop sign before crossing Ga. 4,
which has no traffic control devices at the intersection.

A tractor-trailer driven by Faisal Noor was approaching on 57 and hit
Pool’s pickup near the front passenger side in October 2006. “Mr. Noor
said he recalled seeing the pickup in front of him, but it was too late to do anything to avoid it," Kurey said. Noor was [s]lightly injured, he said, but Pool never regained consciousness and died shortly thereafter.

The Georgia state trooper who investigated the case did not cite either driver and reported finding no skid marks from the tractor-trailer, Kurey said. The plaintiff's expert, Tom Langley of Woodstock, went to the scene two months later. "He said he found 85 feet of pre-impact skid marks, and he placed the tractor-trailer going between 75 and 85 miles an hour," Kurey said.

The defense expert, LaGrange accident reconstructionist Bob Awtrey, testified that the semi's onboard software indicated it was equipped with a governor that prevented it from going over 67 mph, Kurey said. The skid marks were also problematic because the trooper changed his story to say he "misremembered" whether there were marks, and then changed it again when confronted with his original affidavit, Kurey said.

Adding to the confusion was the fact that there was another wreck at the same intersection the day after the one that killed Poole. "There are a lot of accidents at that intersection," Kurey said. Poole's widow, Linda Poole, sued Noor and trucking company Knight Transportation in DeKalb County State Court. At the close of the trial before Judge Johnny Panos, Kurey said Rogers asked the jury to award $5 million in damages.

The jury took about 45 minutes to return a defense verdict on Aug. 16, he said. Neither side spoke to the jurors, who exited as a group, Rogers said. "Buck did a good job; they tried a great case," Kurey said.

B. Shift the Risk of Loss: Private Contracts concerning Attorney’s Fees – Florida’s Experience

Attorneys should be allowed to shift the risk of the unknown outcome of OCGA § 9-11-68.

Offer-of-Settlement Insurance Aims to Protect Parties from Attorney Fee Awards | Daily Report | By Greg Land | October 24, 2018

It’s a recurring dilemma for litigators: The case has been landed, and a certified demand for settlement has been sent to the opposing party, who responds with a less-than-satisfactory counter-offer. Take the offer? Or refuse and risk going to trial, knowing that a loss or award that’s not much higher than the spurned offer leaves the client at risk of having to pay attorney fees under Georgia’s offer of judgment statute?
A recent arrival in Georgia's insurance market can for a price help alleviate some or all of that concern by covering any such fee awards ranging from $10,000 to as much as $250,000. Lawyers whose clients have purchased the policies which are unregulated by the Georgia insurance commissioner but are marketed as enforceable private contracts say it has worked well for them. But the policies are apparently little known in Georgia, one of several states that have some form of offer of settlement statute on their books.

The price [according to insurance company] varies depending upon the amount of coverage and when it is obtained. The $10,000 policy, for instance, costs $500 if purchased within 30 days of the offer of settlement and tops out at $1,500 if purchased between 90 and 40 days before trial.

The $250,000 coverage starts at $12,500 and tops out at $37,500 within the 90- to 40-day window; the insurance is unavailable if the case is less than 40 days from trial. The coverage is only payable if the case goes to trial and does not apply to litigation that settles or is otherwise dismissed.

Under Georgia's offer of settlement statute, a plaintiff who declines an offer to settle a tort claim and then is awarded no more than 75 percent of that offer may be held liable for the opposing party's attorney fees and expenses dating from the date of the rejected offer.

Similarly, a defendant who rejects an offer and then is hit with a judgment of 125 percent or more than the offer also may face claims for the plaintiff's attorney fees. Marketed as (http://www.legalfeeguard.com/), the coverage has been LegalFeeGuard available in Florida since 2012, said Stephen van Wert of Founders Specialty Insurance in Tampa, the managing general agent for the program.

Marketing materials tout the coverage as a way to both protect clients from costly judgments and for lawyers to safeguard their contingency fees. Van Wert said that about 1,300 policies have been sold in Florida since the insurance began being marketed; he estimates that 98 percent of the coverage was sold to plaintiffs, although it is available to defendants as well. "We have 300 or 400 lawyers who've bought it several times over the years," van Wert said.

The coverage is available to purchasers online. Georgia is the second state where the insurance is being offered, van Wert said, although he expects it to be offered elsewhere in the future. Insurance broker Ed Alden of Roswell's (https://eaapi.com), who is Alden & Associates the sole marketer of the policies in Georgia, said the coverage is not regulated by Georgia's insurance commissioner, but must be sold by an authorized
insurance carrier. "It's essentially a contract between two private parties," Alden said. So far, he said, only a couple of policies have been sold in Georgia. An advisory opinion from the Florida bar offers "no opinion on whether the insurance product is legal," but does state that its premium constitutes a cost of litigation and, may be advanced by a litigation funding company. State Bar of Georgia General Counsel Paula Frederick said she was not prepared to offer any opinion concerning the insurance at this point.

Van Wert counts several attorneys with Florida-based Morgan & Morgan (https://www.forthepeople.com/), which has offices in 14 states including Georgia, among his clients. Firm partner Matt Morgan said his clients have bought the coverage in several cases. "My clients are the individuals who purchased the policies, and I've never become aware of any complaint from them," said Morgan. "They've always indicated to me that the process was seamless."

Morgan said he "absolutely" supports the coverage, primarily because we try a large number of cases, and we want out our clients to be aware of every possible outcome, including that a party could file an offer of judgment that could be in the hundreds of thousands of dollars. But most attorneys queried by the Daily Report were either unaware of the insurance or knew little about it. "I don't have any personal knowledge [or] experience with this type of product," said Georgia Trial Lawyers Association President Laurie Speed of Speed + King (https://www.speedkinglaw.com/), who specializes in medical malpractice cases. But, she said, "I understand that GTLA elected not to establish a relationship with these folks when approached several years ago." Speed said queries to fellow officers indicated that most seldom dealt with offers of settlement by defense counsel.

Several defense lawyers were similarly unfamiliar with the insurance and indicated that it might deliver mixed results for plaintiffs. "I've heard about this from some Georgia plaintiff attorneys, [but] have not understood it is being done in Georgia," said Gray, Rust, St. Amand, Moffett & Brieske (https://www.grsmb.com/) partner Matt Moffett, a former president of the Georgia Defense Lawyers Association. Moffett said an argument could be made that "it's a contract void as against public policy here if the policy behind our statute is to facilitate settlement and put those at risk who refuse reasonable offers." But Jonathan Adelman of Waldon Adelman Castilla Hiestand & Prout (http://www.wachp.com/) said the coverage might be a boon for the defense. "I have not heard of this, despite obtaining what we assumed were uncollectable, numerous attorney's fees awards," Adelman said. "However, another purpose of the [offer of judgment] statute is to shift the expense of litigation to the loser," he said.
“Traditionally, this meant nothing to the defendant as plaintiffs are routinely judgment proof. This type of insurance may now allow for a recovery.”

C. Florida Considers this Contract to Be Private Contract – Specialty Insurance

Florida has tacitly recognized the sale of a product to “shift the risk” of loss of an award of attorney’s fees since January 2010.

The Florida Bar wrote:

After full consideration of the issues, the committee voted 22-12 to withdraw Florida Bar Staff 28705 and direct staff to issue a staff opinion that concludes that the cost of a premium for an insurance policy that would cover a judgment for attorney’s fees and costs of the opposing party under a proposal of settlement files under Florida Statutes §768.79 is a cost that may be advanced under Rule 4-1.8(e), but whether the product is legal [5] or otherwise in compliance with ethics is outside the scope of this staff opinion. Enclosed is a copy of Florida Bar Staff Opinion 28705 as written at the direction of the committee.


The key holding of the Florida Opinion is that the “costs” advanced by the (usually Plaintiff’s) attorney is considered to be a “cost” of the case. “[T]he cost of a premium for an insurance policy that would cover a judgment for attorney’s fees and costs of the opposing party under a proposal of settlement files under Florida Statutes §768.79 is a cost that may be advanced under Rule 4-1.8(e)” Opinion, supra.

D. Georgia Should Follow Florida’s Lead

Georgia should consider following Florida’s lead in this area. Florida presently allows the premium as a cost against any settlement; Georgia should allow the same.

The legislative history on OCGA § 9-11-68 shows that it came from Florida. SB (Senate Bill) 3 passed in 2005 and brought this law to the forefront of Georgia civil litigation. The March 2012 review by the Ga. St. U. Law Rev. Vol. 22: 23 (2015) Georgia State Law School reviewed the history of the laws passed in 2005 including SB3. Ga St. U. L. Rev. shows that SB3 was initially passed as a statute that follows in line to Code Section OCGA § 9-15-14 (the abusive litigation statute). It appears that the first iteration of the bill was actually OCGA § 9-15-16 which follows as two (2) code sections directly after OCGA § 9-15-14. No doubt that it was amended to move the numbering of the statute to conform to the offer of judgments (the 68 line of statutes).
It appears to have been changed to match the federal rule, Rule 68, and other states that use the "68" moniker in their statutes. For example, 768.79 Fla. Stat. Offer of Judgment is the controlling statute in Florida. From an examination of Georgia State's review, it seems clear (though there is no direct citation) that Georgia acquired this fee shifting provision from Florida. The language is so similar in the initial writing of SB3 that it had to be taken from Florida. Ga. St. U. L. Rev. Vol 22:221-226 (2012).

This author looked at the Florida law concerning its current statute, section 768.79 Fla. Stat. and the enforcement provision of Fla.R.Civ. P. 1.442. The Florida law appears to have been in effect at least a decade longer than SB3. A very well written overview of the Florida Statute and litigation as it existed as of 2012 may be found at Rehm, Lauren, A Proposal For Settling The Interpretation of Florida's Proposals for Settlement. 64 Fla. L. Rev. 1811 (2012). Rhem's extensive overview of this area of the law states that much of Florida litigation turns on the interpretation of Fla.R.Civ. P. 1.442. Georgia does not have a companion regulatory interpretation but instead interprets the statute directly. Florida seems to do both – thus further complicating the interpretation of the law in this area in Florida – but not Georgia.

Georgia has no regulatory scheme similar to Fla.R.Civ. P. 1.442 and I am hopeful we never enact one.

IV. IMPORTANT ISSUES IN INTERPRETING OCGA § 9-11-68

A. Paying A Big Firm's Fees In A Plaintiff's Loss; Gowen Oil Company

A plaintiff in the Southern District of Georgia ended up paying a large firms attorneys' fees of $300,000.00 for a loss on a Motion for Summary Judgment in a complex case.

Plaintiff Gowen Oil Company, Inc. ("Gowen") sued Greenberg Traurig for legal work done by Greenberg Traurig for its previous client Biju Abraham. While the facts are somewhat complex, Gowen asserted that Greenberg Traurig conspired with its prior client Abraham to interfere with Gowen's contractual rights to purchase a number of filling stations in Georgia. Gowen Oil Company, Inc., v. Biju Abraham; Greenberg Traurig, LLP, United States District Court for the Southern District of Georgia, CV-210-157 (March 30, 2012).

Gowen asserted that Greenberg Traurig tortuously interfered with Gowen's Right of First Refusal with regard to a pending sale of the filling stations. Gowen asserted violations of Georgia's Bulk Transfer Act in Superior Court. Greenberg Traurig (or perhaps another defendant) removed the case to the Southern District of Georgia based on diversity jurisdiction.

According to the Court, the case was complex, involved extensive discovery and substantial motion practice. Both parties sought extended discovery due to the large
number of parties and witnesses and some discovery was necessary outside of the United States.

This case is particularly instructive for the application of Georgia's OCGA § 9-11-68 attorney's fees statute when applied in federal court. At least at the district level, OCGA § 9-11-68 has been found to be substantive law. Given that it's substantive, a federal court sitting in diversity must apply it as the rule of decision.

Greenberg Traurig hired outside counsel of Rogers & Hardin in Atlanta and while discovery was pending Rogers & Hardin sent an OCGA § 9-11-68 offer of settlement. While the amount is not referred to in the case, a review of the docket on Pacer shows that the offer to settle, including attorneys' fees and punitive damages was set at $63,000.00. Gowen neither accepted nor rejected but went silent, which under the statute is a rejection. Two months later Greenberg Traurig filed a Motion for Summary Judgment. The Motion for Summary Judgment on all the substantive claims was granted and some months thereafter Greenberg Traurig filed a Motion for its attorney's fees under 9-11-68.

Gowen's initial claim made out a claim for $35 million and by the time Greenberg Traurig had succeeded in obtaining a dismissal of all of the claims and asserting its request for fees, it was entitled to fees in excess of $300,000.00. Due to various withdrawals of certain claims and voluntary reductions on behalf of Greenberg Traurig's part, the Court granted fees in the amount of $281,000.00 and Court costs of $35,000.00.

The case is instructive for a number of reasons.

The Court sided with Greenberg Traurig that given the potential exposure, $35 million, plaintiff was not well grounded in its assertion that plaintiff used two lawyers and a few paralegals while Greenberg Traurig employed eight lawyers and five support staff. The Court found that Greenberg Traurig had a reasonable explanation for each attorney and each paralegal and therefore granted fees for them all at a slightly reduced rate.

On a practice level, the case also provides a clear exhibit that was used by Greenberg Traurig, prepared by Rogers & Hardin, from which a fairly clear OCGA § 9-11-68 demand letter may be crafted. Exhibit B.

Additionally, the Motion prepared by Rogers & Hardin on behalf of Greenberg Traurig is a fairly good form for use in federal court (and could be easily modified for Superior Court). It is attached hereto as Exhibit C.

Gowen was affirmed in Gowen Oil Company vs. Greenberg Traurig, et al., United States Court of Appeals for the 11th Cir. (December 13, 2011) (Unpublished).

B. Potential Bad Press Associated With Seeking Attorney's Fees: Hall v. 84 Lumber
In an Order in Charles D. Hall, Plaintiff v. 84 Company; Darren Richardson; Keith Conner; Robert Venal; Robert C. Venal, Inc., Defendants, United States District Court for the Southern District of Georgia Savannah Division, Judge William T. Moore, (March 28, 2012), Judge Moore "encouraged" the Defendants not to seek fees. Judge Moore, while finding the OCGA § 9-11-68 Motion was hyper technically not ripe, cautioned the Defendants concerning whether they should seek attorneys’ fees of in excess of $250,000.00 from the Plaintiff who lost his case.

The Court, in Hall v. 84 Lumber, supra, stated that:

Mr. Hall is not some deep pocket corporate entity. Rather, he was simply an unfortunate delivery driver who suffered an injury when one of defendant’s employees ran over his foot with a forklift. Mr. Hall brought a legitimate claim before this Court: whether defendants qualified as statutory employers under Georgia law and, as a result, were shielded from liability for his injury. In this Court’s opinion, defendants need to ask themselves whether the mere fact that Mr. Hall’s counsel failed to convince this Court that his client was meritorious should result in saddling an injured blue-collar worker with not only the fallout from his injury but also $271,000.00 of fees and expenses. This Court wonders whether this is truly a position that a customer-service oriented business like 84 Lumber should take. Perhaps the limited and general partners of defendant 84 Lumber should ask themselves the same question."

Hall v. 84 Lumber, supra at 5. (Order of March 28, 2012).

A review of the docket sheet concerning Southern District Case No. 4:09-CV-00057- WTM-GRS shows that 84 Lumber dismissed the motion with prejudice and did not refile it.

C. Small Jury Verdict for Plaintiff Equals Judgment for the Defendant

Abraham v. Hannah, 306 Ga.App. 735, 702 S.E.2d 904 (2010), is a case that has a fairly shocking outcome under OCGA § 9-11-68. While Abraham was reversed on appeal because the plaintiff did not have notice of the OCGA § 9-11-68 hearing, it shows how a plaintiff may win and then lose under OCGA § 9-11-68.

Abraham (Plaintiff) recovered $850.00 in a jury verdict (this author admits that it’s in a tiny sum); however, prior to the jury verdict Hannah (defendant) had offered $2,500.00 to Abraham to settle the case. After the jury verdict in Abraham’s favor of $850.00, the trial Court held a hearing and granted attorney’s fees, pursuant to OCGA § 9-11-68, to Hannah in the amount of $2,425.00. Once the jury verdict of $850.00 was subtracted from that amount the defendant (though the defendant lost at trial) had a judgment in its favor against the successful plaintiff, Abraham, of $1,575.00.

While this case was reversed for lack of notice, it displays in stark contrast the painful reality of an unacceptable offer in the face of a small jury verdict.
D. Punitive Damages Count Toward the 75% - 125%

In *Wildcat Cliffs Builders, LLC v. Hagwood*, 229 Ga. App. 244, 663 S.E.2d 818 (2008), (This case was decided under prior law), plaintiff in the underlying action, Hagwood, recovered a $90,000.00 compensatory award, $100,000.00 punitive damage award and $14,688.56 in OCGA § 9-11-68 attorney's fees.

The facts most favorable to Hagwood showed that Wild Cliffs Builders knowingly encroached upon Hagwood’s property, built a retaining wall, refused to remove it and then offered Hagwood only $10,000.00 in an effort to purchase an easement and a complete release of liability. A jury awarded to Hagwood the amounts stated above. Though decided under prior law, an interesting nuance out of the Wildwood Builders case is that defendant/appellants took the position on appeal that punitive damages should not be counted in calculating the OCGA § 9-11-68 award. Although it is unclear whether the Georgia Court of Appeals simply said that they would or would not consider the inclusion of punitive damages, they held that it was “moot” once they affirmed the punitive damage award. *Wildcat Cliffs*, at 822.

In sum, the evidence showed that Wildcat had no interest in remedying or lessening the run-off problem or compensating Hagwood for the property damage he had sustained. Rather, it was amenable only to paying Hagwood for an easement and a release from all liability arising from the retaining walls it had constructed on Hagwood’s property. The foregoing evidence was sufficient to authorize the jury's conclusion that, after it learned of its trespass onto Hagwood's property and its creation of a continuing nuisance thereon, Wildcat acted with a conscious indifference to the consequences of its conduct.

Hagwood requested and received attorney fees and expenses pursuant to OCGA § 9-11-68(b)(2). Prior to trial, Hagwood offered to settle the case for $110,000. After the jury awarded him a total of $190,000 in damages, he was, therefore, statutorily entitled to recover his attorney fees and expenses.

On appeal, Wildcat argued that this award must be overturned, because, in the absence of the punitive damages award, Hagwood did not recover greater than 125% percent of his Offer of Settlement. The Court of Appeals held that since it sustained the award of punitive damages, that argument is moot.

It affirmed the entry of judgment against Wildcat in favor of Hagwood, including the award of $100,000 in punitive damages and $14,688.56 in attorney fees and expenses.

E. A Dismissal Without Prejudice Did Not Trigger the Award

In *McKesson Corporation, et al. v. Green, et al.*, 286 Ga. App. 110, 648 S.E.2d 457 (2007), (decided under prior law), the Court of Appeals declined to award OCGA § 9-11-68 attorney’s fees where a demand had been made but plaintiff took a dismissal without prejudice (OCGA § 9-11-41) prior to proceeding to trial. While the McKesson case turned on complex issues associated with stockholdings, RICO allegations
concerning stockholdings and plaintiff's apparent lack of an expert immediately prior to trial, the OCGA § 9-11-68 issue was resolved by the Court of Appeals in that a voluntary dismissal does not constitute the type of judgment or final judgment which will invoke liability under the OCGA § 9-11-68 statute. The Court of Appeals wrote in that regard as follows:

_McKesson contends that the trial Court erred in denying its motion for attorney’s fees under OCGA § 9-11-68(b)(1). That code section provides that a defendant whose settlement offer is rejected shall recover attorney’s fees and expenses of litigation “if the final judgment is one of no liability or the final judgment obtained by the plaintiff is less than 75 percent of such Offer of Settlement.” The trial Court in this case entered no final judgment within the meaning of the statute, and therefore did not err in denying this motion. A right to dismiss voluntarily without prejudice would be meaningless if doing so would trigger the payment of defendant’s attorney’s fees. Without explicit language establishing that the legislature intended to excise a plaintiff’s right to dismiss in this manner, this Court will not engrat such an intention into the statute._

_McKesson, at 462._

_F. Courts Struggle With “Offers Not Made in Good Faith”_

The trial courts and Georgia Court of Appeals have struggled with the defining what constitutes and Offer not made in “good faith.” It is, somewhat, like trying to put a subjective concept into an objective box. However, given that the General Assembly has foisted O.C.G.A. § 9-11-68 upon us, we must do it. The most prominent case on point is, _Great West Cas. Co. v. Bloomfield_, 313 Ga.App. 180, 721 S.E.2d 173 (2011).

A masterful overview of _Bloomfield_, at the trial level is found at: Clay, Jr., Charles "Chuck" and Paupeck, Michael, _Recent Decision Highlights Additional Issues with Georgia’s Tort Reform Act_, Weinburg, Wheeler, Hudgins, Gunn & Dial, December 29, 2011. I reproduce it below (without indention).

"On December 1, 2011 the Georgia Court of Appeals issued an opinion that complicates efforts by defendants and their insurers to obtain fees and costs, particularly in large damages cases. See, Bloomfield, supra. This appeal was taken from a trial court’s denial of a motion for fees and costs pursuant to O.C.G.A. § 9-11-68, Georgia’s offer of settlement statute. This statute is quite specific regarding the procedure and essential terms of the written offer. If complied with, the statute states that a defendant shall be entitled to recover reasonable attorney’s fees and expenses of litigation incurred from the date an offer was rejected through entry of judgment, if the final judgment is one of no liability or less than 75 percent of such offer of settlement. That is, unless the trial judge determines that the offer was not made in “good faith.”

In Bloomfield, Judge Patsy Porter of the Fulton County State Court ruled that the Great West Defendants’ $25,000.00 offer of settlement did not constitute a "good faith"
offer in a wrongful death trucking case, and, thus, she disallowed an award of $69,000.00 in fees and costs to which these defendants were otherwise entitled under the statute. The trial judge's ruling and the ultimate decision on appeal were somewhat surprising because these defendants won at trial and their written offer, in all technical aspects, complied with the requisites of O.C.G.A. § 9-11-68. Moreover, in June of 2011, the Court of Appeals held that a $750 offer was not made in good faith in a slander case and, therefore, upheld a $84,000.00 award of fees and expenses. The Bloomfield decision makes clear that winning at trial does not guarantee a recovery of attorneys' fees and costs. Unfortunately, it provides limited explanation as to exactly why the particular offer was deficient and creates ambiguous precedent.

The underlying case in Bloomfield involved two separate collisions. In the first collision, the tractor-trailer driver insured by Great West struck another vehicle while changing lanes, causing an accident. Subsequently, the vehicle in which Mrs. Bloomfield was a passenger slowed while approaching the original wreck and was struck from behind by a second tractor-trailer, the driver of which admitted fault and was ultimately assessed 100% liability. A Fulton County jury awarded $10.4M compensatory damages and $44M in punitive damages (which were capped at $250,000.00 by statute) against the defendants associated with the second tractor-trailer.

The specific issue on appeal was whether the trial court had abused its discretion pursuant to subsection (d)(2) of O.C.G.A. § 9-11-68 in disallowing the fees and costs to which the Great West Defendants were otherwise entitled. Subsection (d)(2) reads, "If a party is entitled to costs and fees pursuant to the provisions of this Code section, the court may determine that an offer was not made in good faith in an order setting forth the basis for such a determination." (emphasis added). The trial court initially denied the motion for fees without providing the statutorily required basis, so the Court of Appeals first vacated that order and remanded the case back with instructions to explain the basis for finding bad faith. See Great West Cas. Co. v. Bloomfield, 303 Ga. App. 26, 693 S.E.2d 99 (2010); cf Cohen v. Alfred and Adele Academy, Inc., 310 Ga. App. 761, 714 S.E.2d 350 (2011) (trial courts are not required to make written findings of fact or conclusions of law should they find that an offer was made in good faith). On remand, the Bloomfield trial court supported its denial by stating: 1) $25,000.00 was not a reasonable offer or realistic assessment of liability in a wrongful death case; 2) the subject truck driver paid a traffic ticket fine for improper lane change; 3) defense counsel made the offer without having even deposed a police officer on the scene who later testified at trial; and 4) that the Great West Defendants eventually made a $1M offer during trial, which Plaintiff rejected.

The case then went to the Court of Appeals a second time. Initially, it was assigned to a three-judge panel which included Judges Anne Elizabeth Barnes, Harris Adams and Keith Blackwell. They split 2-1 in favor of reversing the trial court on the grounds that it had failed to justify the finding of bad faith. Because there was a split, an expanded seven-judge panel was employed to resolve the split. Judge Barnes apparently convinced the additional panel members to side with her, and in a 5-2
decision focusing heavily upon the abuse of discretion standard of review, the majority upheld the trial court’s denial of fees and costs.

While upholding the trial court’s ruling, the Court of Appeals’ majority opinion offered almost no analysis of the trial court’s four-part rationale for finding a lack of good faith. The dissent raised frustration with that approach and then proceeded to delve into a more detailed analysis in which they challenged each of Judge Porter’s four reasons. Instead, the majority broadly stated that the trial court’s determination of the reasonableness of an offer “is a factual determination, based on the trial court’s assessment of the case, the parties, the lawyers, and all of the other factors that go into such determination, which the trial court has gathered during of the case.” They did not address: 1) whether the $25,000 offer was per se unreasonable in a wrongful death case; 2) whether the fact that the subject truck driver paid a traffic ticket fine for improper lane change properly supported a finding of bad faith; or 3) whether defense counsel’s failure to depose a police officer on the scene who later testified at trial was indicative of bad faith. The Court of Appeals did analyze the trial court’s fourth factor and held that the trial court properly considered the fact that Great West made a $1M settlement offer during trial.”

Id.

G. OCGA § 9-11-68 is Constitutional

Smith et al. v. Baptiste, et al., 287 Ga. 23, 694 S.E.2d 83 (2010), stands for the proposition that the Supreme Court of Georgia found OCGA § 9-11-68 to be constitutional.

The Baptistes filed a complaint for damages against Chuck Smith and the radio station WQXI 790 AM after WQXI broadcast defamatory statements about the Baptistes. While the case was pending and pursuant to OCGA § 9-11-68(a), Smith and WQXI offered to settle the case for $5,000.00. The Baptistes did not respond to the offer which was deemed a rejection under OCGA § 9-11-68(c). The Court granted summary judgment.

Smith and WQXI moved for attorney’s fees pursuant to OCGA § 9-11-68(b)(1); however, after a hearing, the trial Court denied Smith and WQXI’s motion for attorney’s fees and found that the scheme enacted under OCGA § 9-11-68 was unconstitutional and violated various provisions of the Georgia constitution.

In the Baptiste, supra, Mr. Justice Carley sketched out the background of OCGA § 9-11-68. He wrote that OCGA § 9-11-68 was enacted as part of the Tort Reform Act of 2005. The scheme enacted under OCGA § 9-11-68(a) specifies that in a tort claim either party may serve on the other party a written demand or offer to settle that tort claim. If the settlement demand or offer is rejected, that party may be entitled to recover attorney’s fees pursuant to OCGA § 9-11-68(b).

The Georgia Supreme Court overturned the trial Court on the finding that OCGA § 9-11-68 violated the “uniformity” clause of the Georgia constitution. The trial Court
apparently found that OCGA § 9-11-68 was non-uniform in that it applied only to tort cases and not to civil cases including contract claims or other claims. That is, because it did not apply to the entire class of civil cases but only to tort claims inside civil cases it was therefore (in the trial Court’s opinion) unconstitutional.

The Georgia Supreme Court wrote that “our state Constitution only requires a law to have uniform operation across all laws.” Baptiste, at 88.

Because the Supreme Court found that OCGA § 9-11-68 applied uniformly across the state to all similarly situated tort claims, it was a general law and was therefore uniform across those types of claims. It was therefore constitutional. id.

V. FEDERAL COURT APPLICATION OF OCGA § 9-11-68

OCGA § 9-11-68 is Substantive Law in Federal Court.

Wheatley v. Moe’s Southwest Grill, LLC, et al. 580 F. Supp. 2d 1324 (N.D. Ga. 2008), sheds light on some of the difficulties of the enforcement of OCGA § 9-11-68 (the Georgia Offer of Settlement) in Federal Court. While many parts of this long and messy case go beyond a simple discussion of OCGA § 9-11-68, it turned on an offer of 50,000 shares of stock in Moe’s and related corporations [Mama Fu’s Noodle House, Inc. and Raving Brands Holding, Inc.] when Plaintiff, Wheatley, was promoted from employee to company vice president with an equity share. When Wheatley resigned from the corporation, she sought the 50,000 shares by written certificate. Because of the lack of writing and ambiguity, litigation arose concerning whether the shares had to be issued.

An award of OCGA § 9-11-68 attorney's fees may not be had for the attorney's fees incurred from an appeal from the District Court through the 11th Circuit and on remittitur back to the District Court. Attorneys for Moe’s Southwest moved for $49,000.00 of attorney’s fees incurred while the case was appealed from the District Court through the 11th Circuit and back on remand to District Court. The United States District Court for the Northern District of Georgia gave a short shrift to the request for attorney’s fees on appeal in federal Court and wrote: "The motion that seeks attorney’s fees and expenses of litigation incurred on appeal is meritless. The statute expressly limits the award of attorney’s fees and expenses to those incurred from the date of the rejection of the Offer of Settlement to the date of entry of judgment ... " 580 F. Supp. 2d 1326.

It is unclear, from Wheatley and similar cases, how practitioners are to deal with cases that are a combination of contract claims, tort claims and hybrid claims. In Wheatley, the Plaintiffs contended they were suing on contract for the 50,000 shares. The defendants contended that it was a meritless tort suit, suit on breach of fiduciary duties, conversion and other counts. The federal Court struggled with the question concerning whether an OCGA § 9-11-68 Offer of Settlement could properly be made to a case that had some contract claims buried in amongst tort claims. 580 F. Supp. 2d 1325 1327.
While the trial court did not resolve this area of the law, he found that the statute applied to any suit that involved a "tort claim" in the action. Thus, perhaps reading between the lines, one can make an Offer of Settlement if any portion of Plaintiff's complaint includes a well-defined "tort" claim. 580 F. Supp. 2d 1327. Perhaps the most important determination out of Wheatley, supra, is that the Court specifically and unequivocally held that OCGA § 9-11-68 offers apply as substantive law in federal Court. While the Plaintiff argued that the Georgia statute was merely procedural and could not be applied in federal Court, the Court found otherwise. The Court cited, Erie Railroad Company v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L. Ed. 1188 (1938) and its progeny, the Court found that it could (and perhaps was obliged to) apply state substantive law on this particular issue. Id.

The Wheatley case goes on to show that it certified three (3) questions to the Georgia Supreme Court. Research reveals that while the record was transferred to the Georgia Supreme Court and the issues were placed before the Supreme Court, the parties settled their claims and the Supreme Court allowed the case to return to the District Court on remittitur without answering the certified questions posed in Wheatley. See, the Order of the Supreme Court of Georgia dated April 28, 2009 and Wheatley, returning the file to the United States District Court for the Northern District of Georgia without an answer. Document 173 in United States District Court Northern District of Georgia Case. No. 1:05 CV 02174 TCB.

VI. CONCLUSION

The Georgia Offer of Settlement statute OCGA § 9-11-68 is a powerful tool to shift an opponent off the status quo and toward a resolution of the case. This paper has shown that the drafter of the Offer must carefully follow the statute. A plaintiff must recover more than 75% percent of a rejected offer or bear the defendant's fees and a defendant must be confident that a plaintiff can recover no more than 125% percent of a rejected offer or risk paying plaintiff's counsel's fees. This paper has reviewed the statute's potential for legal malpractice if an Offer is not made or not employed correctly. It has reviewed the recent finding of constitutionality of the statute and looked at additional recent cases.
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ENDNOTES

[1] In 1989 the Georgia General Assembly, in its wisdom, gave us OCGA §§ 51-7-80 through 51-7-85. In that abusive litigation/malicious prosecution scheme we, as practitioners, had to stay within the confines of two paragraphs of OCGA § 51-7-84 to write a cogent and enforceable notice by certified mail to be able to enforce a claim after the end of the suit. The General Assembly, in its wisdom, has now given us twenty-three (23) paragraphs under OCGA § 9-11-68 to make an appropriate Offer of Settlement during a case.

[2] What if the Complaint, is part in tort and part in contract? May one submit an OCGA § 9-11-68 Offer of Settlement for the tort portions of the action? The United States District Court, Northern District of Georgia struggled with this issue in Wheelely v. Moe’s Southwest Grill, LLC, et al., 586 Fed. Supp. 2d 1324 (2008). Unfortunately, there is no clear answer from that case. The Federal Court certified the question to the Georgia Supreme Court; however, the case then settled without an answer. Wheelely, supra, contains and interesting “chaos,” delineating “tort,” causes of action from “contract,” causes of action. 586 Supp. 2d 1324, 1326. This author’s personal opinion though is that this expands litigation and makes the offers unweildy and unfair, but “yes,” one can make Offers of Settlement to the tort claims (inside) a larger complaint or petition.

[3] There are substantial nuances in the concerning the making of an Offer of Settlement with regard to a counter-offer and nuances with regard the effect of the withdrawal of an Offer on the collection of on attorney’s fees. These are beyond the scope of this article.

[4] Prior Year Review of Cases:

E. 2014 Cases


F. 2013 cases

1. Gowan Oil Company v. Biju Abraham, et al., 511 F. App’x, 930, 938 (11th Cir. 2013)

D. 2014 Cases

In Couch II, infra, the Supreme Court applied OCGA § 9-11-68 to the State of Georgia and held that sovereign immunity was waived as to an attorney fee application against the State. In Crane Composites, infra, the court held that OCGA § 9-11-68 may be applied when the injury occurred before the date of the statute but the action was filed after the date of the statute. And in the second appearance of Canton Plaza, infra, again reveals that to obtain an OCGA § 9-11-68 award that will survive appeal requires segregation of attorney’s fees to the negligence report claim on which the losing party failed to accept the tendered offer.

ABUSIVE LITIGATION
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Sovereign Immunity Waived OCGA § 9-11-68. David Lee Couch filed a tort lawsuit against the Georgia Department of Corrections. After the Department rejected Couch’s offer to settle the case for $24,000, the case proceeded to trial, where the jury returned a verdict for Couch in the amount of $105,417. Based on Couch’s 40% contingency fee agreement with his attorneys, the trial court ordered the Department to pay Couch $49,542 in attorney fees — 40% of his total recovery, after appeal, including post-judgment interest — as well as $4,782 in litigation expenses, pursuant to the “offer of settlement” statute, OCGA § 9-11-68 (b) (2). [The contingent award was reversed on appeal. It consisted in part of fees on appeal which are not within the statute. It seems somewhat unclear whether a contingent fee may stand (alone) for an award under OCGA § 9-11-68.]

This Supreme Court then granted certiorari to address sovereign immunity.

1. Did the Court of Appeals err when it held that the sovereign immunity of the Department was waived by the Georgia Tort Claims Act as to Couch’s attorney fees?

2. If the sovereign immunity of the Department was waived as to Couch’s attorney fees, did the Court of Appeals err by failing to prorate the 40% contingency fee to reflect that some of the fees were incurred before the settlement offer was rejected?

For the reasons discussed below, we hold that the sovereign immunity of the Department was waived as to the attorney fees award under OCGA § 9-11-68 (b).


The question for decision in this case is whether OCGA § 9-11-68, can be applied to a negligence action in which the injury occurred prior to the effective date of the statute, but in which the action was filed after that date. The Court answered this question affirmatively and, in so doing, they overruled L. P. Gas Industrial Equipment Co. v. Burch, 306 Ga.App. 156, 701 S.E.2d 902 (2010).


In an unusual case the United States District Court for the Northern District of Georgia applied Georgia’s fee shifting statute under OCGA § 9-11-68 to a personal injury claim that occurred in Queensland, Australia. The plaintiff was severely injured, with spinal injuries, in a Yamaha WaveRunner™ accident in Queensland. The Yamaha WaveRunner™ was manufactured by Yamaha in Newman, Georgia.

The plaintiff chose to sue in the United States District Court for the Northern District of Georgia instead of the Commonwealth Courts in Queensland, Australia. The Court accepted the claim based on diversity pursuant to 28 U.S.C. § 1332 and retained the case. While the Court’s order only proceeds through the application of which law shall apply, the parties struggled concerning whether to apply the legal standards of Australia or Georgia.

For simplicity Georgia tends not to apply fixed caps to products liability claims or punitive damages whereas the Commonwealth Courts in Queensland apply a cap of approximately $230,000.00 (AUD) to compensatory damages (general damages including emotional distress, pain and suffering and other economic damages and Australia provides a $274,000.00 (AUD) cap on strict liability claims.) Australia also capped lost income. The plaintiffs argued for the application of the Georgia law even though the injury occurred in Australia and the Court eventually applied Australian law. The plaintiff was unable to show that the public policy of Georgia was such that Australian caps on damages and punitive damages should not be applied.

However, the determination of attorneys’ fees was decided by the Court to apply Georgia law. Australian expert affidavits showed that Queensland would apply the “English rule,” that generally provides the winner of the lawsuit is able to shift the attorneys’ fees to the loser. Georgia, instead, applies statutory fee shifting including, which the Court discussed at some length. Because the Australia law was general common law in Georgia had specific statutes on point, including OCGA § 9-11-68, the Court decided to apply the specific Georgia statute instead of the general common law of Australia on attorneys’ fees.
The resolution of the case is not revealed in the published Order.


OCGA § 9-11-68 is mentioned as part of an Order in case by an Atlanta law firm to collect its fees. The law firm prevailed on the collection of fees. However, the Order contains a discussion of the denial of the application of OCGA § 9-11-68.

In the underlying case (which generated the fee litigation based on losing Defendant’s nonpayment of the law firm’s fees) Plaintiff’s (in the underlying case) asked the jury for $17,000,000.00. The jury returned $1,700,000.00. Defendant offered $3,000,000.00 prior to trial to settle, apparently within OCGA § 9-11-68(c). The Court refused to apply the fee shifting statute citing the offer as 5 days late. While perhaps obvious on the application of the statute, this Order again shows the rigid application of this statute and how every part of the offer must come within the four (4) corners of the statute.

E. 2013 Cases


A frivolous case can generate a massive fee claim. In the 2013 overview of this area of the law, Gowen Oil Company v. Biju Abraham, et al, stands out as the poster-child for an OCGA § 9-11-68 award of attorney’s fees in Federal court.

In that convoluted legal malpractice case where Abraham asserts that his former counsel Greenberg Traurig, LLP preferred some of his existing clients over Abraham and caused him damages based on the sale of convenience stores in South Georgia, his action to sue Greenberg Traurig backfired significantly in attorney’s fees. As stated in the Southern District of Georgia trial court, Greenberg Traurig offered $63,000.00 early on to settle the claim and be done with it. The case continued for a number of months whereupon the Southern District of Georgia granted summary judgment in favor of Greenberg Traurig and awarded in excess of $300,000.00 of attorney’s fees (primarily generated by Rogers & Harden of Atlanta) against Plaintiff.

The trial court found that the case was without merit, that the attorney’s fees were appropriate, that it really didn’t make any difference whether they used Atlanta attorney’s fees or Brunswick-based attorney’s fees because the amounts were similar based on a 10 percent discount, that paralegal fees were recoverable and (more specifically) that defendant is entitled to determine how many paralegals and lawyers it intends to use to defend the case within reason and the fact that plaintiff used only two lawyers and two paralegals did not control what resources Greenberg Traurig felt were necessary to defend itself.

Perhaps one of the more cogent arguments is that appellant argued Greenberg Traurig should not be entitled to attorney’s fees because those fees were covered by an insurance policy for legal malpractice. The court rejected that argument and did not weigh into the possibility of a double recovery where the attorney’s fees were recovered despite the fact they’d been paid for by insurance. The court simply said that OCGA § 9-11-68 is designed to encourage settlements and it refused to look at whether the fact that fees were covered by insurance. Malpractice insurance did not insulate Gowen from the payment of legal fees and expenses under OCGA § 9-11-68.

& & &

The 2012 Version of this paper extensively reviewed OCGA § 9-11-68 as a statutory scheme of “Betting the Spread,” in game theory. That paper also reviewed academic statistical reviews of whether Offers of Settlement statutes (throughout the United States) do, in fact, reduce litigation?

Prior versions of this Paper, 2011 to 2014, reviewed the application of Fed.R.Civ.P. 68 to case. Those prior versions are available from ICLEGA.ORG
Whether this risk shifting contract is "insurance" under Georgia law is beyond the scope of this paper. This author offers no opinion on same. OCJA § 33-1-2. "Definitions (2) "Insurance" means a contract which is an integral part of a plan for distributing individual losses whereby one undertakes to indemnify another or to pay a specified amount or benefits upon determinable contingencies."
EXHIBITS


EXHIBIT B: OCGA § 9-11-68 demand letter: Rogers & Hardin.

EXHIBIT C: OCGA § 9-11-68 Motion prepared by Rogers & Hardin on behalf of Greenberg Traurig is a fairly good form for use in federal court (and can be easily modified for Superior Court).
Exhibit A
Mr. Rick Kolodinsky  
1305 North Atlantic Avenue  
New Smyrna Beach, Florida 32169

Re: Professional Ethics Committee  
Florida Bar Staff Opinion 28705

Dear Mr. Kolodinsky:

As I previously informed you, at its September 11, 2009 meeting, the Professional Ethics Committee reviewed Florida Bar Staff Opinion 28705 issued July 14, 2009 regarding. After full consideration of the issues, the committee voted 22-12 to withdraw Florida Bar Staff 28705 and direct staff to issue a staff opinion that concludes that the cost of a premium for an insurance policy that would cover a judgment for attorney's fees and costs of the opposing party under a proposal of settlement files under Florida Statutes §768.79 is a cost that may be advanced under Rule 4-1.8(e), but whether the product is legal or otherwise in compliance with ethics is outside the scope of this staff opinion. Enclosed is a copy of Florida Bar Staff Opinion 28705 as written at the direction of the committee.

I apologize for the length of time it has taken to re-write the opinion. If you have any questions, please call me at (850) 561-5780.

Sincerely,

Elizabeth Clark Tarbert  
Ethics Counsel

c: Mr. David R. Heffeman, Chair, Professional Ethics Committee

PEC28705 action
FLORIDA BAR STAFF OPINION 28705 (Revised)

January 5, 2010

[The original opinion was withdrawn by the Professional Ethics Committee at its September 11, 2009 meeting. Florida Bar Staff Opinion 28705 (Revised) was written at the direction of the Professional Ethics Committee after that meeting.]

Florida Bar ethics counselors are authorized by the Board of Governors of The Florida Bar to issue informal advisory ethics opinions to Florida Bar members who inquire regarding their own contemplated conduct. Advisory opinions necessarily are based on the facts as provided by the inquiring attorney. Opinions are not rendered regarding past conduct, questions of law, hypothetical questions or the conduct of an attorney other than the inquirer. Advisory opinions are intended to provide guidance to the inquiring attorney; the advisory opinion process is not designed to be a substitute for a judge’s decision or the decision of a grievance committee. The Florida Bar Procedures for Ruling on Questions of Ethics can be found on the bar’s website at www.floridabar.org.

A member of The Florida Bar has requested an advisory ethics opinion asking if an attorney may advance as a cost (to be reimbursed by the client at the close of litigation) a premium for an insurance policy that would cover the eventuality of a judgment for adverse attorney fees secured pursuant to a proposal for settlement filed under Florida Statutes § 768.79 and Rule 1.442. The premium would be for a specified amount of coverage and require a single premium. The premium would be issued by an insurance carrier approved to do business in the state of Florida. The inquirer indicates that obtaining the insurance policy for the client “enhances the client’s likelihood of negotiating a more advantageous settlement, one on the merits.” The inquirer believes that such insurance will level the litigation playing field to permit clients to make decisions based on the facts and circumstances of the clients’ cases rather than the concern that the clients will be forced to pay the opposing party’s attorney fees if the clients fail to obtain a verdict of a minimum specified amount under the statute.

The prohibition against providing financial assistance to a client is rooted in the common law doctrines of champerty and maintenance, Rule 4-1.8(e), Rules Regulating The Florida Bar, provides:

Financial Assistance to Client. A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:
(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and
(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.
Lawyers may ethically loan or advance costs that are directly related to litigation such as filing fees or investigative expenses. Indirect costs of litigation such as litigation-related transportation and medical diagnostic costs may also be advanced. See, Florida Ethics Opinion 72-27 (copy enclosed). However, Florida Ethics Opinion 96-1 (copy enclosed) provides that if a client obtains recovery in a suit, that client must repay the costs and expenses advanced by his or her attorney. Additionally, the rule allows a lawyer to make the repayment of the costs conditioned on obtaining a recovery in a case. However, it is equally clear that lawyers may not advance money to clients to be used for general living expenses and/or for medical treatment. See, The Florida Bar v. Woolen, 452 So. 2d 547 (Fla. 1984); Kopplow & Flynn, P.A. v. Trudell, 445 So. 2d 1065 (Fla. 3d DCA 1984); but see, The Florida Bar v. Taylor, 648 So. 2d 1190 (Fla. 1994). Such advances may serve as an inducement to retain or continue employment of lawyers who make such advances.

Florida Ethics Opinion 96-3 provides that a lawyer may not pay attorneys fees or costs that a client has been ordered to pay under Florida Statutes § 768.79. The opinion concludes that to do so "would defeat the purpose" of the statute.

The cost of a premium for an insurance policy that would cover a judgment for attorney's fees and costs of the opposing party under a proposal of settlement filed under Florida Statutes § 768.79 is a cost of litigation that may be advanced and made contingent on the lawyer making a recovery on behalf of the client under Rule 4-1.8(e). No opinion is offered on whether the insurance product is legal or otherwise in compliance with the Rules of Professional Conduct.

Index: 4-1.8(e)
Exhibit B
March 31, 2010

Robert Bartley Turner, Esq.
Savage, Turner, Pinson & Karsman
304 East Bay Street
Post Office Box 10600
Savannah, GA 31412

United States District Court, Southern District of Georgia
Civil Action No. CV508-98

Dear Bart:

I write pursuant to O.C.G.A. § 9-11-68 on behalf of Greenberg Traurig, LLP and Greenberg Traurig, P.A. ("Defendants" or "Greenberg") to present an offer to Plaintiff Gowen Oil Company, Inc. ("Gowen Oil"), for full and final settlement of all tort claims asserted by Gowen Oil in the above-referenced matter. I am authorized to make this offer on behalf of Greenberg.

Defendants' settlement offer includes the following provisions:

1. **Settlement Relief.** Defendants will pay to Gowen Oil a total amount of Sixty-Three Thousand and no/100 Dollars ($63,000.00) which includes all claims by the plaintiff, including punitive damages and attorneys’ fees. If accepted, payment will be made to Gowen Oil or the person or entity designated by Gowen within 30 days of the date of acceptance.

2. **Dismissal of Litigation.** Plaintiff and Defendants will dismiss all claims in this matter, with prejudice, including Plaintiff's claim for punitive damages and attorneys' fees.
3. **Attorneys' Fees and Other Expenses.** Plaintiff has included attorneys' fees and litigation expenses as a part of its legal claim.

4. **Release and Covenant Not to Sue.** The parties will exchange appropriate mutual releases and covenants not to sue.

5. **No Admissions.** This offer of settlement is made for purposes specified in O.C.G.A. § 9-11-68 and is not to be construed as an admission that any party is liable in this action, suffered damage or incurred attorneys' fees or costs.

6. **Confidentiality.** The parties agree that they will not disclose the terms of this offer except in proceedings to enforce the settlement or determine the award of costs and attorneys' fees in accordance with O.C.G.A. § 9-11-68. In the event a settlement agreement is reached, the parties will treat the amount of the settlement as confidential.

7. **No Assignment by the Parties.** The parties warrant and represent that they are the holders of all claims released by this offer, and that none of the claims at issue in this suit have been sold or assigned, or otherwise disposed of, either voluntarily or involuntarily.

8. **Successors and Assigns.** The provisions of this offer shall be binding and inure to the benefit of the parties and their respective heirs, executors, personal representatives, attorneys, accountants, advisors, administrators, agents, representatives, successors and assigns.

9. **Governing Law.** This offer shall be interpreted, enforced and governed in accordance with the laws of the State of Georgia.

As provided in O.C.G.A. § 9-11-68(c), this offer shall remain open for 30 days. Also, as required by the statute, I enclose a Certificate of Service, which we have not filed with the Court.
Best regards.

Yours very truly,

[Signature]

Richard H. Sinkfield
On behalf of Defendants Greenberg Traurig, LLP and Greenberg Traurig, P.A.

AGREED TO AND ACCEPTED BY:

GOWEN OIL COMPANY, INC.

By: ________________________________
Its: ______________________________

Savage, Turner, Pinson & Karsman

By: ________________________________
Robert Bartley Turner
On behalf of Gowen Oil Company, Inc.

RHS:jmb
Enclosures
cc: C. Dorian Britt, Esq.
IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF GEORGIA
BRUNSWICK DIVISION

GOWEN OIL COMPANY, INC.,

Plaintiff,

v.

BLU ABRAHAM; GREENBERG TRAURIG,
LLP; GREENBERG TRAURIG, P.A.;
JOSEPH WEINGARD; and
JONATHAN WILLIAMS,

Defendants.

CERTIFICATE OF SERVICE

This is to certify that I have this date served a copy of the foregoing

Defendants Greenberg Traurig, LLP's and Greenberg Traurig, P.A.'s Offer of

Settlement Pursuant to O.C.G.A. § 9-11-68 upon all counsel of record, by certified

mail, addressed as follows:

R. Bartley Turner, Esq.
C. Dorian Britt, Esq.
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Jonathan Williams
Post Office Box 9247
Daytona Beach, FL 32120
This 1\textsuperscript{st} day of April, 2010.

Richard H. Sinkfield  
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UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
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CIVIL ACTION FILE
NO. 5:08-CV-00098

DEFENDANTS GREENBERG TRAURIG, LLP’S
AND GREENBERG TRAURIG, P.A.’S MOTION
FOR AN AWARD OF ATTORNEYS’ FEES
(AND MEMORANDUM IN SUPPORT)

Greenberg Traurig, LLP and Greenberg Traurig, P.A. (“Greenberg”) hereby move this
Court for an award against the Plaintiff of the attorneys’ fees and expenses of litigation that they
incurred in this action since May 4, 2010. Greenberg makes this motion on the following
grounds:

1. On April 1, 2010, Greenberg mailed an offer of settlement dated March 31, 2010
to the Plaintiff pursuant to O.C.G.A. § 9-11-68(a). A copy of Greenberg’s offer and certificate
of service is attached hereto as Exhibit “A.”

2. The Plaintiff did not accept or reject Greenberg’s offer within 30 days.

Accordingly, Greenberg’s offer is deemed rejected. See O.C.G.A. § 9-11-68(c) “an offer that is
neither withdrawn nor accepted within 30 days shall be deemed rejected.”

3. On September 3, 2010, this Court granted summary judgment to Greenberg on all
of the Plaintiff’s claims against Greenberg. Under the order, the Plaintiff recovers nothing from
Greenberg or Defendant Weingard.
4. On October 8, 2010, the Court granted Defendant Williams' motion for summary judgment on all of Plaintiff's claims against Defendant Williams. Because Defendant Biju Abraham was never served in this case, this Court's October 8, 2010 order resolves the Plaintiff's claims against all Defendants present before this Court.

5. O.C.G.A. § 9-11-68(b)(1) provides for an award of attorneys' fees and expenses of litigation against the Plaintiff if the following conditions are met:

   If a defendant makes an offer of settlement which is rejected by the plaintiff, the defendant shall be entitled to recover reasonable attorney's fees and expenses of litigation incurred by the defendant or on the defendant's behalf from the date of the rejection of the offer of settlement through the entry of judgment if the final judgment is one of no liability or the final judgment obtained by the plaintiff is less than 75 percent of such offer of settlement.

6. Since Greenberg made an offer of settlement which the Plaintiff is deemed to have rejected under the terms of the statute, and since the order is "one of no liability" to the Plaintiff, the conditions set by O.C.G.A. § 9-11-68(b)(1) have been met. The Court therefore should award Greenberg the reasonable attorneys' fees and expenses of litigation incurred from the date the Plaintiff rejected Greenberg's offer of settlement (May 4, 2010), as provided by the statute. See O.C.G.A. § 9-11-68(b)(1) (quoted above); § 9-11-68(d)(1) ("[t]he court shall order the payment of attorney's fees and expenses of litigation upon receipt of proof that the judgment is one to which the provisions of either paragraph (1) or paragraph (2) of subsection (b) of this Code section apply"). Greenberg estimates that the amount of the fees and expenses incurred in the defense of this action since the Plaintiff rejected Greenberg's offer is approximately $300,000.00.
7. O.C.G.A. § 9-11-68 is applicable to this case because the statute is substantive, not procedural. In Wheatley v. Moe's Southwest Grill, LLC, 580 F. Supp. 2d 1324 (N.D. Ga. 2008), the district court determined that:

O.C.G.A. § 9-11-68 creates a substantive right to attorneys' fees in certain cases where either party, having made an offer of settlement (not judgment, unlike Rule 68), ultimately prevails. While the statute may provide certain procedural constraints, the statute is at its core a substantive law . . . Because O.C.G.A. § 9-11-68 is substantive in nature and does not conflict with a federal law or rule of procedure, the Court is bound to apply it to this case, 580 F. Supp 2d at 1329 (internal citations omitted).

The district court in Wheatley also ruled that “Rule 68 and O.C.G.A. §9-11-68 are not in ‘direct collision’ with one another,” so that the statute was not preempted by Federal Rule of Civil Procedure 68. Id. at 1328-29 (noting the difference between O.C.G.A. §9-11-68 and Fed. R. Civ. P. 68).

8. In addition, the Eleventh Circuit has found Florida’s offer of judgment statute, Fla. Stat. § 768.79, and its predecessors, to be applicable to state law claims in federal diversity actions. Specifically, the Eleventh Circuit has addressed and rejected arguments: (1) that the Florida offer of judgment statute was “procedural” and not “substantive” under Erie; (2) that the Florida statute should be construed to apply only in Florida state courts; and (3) that Federal Rule 68 preempted the application of Florida’s offer of judgment rule in federal court. See Merchise v. Akerman Senterfitt, 532 F.3d 1146, 1150 (11th Cir.2008) (stating that “section 768.79 is substantive law in diversity cases” and that “the language of section 768.79 does not bar its application to claims based on state law that are filed in federal court”) (internal citations omitted); McMahan v. Toto, 256 F.3d 1120, 1132 (11th Cir.2001), modified in part by 311 F.3d 1077 (11th Cir.2002) (holding that § 768.79 is substantive for Erie purposes); and Tanker, 918 F.2d at 1528-29 (“Because Rule 68 applies only to offers of judgment and is in no way
applicable to settlement offers as provided in section 45.061 [a predecessor to § 768.79], Rule 68 does not preempt state law). 

9. For these reasons, Greenberg respectfully requests that its motion for attorneys’ fees be granted. Greenberg estimates that its fees and expenses will amount to approximately $300,000.00.

10. Given that the Court has not yet entered a final judgment in this case, Greenberg is at the same time filing a motion for entry of final judgment pursuant to Rule 54(b), Fed. R. Civ. P. Greenberg will submit its proof of attorneys’ fees and expenses as provided by Local Rule 54.2(c) within 30 days of entry of a final judgment in this matter.

This 21st day of October, 2010.

(s/ Richard H. Sinkfield)
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CERTIFICATE OF SERVICE

This is to certify that I have this date served a copy of the foregoing Defendants

Greenberg Traurig, LLP's and Greenberg Traurig, P.A.'s Motion for An Award of Attorneys' Fees (And Memorandum In Support) with the Clerk of Court using the CM/ECF system which will automatically send e-mail notification of such filing to the following attorneys of record:

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And via U.S. Mail postage prepaid and addressed as follows:

Jonathan Williams
Post Office Box 9247
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This 21st day of October, 2010.

/s/ Richard H. Sinkfield
Richard H. Sinkfield
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DEFENDING CLAIMS AND GRIEVANCES

Brian R. Smith, The Smith Law Practice, Atlanta
February 14th, 2019

WHAT YOU SHOULD DO IF YOU RECEIVE A BAR COMPLAINT

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What You Should Do If You Receive a Bar Complaint

This paper is not written for lawyers who have committed any of the deadly sins obviously warrant discipline, but for lawyers who may nonetheless end up coming into contact with the State Bar’s disciplinary processes. Even the most ethical lawyer may find himself or herself in the position of having to respond to a grievance filed by a disgruntled client or belligerent adversary. Here are a few points to consider regarding the manner in which the disciplinary process typically unfolds in cases where the allegations of ethical misconduct are unwarranted, questionable, or minor.

The Grievance

It could happen to any of us. One day, you’re going through your mail and you find a thick envelope from the State Bar of Georgia’s Office of the General Counsel (OGC). You open it up to find a cover page alleging that you may have violated various Rules of Professional Conduct, followed by a narrative compiled by a former client, adversary, or other person that construes facts out of context in order to make it appear that you did something improper. What should you do?

Even if the grievance lacks merit, the process can be intimidating. Most lawyers, and especially lawyers who are careful not to violate the ethical rules, have not had reason to become familiar with manner in which attorney discipline proceedings are conducted. Furthermore, the case law concerning attorney discipline consists almost entirely of cases in which the attorney committed an ethical violation and was publically punished for it. Grievances that are dismissed by OGC or the State Bar’s Investigative Panel remain confidential, and therefore do not become part of any publically available body of precedent.

Nonetheless, the process is designed to screen out meritless grievances. If you receive a grievance that is not warranted, you may be able to end the inquiry at an early stage with an appropriate and thoughtfully composed response.
**Know the Georgia Rules of Professional Conduct**

First, if you are not already intimately familiar with the substance of the portions of the Georgia Rules of Professional Conduct (GRPC) that you are alleged to have violated, you should review these Rules and all the instructive Comments very carefully.\(^1\) All of us should be familiar with the GRPC anyway. Nonetheless, these Rules contain important nuances that are not always intuitive. The State Bar amends various portions of the GRPC from time to time, and amends the Comments with some regularity. Make sure you have parsed all relevant portions of the GRPC very carefully before crafting a response.

**Responding to the Office of General Counsel**

If the allegations in the grievance are without merit, your goal should be to persuade the OGC to dismiss the grievance before it goes any further. Rule 4-202(b) states:

> Upon receipt of a grievance in proper form, the Office of the General Counsel shall screen it to determine whether the grievance is unjustified, frivolous, patently unfounded or fails to state facts sufficient to invoke the disciplinary jurisdiction of the State Bar of Georgia. The Office of the General Counsel shall be empowered to collect evidence and information concerning any grievance and to add the findings and results of its investigation to the file containing such grievance. The screening process may include forwarding a copy of the grievance to the respondent in order that the respondent may respond to the grievance.

Subsection (c) of the same Rule states that the OGC “shall be empowered to dismiss” grievances that do not warrant further investigation.

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\(^1\) The GRPC can be found on the State Bar’s Website; click on “Bar Rules” → “Ethics and Professionalism”, then scroll down to the section labeled “Ethics and Disciplinary Rules” and click on “Georgia Rules of Professional Conduct.” The Bar’s website also contains the procedural rules regarding the Disciplinary Proceedings applicable to bar grievances, as outlined in Rule 4-201, *et seq.* of the State Bar Rules and Regulations, a link to which can be found three headings under the GRPC on the same webpage. The GRPC and procedural rules are also accessible through Westlaw and most other legal research subscription databases.
As quoted above, Rule 4-202 provides that the grievance may be (and, in practice, generally will be) forwarded to the accused lawyer for a response. There are several things you should keep in mind when responding.

First, the OGC has discretion to request additional replies or supplemental documentation from either the grievant or the respondent, or both. In many cases, the OGC will ask one party or the other to provide additional documents based on questions raised by the positions taken by each side. The cover page that the OGC sends to the responding lawyer calls for the response to be limited to a submission of 25 pages or less. If it is difficult to limit the response and exhibits to less than this amount, you may offer to provide the OGC with additional documents or information upon request.

In almost every case, the grievant will be given the opportunity to reply to your response and to provide any additional information that may call into question your version of events. Therefore, you should be careful not to make any statements of fact that the grievant may discredit by providing additional evidence. In some instances, the OGC will invite the grievant and respondent to go back and forth several times in responding to one another before it makes a decision on whether or not to forward the grievance to the Investigative Panel. On the other hand, many unwarranted grievances are dismissed in cases where the responding lawyer provides a thoughtful response, and the grievant has nothing to say in reply.

Finally, as with any persuasive legal argument, it is important to balance a thorough recitation of the pertinent facts with a concise focus on what is really important. This can be especially difficult, however, when you are responding to an unreasonable former client or belligerent adversary who has frustrated you for months or years, and who is now twisting the facts regarding your representation in an effort to impair your ability to continue practicing law. Be mindful to take a step back and assess the situation as objectively as you can, and then focus your
response on the facts pertinent to the applicability of the particular Rules of Professional Conduct that the grievance alleges may have been violated. Remember, the Bar does not care if your client is crazy, if you think the overall result you achieved for the client was better than most lawyers could have done, or if a belligerent opposing counsel provoked your actions. OGC’s job is to help protect the public from unethical attorney conduct by separating grievances that merit further attention from those that do not. Do not make this job more difficult by bringing up extraneous matters that do not bear upon the ethical analysis. Be as concise as you can be, but no more so. Attach and cite to supporting documents whenever appropriate.

**Proceedings before the Investigative Panel**

If the OGC determines that the grievance against you appears to state facts that may support a finding that an ethical violation has occurred, it will forward the grievance to the Investigative Panel of the State Disciplinary Board of the State Bar of Georgia, and a Notice of Investigation will be issued to you. See Rules 4-204 and 4-204.1. The Investigative Panel consists of both attorneys and lay people, all of whom volunteer their time. Under Rule 4-204, the panel will “appoint one of its members to be responsible for the investigation,” and this Investigating Member will be an attorney rather than a lay person. The OGC will simultaneously appoint a staff investigator to assist in the investigation.

At this stage, you are required to file with the Investigating Member a written response to the Notice of Investigation within 30 days, and you must verify your response under oath. Rule 4-204.3. Unlike during the screening stage before the OGC, immediate negative repercussions (e.g. interim suspension) may follow if you do not timely and adequately respond.

It is important to remember that many matters referred to the Investigative Panel are eventually dismissed before proceeding further, and many others result in relatively minor forms of discipline. Just because you have received a Notice of Investigation does not mean that you will
necessarily be disbarred or suspended. You still have ample opportunity to convince the Panel to consider evidence or understand an argument that failed to carry the day during the initial screening process.

In seeking to persuade the Panel, you may communicate only with the Investigating Member, who will be communicating separately with the grievant. You may provide the Investigating Member with any evidence or argument that you believe the OGC overlooked during the initial screening, and often the Investigating Member will see things differently than the OGC’s attorney who handled the initial screening. The Investigating Member is also “authorized to issue oaths and affirmations and to issue subpoenas for the appearance of persons and for the production of things and records,” and you can suggest to the Investigating Member ways in which these powers could be used to uncover evidence that might exonerate you. See Rule 4-203(a)(10).

After the conclusion of the investigation, the Investigating Member will then issue a report on the matter at a meeting of the Panel. “If the Member’s investigation has been completed, the Investigating Member shall give an accounting of the form and substance of the investigation after which the member may recommend and the Panel shall determine either that probable cause does or does not exist.” See Rule 8 of the Internal Rules of the Investigative Panel. If the Investigating Member finds that no probable cause exists and a majority of the Panel agrees, the matter may be dismissed.

Confidential Discipline and Petitions for Voluntary Discipline

Even if the matter is not dismissed, the Investigative Panel is authorized to impose confidential discipline in certain cases rather than proceeding with the process of imposing publicly reported sanctions such as disbarment, suspension, or a public reprimand. Under Rule 4-204.5, if the Investigative Panel finds that the respondent lawyer has engaged in conduct that, while not ideal, either did not violate the GRPC or constituted only a minor technical violation, it
may issue “letters of instruction” advising the attorney that the conduct was improper and should be avoided in the future. Letters of instruction do not constitute a disciplinary infraction. A step above that, the Panel may issue “letters of formal admonition” or an Investigative Panel Reprimand for relatively minor violations of the GRPC. See Rule 4-205. Letters of formal admonition and Investigative Panel Reprimands, while confidential, are considered disciplinary infractions. Confidentiality is waived if the lawyer is brought up before subsequent disciplinary proceedings, and a subsequent infraction will automatically make the attorney subject to harsher punishment. See Rules 4-208 and 4-103. On the other hand, if there is no subsequent violation, the public never hears about it and the lawyer’s right to practice is not impaired.

In the event you are brought before the Investigative Panel on charges that turn out to be merited to some degree, you may want to consider filing a Petition for Voluntary Discipline requesting that the Panel administer confidential discipline. See Rule 4-203(a)(9) and Rule 9 of the Panel’s Internal Rules. The Investigating Member will then report on whether or not the Petition should be accepted, following which the Panel will vote on the Petition.

**Should you get help?**

Lawyers facing disciplinary proceedings are entitled, but not required, to have lawyers of their own. Hiring counsel is not guaranteed to change the eventual result, but it can often help. Among the advantages of hiring counsel are, (1) the ability to consult with an attorney who specializes in handling ethical complaints and is familiar with the process, (2) having an objective advocate who can see things as the fact finders will, uncolored by the emotions that inevitably arise when dealing with unreasonable former clients and belligerent adversaries, (3) the ability to offload some of the stress of having to frame a response so that you can focus on working for your existing clients, (4) the ability to have someone else respond to the OGC at the initial screening stage (when a response under oath from the accused attorney is not yet required) so as not to
overcommit oneself to factual positions that may later need to be revised, and (5) having access to unbiased advice regarding whether or not filing a Petition for Voluntary Discipline may be the best option.

*Know your coverage! You may be entitled to reimbursement for the cost of hiring a bar complaint defense attorney under your errors and omissions policy.*

Many lawyers have coverage for bar complaint defense counsel included in their errors and omissions policies and do not even know it. E&O policies often have a provision allowing for a specific amount (smaller than the policy limit) to be paid to an attorney hired to handle disciplinary proceedings. The following clause is highly typical:

**Disciplinary Proceedings**

The Company will reimburse the Named Insured up to $20,000 for each Insured and all Insureds in the aggregate, for attorney fees and other reasonable costs, expenses or fees (the “Disciplinary Fees”) paid to third parties (other than an Insured) resulting from any one Disciplinary Proceeding…arising out of an act or omission in the rendering of legal services by such Insured.

Policies sometimes contain additional coverage if there is no ultimate finding of wrongdoing by the lawyer. The following is also typical:

In the event of a determination of No Liability of the Insured against whom the Disciplinary Proceeding has been brought, the Company shall reimburse such Insured for Disciplinary Fees, including those in excess of the $20,000 cap set forth above, up to $100,000.

Insurance carriers often do not oversee the reimbursement of disciplinary fees in the same manner as fees incurred by defense attorneys in civil matters in which the carrier might be responsible for paying the eventual judgment. This means that you can often get the errors and omissions carrier to reimburse you for fees paid to the ethics counsel of your choice, whether this is an insurance defense attorney or not.
Conclusion

If you ever have the misfortune of having to respond to a grievance filed with the State Bar, it is not necessarily the end of your legal career. Although the process may be unfamiliar and intimidating, there are many options at your disposal. If you have not committed a serious ethical violation, you may be able to emerge from the process without any discipline, or with no public discipline, being imposed.
February 14th, 2019

PROVING ATTORNEYS’ FEES

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Proving attorneys’ fees can be tricky even when the law authorizes you to recover them as a result of your opponent’s stubborn litigiousness or abusive litigation tactics. Georgia case law is littered with many cases in which a party managed to convince the trial court that attorneys’ fees ought to be awarded under O.C.G.A. §§ 9-15-14 or 13-6-11 only to have the Court of Appeals rule that the fee award failed to satisfy the necessary conditions and remand the decision back to the trial court for further consideration. This paper includes a general overview of when you can recover attorneys fees by discussing the manner in which the various abusive litigation statutes mesh with one another, and also provides a “nuts and bolts” discussion of how you can present the evidence necessary to recover your fees (and how you can do so in a manner that can withstand a challenge on appeal).

I. Statutes providing for recovery of attorneys’ fees for abusive litigation

At the trial level, there are three basic statutory vehicles for recovering abusive litigation attorneys’ fees – O.C.G.A. §§ 13-6-11, 9-15-14, and 51-7-80 through 85 – each of which applies in a different manner to different conduct.¹

a. Bad faith attorneys’ fees under O.C.G.A. § 13-6-11

O.C.G.A. § 13-6-11 applies to bad faith conduct committed by the defending party in the underlying transaction before the litigation commences. Unlike O.C.G.A. § 9-15-14 (discussed below), 13-6-11 specifically states that fees awarded under this code section are to be determined “by the jury” (or by the judge sitting as the factfinder in a bench trial), rather than by the Court at a pre-trial or post-trial hearing.

¹ At the appellate level in Georgia, frivolous appeal penalties are addressed by O.C.G.A. § 5-6-6, as well as by Rule 6 of the Georgia Supreme Court and Rule 15 of the Georgia Court of Appeals.
Although located in the Contracts Title of the Code, 13-6-11 also applies to tort actions. In any case seeking damages for an intentional tort, 13-6-11 fees should be sought because Georgia cases have repeatedly held that “[e]very intentional tort invokes a species of bad faith and entitles a person so wronged to recover the expenses of litigation including attorney fees.” See e.g. Bunch v. Byington, 292 Ga. App. 497, 664 S.E.2d 842 (2008). On the other hand, the fact that the alleged tort is not of the intentional variety is not necessarily fatal to a tort-based claim for 13-6-11 fees. Windermere, Ltd. v. Bettes, 211 Ga. App. 177, 438 S.E.2d 406 (1993).

Although the statute applies “where the defendant has acted in bad faith, has been stubbornly litigious, or has caused the plaintiff unnecessary trouble and expense,” any “stubborn litigiousness” or “unnecessary trouble or expense” alleged must be based on the underlying transaction out of which the action arose, rather than on the conduct of the parties and their counsel during the ensuing litigation. See e.g. Capital Health Management Group, Inc. v. Hartley, 301 Ga. App. 812, 689 S.E.2d 107 (2009); Merlino v. City of Atlanta, 283 Ga. 186, 191(4), 657 S.E.2d 859 (2008); Atlanta Journal Co. v. Doyal, 82 Ga. App. 321, 336(5), 60 S.E.2d 802 (1950). In other words, “stubborn litigiousness” in the context of a 13-6-11 claim means conduct predating the complaint indicating a “so sue me” attitude on the part of the defendant. See e.g. Clearwater Const. Co. v. McClung, 261 Ga. App. 789, 584 S.E.2d 61 (2003). If the bad faith or stubborn litigiousness alleged arises out of litigation conduct by the parties after the complaint is filed, then such a claim should be evaluated under O.C.G.A. § 9-15-14 instead. (see below)

As stated in the statute, 13-6-11 attorneys’ fees are available only where “where the plaintiff has specially pleaded and has made prayer therefor.” Therefore, the plaintiff (or
a counterclaimant with an independent counterclaim) should clearly and specifically present a claim for 13-6-11 fees in the complaint (or independent counterclaim) and allege facts showing the requisite bad faith. “A general request for attorney fees, without reference to OCGA § 13-6-11 or the criteria set forth therein, is not the specific pleading contemplated by the statute. The statute requires that the party specifically plead and pray for fees thereunder.” Pipe Solutions, Inc. v. Inglis, 291 Ga. App. 328, 661 S.E.2d 683 (2008). Therefore, the claim for 13-6-11 fees should cite to the statute and specifically demonstrate how the facts pled meet its requirements.

Once the case goes to trial, the claim for 13-6-11 fees should again be specifically alleged in the pretrial order. All attorneys and other law firm personnel needed to testify should be listed in ¶ 19 regarding witnesses, and all time records and other documents pertaining to the amount of the fees should be listed in ¶ 14 regarding exhibits. Because the issue of O.C.G.A. § 13-6-11 fees will be heard by the jury or factfinder, the plaintiff must be prepared to present evidence regarding the amount of fees sought in its case in chief. In a short trial, if the plaintiff mistakenly believes that the issue of fees will be heard

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2 “The award of expenses of litigation under O.C.G.A. § 13–6–11 can only be recovered by the plaintiff in an action under the language of the statute; therefore, the defendant and plaintiff-in-counterclaim cannot recover such damages where there is a compulsory counterclaim… However, if the counterclaim is an independent claim that either arose separately from the plaintiff’s claim or arose after plaintiff’s claim, then a plaintiff-in-counterclaim may recover expenses of litigation.” Sanders v. Brown, 257 Ga. App. 566, 571 S.E.2d 532 (2002). See also Byers v. McGuire Properties, Inc., 285 Ga. 530, 679 S.E.2d 1 (2009); Singh v. Sterling United, Inc., 326 Ga. App. 504, 513, 756 S.E.2d 728, 737 (2014), cert. denied (Sept. 22, 2014)(“applying Byers and Sanders, we find that [defendant]’s counterclaim for breach of contract for failing to make repairs and upon which [defendant] bases its attorney fees claim was clearly in the nature of a compulsory counterclaim and thus fees were not permitted for that claim under OCGA § 13–6–11.”)
at the conclusion of the entire trial and fails to bring the necessary evidence and witnesses to the courthouse in time, the opportunity to recover fees may be lost.

b. **Attorneys fees for frivolous positions or abusive litigation tactics under O.C.G.A. § 9-15-14**

O.C.G.A. § 9-15-14 provides a remedy for tactics that are more typically thought of as “abusive litigation” – i.e. frivolous positions or abusive tactics originating during the litigation, itself. It is a formidable weapon in the hands of a knowledgeable lawyer in a case where the trial judge has become irritated with his or her opposing counsel. As explained below, an order awarding O.C.G.A. § 9-15-14 must fulfill strict technical requirements in order to survive on appeal. However, so long as the trial judge (or a prevailing party who drafts a proposed order for the trial judge’s signature) understands these requirements and drafts the order accordingly, the trial court’s substantive basis for deciding to award fees will be entitled to a great deal of deference.

Unlike 13-6-11, 9-15-14 fees must be sought by motion rather than as a count of the Complaint, and they are awarded by the trial judge rather than by the jury. Such a motion may be brought at any time during the litigation or up to 45 days after the final disposition. See subsection (e). Also unlike 13-6-11, 9-15-14 fees can be awarded against a party, a party’s attorney, or both depending on the circumstances.

Subsections (a) and (b) of O.C.G.A. § 9-15-14 provide relief for different types of conduct under different circumstances. Subsection (a) mandates that fees “shall” be awarded where the opposing party has asserted a “…position with respect to which there existed such a complete absence of any justiciable issue of law or fact that it could not be reasonably believed that a court would accept the asserted...position.” On the other hand, subsection (b) provides a discretionary award where the opposing party has engaged in
tactics that “lacked substantial justification or that the action, or any part thereof, was
interposed for delay or harassment, or ... unnecessarily expanded the proceeding by other
improper conduct, including, but not limited to, abuses of discovery...”

Thus, subsection (a) applies only to legally baseless positions, while subsection (b)
applies both to baseless positions and also to litigious misbehavior designed to cause the
other side unnecessary trouble and expense. Therefore, a motion under subsection (a)
should only be successful where the opposing party asserted a truly frivolous position,
while a motion under subsection (b) could be held to apply even against a prevailing party
if that party has engaged in abusive litigation tactics that unnecessarily expanded the
proceedings.

If the allegation of misconduct is that the opposing party committed discovery
abuse or otherwise put the moving party to unnecessary trouble and expense by the
manner in which it pursued otherwise justiciable claims or defenses, a 9-15-14 motion
may only be brought under subsection (b). On the other hand, a motion asserting that a
certain claim, defense, or other position was entirely baseless can be brought either under
subsection (a), or under the open-ended “lacked substantial justification” language in
subsection (b), or by moving under both in the alternative. However, any motion that
conflates the different requirements contained in subsections (a) and (b) without
demonstrating separately how the pertinent facts fall under the specific language of either
subsection will be doomed to failure.

Under either subsection, the decision of the court is entitled to substantial
deference on appeal so long as the order is drafted correctly. The standard of review under
subsection (a) is “any evidence” to support the award, while an abuse of discretion
standard applies to subsection (b). See e.g. Trotter v. Summerour, 273 Ga. App. 263, 614

Nonetheless, although an order that does not fulfill these technical requirements will be vacated and remanded on appeal, the appellate courts are much more deferential in assessing the trial court’s substantive basis for awarding fees. The “lacked substantial justification” language of subsection (b) is particularly nebulous. (The statute explains that “lacked substantial justification’ means substantially frivolous, substantially groundless, or substantially vexatious” – a non-description that only highlights the
ambiguity.) Therefore, so long as the order “checks all the boxes,” there is little to constrain a trial judge who decides to award fees so long as there is some basis to do so.

c. Separate actions for abusive litigation under O.C.G.A. § 51-7-80, et seq.

O.C.G.A. §§ 51-7-80 through 85 create a separate action for abusive litigation where the litigant has acted with malice and without substantial justification. It is often difficult to bring a valid claim under this subsection for several reasons. First, the necessity of bringing a second civil action regarding the abusiveness of a previous action makes the process time consuming and cumbersome. Also, O.C.G.A. § 51-7-82 and 84 provide for a strict notice and “safe harbor” process by which the complaining party must first give notice of the potential abusive litigation claim by registered or certified mail or statutory overnight delivery and allow his or her opponent 30 days to withdraw the allegedly abusive claim, defense, or other position. If the opponent withdraws the frivolous position within that window, the withdrawal acts as a complete defense to a subsequent 51-7-80 claim.

Furthermore, O.C.G.A. § 51-7-83 provides that “[i]f the abusive litigation is in a civil proceeding of a court of record and no damages other than costs and expenses of litigation and reasonable attorney’s fees are claimed, the procedures provided in Code Section 9-15-14 shall be utilized instead.” Thus, the Georgia Court of Appeals has reasoned that O.C.G.A. § 51-7-80 et seq. presents a valid cause of action only where (1) the abusive litigation conduct occurs “in a court other than one of record,” or (2) the plaintiff is claiming “special damages in addition to the costs and expenses of litigation and attorneys’ fees.” Condon v. Vickery, 270 Ga. App. 322, 327, 606 S.E.2d 336, 340 (2004).
“An action or claim under this article requires the final termination of the proceeding in which the alleged abusive litigation occurred and must be brought within one year of the date of final termination.” O.C.G.A. § 51-7-84(b).

II. **Practical considerations for proving your fees**

Regardless of which abusive litigation code section applies, only *reasonable and necessary* attorneys’ fees may be awarded, and “reasonableness” and “necessity” are facts that must be proven by evidence. Moreover, both O.C.G.A. §§ 13-6-11 and 9-15-14 require that the fees awarded must be specifically apportioned so that they are tied to the specific claim or tactic deemed to be abusive. The party seeking the fees has the burden of proving that the fees sought were both reasonable under the circumstances and directly necessitated by the abusive conduct at issue. Any fees relating to claims, defenses, or positions other than those deemed abusive may not be recovered.

As shown by many of the cases cited above as well as countless others, the appellate courts will not hesitate to vacate attorneys’ fee awards under either 13-6-11 or 9-15-14 if the order or verdict form does not specifically demonstrate (1) which code section is being applied³, (2) the particular position or behavior deemed to be abusive under that code section, (3) the specific facts that justify the application of the statute and establish the amount of the fees, (4) that the attorneys’ fees awarded are solely those related to work done in response to the abusive litigation behavior at issue, and (5) that those fees were reasonable and necessary under the circumstances. Fortunately despite these hurdles, the litigant seeking abusive litigation attorneys’ fees has a few distinct advantages at his or her disposal, as discussed below.

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³ Including, in a 9-15-14 motion, whether subsection (a) or (b) is being applied.
a. You can create your own evidence; keep detailed time records

Seeking compensation for attorneys’ fees incurred as a result of your opponent’s abusive litigation tactics gives you a rare opportunity as a lawyer to present evidence that you have actually created, rather than merely taking evidence created by someone else and presenting it in the light most favorable to your client. Although filling out time records can be tedious (especially in a contingent fee case), there is no better way to support a claim for abusive litigation attorneys’ fees. Because the case law requires that the attorneys’ fees awarded include only those attorneys’ fees that can be specifically apportioned as being made necessary by the abusive conduct at issue, it helps to have enough detail in the records to tell exactly how much time was spent responding to specific claims, defenses, or other positions. If the billing is extensive, it often also helps to prepare a demonstrative summary of the billing records in order to simplify and organize the billing entries for the judge or jury.

Even if you do not otherwise keep time-based billing records in your practice, such as in a contingency fee practice, it can often help to keep track of all time spent on issues that you anticipate may later give rise to an abusive litigation claim (even if you do not keep any time records for time spent on any of the other issues in the case). A contingency fee agreement alone will not be enough to support a fee award in any specific amount; other evidence attesting to the reasonable value of the attorneys’ services must be proffered.

A court may consider a contingent fee agreement and the amount it would have generated as evidence of usual and customary fees in determining both the reasonableness and the amount of an award of attorney fees. When a party seeks fees based on a contingent fee agreement, however, the party must show that the contingency fee percentage was a usual or customary fee for such case and that the contingency fee was a valid indicator of the value of the professional services rendered. In addition, the party seeking
fees must also introduce evidence of hours, rates, or some other indication of the value of the professional services actually rendered.

Ga. Dept. of Corrections v. Couch, 295 Ga. 469, 483(3)(a), 759 S.E.2d 804 (2014)(emphasis added), citing Brock Built, LLC v. Blake, 316 Ga. App. 710, 730 S.E.2d 180 (2012). In Shiv Aban, Inc. v. Georgia Dept. of Transp., the Court of Appeals upheld an award of fees under O.C.G.A. § 9-15-14 in a case where the attorneys were being paid a contingent fee, but the court noted that the attorneys also submitted detailed evidence regarding the numbers of hours worked, the attorneys’ many years of specialized experience, and other factors showing that the total amount sought was reasonable. 336 Ga. App. 804, 784 S.E.2d 134 (2016). In that case, although the amount sought based on the contingency fee was greater than what the firm would have charged for their services based on an hourly rate, the Court of Appeals upheld the trial court’s finding that “a risk premium of two times the hourly rate [was] a reasonable parameter” given the issues involved. Id., 336 Ga. App. at 820, 784 S.E.2d at 146.

Correspondence presents another avenue for you to create your own evidence in support of an abusive litigation claim. If your opponent is taking positions that could form the basis of a 9-15-14 claim, care should be taken to craft letters and emails with an eye toward eventually presenting the chain of correspondence to the judge as evidence.

b. You and your co-workers are the testifying witnesses

Although lawyers are often uncomfortable acting as witnesses in their own cases (and are usually prohibited from doing so under G.R.P.C. 3:7), an abusive litigation claim presents a rare occasion for the lawyer to testify. This can be nerve-racking because the opposing party has the opportunity to cross-examine the lawyer. Nonetheless, whether it is a 13-6-11 claim before a jury or a 9-15-14 motion pending before a judge, well thought-
out lawyer testimony regarding the fees incurred, the work involved, and the reasons why the abusive conduct necessitated it can be extremely persuasive.

Generally in the absence of an objection from opposing counsel, the lawyer may have the option of “stating in his or her place” the facts regarding the fees. When doing so, an outline should be prepared so that the lawyer can be sure to put on the record all the facts establishing the necessary elements of an abusive litigation claim.

However, different judges may have different procedures regarding how they prefer for lawyers to present evidence regarding their own fees. Be prepared to be flexible. If the judge asks you to take the witness stand and have your co-counsel lead you through a direct examination, be prepared to do it.

Also, be prepared for the fact that your opponent has the right to cross-examine you. Even if you stand at the counsel table and state in your place the evidence regarding your fees, your opposing counsel may then require you walk up to the witness stand, take a seat, and answer his questions. If you are sufficiently prepared for this, however, it can present an opportunity rather than a danger. Since it was your opponent’s (or opposing counsel’s) misbehavior that gave rise to the abusive litigation claim in the first place, a cross-examination that fails to score any major points may only further exacerbate the position in which your opponent now finds himself.

Georgia law is not entirely clear as to whether or not lead counsel can testify to work done by other lawyers working in the firm. Therefore, unless your case has employed a team of associates so large that it would be utterly unreasonable to have them all testify at a hearing or trial, you should bring to court everyone in your office who worked on the case and have them be prepared to testify (at least briefly) to the work that they did regarding the abusive claims or positions.
If – whether based on the court’s preference or your own case strategy – it becomes necessary for you to testify to the work done by others, then proving your personal knowledge of their work is the key. In that case, be sure to establish that you worked alongside the other lawyers and interacted with them while working on the matter so that your statements regarding their work are more than just hearsay. Furthermore, you should also be sure to have all bills and time records admitted under the business records exception to the hearsay rule. O.C.G.A. § 24-8-803(6).

c. You should draft a proposed order or verdict form

On a motion seeking fees under O.C.G.A. § 9-15-14, you should always prepare a draft order and take it with you to the hearing on the motion. There are at least two reasons for this. First, judges sometimes decide to grant abusive litigation fees in the “heat of the moment” and your chances of getting what you are asking for are greater if the judge has the option of signing the order immediately after hearing the damning evidence regarding the abusive claims or tactics at issue. Secondly, as shown by the cases cited above, countless 9-15-14 awards have been vacated on the grounds that the trial court’s order did not contain the specific findings required by the statute. The best way to make sure this does not happen to you is to draft the order yourself, and to be sure to include the necessary factual and legal findings.

Similarly under O.C.G.A. § 13-6-11, in a case involving multiple claims, attorneys’ fees may be awarded only on those claims that are both successful and fall within the terms of the statute. See, generally, e.g. McClung v. Atlanta Real Estate Acquisitions, LLC., 282 Ga. App. 759, 639 S.E.2d 331 (2006). Therefore, the evidence of fees spent (such as time records) should be presented accordingly, and the verdict is more likely to survive on appeal if there is a special verdict form that makes it clear that the fees awarded were
specifically tied to the claim involving the abusive conduct. For a court to allow a jury to include 13-6-11 fees as part of a lump sum verdict on a general verdict form is reversible error. Metropolitan Atlanta Rapid Transit Authority v. Mitchell, 289 Ga. App. 1, 659 S.E.2d 605 (2007). Don’t let this happen to you.

**Conclusion**

Although not every case gives rise to a valid opportunity to seek them, abusive litigation attorneys’ fees under O.C.G.A. §§ 13-6-11 and 9-15-14 are among the most neglected items of recoverable damages under Georgia law. These damages are not an afterthought; they represent a substantial benefit that may be lost if counsel is not prepared to seek them. Moreover, nothing makes for a happy client like recovering their fees from the other side as a result of their abusive tactics.
Brian Smith’s practice focuses on appeals, professional liability matters, ethics consultations, and bar complaint defense. He is board certified in the area of legal malpractice law with the American Board of Professional Liability Attorneys (ABPLA).

Mr. Smith is a “lawyer’s lawyer.” He has helped many of his fellow attorneys who have been faced with Bar complaints. In most cases, he has helped his professional discipline clients secure either a dismissal of the Bar complaint against them or minor confidential discipline from the State Bar.

Mr. Smith handles appellate matters in tandem with his father, J.D. Smith, who served as a judge on the Georgia Court of Appeals from 1993 until 2011. They also provide consultation services to other lawyers handling appeals and legally-intensive cases pending at the trial court level.

Mr. Smith graduated from Washington & Lee University in 2001 and received his law degree from the University of Georgia Law School in 2004, graduating cum laude. Upon graduating, he became a member of the State Bar of Georgia in 2004 and began practice as a trial lawyer with Strawinski & Goldberg, LLP where he represented both plaintiffs and defendants. Just three months after being sworn in with the Georgia Bar, he tried his first civil jury trial as part of a two-man trial team with Michael L. Goldberg, and the two of them succeeded in obtaining a favorable plaintiff’s verdict in a difficult medical malpractice trial.

For more than four years, Mr. Smith practiced with Frank Beltran at The Beltran Firm, a firm specializing in legal malpractice claims and other matters involving lawyers and law practice as the underlying subject matter. When Mr. Smith founded his own firm, his areas of practice naturally included those in which he had worked during his time at The Beltran Firm. Mr. Smith considers Mr. Beltran his mentor and retains a close working relationship with Mr. Beltran and his firm.
12:10 PANEL ON ETHICALLY DEALING WITH THE ABUSIVE LITIGATOR
A. Related Ethics and Professionalism Issues as to Abusive Litigation Claims
B. Questions and Answers
Moderator: Julia A. Merritt, Cheeley Law Group LLC, Alpharetta
Panelists:
Robert D. Cheeley, Cheeley Law Group, LLC, Alpharetta
David F. Root, Carlock Copeland & Stair LLP, Atlanta
Frank J. Beltran
ETHICALLY DEALING WITH THE ABUSIVE LITIGATOR

MODERATOR:
Julia A. Merritt, Cheeley Law Group

PANELISTS:
Frank J. Beltran, The Beltran Firm
Bob Cheeley, Cheeley Law Group
David F. Root, Carlock Copeland
I. **INTRODUCTION:**

The following materials contain rules, quotes, and aspirational goals regarding ethics and professionalism to be used as a reference during the panel discussion.

II. **PREAMBLE: A LAWYER’S RESPONSIBILITIES (Georgia Rules of Professional Conduct)**

[1] A lawyer is a representative of clients, an officer of the legal system and a citizen having special responsibility for the quality of justice.

[2] As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others. As intermediary between clients, a lawyer seeks to reconcile their divergent interests as an advisor and, to a limited extent, as a spokesperson for each client. A lawyer acts as evaluator by examining a client's legal affairs and reporting about them to the client or to others.

[3] In all professional functions a lawyer should be competent, prompt and diligent. A lawyer should maintain communication with a client concerning the representation. A lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by these Rules or other law.

[4] A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the law, the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.

[5] As a citizen, a lawyer should seek improvement of the law, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its
use for clients, employ that knowledge in reform of the law and work to strengthen legal education. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance, and should therefore devote professional time and civic influence in their behalf. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.

[6] A lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as by substantive and procedural law. A lawyer also is guided by conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession's ideals of public service.


[8] In the nature of law practice conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict among a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an upright person. The Rules of Professional Conduct prescribe terms for resolving such conflicts. Within the framework of these Rules, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules.

[9] The legal profession is largely self-governing. Although other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement. This connection is manifested in the fact that ultimate authority over the legal profession is vested in the Supreme Court of Georgia.

[10] To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated. Self-regulation also helps maintain the legal profession's independence from government domination. An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession
whose members are not dependent on government for the right to practice.

[11] The legal profession's relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar. Every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves.

[12] The fulfillment of a lawyer's professional responsibility role requires an understanding by them of their relationship to our legal system. The Rules of Professional Conduct, when properly applied, serve to define that relationship.

III. ASPIRATIONAL STATEMENT ON PROFESSIONALISM (State Bar Rules and Regulations):

The Court believes there are unfortunate trends of commercialization and loss of professional community in the current practice of law. These trends are manifested in an undue emphasis on the financial rewards of practice, a lack of courtesy and civility among members of our profession, a lack of respect for the judiciary and for our systems of justice, and a lack of regard for others and for the common good. As a community of professionals, we should strive to make the internal rewards of service, craft, and character, and not the external reward of financial gain, the primary rewards of the practice of law. In our practices we should remember that the primary justification for who we are and what we do is the common good we can achieve through the faithful representation of people who desire to resolve their disputes in a peaceful manner and to prevent future disputes. We should remember, and we should help our clients remember, that the way in which our clients resolve their disputes defines part of the character of our society and we should act accordingly.

As professionals, we need aspirational ideals to help bind us together in a professional community. Accordingly, the Court issues the following Aspirational Statement setting forth general and specific aspirational ideals of our profession. This statement is a beginning list of the ideals of our profession. It is primarily
illustrative. Our purpose is not to regulate, and certainly not to provide a basis for
discipline, but rather to assist the Bar’s efforts to maintain a professionalism that
can stand against the negative trends of commercialization and loss of
community. It is the Court’s hope that Georgia’s lawyers, judges, and legal
educators will use the following aspirational ideals to reexamine the justifications
of the practice of law in our society and to consider the implications of those
justifications for their conduct. The Court feels that enhancement of
professionalism can be best brought about by the cooperative efforts of the
organized bar, the courts, and the law schools with each group working
independently, but also jointly in that effort.

IV.  A LAWYER’S CREED (State Bar of Georgia):

To my clients, I offer faithfulness, competence, diligence, and good judgment. I
will strive to represent you as I would want to be represented and to be worthy of
your trust.

To the opposing parties and their counsel, I offer fairness, integrity, and civility. I
will seek reconciliation and, if we fail, I will strive to make our dispute a dignified
one.

To the courts, and other tribunals, and to those who assist them, I offer respect,
candor, and courtesy. I will strive to do honor to the search for justice.

To my colleagues in the practice of law, I offer concern for your welfare. I will
strive to make our association a professional friendship.

To the profession, I offer assistance. I will strive to keep our business a profession
and our profession a calling in the spirit of public service.

To the public and our systems of justice, I offer service. I will strive to improve
the law and our legal system, to make the law and our legal system available to
all, and to seek the common good through the representation of my clients.
V. **SPECIFIC ASPIRATIONAL IDEALS (State Bar of Georgia):**

As to opposing parties and their counsel, I will aspire:

(a) To cooperate with opposing counsel in a manner consistent with the competent representation of all parties. As a professional, I should:
   (1) Notify opposing counsel in a timely fashion of any canceled appearance;
   (2) Grant reasonable requests for extensions or scheduling changes; and
   (3) Consult with opposing counsel in the scheduling of appearances, meetings, and depositions.

(b) To treat opposing counsel ... consistent with ... professional obligations and ... the search for justice.
   (1) Not serve motions or pleadings .... as to preclude opportunity for a competent response;
   (2) Be courteous and civil in all communications;
   (3) Respond promptly to all requests by opposing counsel;
   (4) Avoid rudeness and other acts of disrespect in all meetings including depositions and negotiations;
   (5) Prepare documents that accurately reflect the agreement of all parties; and
   (6) Clearly identify all changes made in documents submitted by opposing counsel for review.

VI. **GEORGIA RULE OF PROFESSIONAL CONDUCT 3.4:**

FAIRNESS TO OPPOSING PARTY AND COUNSEL

A lawyer shall not:

a. unlawfully obstruct another party’s access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

b.

1. falsify evidence;
2. counsel or assist a witness to testify falsely; or
3. pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of the testimony or the outcome of the case. But a lawyer may advance, guarantee, or acquiesce in the payment of:
   i. expenses reasonably incurred by a witness in preparation, attending or testifying; or
   ii. reasonable compensation to a witness for the loss of time in preparing, attending or testifying; or
   iii. a reasonable fee for the professional services of an expert witness;

c. Reserved.;
d. Reserved.;
e. Reserved.;
f. request a person other than a client to refrain from voluntarily giving relevant information to another party unless:
   1. the person is a relative or an employee or other agent of a client; or the lawyer reasonably believes that the person’s interests will not be adversely affected by refraining from giving such information; and
   2. the information is not otherwise subject to the assertion of a privilege by the client; and

g. use methods of obtaining evidence that violate the legal rights of the opposing party or counsel; or

h. present, participate in presenting or threaten to present criminal charges solely to obtain an advantage in a civil matter


Younger lawyers, convinced that their future careers may hinge on how tough they seem while conducting discovery may conclude that it is more important to look and sound ferocious than to act cooperatively, even if all that huffing and puffing does not help and sometimes harms their cases. While unpleasant at first, nastiness, like chewing tobacco, becomes a habit. Furthermore, ..., all this goes on against a case law background in which the line between tough, aggressive lawyering and abusive conduct is far from clear. Without guidance as to appropriate conduct from their elders, either at the firm or on the bench, it is easy for young lawyers not only to stay mired in contumacious, morally immature conduct, but to actually enjoy it.

To avoid incivility’s evil consequences of discord, disrespect, unresponsiveness, irresponsibility, and blind advocacy, we must encourage lawyers to embrace civility’s positive aspects. Civility allows us to understand another’s point of view. It keeps us from giving vent to our emotions. It allows us to understand the consequences of our actions. It permits us to seek alternatives in the resolution of our problems. All of these positive consequences of civility will help us usher in an era where problems are solved fairly, inexpensively, swiftly, and harmoniously. The public expects no less and we must rise to the occasion in meeting those expectations.

*See also, Evanoff v. Evanoff, 262 Ga. 303 (1992) (Benham, J. Concurring)* (“If the bar is to maintain the respect of the community, lawyers must be willing to act out of a spirit of cooperation and civility and not wholly out of a sense of blind and unbridled advocacy”).


“In law offices across the country, the John Rambos of the legal world are invading deposition rooms, yelling obscenities at opposing counsel, and attempting to mow down their ‘enemies’ with nasty verbal invectives.”
Julia Merritt was a member of the honors Program in Writing at Northwestern University, where she received her B.A. in English in 2000. She was an editor in the Reporter of Decisions Office at the Supreme Court of Georgia from 2000 through 2002 before attending Georgia State University College of Law. She became a member of the Georgia Bar in 2005.

Julia launched her law career with an insurance and commercial defense firm, where she primarily defended professional, premises, and products liability cases. Julia started her own firm, Julia A. Merritt, Attorney at Law, LLC in 2011. Her firm was affiliated with The Beltran Firm, where she litigated business torts and legal malpractice claims with Frank J. Beltran. Julia authored and edited the Georgia litigation section of Westlaw’s Practical Law materials in 2016.


Julia is rated “AV® Preeminent” by Martindale-Hubbell.

Julia has resided in the Atlanta area for over eighteen years. She enjoys spending time with her husband and two young daughters at their home in Milton. They are active members at Alpharetta United Methodist Church.
Robert D. Cheeley

Robert D. Cheeley received his BA at University of Georgia in 1978 and his JD at University of Georgia School of Law in 1982. Over the course of his law career, he has obtained verdicts and settlements of more than $400MM.

Bob is the Senior Member of Cheeley Law Group, LLC, which he founded in June 2016. He was awarded the Top Georgia Verdicts & Settlements by VerdictSearch in 2017 for a $15 million verdict rendered January 2017 in a personal injury case against a major interstate trucking company. (Megan Richards vs U.S. Xpress, et al, Superior Court of Bryan County, Georgia.)

Bob focuses his practice on catastrophic injury; wrongful death; tractor trailer caused injury & death; products liability; medical malpractice; business torts; fraud; breach of fiduciary duty; and asbestos-caused disease from use of talcum powder. He is currently working on 60+ cases for Georgia residents against Johnson & Johnson for their asbestos contaminated Baby Powder brand.

Bob is married to Lisa Ackerman Cheeley and has three children and a son in law: Robert D. Cheeley, Jr; Amelia and Tyler Hearin; and Harrison A. Cheeley. Bob is an active member at Perimeter Church and a successful land developer in the North Fulton region.
BIO FOR DAVID ROOT—2019 ABUSIVE LITIGATION SEMINAR

David Root is a partner at Carlock, Copeland & Stair, LLP, in Atlanta, specializing in civil defense litigation. He has tried numerous civil cases throughout Georgia covering a variety of subject areas, including general liability, trucking, construction, and employment.

Dave is a fellow of the American College of Trial Lawyers, and a member of The Federation of Defense and Corporate Counsel. He is also a member of the Defense Research Institute and the Georgia Defense Lawyers Association. Since 2008, Dave has been an honoree on the *Georgia Super Lawyers*® list in Atlanta Magazine.

Dave is a *magna cum laude* graduate of Wake Forest University, where he was elected to Phi Beta Kappa and Phi Alpha Theta. He graduated from the Wake Forest University School of Law where he participated in Moot Court.
Frank J. Beltran

Frank Beltran began practicing law in 1976 as an associate in the litigation, corporate and banking divisions of Alston, Miller & Gaines, now known as Alston & Bird. Frank established his own firm in 1982, and his expertise has been recognized and sought after from that time to the present.

Each year since 1982, Frank has earned Martindale-Hubbell’s highest rating of AV and from 1994 to present, he has been included in Martindale-Hubbell’s Bar Register of Preeminent Lawyers. From 1995 to present, Frank has also been listed among Best Lawyers in America (Legal Malpractice Law – Plaintiffs) and was selected their 2016 “Lawyer of the Year” for Legal Malpractice Law in Atlanta. Frank has also been included on each year’s Georgia Super Lawyers (Professional Liability – Defense) list since its initial publication in 2004.

Frank often speaks at continuing legal education seminars on the topics of legal malpractice, ethics and professionalism.

Education
• JD cum laude, Mercer University’s Walter F. George School of Law
  Mercer Law Review, Student Writing Editor
  Furman Smith Scholarship recipient
  Student Honor Court
• BBA, The University of Georgia

Presentations
• Continuing Legal Education (CLE) lecturer on professionalism, ethics and legal malpractice for
  American Bar Association
  State Bar of Georgia
  Georgia Trial Lawyers Association
  Atlanta Bar Association
  The Lawyers Club of Atlanta
  Layman’s Lawyer television shows
  Staff attorneys of the Georgia Appellate Courts

Recognitions
• 1982 to present Martindale-Hubbell’s highest rating of “AV”
• 1994 to present Martindale-Hubbell’s Bar Register of Preeminent Lawyers
• 1995 to present Best Lawyers in America (Legal Malpractice Law - Plaintiffs)
• 2004 to present Georgia Super Lawyers (Professional Liability: Defense)

Memberships
• American Board of Trial Advocates, Georgia Chapter President 2010-2012
• American Bar Association
• American Association for Justice (Sustaining Member)
• Atlanta Bar Association
• Atlanta Bar Foundation (Charter Lifetime Fellow)
• State Bar of Georgia
  • Founding member of the Professional Liability Section
  • Legal Malpractice Insurance Committee
• Georgia Legal Foundation
• Georgia Trial Lawyers Association (Champion Member)
  • Past Co-Chair of Ethics Committee
  • Past Chair of Amicus Curiae Committee
• Federal Bar Association
• Bleckley American Inns of Court (Master)
• Lawyers Club of Atlanta (Past Chair, Publications)

Community
• Southern Institute for Business and Professional Ethics (Founding Board Member)
• Boys and Girls Clubs of Metro Atlanta, West End Club Board of Directors (Past President)
• St. Joseph Hospital’s Community Advisory Board (Past Member)
PERSPECTIVES OF OCGA §9-15-14 AND OCGA §51-7-80, ET SEQ.: ACTIONS FROM THE TRIAL BENCH; THE OCGA §9-15-14 EVIDENTIARY HEARING; LIMITS OF TRIAL COURT JURISDICTION

*Hon. Christopher S. Brasher*, Judge, Fulton County Superior Court, Atlanta
2019 ABUSIVE LITIGATION SEMINAR

PERSPECTIVES FROM THE BENCH ON O.C.G.A. §§ 9-15-14 AND 51-7-80, et seq.

Christopher S. Brasher, Judge
Superior Courts of Georgia
Atlanta Judicial Circuit
Atlanta, Georgia
I. Background overview of Abusive Litigation actions in Georgia.

A. History of Abusive Litigation prior to 1986


C. Opinion published same year as General Assembly adopted O.C.G.A. § 9-15-14, and opinion used language from new statute as elements of the newly-described tort of abusive litigation.

D. Adoption of O.C.G.A. § 51-7-80, et seq. in 1989. The statutorily-created tort of abusive litigation.

1. Elements: when one litigates with malice and without substantial justification.


3. Punitive damages not available.
4. If only damages are attorney fees and expenses of litigation, use procedures set out in O.C.G.A. § 9-15-14. See O.C.G.A. § 51-7-83.

5. Tort has a one-year statute of limitation (See O.C.G.A. § 51-7-84) in keeping with its limited utility and intended deterrent effect. Also, because it is in derogation of the common law, the statutory scheme must be strictly construed. Land v. Boone, 265 Ga. App. 551 (1994).

E. O.C.G.A. §§9-15-14 and 51-7-80, et seq., are designed to be complimentary to one another, as cross-references suggest.


G. Claims under O.C.G.A. § 51-7-80, et seq., are rare. Claims under O.C.G.A. § 9-15-14 are common and are frequently pled, litigated and granted by the trial courts of our State.

II. Generational Change regarding Abusive Litigation Claims in the post-Yost v. Torok era.

Contrast between lawyers who came up prior to 1986 vs. those who came up after that year. Personal, acrimonious and often distasteful vs. necessary, useful and appropriate claims.

I am here to describe my observations and suggestions from my perspective as a trial judge on a busy, urban trial court. I am not here to urge use of, or excuse the need for, these tools.

A. Scope: Shall vs. may. O.C.G.A. § 9-15-14(a) vs. (b). Subsection (b) coverage is broader than (a). (e.g., discovery abuses). Note that although the Court of Appeals held that OCGA § 9-15-14 did not apply in the context of a post-judgment discovery dispute, reasoning that “any position taken or conduct occurring in post-judgment discovery is not asserted as a part of the underlying lawsuit, and such a position or other conduct cannot expand the underlying litigation.” See RL BB ACQ I–GA CVL, LLC v. Workman, 341 Ga. App. 127, 134-5, 798 S.E.2d 677 (2017). That holding was reversed by the Georgia Supreme Court in Workman v. RL BB ACQ I-GA CVL, LLC, 303 Ga. 693 (May 21, 2018). There, the Supreme Court found that the Court of Appeals ruling regarding the scope of term “lawsuit” was erroneous, describing it as “an unreasonably narrow reading and application of the plain language.” Id. at 696. The Supreme Court went on to conclude that “the plain language of OCGA § 9-15-14 (a) and (b) permit the recovery of fees and expenses of litigation—that is, any civil, judicial proceeding between parties—as part of a civil action—that is, a legal proceeding instituted to enforce a private right. Contrary to the conclusion reached by the Court of Appeals, OCGA § 9-15-14 (a) and (b) are not limited to pre-judgment proceedings.” Id. at 697.
B. Application: Made as a motion ancillary to the underlying proceeding. Contrast with O.C.G.A. 51-7-80, et seq.

C. Process.

1. Basis: O.C.G.A. § 9-15-14(a) or (b) violated.

2. Notice is not required for O.C.G.A. § 9-15-14 claim (contrast w/tort claim), but is advisable. Also, if you receive a notice, do something about it and document the file.

3. Pleading requirements. Be specific; avoid generalizations; allege specific examples and costs/fees associated with them. No “shotgun abusive litigation pleadings” allowed! Choose which subsection you will rely upon O.C.G.A. § 9-15-14(a) or (b) and stick to it. Don’t merely restate each claim under each subsection. Know and adhere to technical pleading requirements, including time limitations, which are jurisdictional.

D. Hearing and evidence. To pass muster, a fee/expense claim under O.C.G.A. § 9-15-14 must: (1) be for fees/expenses in the case at bar; (2) be pled and proven with specificity as to fees incurred based upon the alleged sanctionable conduct; (3) there must be a nexus between the conduct alleged and proven and the fees/expenses incurred; and, (4) the fees/expenses claimed must be reasonable and necessary. Thus, lump sum, windfall, or percentage fee claims are almost sure to fail. Appellate courts require the record to demonstrate the “complex decision making process necessarily involved in reaching a particular dollar figure.” Gibson Law Firm v. Miller Built Homes, 327 Ga. App. 688 (2014).
Proof must include whatever testimony and/or other competent evidence necessary to make out the showings required. Include: responsible attorney(s) testimony; co-counsel testimony; expert testimony; billing records; records admitted in summary form (in compliance with Rule 1006), and the like.

Should be prepared for direct examination, presentation of documentary evidence, and for cross examination. Cross often is the undoing of such claims because witness is unfamiliar with bills, process, and lacks recollection of what work was done and why. If it can’t be parsed out, claim must be denied. Be ready to address “reasonableness” questions and challenges based on experience, complexity, etc. Likewise, cross examination must be prepared and targeted, not merely broadsides and potshots.

E. Argument. Should be tailored to the facts presented. Should establish the relevant standard and argue specific instances of deviation from it. Not appeals to shocking of the conscience. Give argument as to how you have proven the requisite elements and set out the findings you need to have made. If those things aren’t in the order, all your efforts will be for naught.

F. Findings required. Both the Court of Appeals and Supreme Court have gone to extensive lengths to make clear that express findings specifying the abusive conduct are necessary in any award under 9-15-14. See, e.g., Moore v. Hullander, 345 Ga. App. 568 (April 25, 2018); Adams v. Pinetree Trail Enterprises, LLC, et al., ___ Ga. App. ___, 820 S.E.2d 735 (October 22, 2018); and, Jackson v. Brown, ___ Ga. App. ___, 2018 WL 6566303 (December 13, 2018). Judgments will be vacated and the case
remanded if not included. So, my recommendation is to include them in that proposed order you ask to send to the judge after your hearing!

G. O.C.G.A. § 9-15-14(g) and its utility with serial filers.

H. Standards of review. Any evidence review as to factual findings. Omni Builders Risk v. Bennett, 325 Ga. App. 293 (2013). But whether the claim/defense/assertion was unsupported so as to support liability under O.C.G.A. § 9-15-14(a) or (b) is a question of law to be decided by the appellate court.

I. Appeals of Fee/Expenses Awards. “Stand-alone” appeals of fee awards are done by application. O.C.G.A. § 5-6-35(a)(10). Appeals as part of the larger case are done pursuant to the appeal of the final order and are directly appealable. Practice strategy question.

Judge Christopher S. Brasher

Judge Christopher S. Brasher has served on the Superior Court of Fulton County since 2006. Previously, Judge Brasher served for nearly five years as an Assistant District Attorney in the Alcovy Judicial Circuit, and then for 11 years as the Senior Assistant Attorney General in charge of the Public Safety Section at the Georgia Attorney General’s Office.

As part of his practice, Judge Brasher tried cases in all of Georgia’s Federal District Courts, as well as the Superior Courts of more than 120 of Georgia’s counties. Judge Brasher also had a significant appellate practice, having had oral arguments on dozens of cases before the Georgia Supreme Court and Georgia Court of Appeals, arguments before the Eleventh Circuit Court of Appeals, and an oral argument before the United States Supreme Court in 2000. Judge Brasher has served on the Georgia Criminal Justice Coordinating Council, and as Chair of the Georgia Crime Victims’ Compensation Committee. He has also served locally as an elected member of the Executive Committee of the Fulton County Superior Court, as Chair of the Superior Court’s Internal Operations Committee, and as a member of the Joint Governance Committee along with colleagues from the Fulton State Court Bench.

Judge Brasher now presides over family law cases as the Chief Judge of the Family Division. He previously presided over felony criminal cases, as well as all types of civil litigation. In addition to regularly speaking to professional, civic, and community organizations, Judge Brasher served for several years as a High School Mock Trial attorney coach. He has served as a Member of the Board of Directors for the North Fulton Bar since 2008, and has been a judge of high school and college mock trial competitions. Judge Brasher received his Bachelor of Arts Degree from Furman University, and earned his juris doctor degree from the Georgia State University College of Law. Judge Brasher and his wife have adult children.
PANEL ON FRIVOLOUS APPEAL PENALTIES UNDER GEORGIA COURT OF APPEALS RULE 15(b)

A. Provisions of Rule 15(b)

B. Elements of a Frivolous Appeal
   1. Absence of supporting law
   2. Failure to provide record or transcript on appeal
   3. Failure to cite facts or legal authority or make argument
   4. Misrepresentation of facts or law
   5. Obvious use of delaying tactics

C. Changes Over Time in Application of the Rule

D. When and Why the Rule is Applied

Moderator: Hon. Carla Wong McMillian, Judge, Court of Appeals of Georgia, Atlanta

Panelists:
Hon. Anne Elizabeth Barnes, Presiding Judge, Court of Appeals of Georgia, Atlanta
Hon. Amanda H. Mercier, Judge, Court of Appeals of Georgia, Atlanta
Hon. Brian M. Rickman, Judge, Court of Appeals of Georgia, Atlanta
Frivolous Appeal Penalties Under
Georgia Court of Appeals
Rule 7 (e) (2)

Judge Carla Wong McMillian
Georgia Court of Appeals
January 7, 2019¹

OVERVIEW

If the Court of Appeals determines that an appeal is frivolous, it may impose a monetary sanction of up to $2500 against the appealing party and/or the party's attorney under Court of Appeals Rule 7 (e) (2) (formerly Rule 15 (b)). The Court may also award additional damages under OCGA ' 5-6-6 of 10% of “any judgment for a sum certain which has been affirmed” if the Court determines that the appeal was filed solely for the purposes of delay.²

This paper contains a selective review of more recent decisions concerning frivolous appeals under Court of Appeals Rule 7 (e) (2) and former Rule 15 (b). Although the frivolous appeal provision was renumbered for the current version of the court rules (effective January 1, 2017), the language of the rule did not change.

¹ This research was originally authored by former Judge J. D. Smith in 2012 and later updated in 2015 by Judge Sara L. Doyle, both of the Court of Appeals of Georgia. The current version adds a selective review of cases since the 2015 update.

² OCGA ' 5-6-6 provides that “[w]hen in the opinion of the court the case was taken up for delay only, 10 percent damages may be awarded by the appellate court upon any judgment for a sum certain which has been affirmed. The award shall be entered in the remittitur.”
Therefore, decisions under the former rule may be referenced in interpreting Rule (7) (e) (2), which provides:

The panel of the Court ruling on a case, with or without motion, may by majority vote impose a penalty not to exceed $2,500.00 against any party and/or party=s counsel in any civil case in which there is a direct appeal, application for discretionary appeal, application for interlocutory appeal, or motion which is determined to be frivolous.

(See Appendix 1 for the full text of Rule 7.)

Court cannot consider a motion for frivolous appeal sanctions in such circumstances. Id. ³

Either OCGA ' 5-6-6 or Court of Appeals Rule 7 (e) (2) must be used to request a frivolous appeal penalty. See David G. Brown, PE v. Kent, 274 Ga. 849 (561 SE2d 89) (2001) (holding that OCGA ' 13-6-11 is not a proper vehicle for imposition of attorney fees and expenses of litigation in the appellate courts). However, a party is not limited to frivolous appeal penalties under these remedies when other legal avenues for the award of penalties and attorney fees are available. See Yates Paving & Grading Co. v. Bryan County, 265 Ga. App. 578, 583-584 (594 SE2d 756) (2004) (claim for appellate attorney fees under Georgia Prompt Pay Act, OCGA ' 13-11-1 through 13-11-1). The Supreme Court of Georgia recently noted that a trial court could require an appellant to post a supersedeas bond when an appeal appears “jurisdictionally frivolous,” and that “[t]here is also some authority for the proposition that a trial court may award attorney fees under OCGA ' 9-15-14 for filing in the trial court a frivolous notice of appeal,” although trial courts lack authority for awarding such fees for appellate court filings. (Citation and footnote omitted.) Rollins v. Rollins, 300 Ga. 485, 487 (1) & 489 (2) (796 SE2d 721) (2017).

In several cases, an appellee has improperly sought sanctions against an appellant via a motion to dismiss the appeal as frivolous. See Colbert v. State, 303 Ga. App. 802, 804 (694 SE2d 694) (2010); Vines v. LaSalle Bank Nat. Assn., 302 Ga. App. 353, 353 n.2 (691

³The Court has also held that damages under OCGA ' 5-6-6 are not available when an appeal is dismissed; the judgment must be affirmed for that Code section to apply. Noaha, LLC v. Vista Antiques &c., 306 Ga. App. 323, 326 (2) (702 SE2d 660) (2010); Wieland v. Wieland, 216 Ga. App. 417, 417 (3) (454 SE2d 613) (1995).

Requests for and imposition of sanctions for frivolous appeal are relatively rare. In 2018, it appears that parties moved for frivolous appeal sanctions and received a ruling in twelve cases. All of these motions were resolved by order or in an unreported decision. The Court of Appeals denied eleven of the motions, although in one case the Court found the appeal to be frivolous but chose to issue a warning in lieu of sanctions to the pro se appellant. In the twelfth case, the Court imposed $500 in sanctions to be split between the appellant and his counsel, finding that the appellant’s brief asserted a groundless argument and failed to cite any supporting legal authority. And in one additional case, the trial court found sua sponte that an appeal was frivolous, but issued a warning in lieu of sanctions to the pro se appellant in that case. In 2017, parties sought sanctions in approximately seventeen appeals, and the Court declined to award sanctions in fifteen of those and refused to consider the issue in the other two because the requesting party had not filed a separate motion. However, in the two prior years, the Court imposed a number of sanctions. In 2015, appellate parties requested sanctions for frivolous appeal in at least twenty-four cases, and the trial court imposed

4 These numbers are approximate because parties sometimes request sanctions within the body of their briefs or as additional relief in other motions, making the requests harder to track. The Court, in its discretion, may sometimes consider these requests.
sanctions in at least eight of those, either in response to party requests or on the court’s own motion, including two cases involving the denial of applications for appeal. The sanctions totaled $11,000, but seven of the cases and $10,000 of the sanctions involved a single attorney. In 2016, parties requested sanctions in at least twelve cases, and the trial court imposed sanctions in at least seven cases, including three cases involving denied applications, for a total of $17,400 in sanctions. Six of those cases and $14,900 in sanctions involved the same attorney who received $10,000 in sanctions in 2017.5

These sanctions constitute a money judgment in favor of the appellee against the sanctioned party, either the appellant, appellant’s counsel, or both. After the remittitur is returned to the trial court, the appellee can collect the penalty in the same manner as other money judgments. See OCGA ' 5-6-6; Court of Appeals Rule 7 (e) (3).

**Penalties Denied**


In some cases, however, the Court has provided a basis for its denial of frivolous appeal penalties. For example, recently, in *American Academy of Gen. Physicians, Inc. v. LaPlante*, 340 Ga. App. 527, 534 (4) (798 SE2d 64) (2017), the Court declined to impose sanctions because it could not say that the appeal was totally frivolous or solely to delay enforcement of the parties’ agreement, although the Court was unable “to discern any reasonable ground upon which [the appellants] might have anticipated the reversal of the trial court’s judgment.” Further, *Slone v. Myers*, 288 Ga. App. 8, 10 (1) (653 SE2d 323) (2007), overruled on other grounds, *Reeves v. Upson Regional Med. Center*, 315 Ga. App. 592, 582 (726 SE2d 544) (2012), and *De Louis v. Sheppard*, 277 Ga. App. 768, 772 (4) (627 SE2d 846) (2006), hold that a request for frivolous appeal penalties will be denied if the appellant=s arguments do not appear to have been made
unreasonably or in bad faith. In *Dover v. Higgins*, 287 Ga. App. 861, 867 (3) (652 SE2d 829) (2007), appellee argued that appellant could not have reasonably anticipated a reversal of a jury verdict under the *any evidence* standard. The Court rejected that argument, noting that appellant also argued that the verdict was erroneous as a matter of law and it was not apparent that appellant made that argument unreasonably. This suggests, however, that those appealing from a jury verdict under the *any evidence* standard should exercise caution.

In *Whisper Wear v. Morgan*, 277 Ga. App. 607, 611 (4) (627 SE2d 178) (2006), the Court held that frivolous appeal penalties will not be awarded in a case involving a *bona fide controversy*, applying the same standard used in affirming the trial court’s grant of directed verdict on the claim for attorney fees in that contract action. Id. at 608. In *Collier v. Cawthon*, 256 Ga. App. 825, 827 (2) (570 SE2d 53) (2002), we held that frivolous appeal penalties were not appropriate on appeal of a trial court’s denial of a motion to open default, because *the trial court would not have erred had it decided to open default in this case.* In *Mize v. Woodall*, 291 Ga. App. 349, 352 (3) (662 SE2d 178) (2008), the Court used the term *justiciable conflict*, finding that an appeal was not frivolous based on the need for legal resolution of the terms of a promissory note and security deed. *Hargett v. Dickey*, 304 Ga. App. 387, 389-390 (4) (696 SE2d 335) (2010), suggests that when *the question [is] close as to whether [appellant] had any reasonable basis to believe that she could prevail in her appellate arguments,* the court may deny a motion for penalties. And where a case involves *complex* issues that may

If the judgment is reversed on appeal, appellee=s motion for sanctions usually will be denied, *Hall v. Hall*, 303 Ga. App. 434, 437 (3) (693 SE2d 624) (2010), even if the reversal is only in part. *In re Hudson*, 300 Ga. App. 340, 347-348 (5) (685 SE2d 323) (2009). In *Sadi Holdings, LLC v. Lib Properties*, 293 Ga. App. 23, 27 (666 SE2d 446) (2008), the Court noted that it was declining to assess penalties in view of its partial reversal of the trial court=s dismissal order. See also *Stamps v. Nelson*, 290 Ga. App. 277, 278 n.1 (659 SE2d 697) (2008); *Delta Cleaner Supply Co. v. Mendel Drive Assoc.*, 286 Ga. App. 227, 230 (3) (648 SE2d 651) (2007). However, if the partial reversal is on a peripheral matter, the Court may still assess frivolous appeal penalties. In *Transportation Ins. Co. v. Piedmont Constr. Group*, 301 Ga. App. 17 (686 SE2d 824) (2009), the trial court granted summary judgment to a building contractor, finding that an insurer frivolously denied the contractor=s claim under a liability policy. It also made an award of bad faith penalties and attorney fees under OCGA ' 33-4-6, and in a later order assessed a sum as attorney fees. The Court of Appeals reversed the later order, because a jury must determine the amount of attorney fees under OCGA ' 33-4-6 (a). Id. at 24 (4). But the Court nevertheless assessed frivolous appeal penalties based on appellant=s disregard of controlling law, failure to support its factual contentions on the record, and failure to heed the trial court=s warning that the coverage issue was not a>close case=. @ Id. at 23-24 (3).

**Penalties Assessed**
While some opinions granting penalties are no more forthcoming than the traditional denial, others set out the reasons for concluding that an appeal is frivolous, and we can observe patterns of conduct that frequently result in such an award. The black-letter law states: When the law is indisputably clear concerning the issues raised on appeal, this Court may impose frivolous appeal penalties. [Cit.] Golden Atlanta Site Dev. v. R. Nahai & Sons, 299 Ga. App. 654, 655 (1) (b) (683 SE2d 627) (2009). We have repeatedly held that a penalty for a frivolous appeal may be assessed in cases where the appellant could have no reasonable basis for anticipating reversal of the trial court's judgment. [Cits.] Trevino v. Flanders, 231 Ga. App. 782, 783 (2) (501 SE2d 13) (1998). See also Eissen, 335 Ga. App. at 729-30 (counsel “failed to assert any argument on behalf of his client in the appellate brief that conceivably could have supported the claim that the trial court erred in granting summary judgment to the movants”); Campbell v. Landings Assn., 311 Ga. App. 476, 482 (5) (716 SE2d 543) (2011) (Under the circumstances and given the clear state of the law, Campbell's attorney could not reasonably have believed that this appeal would result in a reversal of the trial court's decision); Pacheco v. Charles Crews Custom Homes, 289 Ga. App. 773, 776-777 (3) (658 SE2d 396) (2008); Kurtz v. Brown Shoe Co., 281 Ga. App. 706, 707 (2) (637 SE2d 111) (2006). If the applicable law is indisputably clear and the appeal has no arguable merit penalties may be imposed. Horton v. Middle Georgia Bank, 203 Ga. App. 127, 127 (2) (417 SE2d 220) (1992).

However, as these decisions demonstrate, in such cases the imposition of a penalty is permissible but not mandatory. The overwhelming majority of cases require something more than a mere lack of law in support of appellant=s position. Even if the existing law is
not in appellant’s favor, a straightforward avowal that the appeal seeks a change in the existing law for reasons of public policy or equity or is a necessary step on a procedural journey to the Supreme Court will not trigger an assessment of penalties. See, e.g., Spikes v. Kim, 203 Ga. App. 302, 303 (2) (416 SE2d 780) (1992), where the law was abundantly clear, but the issue of frivolity did not even arise.

The something more necessarily varies from case to case because the determination is completely fact-based. Nevertheless, some general conclusions may be drawn. In assessing penalties, the Court may believe that the penalized appellant or counsel, or both, are frequently involved in what might be termed as sharp practices, which often include acts that appear calculated to conceal the true state of the law or the facts from the Court, or to gain an advantage such as delay in the enforcement of a judgment. Stubborn persistence in a legal position despite repeated warnings may also result in penalties. A few of the most common examples can be divided into categories, as follows:

1. An appellant’s total failure to provide an appropriate record has been used to infer knowledge that the appeal lacks any reasonable basis. This omission, in effect, deprives the Court of the ability to reverse, because in the absence of a transcript the Court presumes the evidence was sufficient to support the judgment. Browning v. Federal Home Loan Mtg. Corp., 210 Ga. App. 115 (435 SE2d 450) (1993). In Enviro Pro v. Emanuel

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County, 265 Ga. App. 309 (593 SE2d 673) (2004), the appellant contended in the face of well-established statutory and case law that it had a valid permit to apply septage to land in the form of an ultra vires letter written by a county commission chairman without a meeting, vote, or entry on the minutes as required by law, and the appellant failed to present any evidence on the record supporting this contention. The Court found that Appellant=s appeal in the face of controlling law as to which there was no reasonable doubt justified the award of attorney fees under Rule 15 (b). Id. at 315 (4).

In Trevino v. Flanders, 231 Ga. App. at 783 (2), the appellant intentionally failed to include either the transcript or a statutorily authorized substitute in the record on appeal and made numerous factual assertions that were unsupported by the record. See also Kulkov v. Botvinik, 230 Ga. App. 204, 205 (3) (495 SE2d 662) (1998). In McClain v. George, 267 Ga. App. 851 (600 SE2d 837) (2004), the appellant entered into a settlement agreement, but then sought to relitigate the same issues in the trial and appellate courts. Noting that [t]his conduct clearly contravenes the public policy favoring settlements, that appellant had no reason to believe he could prevail on the arguments he raised, and that he failed to provide a transcript, the Court of Appeals imposed frivolous appeal penalties on appellant and his counsel.

Failure to cite legal authority or to make argument has led the Court to the same conclusion. In Mercer v. Washington Mut. Home Loans, 287 Ga. App. 388 (651 SE2d 499) (2007), sanctions were imposed against a pro se appellant whose brief failed to comply with court rules, did not cite to the record or legal authority, and made irrelevant arguments without addressing the order appealed. In Popham v. Garrow, 275 Ga. App. 499 (621 SE2d 468) (2005), another pro se appellant did not support his enumerations of
error with citations to the record or to legal authority. He claimed that the record was incomplete, but the court found otherwise and imposed sanctions. Id. at 500 (2). See also Revels v. Wimberly, 223 Ga. App. 407, 409 (3) (477 SE2d 672) (1996); Brayman v. Allstate Ins. Co., 212 Ga. App. 96, 97 (2) (441 SE2d 285) (1994) (one-page brief citing no Georgia authority). A complete failure to respond to the controlling legal issues either below or on appeal may also support an award of penalties. Golden Atlanta, 299 Ga. App. at 655 (1) (b) (failure to support claim of error on appeal; appellant’s own contract did not support its argument@); In re Estate of Sieg, 277 Ga. App. 361, 361-62 (3) (626 SE2d 577) (2006) (failure to assert any reason why trial court’s controlling ruling was erroneous); Oswell v. Nixon, 275 Ga. App. 205, 208 (2) (620 SE2d 419) (2005); Bowden v. Pryor, 215 Ga. App. 351, 352 (450 SE2d 845) (1994) (failure to address controlling issues in case as should be both deprecated and actively discouraged.@)

In Med. Center of Central Georgia v. Landers, 274 Ga. App. 78 (616 SE2d 808) (2005) (full concurrence), the Court assessed Rule 15 (b) penalties against an appellee for filing a meritless motion for reconsideration. Examining the requirements under Court of Appeals Rule 37 (e), the Court found that because the appellees fail to make any attempt to state a basis for granting the motion under the applicable standard, we hereby determine the motion to be frivolous.@ Id. at 88 (on motion for reconsideration.)

2. The misrepresentation or concealment of controlling authority also will support an award of penalties. In Zohoury v. Zohouri, 218 Ga. App. 748, 751 (7) (463 SE2d 141) (1995), the appellants ignored the controlling law and selectively omitted controlling portions of the relevant statutes. In Piedmont Constr. Group, 301 Ga. App. at 23 (3), the appellant relied exclusively on a single, easily distinguishable decision and ignored a
substantial controlling body of law governing a common exclusion in a contractor’s liability policy. Similarly, the misrepresentation of facts may be used to support an award of penalties. For example, in *Wade v. Howard*, 232 Ga. App. 55, 60 (499 SE2d 652) (1998), the Court imposed frivolous appeal sanctions when the evidence showed that the appellants tried to hide unfavorable factual information. The first expert witness hired by appellants informed them that the facts did not support their claims. Appellants dismissed that expert and the lawyer who had hired him, concealed the existence of the unfavorable report, and failed to respond to interrogatories seeking the factual basis of their claims. They also failed to retain a second expert until after a summary judgment motion was filed, and they did not provide that expert with complete information. See also *In the Interest of A. W.*, 242 Ga. App. 26, 30 (528 SE2d 819) (2000) (appellant and counsel made outrageous, unsupported factual assertions that fly in the face of the record.\(^\text{9}\) Compare *In the Interest of J. R. T.*, 250 Ga. App. 720, 721 (3) (552 SE2d 892) (2001) (on minimal record, \[whether the evidence establishes all the statutory criteria which must be met before a termination of parental rights is authorized is a subject of legitimate inquiry.\]^\text{\textcopyright} (Citation and footnote omitted.)\) Id.

both the appellant and appellate counsel for engaging in litigation tactics calculated to obfuscate, delay, and postpone a resolution of the claims against.\textsuperscript{7} The Freese II decision noted that the trial court had already imposed sanctions and because of their conduct both here and below, [the Court] conclude[d] that Freese has appealed purely for the purpose of delaying enforcement of the judgment against it.\textsuperscript{7} Id. At 668.

In Leone v. Green Tree Servicing, 311 Ga. App. 702 (716 SE2d 720) (2011), the pro se appellant remained in possession of the property for over two years but paid no monthly rent into the registry of the trial court despite being ordered to do so. The Court of Appeals concluded that all issues raised by Leone in the trial courts and in this court are completely lacking in merit and appear to be an attempt to abuse the judicial system in an effort to avoid her contractual obligations.\textsuperscript{7} Id. at 706 (6). Finding no reasonable basis to anticipate a reversal, the Court assessed a frivolous appeal penalty. Similarly, in Davita, Inc. v. Othman, 270 Ga. App. 93, 97 (3) (606 SE2d 112) (2004), a tenant ignored repeated reminders that a lease was due to expire and interposed meritless defenses including challenging the jurisdiction of the court and citing cases not controlling or even suggestive of the result they urge.\textsuperscript{7} Id. at 97. Over a year after expiration of the lease, the tenant remained in possession, and the Court concluded that the appeal was purely for purposes of delay.\textsuperscript{7} Id. In Goodman v. Frolik & Co., 233 Ga. App. 376, 380 (6) (504 SE2d 223) (1998), the appellant repeatedly contested matters not in dispute, requested numerous

\textsuperscript{7} The Court also noted that Freese had filed a separate appeal arising out of a contempt order. In that separate appeal, the Court in an unpublished opinion imposed the maximum sanctions against both the appellant and appellate counsel. Freese II, Inc. v. Mitchell, Case No. A12A2416. A copy of the opinion is included in Appendix 2.
continuances and extensions, and filed lengthy and impertinent pleadings in the trial court. He also failed to file necessary motions and attempted to raise issues not included in the pretrial order. This pattern continued in the appellate court, where he requested three separate extensions of time and attempted to avoid filing a supersedeas bond. This conduct was considered particularly worthy of notice because the appellant was an attorney and represented himself pro se for the trial and multiple motions for new trial below. And an attorney who is represented by counsel may, like other clients, be charged with knowledge that an appeal is frivolous. *Cagle v. Davis*, 236 Ga. App. 657, 663 (4) (b) (513 SE2d 16) (1999).

Multiple appeals in the same or related cases seeking a ruling on the same issues may also result in the assessment of frivolous appeal penalties, particularly when the same counsel represents the appellant in both appeals. In *Cornwell v. Kirwan*, 270 Ga. App. 147, 151-152 (606 SE2d 1) (2004), a plaintiff attempted to relitigate in a legal malpractice action the very same issues he contested in his second habeas corpus petition. Observing that the principle barring relitigation of issues previously resolved in a valid court judgment is clear and well settled and that neither appellant nor his counsel could have reasonably expected to succeed either in the trial court or on appeal, the court imposed sanctions on both. Id. In *Baxley v. Baldwin*, 287 Ga. App. 245, 246 (2) (651 SE2d 172) (2007), appellant attempted to refile an action which had already been dismissed and the dismissal affirmed on appeal. Observing that the law

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of Georgia is indisputably clear, the court concluded that the appellant had no reasonable basis to believe her second appeal would succeed and awarded penalties. In *Ruskin v. AAF-McQuay, Inc.*, 294 Ga. App. 842, 844-845 (670 SE2d 517) (2008), the appellant entered into a settlement agreement but refused to honor the agreement and appealed the judgment enforcing the settlement. *Ruskin v. AAF-McQuay, Inc.*, 284 Ga. App. 49 (643 SE2d 333) (2007). Even after losing that appeal, appellant still refused to honor the agreement and was found in contempt of the trial court’s order. Appellant then filed a second appeal from the contempt order, and the court sua sponte imposed Rule 15 (b) penalties, observing that appellant was attempting to relitigate matters already decided and had avoided enforcement of a binding settlement agreement for nearly four years, clearly an appeal for purposes of delay. *Ruskin*, 294 Ga. App. at 844.

Some parties carry relitigation to extremes. In *We Care Transp., Inc. v. Branch Banking Company*, 335 Ga. App. 292, 297 (3) (780 SE2d 782) (2015), in a whole court decision, the Court, *sua sponte*, imposed the maximum allowable sanctions under former Rule 15 (b) against the appellants’ counsel finding that “earlier filings and actions by [the appellants] this case [suggest] that [the attorney’s] litigation efforts have been brought not to resolve justiciable issues, but for delay and harassment.” The Court further found that “[t]his misconduct is part of a pattern,” based on its review of more than sixty-five appeals filed by the attorney, one-third of which had been dismissed. The Court stated “that [counsel] has repeatedly engaged in similar misconduct in his representation of other clients,” and “repeatedly [asserted] the same meritless
arguments and [committed] the same procedural defaults.” *We Care Transp.*, 335 Ga. App. at 297 (3).

Further, a case described in a previous seminar as “the most egregious recent example of misguided persistence in litigation” involved a pro se attorney who had been suspended from the practice of law. *Kent v. A. O. White, Jr., Consulting Engineer*, 266 Ga. App. 822 n.1 (598 SE2d 113) (2004). That appeal marked the fifth appearance of the litigation before the Court of Appeals, and the attorney had already been assessed frivolous appeal penalties by both the Court of Appeals and the Supreme Court. The attorney was held in contempt by the trial court, appealed that order, and was assessed another frivolous appeal penalty of $1,000, then the maximum penalty available. Id. at 823-824. Perhaps it is no surprise that the attorney appeared for a sixth time in the annals of the Court of Appeals. *Kent v. A. O. White, Jr., Consulting Engineer*, 279 Ga. App. 563 (631 SE2d 782) (2006). Once again, finding no reasonable ground upon which [the attorney] might have anticipated reversal of the superior court’s judgment, and noting his previous encounters with sanctions, the court imposed a frivolous appeal penalty against him of $1,000. Id. at 563.

Also in 2006, the Court of Appeals assessed frivolous appeal penalties for the fourth time against another pro se litigant after his tenth assertion of a groundless constitutional argument arising from a dispute over real property. *Crane v. Poteat*, 282 Ga. App. 182 (638 SE2d 335) (2006). The latter appeal listed the attorney’s numerous and meritless appeals, both reported and unreported. Observing that [he] continues undeterred to plague this Court with frivolous appeals on grounds previously rejected, we once again
impose a penalty against [him] for frivolous appeal under Court of Appeals Rule 15 (b).\(^@\)

Id. at 185 (4). The Court also directly instructed the attorney not to raise the constitutional argument again. Id. at 184 (1).\(^9\) See also *Georgia Receivables, Inc. v. Kirk*, 242 Ga. App. 801, 803 (3) (531 SE2d 393) (2000); *Wieland v. Wieland*, 216 Ga. App. 417, 418 (3) (454 SE2d 613) (1995). In *Davis v. CitiMortgage, Inc.*, 312 Ga. App. 238 (718 SE2d 95) (2011), a pro se appellant’s claims were barred by the resolution of several prior appeals, and the Court observed, Although we have exercised our discretion not to subject [the appellant] to a frivolous appeal penalty pursuant to Rule 15 (b) of this court, we warn her that she may be subject to such penalty should she file a similarly frivolous appeal in this case in the future.\(^@\) Id. at citing *Leone*, 311 Ga. App. at 706 (6). In *Hardwick v. Williams*, 272 Ga. App. 680, 683 (3) (613 SE2d 215) (2005), and in *Ligon v. Bartis*, 254 Ga. App. 154, 155 (2) (561 SE2d 831) (2002), the Court also warned the litigants that further appeals of already decided issues could result in sanctions.

Some of these decisions engrafted onto Rule 15 (b) the language from OCGA 5-6-6, authorizing assessment of 10% of a money judgment for frivolous appeals which are taken up only for purposes of delay. See, e.g., *Miller v. Trammell*, 198 Ga. App. 27, 28 (2) (400 SE2d 387) (1990). Some cases reasoned from OCGA 5-6-6 that Rule 15 (b) penalties should be assessed only when the appeal is filed solely for the purpose of delay.\(^@\) *Hubbard v. DOT*, 256 Ga. App. 342, 353 (6) (568 SE2d 559) (2002). This reasoning can be reconciled with other cases by considering that failure to present or misrepresentation of case law or facts is most often seen as a delaying tactic: Delay can be assumed where an

\(^9\)In 2007, the United States Supreme Court denied the attorney=s petition for
appeal lacked merit. (Citations and punctuation omitted.) 

Marshall v. SDA, Inc., 234 Ga. App. 312, 313 (4) (506 SE2d 661) (1998). This reasoning also was followed in Shamsai v. Coordinated Props., 259 Ga. App. 438, 440 (3) (576 SE2d 901) (2003), in which the Court not only awarded ten percent of a money judgment as permitted under OCGA ' 5-6-6 but also considered counsel=s acursory brief, his neglect to include a complete record, and the total lack of merit to the arguments, and assessed a frivolous appeal penalty against appellant=s counsel. The Court observed, Whether these tactics were the result of carelessness, incompetence, or willful blindness is impossible to say, but the attitude of plaintiff and counsel throughout this litigation should be deplored and actively discouraged. Id. See also Vaughn v. Roberts, 282 Ga. App. 840 (640 SE2d 293) (2006), citing Shamsai. More recently, the Court awarded the maximum amount of penalties in Henderson v. Schklar, 303 Ga. App. 875, 877 (3) (695 SE2d 323) (2010), finding that because appellant "had no valid reason to anticipate reversal of the trial court=s orders, we conclude that this appeal was brought only for purposes of delay."

4. Conduct in the trial court is sometimes considered when it occurs in combination with similar conduct on appeal, in aggravation, so to speak. When a party has already been held in contempt by the trial court, for example, meritless legal arguments are more likely to result in the assessment of appellate penalties. In Murphy v. Murphy, 328 Ga. App. 767 (759 SE 2d 909) (2014), on the second of what would be three trips to the Court of Appeals, Appellant=s attorney was sanctioned $2,500.00 for raising frivolous claims and submitting briefs disparaging opposing counsel and judges in violation of Court of Appeals Rule 10. See also Freese II, Inc., 318 Ga. App. at 668 (6) (imposing sanctions based on conduct both
on appeal and in the trial court). In fact, in the recent case of Murphy v. Freeman, 337 Ga. App. 221, 229 (2) (787 SE2d 755) (2016), the Court imposed sanction on appellants’ counsel who had repeatedly violated Rule 10 in his appellate filings, even without regard to his actions in the trial court, concluding that the appellant “appealed this case solely for the purpose of making meritless and public attacks on those individuals involved with this case with whom she disagrees.” The court noted that this conclusion was supported by counsel’s failure “to make even the slightest attempt to use any relevant authority to argue in support of the enumerations of error she raised on appeal.” Id.

In Wright v. Stuart, 229 Ga. App. 50, 52 (3) (494 SE2d 212) (1997), a settlement between the parties was made an order of the trial court. Appellant was held in contempt for failure to abide by the order, and his appeal raised several meritless legal arguments. The Court of Appeals sua sponte imposed frivolous appeal penalties. See also Ruskin, 294 Ga. App. at 844, in which appellant had been found in contempt below, and Noaha, LLC v. Vista Antiques &c., 306 Ga. App. 323 (702 SE2d 660) (2010), in which appellant failed to challenge a foreign judgment in the trial court but appealed its domestication.

In Jones v. Forest Lake Village Homeowners Assn., 312 Ga. App. 775 (720 SE2d 174) (2011), a jury awarded a substantial penalty for stubborn litigiousness in a contract dispute, and the Court of Appeals affirmed on every legal issue but remanded to correct a technical error in the language of the judgment. Jones once again appealed, asserting three additional meritless grounds, and the Court affirmed and awarded frivolous appeal penalties in the total amount of $5,000, representing a penalty of $2,500 each against the appellant and his counsel. In Pitts Properties v. Auburn Bank, 274 Ga. App. 538 (618 SE2d 171) (2005), the trial court expressly warned appellants, “This is a frivolous action.”
[You] should not be in court. @ Id. at 538. Because a[p]pellants ignored the trial court=s fully justified warning and prosecuted this wholly frivolous appeal, @ id. at 538-39, the then-maximum penalty allowed by Rule 15 (b) was imposed in full against each appellant and against their appellate counsel as well. In Austin v. Austin, 292 Ga. App. 335, 335-36 (664 SE2d 780) (2008), the appellant likewise ignored the warnings of the trial court that his claims had no merit and that he was exposing himself to attorney fees. He also made wholly unsupported and conclusory allegations of corruption on the part of the trial court.10 See also Haezebrouck v. State Farm Mut. Auto. Ins. Co., 252 Ga. App. 248, 250 (2) (555 SE2d 764) (2001) (sanctions based on counsel=s at tempt s to further his admittedly acrimonious crusade on appeal . . . . Such invective in the absence of factual or legal support is both unprofessional in general and violative of this Court=s rules in particular.) Similarly, in Piedmont Constr. Group, we noted that a[d]espite receiving an exhaustive, thoroughly sourced, and detailed order from the trial court explaining every aspect of its ruling, [appellant] proceeded with an appeal not only of coverage in this action but even its

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10 Jones, Austin and Pitts are somewhat unusual in that the appeals were affirmed pursuant to Court of Appeals Rule 36 (1) - (4), but the opinions were published. In Jones, a motion for reconsideration by the appellant resulted in an elaboration of the original award in an addendum further explaining the frivolous nature of the appeal. In Nanan et al. v. Everhome Mortgage Co. et al., A09A1668, the pro se appellants filed numerous motions and pleadings in the Court of Appeals, but never filed a brief. The trial court had already levied multiple sanctions for discovery abuse and frivolous pleadings, and appellants made wholesale allegations of corruption, mail fraud, and obstruction of justice against the trial court, the court reporter, the clerk of this court, appellee=s counsel, and appellee. Such frivolous and unsupported allegations are completely inappropriate and appear to have been interposed purely for purposes of delay. @ The appeal was dismissed by order for failure to file a brief, and frivolous appeal penalties were assessed. A copy of the order is included in Appendix 3.
duty to undertake a defense. . . . The trial court warned [appellant] that this was not a 
>close case,= and we agree.@ Id. at 23 (3).

In *Pacheco*, the Court affirmed the trial court=s award of attorney fees against 
appellant under OCGA ' 9-15-14 for bringing a frivolous complaint. AEven after the 
assessment of attorney fees by the trial court, however, Pacheco continued in her effort to 
raise arguments completely lacking in merit. Because Pacheco had no valid reason to 
anticipate reversal of the trial court=s orders, we conclude that this appeal was brought 
only for purposes of delay.@ 289 Ga. App. at 777. However, in *Roylston*, 290 Ga. App. 556, 
564 (3), the Court found that the appeal was not frivolous and Rule 15 (b) penalties were 
not justified, even though the Court affirmed the trial court=s award of attorney fees 
against the appellant under OCGA ' 9-15-14 because he Afailed to present any justiciable 
issue of law or fact and brought claims that lacked substantial justification.@ Id. at 561-564 
(2). This case demonstrates that the award of frivolous appeal penalties is discretionary, 
not mandatory, and depends largely upon the specific facts of the case.

5. Government agencies and actors may be held to a higher standard in avoiding 
frivolous appeals: AIt is incumbent upon those who appeal a trial court=s ruling to insure 
that they have a reasonable basis on which to proceed. This is especially true of a 
government agency spending the taxpayers= money in pursuing an appeal.@ *Fulton 
SE2d 179) (2003). This principle was quoted and relied upon in *Ferdinand v. City of East 
County=s liability under a tax collection agreement with the City of East Point had been
established in a previous appeal, the Court observed that the county’s arguments on appear were clearly without merit and that the county made no genuine effort to challenge the amount determined by the trial court on remand. Id. at 339. The Court concluded that the appeal was brought only for purposes of delay, and granted not only frivolous appeal penalties but also assessed 10% damages under OCGA 5-6-6. Id. at 340.

Appendix 1

Rule 7. Contempt.

(a) Inherent Power.

Nothing contained in these rules shall be construed to deny or limit the Court of Appeals’ inherent power to maintain control over proceedings conducted before it or to deny the Court those powers derived from statute, rules of procedure, or rules of court.

(b) Attorney Misconduct.

When alleged attorney misconduct is brought to the attention of the Court, a lawyer admitted to practice before the Court, an officer or employee of the Court, or otherwise, the Court may dispose of the matter through the use of its inherent, statutory, or other powers, or refer the matter to an appropriate state agency for investigation or disposition. These provisions are not mutually exclusive.

(c) Breach of Rules.

Breach of any rule of the Court of Appeals may result in a Court order requiring compliance. Failure to comply with a Court order may subject the offending party and/or attorney to a finding of contempt and may cause the appeal to be dismissed or the party’s brief to be stricken.

(d) Repeated Violations.

Repeated violations of this Court’s rules or orders may result in the revocation of the violator’s admission to practice before the Court of Appeals.

(e) No Prosecution, Frivolous Appeals, and Penalties.

(1) Failure to Appear and File Brief.

On the call of the case for argument, if the appellant does not appear and has not filed a brief, the Court may dismiss the appeal for want of prosecution.

(2) Penalty.
The panel of the Court ruling on a case, with or without motion, may by majority vote to impose a penalty not to exceed $2,500 against any party and/or a party’s counsel in any civil case in which there is a direct appeal, application for discretionary appeal, application for interlocutory appeal, or motion which is determined to be frivolous.

(3) Money Judgment.

The imposition of this penalty shall constitute a money judgment in favor of appellee against appellant or appellant’s counsel or in favor of appellant against appellee or appellee’s counsel, as the Court directs. Upon filing of the remittitur in the trial court, the penalty may be collected as are other money judgments.
In the Court of Appeals of Georgia

A12A2416. FRESEE II, INC. v. MITCHELL et al.

BOGGS, Judge.

In this case, the following circumstances exist and are dispositive of the appeal:

(1) The evidence supports the judgment;

(2) No reversible error of law appears and an opinion would have no precedential value;

(3) The judgment of the court below adequately explains the decision; and

(4) The issues are controlled adversely to the appellant for the reasons and authority given in the appellee=s brief.

The judgment of the court below therefore is affirmed in accordance with Court of Appeals Rule 36.

In addition, we find that Freese has appealed purely for the purpose of delaying enforcement of the judgment against it, for the reasons stated in Freese II, Inc. v. Mitchell,
et al., __ Ga. App. ___ (734 SE2d 491) (2012) (Case No. A12A0966, decided November 20, 2012). We therefore once again impose frivolous appeal penalties pursuant to Court of Appeals Rule 15 (b), in the amount of $2,500.00 against appellant and $2,500.00 against its appellate counsel. Upon return of the remittitur, the trial court is directed to enter a $5,000.00 judgment in favor of Lisa Mitchell as Administrator of the Estate of Fatima Bird and as Conservator of her grandchildren Naje Bird and Nadia Winn, in the form of a $2,500.00 penalty against Freese II, Inc. and a $2,500.00 penalty against its attorney.

Appendix 3

Court of Appeals
of the State of Georgia

ATLANTA,

The Court of Appeals hereby passes the following order:

A09A1668. NANAN et al. v. EVERHOME MORTGAGE COMPANY, et al.

Appellee Everhome Mortgage Company has moved to dismiss the pro se appeal of Mahabir Nanan and Shellielle Youhoing-Nanan from the trial court=s order entering judgment and awarding attorney fees in favor of Everhome. The appeal was docketed on May 1, 2009, and appellant=s brief was due on May 21, 2009. Appellants have not moved to extend the time for filing. Appellee filed his motion to dismiss on June 8, 2009. While appellants filed a response to that motion, they still have failed to file a brief. The reasons stated in their response to appellee=s motion are without merit. Although appellants claim that Everhome is not a party to this action, its status as a substituted defendant in interpleader was patiently explained to appellants by the trial court in its order.

Appellee=s motion to dismiss is GRANTED.

Appellee has moved for imposition of frivolous appeal penalties pursuant to Court of Appeals Rule 15 (b). We find merit in appellee=s contention that this appeal was purely for purposes of delay and warrants the imposition of penalties, particularly since multiple awards of sanctions for bad faith and stubborn litigiousness were made against appellants by the trial court for discovery abuse and frivolous pleadings below. See In the Interest of A. W., 242 Ga. App. 26, 30 (528 SE2d 819) (2000) (appellant and counsel made aoutrageous, unsupported factual assertions that fly in the face of the record@); Pitts Props. v. Auburn Bank, 274 Ga. App. 538-539 (618 SE2d 171) (2005) ([a]ppellants ignored the trial court=s fully justified warning and prosecuted this wholly frivolous appeal.@) Appellants have also made wholesale allegations of corruption, mail fraud, and obstruction of justice against the trial court, the court reporter, the clerk of this court, appellee=s counsel, and appellee. Such frivolous and unsupported allegations are completely inappropriate and appear to have been interposed purely for purposes of delay. Austin v. Austin, 292 Ga. App. 335-336 (664 SE2d 780) (2008).
Accordingly, we assess frivolous appeal penalties pursuant to Court of Appeals Rule 15 (b), in the amount of $1,000. Upon return of the remittitur, the trial court is directed to enter a $1,000 judgment in favor of Everhome Mortgage Company in the form of a $1,000 penalty against Mahabir Nanan and Shellielle Youhoing-Nanan.

Court of Appeals of the State of Georgia
Clerk=s Office, Atlanta

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

, Clerk.
Judge Carla Wong McMillian was appointed to the Georgia Court of Appeals by Governor Nathan Deal, taking office on January 24, 2013. Born and raised in Augusta, Georgia, she is the first Asian Pacific American state appellate judge ever to be appointed in the Southeast. Upon her election in May 2014, Judge McMillian became the first Asian Pacific American to be elected to a statewide office in Georgia.

Judge McMillian has also served as the State Court Judge for Fayette County, a position to which she was appointed by Governor Sonny Perdue in 2010.

Before her appointment to the bench, Judge McMillian was a partner in the litigation group of Sutherland Asbill & Brennan LLP. Judge McMillian also had the privilege of starting her legal career as a federal law clerk for the Honorable William C. O'Kelley of the United States District Court for the Northern District of Georgia.

Judge McMillian attended law school as a Woodruff Scholar at the University of Georgia School of Law. She also graduated with high honors from Duke University. Judge McMillian has been married since 1997 to her husband Lance, a professor at Atlanta’s John Marshall Law School. They have two children and live in Fayette County where they have been long-time members of Dogwood Church.
Presiding Judge Anne Elizabeth Barnes won election in 1998 to the Georgia Court of Appeals in a three-way race without a runoff, and took office January 1, 1999. She was the first woman to be elected in a state-wide judicial race without having been first appointed to the bench, and was re-elected, without opposition, to a second term in 2004. She was elected to serve a two year term as Chief Judge from 2006 through 2008. She was elected to a third term in 2010, receiving more votes than any other candidate in the State of Georgia, and was again re-elected in 2016.

A native Georgian, Presiding Judge Barnes grew up in Chamblee and attended DeKalb County public schools. She graduated magna cum laude from Georgia State University in 1979 and earned her Juris Doctor from the University of Georgia in 1983 and her Master of Laws in the Judicial Process from the University of Virginia in 2004. Currently she is enrolled in the Duke University School of Law Judicial Studies Program.

Presiding Judge Barnes has served on the Judicial Council of Georgia’s Standing Committee on Policy and its Budget Committee, the Chief Justice’s Commission on Professionalism, and the Domestic Violence Committee of the Judicial Council of Georgia. In 2018 Presiding Judge Barnes was appointed to serve on the Child Support Commission by Governor Nathan Deal. She also chaired the Judicial Section of the Atlanta Bar Association and served on the Supreme Court’s Commission on Interpreters.

Presiding Judge Barnes has served on the Board of Directors of Georgia Court Appointed Special Advocates for Children since 2011. She has volunteered with the Truancy Intervention Project’s Early Intervention Program, working with elementary school children, joined TIP’s Board of Directors in 2014, and currently serves on the Advisory Board. She completed a fellowship program with the Advanced Science and Technology Adjudication Resource Center (ASTAR) in 2013, and joined the Board of Directors of the National Courts and Science Institute in 2014.

Presiding Judge Barnes is a member of the American Bar Association, the State Bar of Georgia, the Atlanta, DeKalb, and Gate City Bar Associations. Presiding Judge Barnes is a Fellow of the Lawyers Foundation of Georgia, a Master of the Bleckley Inn of Court, and a member of the National Association of Women Judges, the Lawyers Club of Atlanta, and the Old Warhorse Lawyers Club. She is a 2006 graduate of Leadership Atlanta.

Presiding Judge Barnes has been recognized for her service by the DeKalb Bar Association, the Women in the Profession Committee of the Atlanta Bar Association, the Young Lawyers Division of the State Bar of Georgia, and Justice Served. In 2012 she received the Romae Turner Powell Judicial Service Award. She has been twice recognized by the Barbados Association of Atlanta, receiving both their Trident and Community Service Awards. Currently she serves as a District Director of the National Association of Women Judges.

Presiding Judge Barnes is married to Dr. Tom Banks, a physicist, and attends St. Martin in the Fields Episcopal Church.
Amanda H. Mercier

Judge Amanda H. Mercier was appointed to the Georgia Court of Appeals by Governor Nathan Deal and took office on January 4, 2016. In 2018 she was elected to serve a full six year term after an uncontested election. Prior to her appointment to the Court of Appeals, Judge Mercier was appointed to the Superior Court in the Appalachian Judicial Circuit on July 15, 2010 by Governor Sonny Perdue. In 2012, the voters of the Appalachian Judicial Circuit, which includes Fannin, Gilmer, and Pickens Counties, elected Judge Mercier to serve a full four year term after an uncontested election.

Judge Mercier was born in Cleveland, Tennessee in 1975. She is the daughter of Tim and Sandra Mercier. Judge Mercier spent her youth on her family’s farm, Mercier Orchards, where she worked summers and after school until she graduated from college. It was on her family’s farm that she learned the value of hard work. She graduated from Fannin County High School in Blue Ridge, Georgia in 1994. After graduation, she attended the University of Georgia, where she graduated cum laude with a B.A. in 1998. She then attended Syracuse University College of Law in New York, where she graduated magna cum laude with a J.D. in 2001. While there, she completed a year long externship in the United States Attorney’s Office for the Northern District of New York. Judge Mercier became a member of the Syracuse Chapter of the Order of the Coif in 2001.

After deciding to return home to Georgia after law school, Judge Mercier returned to her hometown of Blue Ridge, where she began her career in private practice with the Law Office of David E. Ralston. Judge Mercier practiced both criminal and civil litigation from 2001 until her appointment as a Superior Court Judge in 2010. During that time, she was actively involved as a defense attorney in the first accountability court in the Appalachian Judicial Circuit. She has served a term as the president of the Appalachian Judicial Circuit Bar Association. In addition to her full time private practice, Judge Mercier also was a part time solicitor for Ellijay City Court.

Upon being sworn in as a Superior Court Judge, Judge Mercier became actively involved in the many accountability courts in the Appalachian Judicial Circuit, and was the presiding judge of the Appalachian Judicial Circuit Mental Health Court. As a member of the Council of Superior Court Judges, she served on the Legislation Committee, Accountability Courts Committee, Pattern Jury Committee, and Uniform Rules Committee.

Judge Mercier was appointed by Governor Nathan Deal to two successive terms on the Georgia Commission on Family Violence. She also currently serves as a member of the Georgia Commission on Dispute Resolution and served as a member of the Judicial Council Ad Hoc Committee on Criminal Justice Reform in 2018. She currently serves as a master in the Lumpkin Inn of Court and as a master in the Bleckley Inn of Court.

In 2014, she was chosen to participate in Leadership Georgia, which Judge Mercier counts as one of the greatest professional experiences of her life. While still in private practice, she was actively involved in her local Chamber of Commerce, and served as chairperson for the Governmental Affairs Committee of the Fannin County Chamber of Commerce. She also served as the attorney coach for the Fannin County High School Mock Trial Team for several years.

Judge Mercier has been married to her husband, Joe Foster since 2001, and together they have one child, Alexandria. They reside in Blue Ridge, Georgia and are active members of their community.
Judge Brian M. Rickman was appointed to the Georgia Court of Appeals in November 2015 by Governor Nathan Deal and took office on January 1, 2016.

Born in Madison County, Georgia, Judge Rickman was a jailer working in the Rabun County Detention Center before entering Piedmont College where he graduated cum laude with a Bachelor's degree in 1998. He earned his Juris Doctor from The University of Georgia School of Law in 2001. While in law school he was a member of the Mock Trial Board and was involved in the Prosecutorial Clinic. Judge Rickman was admitted to the State Bar of Georgia on October 29th, 2001. He began his legal career as an Assistant District Attorney for the Alcovy Judicial Circuit and then the Mountain Judicial Circuit. In 2004 he left the District Attorney's Office to become a partner in a small town law firm in Rabun County, Georgia. He was a partner at Stockton & Rickman. At Stockton & Rickman, in addition to taking on whatever clients came through the door, including several pro bono cases, he was involved in civil litigation and was defense counsel in several cases including murder cases. In 2008, Judge Rickman was appointed by Governor Sonny Perdue to be the District Attorney for the Mountain Judicial Circuit and this was the position Judge Rickman held prior to taking office at The Georgia Court of Appeals.

In 2004, Judge Rickman became an adjunct professor at Piedmont College. He has taught several courses, including, American Government, Criminal Law and Procedure, and Courts and Society. He is a member of the Piedmont College Board of Trustees.

Judge Rickman was involved in several Professional Organizations as District Attorney. He was a member of the Georgia Board of Public Safety. The Georgia Board of Public Safety has statutory oversight over the Georgia Bureau of Investigation, the Georgia Department of Public Safety, and the Georgia Public Training Center. He was elected to be Secretary of the Georgia Board of Public Safety. Judge Rickman also served on the Criminal Justice Coordinating Council as the Board of Public Safety representative. Judge Rickman was elected by colleagues to serve on The Prosecuting Attorney's Council of Georgia. The Prosecuting Attorney's Council has statutory oversight over the State budget and training of Georgia's District Attorney's Offices. He served as chairman of the Personnel Committee.

In 2008, Judge Rickman was a recipient of the Piedmont College Alumni Association's Pacesetter Award. In 2013 he was named by the Fulton Daily Report as a "40 under 40 On the Rise," selection.

Judge Rickman's most important role is as husband to his wife, Maggie, and father to his two young children.
## ICLE BOARD

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GEORGIA MANDATORY CLE FACT SHEET

Every “active” attorney in Georgia must attend 12 “approved” CLE hours of instruction annually, with one of the CLE hours being in the area of legal ethics and one of the CLE hours being in the area of professionalism. Furthermore, any attorney who appears as sole or lead counsel in the Superior or State Courts of Georgia in any contested civil case or in the trial of a criminal case in 1990 or in any subsequent calendar year, must complete for such year a minimum of three hours of continuing legal education activity in the area of trial practice. These trial practice hours are included in, and not in addition to, the 12 hour requirement. ICLE is an “accredited” provider of “approved” CLE instruction.

Excess creditable CLE hours (i.e., over 12) earned in one CY may be carried over into the next succeeding CY. Excess ethics and professionalism credits may be carried over for two years. Excess trial practice hours may be carried over for one year.

A portion of your ICLE name tag is your ATTENDANCE CONFIRMATION which indicates the program name, date, amount paid, CLE hours (including ethics, professionalism and trial practice, if any) and should be retained for your personal CLE and tax records. DO NOT SEND THIS CARD TO THE COMMISSION!

ICLE will electronically transmit computerized CLE attendance records directly into the Official State Bar Membership computer records for recording on the attendee’s Bar record. Attendees at ICLE programs need do nothing more as their attendance will be recorded in their Bar record.

Should you need CLE credit in a state other than Georgia, please inquire as to the procedure at the registration desk. ICLE does not guarantee credit in any state other than Georgia.

If you have any questions concerning attendance credit at ICLE seminars, please call: 678-529-6688