MAKING YOUR CLIENT WHOLE:
GETTING YOUR FEES FOR BAD FAITH AND ABUSIVE LITIGATION

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*Special thanks to Kimberly Coleman, Esq. for her assistance in preparing this paper.

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I. INTRODUCTION

Recovering a client's attorney's fees is often the key ingredient to actually making the client whole for the damage or injury they have suffered. When a defendant has acted in bad faith and taken the "so sue me" approach to a claim, a resolution without the recovery of attorney's fees is inadequate. The client inevitably is never made whole. Hence, the recovery of the client's fees and costs from the other side, when possible, provides a client with their full cup of justice. While the "American Rule" generally provides that all parties bear their own costs of litigation including the costs of their attorney's fees, there are a number of statutes which operate as fee shifting mechanisms to allow for the recovery of fees from the opposing side in the event they exhibit certain behavior either before, during or after the trial phase of the litigation that justifies their requirement to pay fees. This paper addresses, in overview form, those statutes which are regularly used to recover attorney's fees and expenses from the opposing side as well the practical considerations as to proof and presentation of those fees sought to be awarded to the client.

The point at which a party or their attorney's "bad" conduct has occurred determines the statute under which to pursue recovery of fees as recompense for this behavior. Hence, it is helpful to group the conduct into three broad time categories, to wit: 1) before, 2) during, and, 3) after the trial phase of the lawsuit. Different statutes govern the recovery of fees during each of these phases. If the actions of the defendant **prior** to the litigation were done in bad faith and constitute stubborn litigiousness such that the plaintiff has had to file a lawsuit to which the defendants really have no defense, then fees may be assessed pursuant to O.C.G.A. §13-6-11. This statute is sometimes

referred to as "bad faith" attorney's fees. However, if, **during** the course of the litigation, the actions of the opposing side and/or their attorneys operate to expand the litigation beyond that which is reasonable, or pursue claims or defenses that have no justiciable issues of law or fact, then a party may recovery fees associated with such behavior and claims under O.C.G.A. §9-15-14 et seq. As a corollary, if a party incurs damages as a result of a lawsuit beyond simply attorney's fees, then they may have the ability to pursue an entirely separate cause of action against the parties and their lawyers pursuant to O.C.G.A. §51-7-80. Lastly, if the actions of the party involve activity **after** the trial phase, at the appellate level, then sanctions that can be awarded for frivolous appeals at both the Court of Appeals and the Supreme Court levels. As with any of these statutes, the party requesting the fees is required demonstrate with sufficient and admissible evidence: 1) the fees actually incurred, 2) a connection between the actions of the opposing side which caused the fees to be incurred, and, 3) whether the fees were reasonable and necessary given the circumstances.

II. PRE-SUIT BEHAVIOR GIVING RISE TO RECOVERY OF ATTORNEY'S FEES AND COSTS

The statute governing the recovery of fees for pre-suit behavior is O.C.G.A. §13-6-11. The statute itself is relatively short and provides:

> The expenses of litigation generally shall not be allowed as part of the damages; but where the plaintiff has specially pled 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.

This statute sets forth the general rule, i.e. the "American Rule" that everyone bears their own costs. However, this statute is a "plaintiff friendly" statute in that it allows a plaintiff, and a plaintiff only, the ability to recovery fees from a defendant if their actions prior to the initiation of the claim so merit. Hence, the actions of the party which have given rise to the litigation may also merit an award of attorney's fees to the plaintiff. Therefore, this statute provides plaintiffs an opportunity which they should not squander. If the plaintiff has requested the award of fees by pleading it specifically and then putting it in their prayer and where the defendant has acted in bad faith in some way or caused the plaintiff some expense that it should not have had to incur, or has just been stubbornly litigious, then attorney's fees may be awarded. These fees are awarded where the defendant is manipulating the system and making the plaintiff go through the trouble of a trial and the entire litigation process when they should not have been required to do so. The public policy argument is that the lawsuit would not have been necessary in the first place had the defendants been reasonable and acted according to the law. Consequently, O.C.G.A. §13-6-11 relates to acts of the defendant and/or their counsel which occurred prior to having to file the lawsuit (i.e., their "prefiling" conduct). Chong v. Reebaa Construction, Inc. , 284 Ga. App. 830 (2007), judgment rev'd on other grounds, 283 Ga. 222 (2008).

a. Pleading Requirements

There are a few requirements that must be followed in order to recover such fees from a procedural standpoint. First, the statute requires the plaintiff to ask for the award of such fees. Hence, the plaintiff has to make certain to plead the client's claims for the fees in his complaint and then also specifically to pray for them in his prayer. Neither the Court, nor the jury can simply award fees under this statute unless it has

been pled and requested by the plaintiffs. The claim is plead as a separate count supported by the factual allegations and then specifically prayed for in the Complaint.

As a practical point, it is important to be certain that the request for bad faith attorney's fees is sought throughout the litigation, including in the Pre-Trial Order, and can be demonstrated with witnesses necessary to support the request for fees. Likewise, it is important that the client testifies as to the fees he/she incurred and expenses paid and that the defendants are cross examined regarding evidence that will support the request for fees. As to the evidence of the fees themselves, the attorneys will need to testify as to the fees and expenses incurred in addition to having the client testify as to the bills they have had to pay. The originals of the bills and all expenses will need to be submitted as evidence as well and a summary should be offered. Further, as this evidence will be utilized at trial, the opposing counsel is entitled to review it in advance of trial. Hence, the actual billing records will either need to be prepared mindful that the opposing side will be reviewing the bills or redacted where appropriate. Failure to properly plead the request and then insure that adequate evidentiary support is presented at trial may jeopardize the claim for fees.

b. Plaintiff Must Prevail and Defendant's Actions Must Warrant an Award.

The statute provides that each party bears their own costs, unless the defendants have acted in some way to merit defendants paying the plaintiff's fees and expenses. Before the pre-suit actions of defendants can be deemed inappropriate, they are viewed relative to the overall outcome of the case. If the Plaintiff does not prevail, then it cannot be argued that the Defendant acted improperly. Therefore, the Plaintiff must prevail in the case before bad faith attorney's fees can be awarded him. While this is considered a "plaintiff friendly" statute, it applies to any party who is a plaintiff as to a

particular claim. This distinction opens the door for any party affirmatively asserting a claim as opposed to defending a claim to recover fees. Thus, if Defendants have asserted a counterclaim, they are "plaintiffs in counterclaim" and may also make use of this statute. In such circumstances, the requirement for proof remains the same. Along these same lines, where a party asserts multiple claims over the course of litigation, attorney's fees under this statute may only be awarded as to claims on which the party prevails. It is reversible error for the trial court to award fees under O.C.G.A. §13-6-11 where a party fails to prove the amount of fees attributable to each claim; in other words, evidence of attorney's fees must be presented separately as to each claim, rather than in a lump sum. Terrell v. Pippart, 2012 WL 660840, Ga. App. 2012.

However, this statute does not provide a mechanism for the recovery of fees for any party defending a claim, even if they prevail. The question of whether a Defendant's actions warrant an award of fees under O.C.G.A. §13-6-11 is reserved for the trial court. City of Lilburn v. Astra Group, 286 Ga.App. 568, 570 (2007). Where there is any evidence upon which a finder of fact could properly base a finding that the Defendant's actions constitute bad faith or stubborn litigiousness, or caused the Plaintiff unnecessary trouble and expense, the appellate courts will not disturb an award of fees under this statute. *Id.*

III. BEHAVIOR DURING THE LITIGATION

a. O.C.G.A. §9-15-14 Motion for Attorney's Fees

Most attorneys are familiar with the ability to recover attorney's fees under O.C.G.A. § 9-15-14. This statute and the companion O.C.G.A. § 51-7-80 et seq. were designed to codify the common law principles set forth in Yost v. Torok, 256 Ga. 92 (1986). The full text of O.C.G.A. §9-15-14 is quite lengthy, but the grounds for recovery

under this statute are defined in sections (a) and (b), set forth in relevant part as follows:

> (a) ...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. ..
>
> (b) The court may assess reasonable and necessary attorney's fees and expenses of litigation ... 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...

While the proof as to the bad behavior under O.C.G.A. §9-15-14 is largely the same as O.C.G.A. §13-6-11, the statutes operate differently. Under O.C.G.A. §9-15-14, the request for attorney's fees is made by motion, it is not a count of the complaint. Consequently, an O.C.G.A. §9-15-14 motion is heard by a judge and thus, is never offered to the jury to determine. Often attorneys file an Answer to a Complaint and then mistakenly attempt to allege an "O.C.G.A. §9-15-14 Stubborn Litigious Claim", but this is procedurally in error. Nonetheless, it can create a procedural quandary as it often forestalls a plaintiff's automatic right to dismiss and re-file a case where the "Counterclaim for O.C.G.A. §9-15-14" remains pending. This is incorrect. The statute

does not provide for an independent claim. Rather, the statute provides that the request for fees be made by a motion. Unlike, O.C.G.A. §13-6-11, where a party is required to plead it or lose it, a motion for attorneys fees under O.C.G.A. §9-15-14 can be made either by a party or by the Court, *sua sponte*.

A motion for fees can be made at any point during the course of the litigation but in no event later than 45 days after the final disposition of the case. A number of cases have sought to interpret "final disposition" to explain whether it means following appeal or earlier upon a final judgment which is appealable. Hence, any judgment which is sufficiently final such that it gives right to the ability to appeal is deemed to be final for the purposes of the period from which the 45 days runs to file a O.C.G.A. §9-15-14 Motion. A voluntary dismissal without prejudice is not deemed as a final judgment as it is subject to renewal. Therefore, the 45 days to seek fees as to a matter which was voluntarily dismissed without prejudice is 45 days following the expiration of the timeframe in which the renewal could be made.

An award can be made against both the parties and the attorneys. This creates a possible conflict of interest situation in the event that a motion is filed. The motion may allege that the defense or claim pursued lacks substantial justification and is not grounded in law or fact. This may be a function of the party's representation of the facts to the attorney upon which the attorney relied in lodging the defense or claim. In that situation, then the client's failure to accurately convey the facts to the attorney may serve as the basis for the improper claim or defense. Alternatively, the client may seek to stall or delay the litigation and thus, direct the attorney as to a certain course of action which may give rise to the claim for fees. However, it may be that the client conveyed certain facts to which the attorney then determined which course of action to pursue,

which law to allege or utilize and how to respond to the discovery etc. In those circumstances, it is the client who looks to the attorney for guidance as to how to proceed and assumes that the attorney is properly counseling and pursuing the claim or defense. When the opposing side or the Court determines that the actions have been improper, unnecessarily expanded the proceedings, expended for the purposes of delay or harassment, then the client may turn to the attorney and look to him to pay any fees that are awarded. Hence, if a motion for attorney's fees is made as to both the party and the attorney, it is prudent to seek separate and independent counsel in responding to same.

The conduct which is subject to an O.C.G.A. §9-15-14 award is not always readily defined. Rather the courts have taken, a "know it when you see it" approach. While a trial court's award of attorney's fees under this statute must include findings of fact setting forth the conduct authorizing the award, minimal guidelines are in place to identify conduct subject to fee awards under. Carson v. Carson, 281 Ga. 296, 300 (2006). However, certain cases have defined limitations as to the behavior which may not be subject to such an award. First, merely prevailing at summary judgment does not automatically merit an award of attorney's fees. Chong v. Reebaa Construction, Inc., 284 Ga. App. 830 (2007). Likewise, prevailing in the entire case does not garner an automatic award of attorney's fees. Glynn – Brunswick Mem'l Hosp. Autho. v. Gibbons, 243 Ga. App. 341 (2000). Further, simply because a party was required to file a motion to compel does not mean that the party contesting the discovery is subject to a sanction award. Id. There is also an argument to be made that if the matter survived summary judgment challenges, then a justiciable issue is involved by definition, and cannot be deemed to have been frivolous. Further, if there is at least arguable support for the

position taken, then an award of fees should not be justified. If a party is seeking to espouse an argument in which it is known that the law in Georgia is either silent or contrary but yet is operating on a good faith belief that the law should be changed or interpreted differently, then it may be prudent to acknowledge at the outset the lack of current case law on the matter or out-of-state authority or legal periodicals on the topic to support that good faith belief. Diffusing a Court from believing that a position is being taken simply to be contrary or for harassment may forestall an O.C.G.A. §9-15-14 motion in the first place.

b. O.C.G.A. §51-7-80 Separate Action for Additional Damages

O.C.G.A. §9-15-14 and O.C.G.A. §51-7-80 operate in tandem. O.C.G.A. §9-15-14 is the exclusive remedy for the pursuit of fees if the only damages for the abusive litigation is the unnecessary fees incurred. However, if a party has suffered additional damages, such as loss of property, damage to reputation or some additional tangible loss as well as attorney's fees, then, in that event, the party may have a claim for abusive litigation pursuant to O.C.G.A. §51-7-80. A full discussion as to such a lawsuit is beyond the scope of this paper, but it is important to note a few important distinctions. First, failure to file an O.C.G.A. §9-15-14 motion when the only damages are the attorneys fees in the hopes that an O.C.G.A. §51-7-80 claim can be made is in error and may operate to forfeit the fees being sought. Hence, if an O.C.G.A. §9-15-14 motion is a possibility, it is safer to file it within the time frame allowed rather than risk the dismissal of a later O.C.G.A. §51-7-80 claim that does not have sufficient damages beyond attorneys fees to survive. There are certain procedural requirements that are to be met prior to the pursuit of an O.C.G.A. §51-7-80 claim which are meant to discourage the offending party from their offensive behavior. Specifically, a party is required to submit in writing a notice to the

offending party those actions which are deemed to constitute abusive litigation and to afford the offending party an opportunity to cease, desist or otherwise withdraw and retreat from the offending behavior or to suffer a future claim as a result. As with all other statutes which allow for the recovery of fees, the fees must be presented with sufficient evidence to support an award of same and with O.C.G.A. §51-7-80 claims, evidence of additional harm must be adequately demonstrated.

IV. POST TRIAL BEHAVIOR

Although not widely sought or imposed, certain rules and statutes do exist which operate to afford parties the ability to recover fees or some form of compensation for appeals that are taken solely for the purposes of harassment and delay. A party may seek fees for an opposing party's frivolous appeals. Frivolous appeal penalties are governed under Court of Appeals Rule 15(d), 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.

Frivolous appeal penalties may be sought by motion. Such penalties can be awarded "when the law is indisputably clear concerning the issues raised on appeal" Golden Atlanta Site Dev. V. R. Nahai & Sons, 299 Ga.App. 654, 655 (1)(b), (2009). "We have repeatedly held that a penalty for frivolous appeal may be assessed in cases where the appellant could have no reasonable basis for anticipating reversal of the trial court's judgment." Trevino v. Flanders, 231 Ga. App. 782, 783 (1998).

Lack of supporting law will not automatically result in a frivolous appeal penalty. However, failure to provide an appropriate record has been used to prescribe an improper motive and knowledge that the appeal lacks any reasonable basis. Browning Pro. V. Federal Home Loan Mortg. Corp., 210 Ga.App. 115 (1993). Similarly, misrepresentation and concealment of controlling authority may also authorize an award of appeal penalties. Zohour v. Zohouri, 218 Ga. App. 748 (1995).

While a penalty of $2,500.00 may not be deemed a significant sanction, there is also the ability to have an assessment made under O.C.G.A. §5-6-6 of 10% of a money judgment for frivolous appeals which are taken up for the purposes of delay. Thus, construing the Court of Appeals Rule together with O.C.G.A. §5-6-6 may provide adequate financial disincentive to actually discourage a frivolous appeal. Likewise, under Supreme Court Rule 8 fees can be awarded for appeals which are deemed to be abusive and taken merely for the purposes of delay and harassment.

V. PROVING THE FEES

Under any of the above-described statutes, the fees which are sought must be demonstrated by sufficient and admissible evidence as to those fees which were unnecessarily incurred as a result of certain and particular actions of the opposing side. These means that the fees awarded have a direct relationship to the behavior which is giving rise to the award of the fees. Cases are replete with examples of fees which have been denied or reduced as they do not correlate to any particular "abusive" behavior of the offending party or counsel. Hence, the first issue is to define what behavior was offensive and which fees and expenses were incurred in responding or otherwise reacting to the behavior. Clear billing records are essential as they will define the tasks performed and their correlation to the actions of the opposing side. As evidence, the

opposing side has the ability to review and inspect these billing records in advance of their presentation either to the jury or a court. Therefore, the line between detailed billing records and the disclosure of strategy and other confidential information must be constantly considered. Hence, entries must be descriptive enough to identify the task, the behavior and the response but not detail substantive client communications or strategies and tactics of negotiation. Next, simply because fees were incurred and even paid by the client does not make them reasonable or necessary. Once a determination is made that fees for certain behavior should be awarded the amount that is to be awarded is not *ipso facto* the amount incurred or paid. Rather, a second inquiry is made as to whether the fees sought to be awarded were reasonable and necessary to respond to the offensive behavior which merits the award. It may be prudent to introduce evidence from an independent expert in the particular type of litigation or area of practice to affirm that the fees incurred and sought are reasonable and commensurate with those fees which would be incurred in the performance of such a task. Likewise, the hourly rate may be the subject of debate as to its reasonableness. An independent expert to substantiate the rates charged given the character of the litigation, the complexity of the issues and the years of experience of the attorney's commanding the rate will substantiate the request and provide independent evidence of the reasonableness and necessity of the fees sought.

Finally, procedural requirements should not be an afterthought. Note billing records on the list of exhibits in discovery and, in particular, on the pre-trial order. The same is true for the testimony of the attorney's attesting to the fees and time spent. Each will need to be listed in discovery as well as on the pre-trial order to insure that they will have the ability to testify at trial. The original billing records and original

expense receipts will be necessary under the best evidence requirements. Foundation for business records will need to be established and summaries prepared to make the records easy to digest for a judge and jury. Lastly, witnesses will need to be questioned as to fees and expenses and be prepared for cross examination on these matters as well.

VI. CONCLUSION

Recovery of attorney's fees for a client may mean the difference between a hallow victory and truly being made whole. Proper pleading and attention to supporting the claims for attorney's fees throughout the litigation in billing records and developing the evidence will insure that the client is provided the opportunity to seek receive compensation for fees in the event that behavior of the defendants so warrant. The recovery of fees is never guaranteed and certainly not automatic but should be fully pursued and properly preserved by the attorney so as to act in the best interests of the client and maximize recovery of all available damages.