AWARDS OF ATTORNEY'S FEES AND LITIGATION EXPENSES

UNDER O.C.G.A. § 9-15-14: A PRIMER

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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).

O.C.G.A. § 9-15-14 does not create an independent cause of action, and a violation of its provisions may not be pled as a count in a complaint or as a counterclaim. Langley v. Nat'l Labor Group, Inc., 262 Ga. App. 749, 586 S.E.2d 418 (2003); Glass v. Glover, 241 Ga. App. 838, 528 S.E.2d 262 (2000). Instead, an award of attorney's fees and litigation expenses under the statute may only be sought by motion or imposed *sua sponte* by the court. Cagle v. Davis, 236 Ga. App. 657, 513 S.E.2d 16 (1999). Where a trial court makes an award on its own initiative, it can only sanction conduct that meets the requirements of the statutory language in O.C.G.A. § 9-15-14. Kitchens v. Ezell, 315 Ga. App. 444, 451, 726 S.E.2d 461 (2012); Hardwick-Morrison Co. v. Maryland, 206 Ga. App. 426, 425 S.E.2d 416 (1992) (implying *sua sponte* imposition of fee award permitted under 9-15-14(a) based on mandatory language).

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;

neither issue is appropriate for a jury's consideration. O.C.G.A. § 9-15-14(f). In fact, the unambiguous language of O.C.G.A. § 9-15-14(f) forbids the trial court from relegating these issues to a jury. Dismer v. Luke, 228 Ga. App. 638, 492 S.E.2d 562 (2007). Although a court may freely impose monetary sanctions under O.C.G.A. § 9-15-14, dismissal is never an available remedy under the statute. Century Ctr. at Braselton, LLC v. Town of Braselton, 285 Ga. 380, 677 S.E.2d 106 (2009); Whitley v. Piedmont Hosp., 284 Ga. App. 649, 656, 644 S.E.2d 514 (2007).

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.

The statute does not authorize judges in federal district court to make awards thereunder; rather, Rule 11 controls. *See* Dutta-Roy v. Fain, 2014 U.S. Dist. LEXIS 62169 (N.D. Ga. May 5, 2014) (holding that federal court lacked subject matter jurisdiction over pro se plaintiff's § 9-15-14 claim); Carbajal-Ramirez v. Bland Farms, 234 F. Supp. 2d 1353 (S.D. Ga. 2001); Westinghouse Credit Corp. v. Hall, 144 B.R. 568 (S.D. Ga. 1992); Edwards v. Associated Bureaus, Inc., 128 F.R.D. 682 (N.D. Ga. 1989); Thomas v. Brown, 708 F. Supp. 336 (N.D. Ga. 1989); Bruce v. Wal-Mart Stores, Inc., 699 F. Supp. 905 (N.D. Ga. 1988); Union Carbide Corp. v. Tarancon Corp., 682 F. Supp. 535 (N.D. Ga. 1988); Majik Market v. Best, 684 F. Supp. 1089 (N.D. Ga. 1987); Great Western Banks v. Southeastern Bank, 234 Ga. App. 420, 507 S.E.2d 191 (1998). *But see* Blanchard v. DeLoache-Powers, 286 F.3d 1281 (11th Cir. 2002) (a federal opinion finding that the district court abused its discretion in awarding attorney's fees under § 9-15-14

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fees under O.C.G.A. § 13–6–11 are not appropriate simply because a trial court's order incorporates a contractual settlement agreement; as the parties' rights in such cases are based upon the order itself rather than the incorporated contract, O.C.G.A. § 9-15-14 is the correct vehicle for fee awards in these cases).

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). Juvenile courts have no authority to impose attorney's fees under O.C.G.A. § 9-15-14. In re T.M.M.L., 313 Ga. App. 638, 722 S.E.2d 386 (2012); ; see also In the Interest of M.F., 345 Ga. App. 550, 813 S.E.2d 786 (2018)

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

court decisions. Contract Harvesters v. Clark, 211 Ga. App. 297, 299, 439 S.E.2d 30, 33 (1993).[2]

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).

O.C.G.A. § 9-15-14 does not apply to litigation continuing in the Court of Appeals or the Supreme Court. The trial court is without authority to require payment of attorney's fees and litigation expenses for proceedings before the appellate courts. Kautter v. Kautter, 286 Ga. 16, 685 S.E.2d 266 (2009); McGahee v. Rogers, 280 Ga. 750, 632 S.E.2d 657 (2006); In Re Estate of Zeigler, 295 Ga. App. 156, 671 S.E.2d 218 (2008); DeKalb County v. Adams, 263 Ga. App. 201, 587 S.E.2d 302 (2003); Evans Co. Bd. of Comm. v. Claxton Enter., 255 Ga. App. 656, 566 S.E.2d 399 (2002); Bankhead v. Moss, 210 Ga. App. 508, 436 S.E. 2d 723 (1993); Castro v. Cambridge Square Towne Houses, Inc., 204 Ga. App. 746, 420 S.E.2d 588 (1992); DOT v. Franco's Pizza and Delicatessen, Inc., 200 Ga. App. 723, 409 S.E.2d 281 (1991), *overruled on other grounds*, White v. Fulton County, 264 Ga. 393, 444 S.E.2d 734 (1994). *See also* David G. Brown, P.E., Inc. v. Kent, 274 Ga. 849, 561 S.E.2d 89 (2002); Bishop v. Goins, 344 Ga. App. 174, 809 S.E.2d 280 (2018); Rollins v. Rollins, 300 Ga. 485, 796 S.E.2d 721 (2017); Kent v. David G. Brown, P.E., Inc., 248 Ga. App. 447, 545 S.E.2d 598 (2001). 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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[2] Note, however, that a prosecution for violation of a city or county ordinance is "quasi-criminal" and the provisions of O.C.G.A. § 9-15-14 do not apply. DeKalb County v. Gerard, 207 Ga. App. 43, 427 S.E. 2d 36 (1993).

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.[3] 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

A trial court may award attorney's fees and litigation expenses as a sanction for abusive litigation either upon motion by the aggrieved party or upon its own initiative. Mize v. Regions Bank, 265 Ga. App. 635, 595 S.E.2d 324 (2004); Cagle v. Davis, 236 Ga. App. 657, 513 S.E.2d 16 (1999). Any request for an award by an allegedly aggrieved party must be made by motion. Jackson v. Jackson, 282 Ga. 459, 651 S.E.2d 92 (2007). Such a request cannot be made by including a prayer for relief in a complaint or counterclaim. Heiman v. Mayfield, 300 Ga. App. 879, 686 S.E.2d 284 (2009); Hagemann v. City of Marietta, 287 Ga. App 1, 6, fn. 19, 650 S.E.2d 363, 368 (2007); Marlowe v. Colquitt County, 278 Ga. App. 184, 187, 628 S.E.2d 622, 624 (2006). In cases where no motion is made, yet evidence is presented at trial that could arguably support an award of fees, neither party can complain of the trial court's failure to consider the evidence or to make an award. Jackson, *supra.*

A motion under O.C.G.A. § 9-15-14 may be brought at any time up to 45 days after final disposition of an action in the trial court. Until April 5, 1994, a motion could only be brought within a "window of opportunity" that opened upon the final disposition of the action in the trial court and closed 45 days thereafter. *See* Fairburn Banking Co. v. Gafford, 263 Ga. 792, 439 S.E.2d 482 (1994). Cases decided prior to April 5, 1994 hold that no award may be made in cases where a motion was brought prematurely before the window of opportunity opened upon final disposition. *See, e.g.,* Marshall v. Ricmar, Inc., 215 Ga. App. 470, 451 S.E.2d 515 (1994); Hutchinson v. Divorce & Custody Law Ctr. of Kerman & Assocs., 207 Ga. App. 421, 427 S.E.2d 784 (1993); In the Interest of M.A.K., 202 Ga. App. 342, 414 S.E.2d 288 (1991), *overruled in part;* Deavours v. Hog Mountain Creations, 213 Ga. App. 337, 445 S.E.2d 579 (1994); Williams v. Clark-Atlanta

Univ., Inc., 200 Ga. App. 51, 406 S.E.2d 559 (1991). Regardless of when they are filed, motions for fees under O.C.G.A § 9-15-14 are treated as a continuation of the action with regard to which fees are sought, not a new, independent action. Trend Stitchers, LLC v. Wheeler, 310 Ga. App. 573, 713 S.E.2d 720 (2011).

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).

Post-trial motions that extend the appeal deadline likewise will stall the beginning of the 45-day period. A 9-15-14 motion filed within 45 days of a ruling on a motion for new trial or a motion for J.N.O.V. is timely filed. Reece v. Smith, 276 Ga. 404, 408, 577 S.E.2d 583, 587 (2003); Gist v. DeKalb Tire Co. Inc., 223 Ga. App. 397, 398, 477 S.E.2d 616, 617 (1996). An O.C.G.A. § 9-15-14 motion brought within 45 days after a decision on appeal or other post-judgment motion, however, is not. Trammel v.

Clayton Co. Bd. of Comm'r, 250 Ga. App. 310, 551 S.E.2d 412 (2001); Gist, 223 Ga. App. 397, 477 S.E.2d 616 (1996). For example, a motion to set aside, which does not extend the deadline to appeal the underlying decision, does not toll the deadline for the 9-15-14 motion. Gist, 223 Ga. App. at 398, 477 S.E.2d at 618. Likewise, a party's motion under O.C.G.A. § 9-15-14 filed on the forty-fifth day does not extend the opposing party's time to file his own motion. Trammel, 250 Ga. App. at 311, 551 S.E.2d at 414.

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

is afforded, the award must be reversed and remanded for such a hearing. Williams v. Becker, 294 Ga. 411, 754 S.E.2d 11 (2014); Fox-Korucu v. Korucu, 279 Ga. 769, 621 S.E.2d 460 (2005); Evers v. Evers, 277 Ga. 132, 587 S.E.2d 22 (2003); Green v. McCart, 273 Ga. 862, 548 S.E.2d 303 (2001); Barbour v. Sangha, 346 Ga. App. 13, 815 S.E.2d 228 (2018); Tanner Medical Center, Inc. v. Vest Newnan, LLC, 344 Ga. App. 901, 811 S.E.2d 527 (2018); Hearn v. Dollar Rent A Car, Inc., 315 Ga. App. 164, 726 S.E.2d 661 (2012); Woods v. Hall, 315 Ga. App. 93, 726 S.E.2d 596 (2012); Longe v. Fleming, 318 Ga. App. 258, 262, 733 S.E.2d 792, 795 (2012) (*citing* Moon v. Moon, 277 Ga. 375, 589 S.E.2d 76 (2003)); Unifund CCR Partners v. Mehrlander, 309 Ga. App. 685, 710 S.E.2d 882 (2011); Mays v. City of Fairburn, 301 Ga. App. 386, 687 S.E.2d 591 (2009); Olarsch v. Newell, 295 Ga. App. 210, 671 S.E.2d 253 (2008); McCray v. Fannie Mae, 292 Ga. App 156, 663 S.E.2d 736 (2008); Hitch v. Vasarhelyi, 291 Ga. App. 634, 662 S.E.2d 378 (2008), *reversed on other grounds,* 285 Ga. 627, 680 S.E.2d 411 (2009); Slone v. Myers, 288 Ga. App. 8, 653 S.E.2d 323 (2007), *overruled on other grounds*, Reeves v. Upson Reg'l Med. Ctr., 315 Ga. App. 582, 726 S.E.2d 544 (2012), *reconsideration denied* (Apr. 12, 2012), *cert. denied* (Oct. 15, 2012); Honkan v. Honkan, 283 Ga. App. 522, 642 S.E.2d 154 (2007); Note Purchase Co. of Ga., LLC v. Brenda Lee Strickland Realty, Inc., 288 Ga. App. 594, 654 S.E.2d 393 (2007); Sawyer v. Sawyer, 253 Ga. App. 619, 560 S.E.2d 86 (2002); Glass v. Glover, 241 Ga. App. 838, 528 S.E.2d 262 (2000); Greer v. Davis, 244 Ga. App. 317, 534 S.E.2d 853 (2000); Rowan v. Reuss, 246 Ga. App. 139, 539 S.E.2d 241 (2000); Boomershine Pontiac-GMC Truck v. Snapp, 232 Ga. App. 850, 503 S.E.2d 90 (1998); Cohen v. Feldman, 219 Ga. App. 90, 464 S.E.2d 237 (1995), *overruled in part*, Williams v. Cooper, 280 Ga. 145, 625 S.E.2d 754 (2006)..

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.

A party may waive the right to a hearing on a motion for attorney's fees. MacDonald v. Harris, 266 Ga. App. 287, 597 S.E.2d 125 (2004) (*citing* Munoz v. American Lawyer Media, 236 Ga. App. 462, 512 S.E.2d 347 (1999)). A timely objection to the motion for attorney's fees, even without a specific request for a hearing, is generally sufficient to preclude a waiver. Williams v. Becker, 294 Ga. 411, 413, 754 S.E.2d 11, 13 (2014); Slone v. Myers, 288 Ga. App. 8, 653 S.E.2d 323 (2007), *overruled on other grounds*, Reeves v. Upson Reg'l Med. Ctr., 315 Ga. App. 582, 726 S.E.2d 544

(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.

The order granting a § 9-15-14 award must also contain specific findings of fact that identify the conduct authorizing the award and relate the attorney's fees or expenses to such conduct. Leggette v. Leggette, 284 Ga. 432, 668 S.E.2d 251 (2008); Findley v. Findley, 280 Ga. 454, 463, 629 S.E.2d 222, 230 (2006); Moon v. Moon, 277 Ga. 375, 589 S.E.2d 76 (2003); McKemie v. City of Griffin, 272 Ga. 843, 537 S.E.2d 66 (2000); Porter v. Felker, 261 Ga. 421, 405 S.E.2d 31 (1991); Adams v. Pinetree Trail Enterprises, LLC 347 Ga. App. 697, 820 S.E.2d 735 (2018); Razavi v. Merchant, 330 Ga. App. 407, 765 S.E.2d 479 (2014); Ward v. Ward, 289 Ga. 250, 252, 710 S.E.2d 555, 557 (2011) (trial court's comment that "this was a weak case for a change" did not satisfy this requirement); State of Ga. Dept. of Transp. v. Douglas Asphalt Co., 295 Ga. App. 421, 671 S.E.2d 899 (2009); Dan J. Sheehan Co. v. The Fairlawn on Jones Homeowners Assoc., Inc., 312 Ga. App. 787, 720 S.E.2d 259 (2011); Olarsch v. Newell, 295 Ga. App. 210, 671 S.E.2d 253 (2008); Walker v. Walker, 293 Ga. App. 872, 668 S.E.2d 330 (2008); Gilchrist v. Gilchrist, 287 Ga. App. 133, 650 S.E.2d 795 (2007); Note Purchase, 288 Ga. App. 594, *supra*; Johnston v. Correale, 285 Ga. App. 870, 648 S.E.2d 180

(2007); Panhandle Fire Prot., Inc. v. Batson Cook Co., 288 Ga. App. 194, 653 S.E.2d 802 (2007); Hall v. Christian Church of Ga., Inc., 280 Ga. App. 721, 634 S.E.2d 793 (2006); Bailey v. McNealy, 277 Ga. App. 848, 627 S.E.2d 893 (2006); DeRossett Enters., Inc. v. Gen. Elec. Capital Corp., 275 Ga. App. 728, 621 S.E.2d 755 (2005); Mize v. Regions Bank, 265 Ga. App. 635, 595 S.E.2d 324 (2004); MacDonald v. Harris, 266 Ga. App. 287, 597 S.E.2d 125 (2004); H. J. Russell & Co. v. Manuel, 264 Ga. App. 273, 590 S.E.2d 250 (2003); Cotting v. Cotting, 261 Ga. App. 370, 582 S.E.2d 527 (2003); Wehner v. Parris, 258 Ga. App. 772, 574 S.E.2d 921 (2002); Lawrence v. Direct Mortgage Lenders Corp., 254 Ga. App. 672, 563 S.E.2d 533 (2002); Jefferson Randolph Corp. v. Progressive Data Syst., Inc., 251 Ga. App. 1, 553 S.E.2d 304 (2001), *rev'd on other grounds*, 275 Ga. 420, 568, S.E.2d 474 (2002).

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,

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[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.

269 (2013). A court declining to award fees is not required to make specific findings of fact to support its denial. Haney v. Camp, 320 Ga. App. 111, 115, 739 S.E.2d 399, 403 (2013); Campbell v. The Landings Assoc. Inc., 311 Ga. App. 476, 483, 716 S.E.2d 543, 549 (2011); Evers v. Evers, 277 Ga. 132, 133, 587 S.E.2d 22, 23 (2003); Bellah v. Peterson, 259 Ga. App. 182, 576 S.E.2d 585 (2003).

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,

726 S.E.2d 544 (2012). 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, Builder, Inc. v. Scherer, 206 Ga. App. 156, 424 S.E.2d 841 (1992).

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 Services Americas, LLC v. Benjamin, 325 Ga. App. 579, 754 S.E.2d 157 (2014).

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, Merritt, Reilly & Smith, LLP v. Remote Accounting Solutions, Inc., 277 Ga. App. 245; 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).

Settlement bars an award under O.C.G.A. § 9-15-14, unless the parties expressly reserve their rights to bring a motion under this statute. An award may not issue once a case is settled by mutual dismissals pursuant to a negotiated agreement. Fortson v. Hardwick, 297 Ga. App. 603, 677 S.E.2d 784 (2009); Waters v. Waters, 242 Ga. App. 588, 530 S.E.2d 482 (2000); Hunter v. Schroeder, 186 Ga. App. 799, 368 S.E.2d 561 (1988).

D. Elements Of A Claim Under O.C.G.A. § 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

(1991). 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

A permissive award of attorney's fees and litigation expenses is available under O.C.G.A. § 9-15-14(b). Nugent v. A1 Am. Refrigeration LLC, 346 Ga. App. 147, 816 S.E.2d 87 (2018) ; Parker v. Williams, 2018 Ga. Super. LEXIS 268 (May 6, 2018). O.C.G.A. § 9-15-14(b) provides as follows:

> 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. <u>The Good Faith Exception</u>

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); s*ee 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

$3,000 in fees under (b), and the appellate court affirmed. Marchelletta v. Seay Constr. Servs., Inc., 265 Ga. App. 23, 593 S.E. 2d 64 (2004).

Where res judicata bars a party's claims, fees may be appropriately awarded. Seay v. Avazeh Cohan, LLC, 277 Ga. App. 216, 626 S.E. 2d 179 (2006).

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

under O.C.G.A. § 9-15-14. Cohen v. Rogers, 341 Ga. App. 146, 798 S.E.2d 701 (2017). 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 order 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

[5]Attorney's fees also can encompass paralegal fees. Ellis v. Stanford, 256 Ga. App. 294, 568 S.E.2d 157 (2002) (allowing paralegal fees under O.C.G.A. § 9-15-14).

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

evidentiary hearing. Meacham v. Franklin-Heard County Water Auth., 302 Ga. App. 69, 690 S.E.2d 186 (2010); Rowan v. Reuss, 246 Ga. App. 139, 539 S.E.2d 241 (2000); Cohen v. Feldman, 219 Ga. App. 90, 464 S.E.2d 237 (1995), *overruled in part*, Williams v. Cooper, 280 Ga. 145, 625 S.E.2d 754 (2006). The trial court is under an affirmative duty to hear evidence and allow cross-examination as to the necessity, reasonableness and amount of work done. Hallman v. Emory Univ., 225 Ga. App. 247, 483 S.E.2d 362 (1997). A determination of the amount of attorney's fees cannot be based on guesswork or speculation. Ellis v. Stanford, 256 Ga. App. 294, 568 S.E.2d 157 (2002).

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.*

The movant seeking attorney's fees must present evidence to specify the time spent dealing with the positions or claims that lacked substantial justification or were abusive and thus caused the requested expenses of litigation; the legal services must be related to the sanctionable conduct. Citizens for Ethics in Government v. Atlanta Development Authority, 303 Ga. App. 724, 739, 694 S.E.2d 680 (2010); Dave Lucas Co., Inc. v. Lewis, 293 Ga. App. 288, 666 S.E.2d 576 (2008); Hall v. Christian Church of Ga., Inc., 280 Ga. App. 721, 634 S.E.2d 793 (2006); Mills v. Parker, 267 Ga. App. 334, 599 S.E.2d 301 (2004); Lawrence v. Direct Mortgage Lender's Corp., 254 Ga. App. 672, 563 S.E.2d 533 (2002). *Cf.* Doe v. HGI Realty, Inc., 254 Ga. App. 181, 561 S.E.2d 450 (2002). Where an attorney submits a time sheet that fails to separate the portion of time spent defending against a claim lacking substantial justification from the time spent preparing and presenting other claims, and where the time sheet merely summarizes time spent on such things as "meeting with client" and "conducting legal research", such summary evidence is "particularly inadequate." Reynolds v. Clark, 322 Ga. App. 788, 790-91, 746 S.E.2d 266, 269 (2013). *See* Landry v. Walsh, 342 Ga. App.

283, 801 S.E.2d 553 (2017) (reversing fee award when counsel introduced no evidence to support the calculation of his fees or to support that a portion of his fees were attributable to sanctionable conduct).

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

trial court has discretion to hold a hearing to receive supplemental evidence to allow proper attribution of fees to conduct); Williams v. Becker, 294 Ga. 411, 414, 754 S.E.2d 11, 14 (2014) .

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).

It should be noted, however, that personal time spent by attorneys was not recoverable in an award under O.C.G.A. § 9-15-14 when the attorneys were defendants, did not appear as attorneys of record in the case, and had hired outside counsel to represent them. Moore v. Harris, 201 Ga. App. 248, 410 S.E.2d 804 (1991). On the other hand, time spent in a *professional* capacity by an attorney/party is recoverable in a § 9-15-14 award. Harkleroad v. Stringer, 231 Ga. App. 464, 499 S.E.2d 379 (1998). Pro se litigants who are not attorneys cannot recover attorney's fees because of the lack of any meaningful standard for calculating the amount of the award. JarAllah v. American Culinary Fed'n, Inc., 242 Ga. App. 595, 529 S.E.2d 919 (2000).

A party awarded attorney fees under O.C.G.A. § 13-6-11 may not receive attorney fees pursuant to O.C.G.A. § 9-15-14 for the same conduct justifying the § 13-6-11 award. Bloom v. Camp, 336 Ga. App. 891, 785 S.E.2d 573 (2016); Roofers Edge, Inc. v.

Standard Bldg. Co., Inc., 295 Ga. App. 294, 671 S.E.2d 310 (2008). Roofers Edge involved a subcontractor's breach of contract action against a general contractor. A jury returned a verdict for the subcontractor including attorney fees pursuant to O.C.G.A. § 13-6-11. When the general contractor filed a motion for judgment notwithstanding the verdict solely on the issue of attorney fees, the subcontractor filed an abusive litigation motion under O.C.G.A. § 9-15-14. The trial court granted the judgment notwithstanding the verdict, but denied the abusive litigation motion.

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 award is made pursuant to the mandatory provisions of O.C.G.A. § 9-15-14(a), then the standard of review on appeal is whether there is "any evidence" to support the award. Trotter v. Summerour, 273 Ga. App. 263, 614 S.E.2d 887 (2005); Gibson v. Southern Gen. Ins. Co., 199 Ga. App. 776, 406 S.E.2d 121 (1991). If the award is based on discretionary provisions of O.C.G.A. § 9-15-14(b), however, the standard of review is whether the trial court "abused its discretion" in making the award. Mitcham v. Blalock, 268 Ga. 644, 491 S.E.2d 782 (1997), *overruled in part on other grounds*, Felix v. State, 271 Ga. 534, 523 S.E.2d 1 (1999); Bienert v. Dickerson, 276 Ga. App. 621, 624 S.E.2d 245 (2005); Kinard v. Worldcom, Inc., 244 Ga. App. 614, 536 S.E.2d 536 (2000), *overruled on other grounds*, Thompson v. Allstate Ins. Co., 285 Ga. 24, 673 S.E.2d 227 (2009).

Regardless of the section on which the award is based, the trial court's order *must include* findings of fact that support the award. Belcher v. Belcher, 298 Ga. 333, 334; 782 S.E.2d 2, 30(2016); Reese v. Grant, 277 Ga. 799, 596 S.E.2d 139 (2004); Porter v. Felker, 261 Ga. 421, 405 S.E.2d 31 (1991); City of Griffin, *supra*; Hall v. Monroe County, 271 Ga. App. 895, 611 S.E.2d 120 (2005); Rhone v. Bolden, 270 Ga. App. 712, 608 S.E.2d 22 (2004); Katz v. Harris, 217 Ga. App. 287, 457 S.E. 2d 239 (1995); Bill Parker & Assocs. v. Rahr, 216 Ga. App. 838, 456 S.E.2d 221 (1995). Merely stating that a party's conduct "lacked substantial justification" is insufficient to sustain an award of fees and will cause the case to be remanded. Kim v. Han, 339 Ga. App. 886, 795 S.E.2d 191 (2016).

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.