

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

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**This paper covers cases decided through December 31, 2008.**

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

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### **O.C.G.A. §13-6-11. Recovery of expenses of litigation generally.**

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

### **General Considerations.**

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

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

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

<sup>2</sup> 1 Harper, James & Gray, The Law of Torts § 4.8 (2d ed. 1986).

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

The true focus of the Georgia exception is to punish a defendant who has acted badly by having to pay the other side's attorney fees. *Jones v. Spindel*, 122 Ga. App. 390, 177 S.E.2d 187 (1970), *cert. dismissed*, 227 Ga. 264, 180 S.E.2d 241 (1971). In all cases where a litigant seeks to recover attorney fees and expenses of litigation, a litigant must establish a legal basis for the claim. The legal basis may arise out of statute or contract. While statutory exceptions to Georgia's general rule for attorney fees exist under many other statutes, this paper focuses on the general rule expressed in O.C.G.A. §13-6-11.

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

- I. [General Rule] **Each litigant bears its own expenses**
- II. [Exception] **Unless:**
  1. [Operative Rule 1] "**Plaintiff has specially pleaded**"
  2. [Operative Rule 2] "**Plaintiff has made prayer therefor**"
  3. [Operative Rule 3] "**The defendant has acted**"
    - a. [Conduct clause 1] "**in bad faith,**"
    - b. [Conduct clause 2] "**has been stubbornly litigious, or**"
    - c. [Conduct clause 3] "**has caused the plaintiff unnecessary trouble and expense**"
  4. [Operative Rule 4] "**the jury may allow them.**"

Georgia law is clear that each party bears its own litigation expenses *unless* the case fits within some contractual or statutory exception. Judges cannot simply decide to

tax a party's expenses to the other party on a whim or arbitrary decision to make things fair. For example, a trial court cannot summarily award attorney fees to a litigant for merely opposing a motion or litigating a case. *Kyle v. King*, 138 Ga. App. 612, 226 S.E.2d 767 (1976); *Madden v. Bellew*, 195 Ga. App. 131, 393 S.E.2d 31 (1990). Attorney fees cannot be awarded as a punishment for criminal contempt under O.C.G.A. § 13-6-11. *General Teamsters Local Union No. 528 v. Allied Foods, Inc.*, 228 Ga. 479 at 531, 186 S.E.2d 527 (1971); *Ragsdale v. Bryan*, 235 Ga. 58 at 59, 218 S.E.2d 809 (1975).<sup>3</sup> However, attorney fees may be awarded under O.C.G.A. § 13-6-11 in a civil contempt. *G.I.R. Systems, Inc. v. Lance*, 228 Ga. App. 329, 491 S.E.2d 530 (1997), Compare, *Rolleston v. Cherry*, 237 Ga. App. 733, 521 S.E.2d 1 (1999).

The Code section does not create an independent cause of action. It is a remedial statute, ancillary to the primary cause of action, and entirely compensatory. It merely establishes the circumstances in which a plaintiff may recover the expense of litigation as an additional element of his damages. *Brown v. Baker*, 197 Ga. App. 485, 398 S.E.2d 797 (1990). O.C.G.A. §13-6-11 is available in actions at law and equity including actions in contract and in tort. *C & S Nat. Bank v. Haskins*, 254 Ga. 131, 137(4), 327 S.E.2d 192 (1985); *Candler v. Wickes Lumber Co.*, 195 Ga.App. 239, 393 S.E.2d 99 (1990).

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

To recover expenses of litigation under O.C.G.A. §13-6-11, the plaintiff must first prevail in the action and then must prove the defendant has acted improperly in any one of the manners described in the Code section. Plaintiff need only establish the existence

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<sup>3</sup> O.C.G.A. §19-6-2(a) specifically authorizes an award of attorney fees in divorce, alimony, and contempt cases arising out of an alimony case or a divorce and alimony

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

Case law has grouped the three types of bad acts into two types of cases: Type 1, the "bad faith" cases and Type 2, the "Stubbornly litigious [Conduct Clause 2] unnecessary trouble and expense" [Conduct Clause 3] cases. There is no real distinction between the treatment and meaning of the terms in conduct clauses 2 and 3, "stubbornly litigious" and "unnecessary trouble and expense."

The existence of a bona fide controversy defeats a "stubbornly litigious unnecessary trouble and expense" claim. However, if there is bad faith in the underlying transaction, the existence of a bona fide controversy does not defeat the claim for attorney fees unless the defendant wins. *Fidelity Nat'l. Bank v. Kneller*, 194 Ga. App. 55, 390 S.E.2d 55 (1989); *Windermere v. Bettles*, 211 Ga. App 177, 438 S.E.2d 406 (1993). In all cases, the plaintiff must win something to get any attorney fees and may only get fees on the prevailing claims. "A recovery for stubborn litigiousness or causing unnecessary trouble and expense is authorized if no bona fide controversy or dispute existed as to the defendant's liability." (Citations and punctuation omitted.) *Wilen v. Murray*, 292 Ga. App. 30, 33 (2) (663 SE2d 403) (2008). "[A]ttorney fees are not authorized under OCGA § 13-6-11 if the evidence shows that a genuine dispute exists - whether of law or fact, on liability or amount of damages, or on any comparable issue." (Citations and punctuation omitted.) *M & H Constr. Co. v. North Fulton Dev. Corp.*, 238 Ga. App. 713, 714 (1) (519 S.E.2d 287) (1999). "[I]t is for the jury to determine whether there was a bona fide controversy, unless the facts preclude such a finding as a matter of

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case.

law." (Citation and punctuation omitted.) *Webster v. Brown*, 213 Ga. App. 845, 846 (2) (446 S.E.2d 522) (1994). " *Nash v. Studdard*, 2008-GA-1126.108.

An award under O.C.G.A. § 13-6-11 is discretionary to the trier of facts. Just because all of the facts justifying attorney fees are proven, the trier of fact is not required to award attorney fees. *See, Davis v. Walker*, 2007 GACA A07A0907 (Ga. App. 11/21/2007).

**O. C. G. A. § 13-6-11 provides a remedy only for actions occurring prior to the filing of the case.**

O.C.G.A. § 13-6-11 deals exclusively with punishing acts that occurred prior to the filing of the case. "The bad faith authorizing recovery under OCGA § 13-6-11 relates to the defendant's conduct during the subject transaction prior to litigation, not to conduct in defending the litigation. *Chong v. Reebaa Construction, Inc.*, 2008-GA-A0717.002. Bad faith and misconduct in conducting the litigation after filing is subject to the rules of O.C.G.A. § 9-15-14 and 51-7-80 and the inherent power of the court to manage and control the conduct of the parties before the court. The moment of filing the case creates a clear demarcation point between the application of O.C.G.A § 13-6-11 and the abusive litigation statutes. Conduct occurring after the case is filed is simply not regulated by O.C.G.A. § 13-6-11. *Monterrey Mexican Restaurant of Wise, Inc. v. Leon* , 282 Ga. App. 439, 638 S.E.2d 879 (2006); *Trader's Ins. Co. v. Mann*, 118 Ga. 381, 45 S.E. 426 (1903); *Brown v. Baker*, 197 Ga. App. 466, 398 S.E.2d 797 (1990).

The terms "stubbornly litigious" and "unnecessary trouble and expense" refer to pre-filing conduct and do not refer to the manner in which the case is litigated after the case is filed. It would be error to grant O.C.G.A. § 13-6-11 fees and expenses based upon

the premise of bad acts that occur after the case is filed. Of course, if bad acting occurs during the litigation, the amount of the O.C.G.A. § 13-6-11 claim may be increased because the work attributed to the prevailing claim may be more.

**Requirement of success.**

To recover O.C.G.A § 13-6-11 fees, the underlying claim must be successful and a remedy obtained. Unless the claimant prevails on some damage claim or remedy, no attorney fees are recoverable. *Magnetic Resonance Plus, Inc. v Imaging Systems International*, 273 Ga 525, 543 S.E.2d 32 (2001); *Vernon Library Supplies, Inc., v. Ard*, 249 App. 853, 550 SE2d 108 (2001); *Connell v. Houser*, 189 Ga. App. 158, 375 S.E.2d 136 (1988); *Barnett v. Morrow*, 196 Ga. App. 201, 396 S.E.2d 11 (1990); *Clarendon National Insurance Company v. Johnson*, 2008-GA-0801.109. If a plaintiff brings a dual cause of action and prevails on only one of the two causes, the only attorney fees recoverable are those based upon the expense of proving the successful action. A plaintiff is entitled to recover attorney's fees only for that portion of the fees which is allocable to the attorney's efforts to prosecute a successful claim against a defendant." The fact that a claim fails as a matter of law, therefore, bars its recovery of attorney fees under 13-6-11. *McClung v. Atlanta Real Estate Acquisitions, LLC*, 282 Ga. App. 759, 639 S.E.2d 331 (2006).

In a case where election of remedies is required, attorney fees are not available based upon the mooted remedy. *Barnett v. Morrow*, 196 Ga. App. 201, 396 S.E.2d 11 (1990).

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

O.C.G.A. §13-6-11 is not available to the defendant unless the defendant has an *independent* counterclaim unrelated to the main claim against the Plaintiff, in which case the defendant may recover only the expenses of the prevailing counterclaim. *Parker v. Crider Poultry, Inc.*, 249 Ga. App. 381, 549 S.E.2d 711 (2001); *Beall v. E. H. H. Construction, Inc.*, 193 Ga. App. 544, 388 S.E.2d 342 (1989); *Davis v. Knight*, 195 Ga.App. 726, 394 S.E.2d 634 (1990). If the counterclaim is an independent claim that either arose separately from the plaintiff's claim or arose after the plaintiff's claim, then a plaintiff-in-counterclaim may recover expenses of litigation. *Sanders v. Brown*, 257 Ga. App. 566, 571 S.E.2d 532 (2002). *Raza v. Swiss Supply Direct, Inc.*, 256 Ga. App. 175, 568 S.E.2d 102 (2002). The Code section is not available to defendant to convert suit to damages for bringing the complaint against the plaintiff. The defendant may use the section to recover attorney fees for a viable counterclaim. *International Indemnity Co. v. Regional Employer Service, Inc.*, 239 Ga.App. 420, 520 S.E.2d 533 (1999). *Ellis v. Fuller*, 282 Ga. App. 307, 638 S.E.2d 433 (2006).

The defendant cannot recover for the costs of defending against the plaintiff's complaint, but may only recover the expenses incurred in prosecuting its independent counterclaims. *Eways v. Georgia R.R. Bank*, 806 F.2d 991 (11<sup>th</sup> Cir. 1986). In considering whether a defendant is entitled to make a claim for § 13-6-11 attorneys fees, caution should be exercised because law is not clear as to how "independent" a counterclaim must be to support an attorney fee award. OCGA § 13-6-11 does not permit the recovery of expenses incurred in defending a lawsuit. The defendant is only eligible to recover those expenses incurred in prosecuting an independent counterclaim. "The award of expenses of litigation under OCGA § 13-6-11 can only be recovered by the

plaintiff in an action under the language of the statute; therefore, the defendant and plaintiff-in-counterclaim cannot recover such damages where there is a compulsory counterclaim. *See Alcovy Properties v. MTW Investment Co., supra* at 104 (5); *White v. Lance H. Herndon, Inc.*, 203 Ga. App. 580, 581 (4) (417 SE2d 383) (1992).” *Sanders v. Brown*, 257 Ga. App. 566, 571 S.E.2d 532 (Ga. App. 2002).

If the counterclaim fails there cannot be an award of attorney fees to defendant. *Dennis-Smith v. Freeman*, 277 Ga. App. 822 (2006).

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

The case law has essentially merged the conduct of being "stubbornly litigious" [Conduct Clause 1] and "causing unnecessary trouble and expense" [Conduct Clause 2] into one test of whether or not the defendant forced plaintiff to sue where no bona fide controversy exists. *Jeff Goolsby Homes Corp. v. Smith*, 168 Ga. App. 218, 308 S.E.2d 564 (1983) Recovery for "stubborn litigiousness" is not authorized where there is a bona fide controversy. If there is a bona fide controversy, there can be no stubborn litigiousness as a matter of law. When bad faith is not an issue, a bona fide dispute as to part of a claim precludes a finding of stubborn litigiousness. *Auto-Owners Insurance Company v. Crawford*, 240 Ga.App. 748, 525 S.E.2d 118 (1999); *Gaston v. Mullins*, 168 Ga.App. 371, 372(1), 309 S.E.2d 166 (1983). That is a very practical principle, for were it otherwise, the task of separating out the litigation expense relating exclusively to the points which should have been conceded without lawsuit would itself be costly, time-consuming, and frequently impossible. *Candler v. Wickes Lumber Co.*, 195 Ga.App. 239, 393 S.E.2d 99 (1990).

The denial of plaintiff's summary judgment precludes later stubbornly litigious or unnecessary trouble and expense attorney fees because it establishes the existence of a bona fide controversy. *Colquitt v. Network Rental, Inc.*, 195 Ga. App 244, 393 S.E.2d 28 (1990).

A "so-sue-me" attitude forcing a plaintiff to litigate when no bona fide controversy exists causes unnecessary trouble and expense instead of settling claim or fulfilling promises to plaintiff supports an attorney fee claim. *Rogers v. Georgia Ports Auth.*, 185 Ga. App 325, 359 S.E. 2d 855, cert. den. 183 Ga. App. 906, 398 S.E.2d 855 (1987). *Clements v. Barnes*, 197 Ga. App 120, 397 S.E.2d 560 (1990). *Parking Co. of America v. Sucas*, 195 Ga. App. 616, 618 (3) (394 SE2d 411) (1990); *Charter Drywall Atlanta, Inc. v. Discovery Technology, Inc.*, 271 Ga. App. 514 (2005).

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

Existence of a genuine dispute or bona fide controversy precludes the award of "unnecessary trouble and expense" litigation expenses. "It may be assumed that every suit causes the plaintiff some trouble and expense, but this is not what the statute has in mind. One of the provisions of the Bill of Rights contained in the Constitution of this State declares that 'No person shall be deprived of the right to prosecute or defend his own cause in any of the courts of this state, in person, [or] by attorney, or both.' This is a privilege to the defendant as well as to the plaintiff. Where there is a bona fide controversy for the tribunals to settle, and the parties cannot adjust it amicably, there should be no burdening of one with the counsel fees of the other, unless there has been wanton or excessive indulgence in litigation." *Rogers v. Moore*, 207 Ga. 161, 60 S.E.2d

369 (1950). Thus, if the defendant has a bona fide defense to the plaintiff's claim, there can be no litigation expense award for "unnecessary trouble and expense." Where there is a bona fide controversy and no bad faith, the defendant's constitutional right to defend precludes attorney fee award. *Bush v. Northside Trucking, Inc.*, 252 Ga.App. 729, 556 S.E.2d 909 (2001); *Marshall v. King & Morgenstern.*, 272 Ga. App. 515 (2005). Where a purchaser sues to recover damages for breach of contract or, in the alternative, to obtain specific performance, and where there is no bona fide dispute as to the existence of the indebtedness, but there is a bona fide dispute as to the claim for specific performance, it cannot be said that the seller has been stubbornly litigious. *Gaston v. Mullins*, 168 Ga. App. 371, 309 S.E.2d 166 (1983).

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

"Bad faith" attorney fees are awarded when the defendant acted in bad faith in the transactions out of which the case arose. "Bad faith" under this section refers to conduct occurring at a time prior to the institution of the action. *Brannon Enter, Inc. v. Deaton*, 159 Ga. App. 685, 285 S.E.2d 58 (1981). In contract cases, the bad faith can occur in either the making or the performance of the contract or both events. *Canty Building Contractors v. Garrett +Machine & Construction., Inc.*, 270 Ga. App. 871, 608 S.E.2d 280 (2004) Where the defendant's work was unacceptable and defendant failed to fulfill its promises to remedy problems, "bad faith" attorney fees cannot be grounded on the conduct of the defendant in defending the case. *Trader's Ins. Co. v. Mann*, 118 Ga. 381, 45 S.E. 426 (1903); *Brown v. Baker*, 197 Ga. App. 466, 398 S.E.2d 797 (1990). The "bad faith" referred to in the Code section refers solely to the "bad faith" of the defendant in the underlying transaction. The "bad faith" in this context is not the refusal

to pay, but "bad faith" conduct in the transaction out of which the cause of action arose. *Fine & Block v. Evans*, 201 Ga. App. 294, 411 S.E.2d 73 (1991). Evidence of the defendant's conduct subsequent to the formation and breach of the alleged agreement is irrelevant. *Albert v. Albert*, 164 Ga. App. 723, 298 S.E.2d 612 (1982). The scope of evidentiary inquiry on the bad faith issue is limited to the formation and performance of the contract and the cause of the breach. Bad faith evidence should be admissible if it pertains to how the parties conducted themselves in relation to the subject matter of the transaction up until the time of the filing of the lawsuit. The date of filing of the lawsuit is a clear boundary between bad faith conduct under O.C.G.A. § 13-6-11 and the abusive conduct in litigation which is answerable under the abusive litigation statutes set forth in O.C.G.A. § 9-15-14 and O.C.G.A. § 51-7-80. Bad faith and misconduct arising out of the conduct of parties and counsel in litigating the case are exclusively the subject of the abusive litigation statutes found at O.C.G.A. § 9-15-14 and O.C.G.A. § 51-7-80.<sup>4</sup>

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

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<sup>4</sup> O.C.G.A. § 51-7-85 states: Exclusive remedy. On and after April 3, 1989, no claim other than as provided in this article or in Section 9-15-14 shall be allowed, whether statutory or common law, for the torts of malicious use of civil proceeding, malicious abuse of civil

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

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

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

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process, nor abusive litigation, provided that the claims filed prior to such date shall not be affected. This article is the exclusive remedy for abusive litigation.

also sufficient. *Jennings Enterprises, Inc., v. Carte*, 224 Ga.App. 538, 481 S.E.2d 541 (1977); *Glen Restaurant, Inc., v. West*, 173 Ga. App. 204, 325 S.E.2d 781 (1984).

Examples are helpful in interpreting the boundaries of the term "bad faith. The Court of Appeals found retention of earnest money by a seller after rescission of a real estate sales contract to be "bad faith". *New York Ins., Co. v. Willett*, 183 Ga. App. 767, 360 S.E.2d 37 (1987). A manufacturer's actual knowledge prior to sale to consumer of a product from which it could have reasonably foreseen an injury of the specific type sustained a "bad faith" award of litigation expenses. *Ford Motor Company v. Stubblefield*, 171 Ga. App. 681, 319 S.E.2d 340 (1994). In an action for trespass and damage to trees, evidence that a power corporation exceeded a condemnation order by cutting trees outside the right-of-way was sufficient to support a jury finding of "bad faith" and the award of attorney fees. *Oglethorpe Power Corp. v. Sheriff*, 210 Ga. App. 299, 436 S.E.2d 14 (1993). Use of sham documents in the course of a lending transaction with plaintiff borrower was "bad faith". *Crawford v. Crump*, 223 Ga. App. 119, 476 S.E.2d 855 (1996). Refusal to deliver title after purchase of truck was sufficient. *I.M.C. Motor Express, Inc., v. Cochran*, 180 Ga. App. 822, 348 S.E.2d 750 (1986). Failure to remedy the seepage of methane from a landfill to an adjoining property resulted in "bad faith" liability. *Warner Robbins v. Holt*, 220 Ga. App. 794, 470 S.E.2d 238 (1996).

In *Parks v. Breedlove*, 241 Ga.App. 72, 526 S.E.2d 137 (1999), the Court of Appeals found support for a bad faith claim wherein a homeowner refused to pay for construction of a new home. The homeowner claimed that the work was not done properly and refused to pay. After negotiations, the builder and homeowner agreed that the builder would withdraw from the project, waive his contractors fee, ensure that the

house passed rough inspection, and provide the homeowner with a list of all subcontractors and suppliers who provided work of materials for the project in exchange for an agreed upon payment to the builder. The builder then did everything required of him. The homeowner then hired an engineer who found some problems with the construction. The homeowner did not have the problems repaired or ask the county inspectors to re-inspect. Instead, they paid the engineer to do redesign for aesthetic reasons. The Court of Appeals found these facts sufficient to support an inference by the jury that the homeowner's refusal to pay the builder was not based on an honest belief that the expenses were not actually or necessarily incurred or that they had been defrauded. This was sufficient to support a finding of bad faith.

It may be bad faith secretly to explore and proceed to negotiate other business transactions inconsistent with a contract while knowing the other party is proceeding to expend money and time to perform the contract. *DPLM, Ltd. v. J. H. Harvey Company*, 241 Ga.App. 219, 526 S.E.2d 409 (1999); *See, Kemira, Inc. v. Williams Investigative & Security, Inc.*, 215 Ga. App. 194, 450 S.E.2d 427 (1994).

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

The failure to abate a nuisance of excess flow of water and debris from a golf course development constituted bad faith sufficient to support an award of attorney fees. *Foxchase, L.L.L.P. v. Cliatt*, 254 Ga. App. 239, 562 S.E.2d 221 (2002). Similarly, the City of Gainesville was hit with bad faith attorney fees when the city failed to maintain the drainage system that serviced their property and caused repeated flooding

that constituted an abatable nuisance. *City of Gainesville v. Waters*, 258 Ga. App. 555, 574 S.E. 2d 638 (2002) Acceptance and retention of payment for trees wrongfully cut from a neighbor's land during logging operations that cut some trees from the neighbor's land while the landowner was logging his own land supported an award for bad faith attorney fees. *Jones v. Cenza*, 287 Ga. App. 806, 572, S.E.2d 362 (2002).

An example of a case finding acts not to be "bad faith" is *Macon-Bibb County Water & Sewerage Auth. V. Tuttle/White Constructors, Inc.*, 530 F. Supp. 1048 (M.D. Ga. 1981), where disagreement as to certain terms and conditions of a contractual relationship was found not sufficient to evidence any bad faith. Failure to pay a debt because of an honest mistake as to contract terms is not bad faith and is not stubborn litigiousness. *M & H Construction Co., Inc. v. North Fulton Development Corp.*, 238 Ga.App. 713, 519 S.E.2d 287 (1999); *C & H Development, LLC v. Franklin County*, 2008-GA-1125.065

Every intentional tort supports bad faith attorney fees. *Todd v. Byrd*, 283 Ga. App. 37, 640 S.E. 2d 652 (2006); *Paine v. Nations*, 283 Ga. App. 167, 641 S.E. 2d 180 (2006); *Bunch v. Byington*, 2008-GA-A0708.010. In *Tyler v. Lincoln*, 272 Ga. 118, 527 S.E.2d 180, (2000), the Georgia Supreme Court reversed the Court of Appeals on an affirmance of a summary judgment finding that where a intentional tort occurred, there were genuine issues of fact remaining as to whether developer's intentionally tortious actions warranted an award of bad faith attorney fees even when nominal damages are recovered. An intentional tort will support a claim for litigation expenses under the theory that the intention evokes that "bad faith" necessary for recovery under O.C.G.A. §13-6-11. *Tanner v. Gilliland*, 186 Ga. App. 377, 367 S.E.2d 257 (1988). Conversion supports bad faith attorney fees. *Felker v. Chipley*, 246 Ga.App. 296, 540 S.E.2d 285

(2000). “[T]he intentional tort of trespass will support a claim for expenses of litigation and attorney fees under OCGA § 13-6-11.” *Mize v. McGarity*, 2008-GA-1001.093.

"Bad Faith" can be inferred in an action sounding in tort means if there was bad faith in the transaction out of which the case arose. *City of Atlanta v. Murphy*, 194 Ga. App. 652, 391 S.E.2d 474 (1990). Defendants can be held liable for plaintiff's attorney fees in a breach of contract action if they committed the breach in bad faith. *Young v. A. L. Anthony Grading Co., Inc.*, 225 Ga. App. 592, 484 S.E.2d 318 (1997). The award of damages for the intentional tort of conversion alone is sufficient to support attorney fees under the bad faith prong of section 13-6-11. *Infinity Insurance Company v. Martin*, 240 Ga.App. 609, 524 S.E.2d 294 (1999).

Failure to follow fair and reasonable business practices may also be bad faith. *Wachovia Bank of Georgia, N.A. v. Reynolds*, 244 Ga.App. 1, 533 S.E.2d 743, (2000) Evidence of bank's failure to protect funds of mentally incapacitated depositor's needs and failure to honor attorney in fact's instructions constituted bad faith. In *Artzner v. A & A Exterminators, Inc.*, 242 Ga.App. 766, 531 S.E.2d 200, (2000), a summary judgment for attorney fees in favor of defendant exterminator was reversed. A jury could infer that the refusal of exterminator to transfer termite contract was a bad faith breach of contract. In *Hendon v. Superior Roofing Co. of Georgia, Inc.*, 242 Ga.App. 307, 528 S.E.2d 548, (2000), spurious claims against roofer to avoid payment constituted bad faith. In *Ryland Group v. Daley*, 245 Ga.App. 496, 537 S.E.2d 732 (2000), a builder's refusal to do repairs to a new house clearly required under the building contract is sufficient to support a "bad faith" attorney fee award.

Under OCGA § 13-6-11, an estate beneficiary may recover expenses of litigation from an executor who has acted in bad faith, has been stubbornly litigious, or has caused the plaintiff unnecessary trouble and expense. Evidence that an executor breached a fiduciary duty from a motive of self-interest is a sufficient basis for an award under this Code section. *In Re Estate of Zeigler*, 2008-GA-1124.135.

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

### **Mistake**

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

### **Mere Negligence**

Mere negligence is not bad faith. "Bad Faith," which would support an award of attorney fees for bad faith under O.C.G.A. § 13-6-11 is not simply bad judgment or negligence, but it imports a dishonest purpose or some moral obliquity, and implies a

*conscious* doing of wrong, and means a breach of a known duty through some motive of interest or ill will. *Rapid Group, Inc. v. Yellow Cab of Columbus, Inc.*, 253 Ga.App. 43, 557 S.E.2d 420 (2001). "Mere negligence will not support an award of attorney fees based on bad faith." *MARTA v. Mitchell*, 2007 GACA A07A0978 12-14-07. *Hartsock v. Rich's Employees Credit Union*, 279 Ga. App. 724, 727 (4) 632 SE2d 476 (2006); *Rapid Group v. Yellow Cab*, 253 Ga. App. 43, 49-50 (4) 557 SE2d 420 (2001).

### **Effect of Refusal to Pay Debt.**

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

The Supreme Court stated in *Pferdmengs, Preyer & Co. v. Butler Stevens & Co.*, 117 Ga. 400, 48 S.E. 695 (1903), "The only unnecessary trouble and expense shown by the evidence was the fact that defendants had refused to pay without suit. If this would be sufficient to authorize a finding for attorney fees, we see no reason why the plaintiff in every case should not recover attorney fees. The Code has never been so construed. Where there is no bad faith, there must be something more than being put to the expense of a suit to authorize the plaintiff to claim attorney fees as a part of his damages." This old case has continuing viability. It has never been reversed and has been cited by the Supreme Court in *Town of Cimex v. Burnside*, 150 Ga. 556, 104 S.E. 435, 437 (1920); *Mallard v. Curran*, 123 Ga. 872, 51 S.E. 712 (1905); and in *Latham v. Falulk*, 265 Ga. 107, 454 S.E.2d 136 (1995).

The Court of Appeals cases take a stricter approach, allowing attorney fee awards in cases where there is no denial of liability where the plaintiff sues. Under the Supreme Court's view, the mere refusal to pay a *disputed* claim is not the equivalent of stubborn

litigiousness or the causing of unnecessary trouble and expense. *Buffalo Cab Co. v. Williams*, 126 Ga. App. 522, 191 S.E.2d 317 (1972); *D. H. Overmeyer Co. v. Nelson-Brantley Glass Co., Inc.*, 119 Ga. App. 599, 168 S.E.2d 176 (1969); *Palmer v. Howse*, 133 Ga. App. 619, 212 S.E.2d 2 (1974). For the Court of Appeals, however, the failure to pay an *undisputed* claim is the equivalent of causing the plaintiff unnecessary trouble and expense. *Brannon Enterprises, Inc., v. Deaton*, 159 Ga. App. 685, 285 S.E.2d 58 (1981); *Crotty v. Crotty*, 219 Ga. App. 408, 465 S.E.2d 517 (1995). The Court of Appeals did not address the "something more than being put to the trouble of suit," found in the Georgia Supreme Court *Pferdmengs, Preyer & Co. v. Butler Stevens & Co.* line of cases. In *Fresh Floors, Inc., v. Forrest Cambridge Apartments, L.L.C.*, 257 Ga. App. 270, 570 S.E.2d 570, at 592 (2002), the Court of Appeals reversed a default judgment denying attorney fees pointing out that "when a case is in default "the plaintiff is entitled to judgment 'as if every item and paragraph of the complaint or other original pleading were supported by proper evidence'" In *Fresh Floors*, the plaintiff had plead facts sufficient to support a finding of bad faith. In *McLeod v. Robbins Associates*, 260 Ga. App. 347, 579 S.E.2d 748 (2003), being broke and unable to pay supports an award of attorney's fees. As always, it is more expensive not to have enough money.

An unjustified refusal to pay will support attorney fees. In *Graves v. Diambrose*, 243 Ga.App. 802, 534 S.E.2d 490 (2000), a builder's refusal to make admitted repairs supported bad faith attorney fee award. In *Plemons v. Weaver*, 243 Ga.App. 464, 533 S.E.2d 747 (2000), the Court of Appeals affirmed an award of attorneys fees in a contractor's action against a chicken farmer for breach of contract to remove debris following storm damage. The farmer's refusal to pay according to the oral agreement

was not based on any honest mistake regarding contractual duties, but rather, constituted breach of contract in bad faith.

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

### **What is Not Actionable.**

No O.C.G.A. § 13-6-11 attorney fees can be recovered for the attorneys' fees and expenses incurred during an appeal or appearance before an appellate court. *Kent v. David G. Brown, P.E., Inc.*, 248 Ga. App. 447, 545 S.E.2d 598 (2001); *Masters v. Clark*, 296 Ga. App. 537, 604 S.E.2d 556 (2004). The imposition of damages and penalties for conduct before an appellate court are covered by O.C.G.A. § 5-6-6.

In contract cases where O.C.G.A. § 13-6-11 does not apply, if the contract itself has a provision for the payment of attorney fees, such clauses are generally enforceable. *Syler v. Hodges*, 550 S.E. 2d 438 (2001); *Baylis v. Atlanta Integrity Mortg., Inc.*, 253 Ga.App. 110, 558 S.E.2d 429 (2001).

The assessment of attorney fees for the enforcement of notes and mortgages is determined by O.C.G.A. § 13-1-11. It would appear that the application of O.C.G.A. § 13-1-11 and O.C.G.A. § 13-6-11 are mutually exclusive, though it appears that there are no cases directly on point. Both provisions modify the common law and each fully covers the type of case to which it applies. Thus, it would seem that no section 13-6-11 are recoverable in a suit upon a note or other evidence of indebtedness. This makes sense because checks, notes and other evidences of indebtedness under the Uniform Commercial Code are generally *unconditional promises to pay*. In cases of default, most often there is no bona-fide controversy about the debt, only a refusal or inability to pay and the lender is fully able to provide protection against litigation expenses in the loan document. To allow O.C.G.A. § 13-6-11 damages in note cases would obviate the limitations provided in O.C.G.A. § 13-1-11

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

The damages under this section are compensatory. *Bankers Fid. Life Ins. Co. v. Oliver*, 106 Ga. App. 305, 126 S.E.2d 887 (1962). The section is not limited to the recovery of attorney fees and costs alone. Instead, it incorporated the broader term, expenses of litigation. All expenses of the litigation proximately related to the pending claim should be recoverable, including expenses of in-house counsel and travel necessitated by the litigation. *Salsbury Labs, Inc. v. Merieus Labs, Inc.*, 735 F. Supp 1555 (M.D. Ga. 1989, aff'd., 908 F.2d 706 (11<sup>th</sup> Cir. 1990).

This section is inapplicable where the attorney fees sought arise out of a separate legal proceeding. Expenses of a prior proceeding cannot be recovered in a subsequent proceeding under O.C.G.A. §13-6-11. *Randolph v. Merchants & Mechanics Banking &*

*Loan Co.*, 58 Ga. App. 566, 199 S.E. 549 (1938); *Easley v. Clement*, 259 Ga. 107, 376 S.E.2d 860 (1989).

With some exceptions wherein bad faith is involved, expenses of litigation are recoverable only for the amount attributable to the prevailing claim. *Southern Cellular v. Banks*, 209 Ga. App. 401, 433 S.E.2d 606 (1993). For example, in *United Companies Lending Corp. v. Peacock*, 267 Ga. 145, 475 S.E.2d 601 (1996), the plaintiff prevailed only on one count of a six-count complaint. The plaintiff proved the lump amount of fees and expenses incurred to work on all six counts of the complaint, but did not prove the amount of attorney fees attributable solely to the claim on which they prevailed. The Supreme Court reversed and remanded for a hearing to limit the award of attorney fees to the amount based upon the prevailing claim. In *Huggins v. Chapin*, 233 Ga.App. 109, 503 S.E.2d 356 (1998), the Court of Appeals reversed and remanded an attorney fee case arising under the Georgia Securities Act O.C.G.A. § 10-5-14(a) for additional findings of fact or another hearing to separate out the attorney fees associated with the prevailing claims.

As the law develops in this area, written records are becoming a necessity. In *4WD Parts Center, Inc., v. Mackendrick*, 260 Ga. App. 340, 579 S.E.2d 772 (2003), the prevailing attorney stated in his place the number of years he had been sworn to practice law, his billing rate, the number of hours already spent on the case, and the number of unbilled hours, but anticipated hours required by the case. He further stated that the fees incurred were reasonable. His award was vacated and remanded because he offered no billing records or any other evidence describing with any particularity how he spend his time and whether the time awarded was spent on the issues that prevailed.

A *pro-se* litigant who is not an attorney cannot recover O.C.G.A. §13-6-11 attorney fees. *Demido v. Wilson*, 261 Ga. App. 165, 582 S.E.2d 151 (2003).

No section 13-6-11 attorneys fee are recoverable under the Georgia Materialman's Lien Statute. O.C.G.A. § 44-6-361. *Bush v. Northside Trucking, Inc.*, 252 Ga.App. 729, 556 S.E.2d 909 (2001).

An award of attorney fees under OCGA § 13-6-11 is a compensatory damages award (see *Rogers v. Ga. Ports Auth.*, 183 Ga. App. 325, 329 (3) 358 SE2d 855 (1987)) and should bear post-judgment interest as part of the original debt. As a result, the court should properly apply post-judgment interest to the award of attorney fees. *Davis v. Whitford Properties, Inc.*, 282 Ga. App. 143, 637 S.E.2d 849 (2006).

### **Jury-Court Determinations.**

The trier of fact for the main case determines the attorney fees issues along with the plaintiff's main case. Although the statute seems to indicate that it is the jury that determines the issues under O.C.G.A. § 13-6-11, an examination of the cases indicates that the trier-of-fact is determined by the type of case and whether the case itself requires a jury. No Georgia case appears to address the issue directly. There are several equity or injunction cases where the issue is tried by the court in a bench trial. *See, i. e. Rice v. Lost Mountain Homeowners Assoc., Inc.* 269 Ga. App. 351 (Ga. App. 2004). Likewise, there are many, many contract and tort cases where the case says that the issue is one for the jury. *See, i. e., Kent v. Brown*, 274 Ga. 849, 561 S.E.2d 89 (1999). Thus, it appears that the real rule for who is the trier-of-fact is that the case type is the determinant of whether the issue is tried by judge or jury. If the main case has a jury right, then there is a right to a jury trial, otherwise, not.

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

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

### **Pleading Requirements-*Ante Litem***

When suing a municipal corporation protected by O.C.G.A. § 36-33-5, the proper ante-litem notice must be given or the case will be dismissed. *Dover Realty Co v. City of Jackson*, 243 Ga.App. 464, 533 S.E.2d 747 (2000).

### **Pleading Requirements-Complaint**

Damages in the nature of expenses of litigation must be especially pleaded and prayed for. *Davis v. Macon Tel. Publishing Co.*, 93 Ga. App. 633, 92 S.E.2d 619 (1956); *Carroll v. Johnson*, 144 Ga. App. 633, 242 S.E.2d 296 (1978); *Williams v. Binnion*, 227 Ga. App. 893, 490 S.E.2d 217 (1997). "A general request for attorney fees, without reference to OCGA § 13-6-11 or the criteria set forth therein, is not the specific pleading

contemplated by the statute. The statute requires that the party specifically plead and pray for fees thereunder." *Pipe Solutions, Inc. v. Inglis*, 2008-GA-A0505.010 The best practice is clearly to allege the facts that constitute the bad faith. The prayer should state the amount of the relief sought. A general prayer for "such other just and equitable relief as the court may deem proper" is not sufficient to state a claim for attorney fees. *Preferred Risk Ins. Co. v. Boykin*, 174 Ga. App. 269, 329 S.E.2d 900, cert. den. 254 Ga. 349, 331 S.E.2d 879 (1985). In *Daniels v. Price Communications Wireless, Inc.*, 254 Ga. App. 559, 562 S.E.2d 844, the Court of Appeals affirmed the denial of Section 13-6-11 attorney fees for failure of pleading. The plaintiff had include the a paragraph in the prayer reading "[a]ttorney fees and costs of litigation." A general request for attorney fees without reference to O.C.G.A. § 13-6-11 and the pleading of the facts supporting the criteria required by the statute is insufficient to support an attorney fee award. An award of attorney fees is "clearly erroneous" where the plaintiff fails to plead with the requisite specificity.

The failure to plead for attorney fees in the complaint may be fatal to a claim. O.C.G.A. § 9-11-8(a)(2)(B) requires a demand for judgment for the relief to which the pleader deems himself or herself entitled.

### **Motion Practice—Motion for Summary Judgment**

Under certain circumstances, the court may make a pretrial determination of attorney's fee issues. In a case where there is no issue of bad faith, the court may reject an attorney fee claim if the evidence presented on motion for summary judgment demonstrates a bona-fide controversy. *Grange Mutual Casualty Co. v. Kay*, 264 Ga. App. 139, 589 S.E.2d 711 (2003). The Appellate courts, however, are quite attentive to

insuring that if there is any evidence of bad faith, the jury should decide the issue instead of the judge. In *Fertility Technology Resources, Inc. v. Lifetek Medical, Inc.*, 282 Ga. App. 148, 637 S.E. 2d 844 (2006), a summary judgment for attorney's fees based upon the existence of evidence of bad faith arising out of the intentional tort of interference with contract was set aside because the issue of bad faith had not yet been decided by the jury. Because the intentional torts of procuring a breach of fiduciary duty and misappropriation of trade secrets remained for the jury's consideration, the claim for attorney fees rooted in bad faith concerning those actions should have also been left for the jury. It was premature, and thus error, to grant summary judgment on this issue altogether." *Id.* Accordingly, the trial court's order in this regard was reversed. See also, *Insight Tech., Inc. v. Freightcheck, LLC*, 280 Ga App. 19 (2006)

### **Pleading Requirements-Pretrial Order**

The claim for attorney fees must be carried over and included in the pretrial order or it will be lost. O.C.G.A. §9-11-16(b). *Fussell v. Carl E. Jones Development Co., Inc.*, 207 Ga. App. 521, 428 S.E.2d 426 (1993).

### **Preparing for trial**

The proof must be matched to the claim. An award of attorney fees is determined upon evidence of the reasonable value of the professional service underlying the claim for attorney fees. A court may consider a contingent fee agreement and the amount it would have generated as evidence of usual and customary fees in determining both the reasonableness and the amount of an award of attorney fees. The court may determine the amount of the award of attorney fees on the basis of hourly rates. The trial court is

not bound by the fee contract between the parties. *Southern Cellular v. Banks*, 209 Ga. App. 401, 433 S.E.2d 606 (1993).

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

### **Trial Presentation-At the Start**

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

Make sure you have your billing records and other evidence prepared for presentation. If you have a summary exhibit, make sure you have all of the originals

that support it. Make sure you know the evidence rule for the admission of each piece of your evidence. *White v. Dillworth*, 178 Ga. App. 226, 342 S.E.2d 709 (1986). Review the rules of evidence carefully, particularly those for business records.

### **Trial-Presentation of Evidence**

In a jury case, the issue of attorney fees is a question of fact and must be presented to the jury before the jury is authorized to grant any fees. *Stargate Software International, Inc. v. Rumph*, 224 Ga. App. 873, 878, 482 S.E.2d 498, 503 (1997).

The evidence of attorney fees must be presented as a part of the Plaintiff's primary case. Fees awardable under section 13-6-11 are an element of "actual damages" and are therefore subject to the evidentiary standards of proof that are required to sustain any general damage claim--evidence. Plaintiff must make out a proper case for litigation expenses, which must be supported by evidence. *Davis v. Foman*, 144 Ga. App. 14, 240 S.E.2d 383 (1979). As a matter of timing of the trial of the attorney fees issue, the issue should be part of the trial of the main case and the issue submitted to the jury. A ruling on attorneys fees is premature prior to the time the issue of damages goes to the jury. See, *East Beach Properties, Ltd., v. Taylor*, 250 Ga. App. 798, 552 S.E.2d 103 (2001). While the trial court is authorized to award reasonable attorney fees based on its expertise, there must be some evidence to support the court's award. *Sheppard v. Sheppard*, 229 Ga. App. 494, 229 S.E.2d 240 (1997).

In testifying an attorney proving fees should not lump everything together. The testifying attorney has the burden to segregate out the work that is recoverable from the work that is not recoverable. If the fees are lumped, the appellate court may find

insufficient evidence to support an award. *Premier Cabinets, Inc. v. Bulat*, 261 Ga. App. 578, 583 S.E.2d 235 (2003). But, see *Scriver v. Lister*, 235 Ga. App. 487, 510 S.E.2d 59, (1999.). On an award of \$35,000 attorney fees on a judgment with actual damages of \$278,622, and punitive damages of \$500,000, the Court of Appeals found an award of attorney fees supported by the evidence upon testimony from the Plaintiff and the statement in place by counsel. Counsel had stated "that through almost ten years of protracted litigation and the earlier appeal process, Plaintiff has incurred \$35,000 in attorney fees." 235 Ga. App. at 489.

In *First Bank v. Dollar*, 159 Ga. App. 815, 285 S.E.2d 203 (1981), the Court of Appeals reversed an attorney fee award based solely on the testimony of the Plaintiff/Appellee. Appellant did not contest the sufficiency of the evidence of the statutory prerequisite to an award of attorney fees (bad faith, stubborn litigiousness, causing appellee unnecessary trouble and expense), but maintained that appellee's testimony that he had agreed to pay his attorneys "[a] third on contingency on the tax", was not sufficient proof of the legal fees to support an award. The court held that "An attorney cannot recover for professional services without proof of their value," citing *Price v. Mitchell*, 154 Ga.App. 523(6), 268 S.E.2d 743. Generally, a party will proffer the opinion testimony of his present counsel as well as that of other attorneys in an effort to show what constitutes a reasonable attorney fee in light of the litigation history of the case. See, *Bankers Health Life Ins. Co. v. Plumer*, 67 Ga.App. 720(2), 21 S.E.2d 515. A party's testimony as to the "approximate" cost of legal fees is insufficient. *Price v. Mitchell*, supra. Inasmuch as Appellee's testimony alone did not give the jury sufficient basis upon which to award a reasonable amount for attorney fees, it was error to enter judgment on the jury's award of attorney fees. In *Patton v. Turnage*, 260 Ga.

App. 744, 580 S.E.2d 604 (2003), the Court of Appeals reversed an attorney fee award based upon a fifteen percent contingency fee because there was no evidence presented that the percentage amount was the usual and customary fee for the work or that the contingency fee was a valid indicator of the value of the professional services rendered.

In *Hall v. Robinson*, 165 Ga. App. 410, 300 S.E.2d 521 (Ga.App. 1983), the Court of Appeals affirmed a case, finding that there was competent evidence establishing the reasonable value of Appellee's attorney fees. Appellee's counsel stated in her place the amount of time she had put in the case and her hourly rate, which she felt to be reasonable for an attorney of her experience. Appellant did not cross-examine Appellee's counsel or challenge her testimony in any other manner. The Court of Appeals found her testimony sufficient to establish the reasonable value of Appellee's attorney fees under *Altamaha Convalescent Center v. Godwin*, 137 Ga.App. 394, 397, 224 S.E.2d 76.

The proof required falls under two basic categories: proof of what was done, specifically connecting what was done with the prevailing claim for which fees are claimed and proof of reasonableness and necessity.

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

expenses was attributable to the counterclaim. The defendant had produced sufficient evidence of a bad faith attorney fee claim on the counterclaim, but sought to recover all of his attorney fees. Thus, the defendant lost all fees because counsel failed to produce proper expense records.

The reasonableness of fees may be shown through testimony of another attorney who examined the file. *Miner v. Harrison*, 205 Ga. App. 523, 422 S.E.2d 899 (Ga.App. 1992). See, e.g., *Tri-State Systems v. Village Outlet*, 135 Ga.App. 81, 85(2), 217 S.E.2d 399 (1975). The allowance of attorney fees must be supported by evidence as to the amount of the fees and cannot be based upon guesswork. *Wahnschaff Corp. v. O. E. Clark Paper Box Co.*, 166 Ga. App. 242, 394 S.E.2d 91 (1983). When a defendant is entitled to attorney fees for a viable counterclaim, the defendant is entitled to recover the fees attributable solely for prosecuting the counterclaim and must separate them out from the other fees in the case. *International Indemnity Co. v. Regional Employer Service, Inc.*, 239 Ga.App. 420, 520 S.E.2d 533 (1999). Compare *Lineberger v. Williams*, 195 Ga. App. 186, 189, 393 S.E. 2d 23, 26 (1990).

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

*Perry*, 193 Ga.App. 288, 387 S.E.2d 898, (Ga. App. 1989). Care, however, must be taken by the attorney stating the attorney fees in his place to fully cover the evidentiary prerequisites of the claim, including the amount of time spent, the nexus and apportionment between the time spent and the prevailing claims, and most importantly that the fees are reasonable and necessary. In a dissenting opinion in *Lawrence v. Direct Mortgage Lenders Corp.*, 254 Ga. App. 672, at 685, 563 S.E.2d 533 at 543 where attorney fees were allowed. Judge Eldridge pointed out that [P]laintiff's counsel testifies about the hours worked, the amount per hour, and what the work was for but failed to testify that the attorney fees were reasonable, such attorney fees are not recoverable." This dissent should be taken as a warning that the plaintiff's counsel must fully state all of the facts necessary to support an attorney fee award when he states his fees. The failure to submit testimony about reasonableness, even if all other elements are proven, will result in a reversal of the fee award. *Gray v. King*, 270 Ga. App. 855, 608 S.E. 2d 320 (2004).

In *4WD Parts Center, Inc. v. Makendrick*, 260 Ga. App 340, 579 S.E.2d 772 (Ga. App. 2003), the Court of Appeals held that an award of attorney fees is unauthorized if plaintiff failed to prove the actual costs of his attorney and the reasonableness of those costs. Plaintiff's attorney stated in his place the number of years he had been sworn to practice law, his billing rate, the number of hours already spent on the case, and the number of unbilled, but anticipated hours required by the case. He further stated that the incurred fees were reasonable. However, because he offered no billing records or any other evidence describing, with any particularity, how he spent his time, the court's award was improperly based on guesswork and the case had to be remanded for an evidentiary hearing.

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

Good billing records are essential to proof of attorney fees. Good objections and cross examination may prevent introduction of bad billing records. Billing records are subject to the same rules as any other evidence. Billing records are subject to the hearsay rule. There must be a proper foundation laid for the records, either based upon the personal knowledge of their preparer or qualification as a business record. The business record exception the hearsay rule (O.C.G.A. §44-3-14) will not automatically make a billing statement into evidentiary support for the proof of the reasonableness and necessity of an attorney work. Confusion results in this area based upon at least one previous case concerning an award of attorney fees which indicates that a supervisor's testimony as to the amount, necessity, and reasonableness of the time spent by his employees is sufficient to establish the amount of the attorney fee award. *See, Santora v. American Combustion, Inc.*, 225 Ga. 771, 485 S.E.2d (1997). Conversely, other cases indicate that it is not sufficient for only the lead attorney on a case to testify as to the

time spent by the others who worked on the case. See e.g., *Southern Company v. Hamburg*, 220 Ga. App. 834, 470 S.E.2d 467 (1996); *Southern Cellular Telecom v. Banks*, 209 Ga.App. 401, 433 S.E.2d 606 (1993). The question that arises is whether it was the intention of the court in *Santora* to carve a new exception to the hearsay rule in cases such as this, or whether the facts of the *Santora* case indicated to the court that the supervisor worked so closely on every part of the case that he or she actually had personal knowledge of the time spent by other employees. The cases do not clearly state how much hearsay is allowable in these attorney fee cases. Elbow to elbow work may equate to personal knowledge of another's work.

Under common time-keeping practices, attorneys prepare paper time slips that are later edited, collated, and summarized into billing reports and bills. Under this practice, the time slips are the true business record of original entry. The bills and reports are only summaries. Under the rules of evidence, summaries are admissible only if the underlying records are present in court. The issue of the admission and evidentiary value of summaries of time records recording the time of attorneys other than the witness has been raised in several cases. In *Southern Company v. Hamburg*, 220 Ga. App. 834, 470 S.E.2d 467 (1996) and *Southern Company v. Hamburg*, 231 Ga. App. 685, 500 S.E.2d 1 (1998), it was determined that such summaries constitute nothing more than hearsay as to the amount of time spent when the expenses listed on such summaries were generated by persons who did not testify at the attorney fees hearing. *Hamburg*, 470 S.E.2d at 474. Billing sheets, expense reports and summaries recording time and expenses recorded by persons (primarily attorneys) who are not proffered to authenticate their work constitute nothing more than "hearsay, and hearsay, even when admitted into evidence without objection, lacks probative value to

establish any fact. *Southern Company v. Hamburg*, 231 Ga. App. 685, 500 S.E.2d 1 (1998); *Howell Mill/Collier Assoc. v. Pennypacker's*, 194 Ga.App. 169, 171(2), 390 S.E.2d 257. *Mitcham v. Blalock*, 214 Ga.App. 29, 31(2), 32 [447 S.E.2d 83].<sup>1</sup> *Citadel Corp. v. All-South Subcontractors*, 217 Ga.App. 736, 737(1), 738, 458 S.E.2d 711. *Southern Company v. Hamburg*, 220 Ga.App. 834, 842(5), 470 S.E.2d 467.

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

Careful attention should be paid to the Best Evidence Rule. O.C.G.A. §24-5-4 provides that the best evidence which exists of a writing sought to be proved shall be produced, unless its absence shall be satisfactorily accounted for. If the only record brought to the court is a copy of the client's bill summarizing the time slips, the document should be rejected under the Best Evidence Rule unless a satisfactory explanation for the absence of the underlying documents is made. A similar issue to this arose in *White v. Dillworth*, 178 Ga. App. 226, 342 S.E.2d 709 (1986). In that case, a dentist sought to introduce into evidence a purported summary of information concerning his patients and their payment status. The summary was compiled from daily work logs which in turn were created from the records of the individual patients.

*White*, 342 S.E.2d at 710-711. The trial court sustained a best evidence objection to these records. Determining that the original patient records were the primary source of the information contained in the summaries which the dentist sought to introduce, the Court of Appeals determined that the summaries were indeed secondary evidence and inadmissible absent a showing that the primary evidence was inaccessible. Attention should also be paid to O.C.G.A. §§ 24-5-25 and 24-5-26 that state the rules for introducing copies of records.

The requirement that the plaintiff prove the necessity and reasonableness of the attorney fees sought necessitates testimony from plaintiff's counsel. Only the attorney who did or closely supervised the work has true personal knowledge of whether the work was necessary. Likewise, unless two attorneys are working literally elbow to elbow, only the attorney doing the work has personal knowledge of his own work.

This testimonial necessity places the attorney in a difficult practical and ethical position, that of being both advocate and witness. It also gives the adversary attorney a good chance to discredit plaintiff's counsel if the attorney can be impeached in any way. This is a great time for the defendant's attorney to use plaintiff's billing records, correspondence, and pleadings to highlight unreasonable positions, excessive fees, and unclean hands of the plaintiff perpetrated by the plaintiff's attorney.<sup>5</sup> At the same time, the defendant's attorney intimate knowledge of the rationale for the defense may make the defense attorney a key witness for the defense to justify a litigation strategy and to

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<sup>5</sup> It is amazing, sometimes, to compare billing records with output, particularly for such simple line items as cover letters transmitting pleadings or correspondence. Q. Did you really charge your client \$75.00 for this three line cover letter written by your secretary? If the counsel answers, "No, I did some other things during those eighteen minutes", she has discredited her billing records. If she says, "yes," most lay people will think she is overcharging his client and charging for work done by someone else.

prove the existence of a bona fide controversy. All attorneys must be wary of the statutes and Canons of Ethics relating to attorneys taking the witness stand.

### **Trial Motions-Motion for Directed Verdict**

If the claimant has failed to prove the case during the evidence phase of the case, a motion for directed verdict may be made. *MARTA v. Mitchell*, 2007 GACA A07A0978 12-14-07. "The standard for granting motions for **directed verdict** and for j.n.o.v. is the same. They may be granted only when no conflict exists in the evidence and the evidence presented, with all reasonable inferences therefrom, demands a particular verdict."... "An award of attorney fees under OCGA § **13-6-11** will be affirmed if there is any evidence to support it." *City of Lilburn v. Astra Group, Inc*, 2007 GACA A07A1308 - 071207

### **Trial Presentation-Verdict Form**

An award of attorney fees under O.C.G.A. § 13-6-11 requires a special verdict form. Use of a general verdict is error.

### **Trial Presentation- Requests to Charge**

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

jury. *MTW Investment Co. v. Alcovy Properties, Inc.*, 228 Ga. App., 491 S.E.2d 460 (1997).

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

The expenses of litigation are not generally allowed as a part of the damages. But, if the defendant has acted in bad faith or has been stubbornly litigious, or has caused the plaintiff unnecessary trouble and expense, you may allow them. You should determine from the evidence the attorney fees (or other expense) if any, as will be allowed.

O.C.G.A. §13-6-11 (Suggested Pattern Jury Instructions, Volume I: Civil Cases, Third Edition, p. 93.)

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

Bad faith warranting an award of attorney fees must have arisen out of the transaction on which the cause of action is predicated. It may be found in carrying out the provisions of the contract, that is, in how defendant acted in his dealing with the plaintiff. Bad faith other than mere refusal to pay a just debt is sufficient, provided it is not prompted by an honest mistake as to one's rights or duties but by some interested or

sinister motive. So, defendants can be held liable for attorney fees if they committed the breach in bad faith.

In an intentional tort case, a charge to the effect that the intent involved in the commission of an intentional tort constitutes sufficient bad faith to support an award under the "bad faith" prong of the statute. A proper charge would be, "Every intentional tort entitles a person so wronged to recover the expenses of litigation including attorneys fees. " See, *Stargate Software International, Inc. v. Rumph*, 224 Ga. App.873, 878, 482 S.E.2d 498, 503 (1997) and *Bibb Distributing Co. v Stewart*, 238 Ga.App. 650, 519 S.E.2d 455 (1999).

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

### **Post Trial Motions—Motion for Directed Verdict**

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

## **Post-Trial—Findings of Fact**

If a case is tried at a bench trial, special care must be taken to preserve all avenues of appeal by doing everything possible to insure that proper findings of fact are entered in the case. OCGA § 9-11-52 (c) provides:

Upon motion made not later than 20 days after entry of judgment, the court may make or amend its findings or make additional findings and may amend the judgment accordingly. . . . When findings or conclusions are not made prior to judgment to the extent necessary for review, failure of the losing party to move therefor after judgment shall constitute a waiver of any ground of appeal which requires consideration thereof.

Thus, an appellant who intends to argue that the trial court's findings are inadequate or incomplete waives that argument by failing to make the post-judgment motion referenced in OCGA § 9-11-52 (c). *Hampshire Homes, Inc. v. Espinosa Construction Serv., Inc.*, 2007 GACA A07A2475 – 120307.

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

The Georgia rule is substantially similar in its documentation requirements. See, *Southern Cellular Telecom v. Banks*, 209 Ga. App. 401, 433 S.E.2d 606 (Ga. App. 1993); *Parland v. Millennium Construction Services, LLC*, 276 Ga. App. 590, 593 (Ga. App. 2005); *Lay Brothers, Inc. v. Golden Pantry Food Stores, Inc.* 273 Ga. App 870 (Ga. App. 2005); *Southern Co. v. Hamburg*, 220 Ga. App. 834, 470 S.E.2d 467 (Ga. App. 1996).

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

### **Standard for Appeal.**

On appeal the "any evidence" rule applies to factual determinations. *Paine v. Nations*, 283 Ga. Ap. 167 (2006); *Bourke v. Webb et al*, 277 Ga. App. 749 (2006); *Spring Lake Property Owners Ass'n. v. Peacock*, 260 Ga. 80, 390 S.E.2d 21 (1990). "When a trial court sits as both judge and jury, the court's findings of fact are binding on appeal, and, unless wholly unsupported or clearly erroneous, will not afford a basis for

reversal. On appeal, this court must not substitute its judgment for that exercised by the trial court when there is some support for the trial court's conclusion. Our duty is not to weigh evidence *de novo*, but [merely to] determine if there is any evidence that supports the judgment below. Even in the face of conflicting evidence, the trial court's judgment will be upheld as long as there is 'any evidence' to uphold the lower court's determination." (Citations and punctuation omitted.) *Edwards v. Wilson*, 185 Ga.App. 514, 515(1), 364 S.E.2d 642." *Jennings Enterprises, Inc., v. Carte*, 224 Ga.App. 538, 481 S.E.2d 541 (1977).

### **Special Defenses and Cases.**

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

Attorney fees cannot be awarded in a declaratory judgment action because the purpose of the action is "to settle and afford relief from uncertainty and insecurity with respect to rights, status and other relations." O.C.G.A. §9-4-1. Thus, the plaintiff must plead the fact that "a bona fide controversy exists" as the foundation of the action. The existence of that controversy in a declaratory judgment action precludes plaintiff from seeking attorney fees under O.C.G.A. §13-6-11. *General Hospitals of Humana, Inv. v. Jenkins*, 188 Ga. App. 825, 374 S.E.2d 739 (1989).

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

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

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

In trying the issue of attorney fees, the issue of reasonableness of attorney fees may be affected by the settlement posture of the case. It may be important to the jury to know if one side has made settlement offers that reasonably should have ended the case earlier. A plaintiff's unreasonable refusal to settle may make taxing of subsequent fees unreasonable. Conversely, the defendant's refusal to settle on any terms may be proof of the necessity and reasonableness of plaintiff's fees. Even in a "bad faith" case, the O.C.G.A. §24-2-37 normally prevents the introduction of negotiations seeking a compromise of a dispute from being admissible in evidence. The Code section states:

O.C.G.A. §24-3-37. What admissions not proper evidence.

Admissions obtained by constraint, by fraud, or by drunkenness induced for the purpose of admissions or propositions made with a view to a compromise are not proper evidence.

The purpose of this Code section is to encourage settlements and protect parties who freely engage in negotiations directed toward resolution of lawsuits. *Computer Communications Specialists, Inc. v. Hall*, 188 Ga. App. 545, 373 S.E.2d 630 (1988). There is a distinction between an offer or proposition to compromise a doubtful or disputed claim under this section and an offer to settle upon certain terms a claim that is unquestioned. The offer of compromise is protected and the offer of settlement is not. An admission made in an offer to settle will be admissible while one made in an offer to compromise will not be admissible. *Charter Mtg. Co v. Arouse*, 165 Ga. App. 497, 300 S.E.2d 328 (1983).

Evidence of offers of compromise may be admitted by necessity. "In all cases where the object sought to be proved can be proved without violation of a rule of evidence designed to prohibit prejudice, it should be done so, or where the merit of the evidence clearly outweighs its prejudice." *Fred F. French Mfg. Co. v. Long*, 169 Ga. App. 702, 314 S.E.2d 666 (1984). "However where the evidence is necessary for some permissible purpose, and the object is not provable by some available means, it is not error to allow other inadmissible evidence." *Gordon v. Gordon*, 133 Ga.App. 520(1), 211 S.E.2d 374 (1974). If the proffered evidence of negotiations meets these tests, it should be admitted. *Holbrook Contracting, Inc. v. Tyner*, 181 Ga. App. 838, 354 S.E.2d 22 (1987). In *Progressive Life Ins. Co. v. Smith*, 71 Ga. App. 157, 30 S.E.2d 411 (1944), the Court held that a conversation between an attorney for the beneficiary and a proper official of the company is admissible for the purpose of illustrating the good or bad faith

of the company in refusing to pay the amount claimed, where the evidence negates a claimed effort to compromise. In *Fenters v. Fenters*, 238 Ga. 131, 231 S.E.2d 741 (1977). In *U-Haul Co. v. Ford*, 171 Ga. App. 744, 320 S.E.2d 868 (1984), evidence that the plaintiff, in attempting to discuss her claims arising out of an automobile collision, could not get a response from the defendant insurer, though not proper evidence under O.C.G.A. § 24-3-37, were properly admitted under O.C.G.A. § 13-6-11 to show that the defendant acted improperly.

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

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

O.C.G.A. § 9-11-68 reads as follows:

#### **O.C.G.A. § 9-11-68**

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

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

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

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

(4) State with particularity any relevant conditions;

(5) State the total amount of the proposal;

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

(7) State whether the proposal includes attorney's fees or other expenses and whether attorney's fees or other expenses are part of the legal claim; and

(8) Include a certificate of service and be served by certified mail or statutory overnight delivery in the form required by Code Section 9-11-5.

(b) When the complaint sets forth a tort claim for money, if the offeree rejects or does not accept the offer and the judgment finally obtained by the offeree was not at least 25 percent more favorable than the last offer, the offeree shall pay the offeror's reasonable attorney's fees and costs incurred after the rejection of the last offer.

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

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

(1) If the offer of judgment was 25 percent more favorable than the monetary award, the court shall award reasonable attorney's fees and costs and the court shall set off such reasonable attorney's fees and costs against any award; and

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

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

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

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

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

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

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

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

Since last year's seminar, the appellate courts have rendered several decisions on O.C.G.A. § 9-11-68, two of which are important for this paper.

In *Fowler Properties, Inc. v. Dowland*, 282 Ga. 76 (2007), the Georgia Supreme Court declared O.C.G.A. § 9-11-68 unconstitutional to the extent that it has retrospective operation.

In *McKesson Corp. v. Green*, 2007 GACA A07A0415 – 062507, Defendant made a settlement offer pursuant to O.C.G.A. § 9-11-68. The time for acceptance of the offer ran out. After the case was set for trial and plaintiff had lost several important motions, the plaintiff dismissed the case voluntarily pursuant to O.C.G.A. § 9-11-41 and refiled in another court. Defendant filed a motion objecting to the plaintiffs' voluntary dismissal without prejudice, contending that the dismissal should be with prejudice because it violated the purposes of the expert witnesses statute and constituted "forum shopping." Defendant also moved the court to award it attorney fees and costs under OCGA § 9-11-68, the proffer of settlement statute. The trial court denied both motions, and Defendant appealed.

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

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

If the new O.C.G.A. § 9-11-68 is read together with O.C.G.A. § 13-6-11, it would appear that both the winner and the loser could collect attorney fees. Take the situation in which the plaintiff would be entitled to § 13-6-11 fees, but failed to better a § 9-11-68 offer. It would appear that the amount of the award would be reduced by the amount of the defendants fees recoverable under § 9-11-68. There appears to be nothing in the new code section that is a repealer of § 13-6-11 or that would defeat the existing rationale for the existing code section.

**Relationship of O.C.G.A. §13-6-11 to O.C.G.A. §9-15-14 and 51-7-80, et seq.**

Code sections 13-6-11, 9-15-14, and 51-7-81 are all mechanisms for moving the burden of attorney fees to another party. O.C.G.A. §13-6-11 applies only to conduct occurring prior to the litigation. Conduct occurring during the litigation is covered by O.C.G.A. §9-15-14 (a) and (b). *Stone v. King*, 196 Ga. App. 251, 395 S.E.2d 45 (1990). By the practical operation of the statute that requires that the trier of fact assess attorney fees as a part of the main case, section 13-6-11 can only collect attorney fees for the time up to the evidence phase of the trial. Sections 9-15-14 and 51-7-81 are decided later so they may cover time for post trial work. Thus, there is overlap between the fees that may be captured. The damages in all of these sections are compensatory and it is simple logic that one can only recover the same damages once from the defendant even if there are multiple grounds under which the fees may be captured.

There is also a liability coverage overlap between O.C.G.A. § 13-6-11 and the abusive litigation sections. The "stubbornly litigious / unnecessary trouble and expense" "no bona fide controversy" prong of O.C.G.A. § 13-6-11 seems to cover some of the same conduct as the "complete absence of any justiciable issue" language of O.C.G.A.

§ 9-15-14 from the instant when the case is first filed. The conduct may, under certain facts, include the "without substantial justification" conduct described in O.C.G.A. §51-7-81(2). No court has yet addressed the interaction between these provisions with respect to a case with no defense or a default. Does the submission of evidence of attorney fees and award or denial of an award under O.C.G.A. §13-6-11 collaterally estop a later claim in the case for the same fees under O.C.G.A. §9-15-14 or O.C.G.A. §51-7-81? In *Walker v. McLarty*, 199 Ga.App. 460, 405 S.E.2d 294 (Ga.App. 1991), the Court of Appeals affirmed a summary judgment denying a claim for abusive litigation in a prior case because the trial judge found that the denial of a summary judgment in the earlier case resulted in a collateral estoppel of appellant's claim in the case at bar. Considering *Walker* with O.C.G.A. §§51-11-5 and 9-2-44,<sup>6</sup> collateral estoppel and *res judicata* are affirmative defenses and must be properly raised in the pleadings and pretrial order. O.C.G.A. §9-11-8(c); O.C.G.A. §9-11-9(e), and , O.C.G.A. §9-11-16.

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

O.C.G.A. §33-4-6 provided a remedy to provide a penalty and to recover attorney fees when an insurer acts in bad faith and denies to pay a claim.<sup>7</sup> The remedy is the

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#### **<sup>6</sup> O.C.G.A. §9-2-44. Effect of former recovery; pendency of former action.**

(a) A former recovery or the pendency of a former action for the same cause of action between the same parties in the same or any other court having jurisdiction shall be a good cause of abatement. However, if the first action is so defective that no recovery can possibly be had, the pendency of a former action shall not abate the latter.

(b) Parol evidence shall be admissible to show that a matter apparently covered by the judgment was not passed upon by the court.

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

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

#### **<sup>7</sup> 33-4-6 Liability of insurer for damages and attorney's fees.**

exclusive remedy for bad faith denial of benefits so that litigation expenses under O.C.G.A. §13-6-11 are not recoverable. *McCall v. Allstate Ins. Co.*, 251 Ga. 869, 310 S.E.2d 513 (1984); *Howell v. Southern Heritage Ins. Co.*, 214 Ga. App. 536, 448, S.E.2d 275 (1994); *United Services Automobile Association v. Carroll*, 226 Ga. App. 144, 486 S.E.2d 613 (1997). “Based on this plain statutory language, an insured is entitled to recover damages from the UM insurer for bodily injury, death, or property damage. Notably, however, the UM statute makes no provision for the recovery of attorney fees and expenses against a UM insurer based upon the tortfeasor's stubborn litigiousness or bad faith conduct.(fn3) Indeed, the only provision for attorney fees and expenses is found in OCGA § 33-7-11 (j), which pertains to the UM insurer's bad faith failure to pay a claim.” *Smith v. Stoddard*, 2008-GA-1120.252.

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

### **Relationship of O.C.G.A. §13-6-11 to O.C.G.A. §§51-12-5, 5.1, and 6.**

O.C.G.A. §§51-12-5, 5.1, and 6 provide the remedies of punitive and exemplary damages. Attorney fees and expenses of litigation are not punitive or exemplary damages but stand alone and are regulated by § 13-6-11. *Dodd v. Slater*, 101 Ga. App. 358, 114 S.E.2d 167 (1960). Individual damage items, such as punitive damages awarded as additional damages or expenses of litigation, do not provide the requisite support for each other. They are recoverable only in cases where other elements of damages are recoverable. *Cleary v. Southern Motors of Savannah, Inc.*, 142 Ga. App. 163, 235 S.E.2d 623 (1977).

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

Adjudication of O.C.G.A. § 13-6-11 requires careful attention to procedure, the statute, and the rules of evidence. Read the statute. The issue should not be considered lightly. Errors on the issue of attorney fees result in a surprising number of reversals and remands each year at the appellate level. Most of the reversals are caused by a failure of the judge to handle the evidentiary issues, either by improperly granting a summary judgment or by failing to require proper adherence to the rules of evidence. Several cases have been remanded for more complete findings of fact on bench trials.

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

Is the issue properly set forth in the pretrial order?

Is there a special attorney fee statute for the cause of action? If so, is the special statute the sole remedy? *See, Cagle v. State Farm Fire & Casualty Company*, 236 Ga. App. 726, 512 S.E.2d 717 (1999).

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

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

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

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

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

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

On appeal, the Georgia Supreme Court tries to remedy trial errors when possible. “When a party seeking attorney fees has failed to present an essential element of proof, but the trial court nevertheless awarded attorney fees, we have consistently reversed or

vacated that portion of the judgment awarding the attorney fees and remanded the case to the trial court to hold an evidentiary hearing to allow the party, if possible, to cure the matter. *Hardnett v. Ogundele*, 661 S.E.2d 627 (Ga. 2008)

## **Conclusion**

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

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