PURSUIT OF ATTORNEY’S FEES
AND LITIGATION EXPENSES
IN SLIP AND FALL CASES

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In an effort to provide one remedy for abusive litigation, the Georgia General Assembly enacted O.C.G.A. § 9-15-14 in 1986. That Code Section provides for an award of "reasonable and necessary" attorney’s fees and litigation expenses against a party or an attorney who engages in certain abusive litigation conduct during the pendency of the action. Georgia law also provides an alternate remedy in the form of the abusive litigation statute, O.C.G.A. § 51-7-80, which permits a party to file a separate action seeking damages for abusive litigation up to one year after the final termination of the underlying proceeding.

I. INTRODUCTION

Prior to 1997, in order to prevail in a slip and fall action, a plaintiff had to show: 1) that the defendant had actual or constructive notice of the hazard; and 2) that the plaintiff was without knowledge of the hazard or for some reason attributable to the defendant was prevented from discovering the hazard. Alterman Foods, Inc. v. Ligon, 246 Ga. 272, 272 S.E.2d 327 (1980). However, the requirements for proving each prong weighed heavily on the plaintiff.

In order to show notice of the hazard, the Alterman era slip and fall plaintiff had to show either that an employee of defendant was in the immediate area of her fall and easily could have seen the substance and removed the hazard, or that the substance was on the ground for a sufficient period of time that the defendant, by means of implementing a reasonable inspection and maintenance procedure, should have detected the hazard and removed it.

In addition to proving defendant’s knowledge of the hazard, and her own lack of such knowledge, the Alterman-era plaintiff also had to prove a lack of her own negligence in order to prevail. During this era, many slip and fall claims fell at summary
judgment when a defendant could elicit testimony from a plaintiff that she had failed to look down at the ground on the spot where she fell.

Essentially, under *Alterman*, most claims failed because a plaintiff rarely could show the defendant had superior knowledge of the hazard. Once the plaintiff brought her claim, describing the hazard, the inquiry immediately turned to why if the plaintiff could describe the hazard she had not taken care to avoid it.

In 1997, the law governing slip and fall cases in Georgia underwent a significant change. In *Robinson v. Kroger Company*, the Georgia Supreme Court lightened the burden on slip and fall plaintiffs, making them somewhat less susceptible to summary adjudication. First, the *Robinson* court reduced the burden on plaintiffs by ruling that a plaintiff’s failure to see a hazard before falling, or failing to look at the location where she subsequently placed her foot, does not necessarily constitute a failure to exercise ordinary care. The court noted that these issues were inappropriate for summary adjudication and required closer scrutiny as questions of fact.

Second, the court changed the *Alterman* standard as follows: the plaintiff is no longer required to show evidence disproving her negligence until after it has been established or assumed that defendant had actual or constructive knowledge of the hazard, and the defendant presents evidence that the plaintiff’s injuries were caused by her own voluntary act of negligence. This places the evidentiary burden on defendant as to negligence on the part of plaintiff after it has been determined that defendant had either actual or constructive notice of a hazard on its property. Only after the defendant has produced evidence of the plaintiff’s negligence will the plaintiff have the burden of producing evidence in rebuttal showing that her failure to perceive the hazard was due to some act or condition controlled by the defendant of which the defendant was or
should have been aware would have diverted the plaintiff’s attention and caused her injury.

While the revised standard under Robinson has clearly widened the berth for slip and fall plaintiffs to survive summary judgment, it has not relieved plaintiffs and, where applicable, their attorneys from avoiding abusive litigation, including abuses of the discovery process.

II. O.C.G.A. § 1 9-15-14

The code section can be a powerful tool for deterring abusive litigation practices by requiring the party abusing the process and/or its attorney to pay the attorney’s fees and litigation costs of the opposing party. The procedure for recovery of such an award is inexpensive and does not involve drawn out proceedings. The statute vests the trial court with significant power to regulate and punish inappropriate litigation tactics and to make the victim of such tactics whole.

The purpose of an award under O.C.G.A. § 9-15-14 is not merely to punish or deter litigation abuses, but also to compensate litigants who are forced to expend their resources in contending with claims, defenses or other positions that are abusive. Ferguson v. City of Doraville, 186 Ga. App. 430, 367 S.E.2d 551 (1988), overruled on other grounds, Vogtle v. Coleman, 259 Ga. 115, 376 S.E.2d 861 (1989).


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

A. Actions to Which The Statute Applies


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

When a superior court is sitting in an appellate capacity where the lower court did not return a verdict for a sum of money, O.C.G.A. § 9-15-14 may supply the authority for a party seeking attorney's fees for a frivolous appeal. Osofsky v. Board of Mayor, 237 Ga. App. 404, 515 S.E.2d 413 (1999).

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

Abusive appeal sanctions are controlled by Supreme Court Rule 8, Court of Appeals Rule 15 and O.C.G.A. § 5-6-6.

Finally, in 2001, the General Assembly added a provision to O.C.G.A. §9-15-14 which may enforce collection of some sanctions and further deter new filings of frivolous actions. Subsection (g) provides:

Attorney’s fees and expenses of litigation awarded under this Code Section in a prior action between the same parties shall be treated as court costs with regard to the filing of any subsequent action.

This recently added subsection applies to preclude a frivolous litigator from refiling or renewing an action dismissed without prejudice without satisfying an award of attorney’s fees made in the previous action.

B. Procedure For Seeking an Award Under O.C.G.A. § 9-15-14

A trial court may award attorney's fees and litigation expenses as a sanction for abusive litigation either upon motion by the aggrieved party or upon its own initiative. Mize v. Regions Bank, 265 Ga. App. 635, 595 S.E.2d 324 (2004); Cagle v. Davis, 236 Ga. App. 657, 513 S.E.2d 16 (1999). If a request is made, as opposed to the court deciding sua sponte, the request must be made by motion. It cannot be made by including a prayer for relief in a complaint or counterclaim. Marlowe v. Colquitt County, 278 Ga. App. 184, 187, 628 S.E.2d 622, 624 (2006).

A motion under O.C.G.A. § 9-15-14 may be brought at any time up to forty-five (45) days after final disposition of the action in the trial court. Until April 5, 1994, a motion could only be brought within a "window of opportunity" that opened upon the final disposition of the action in the trial court and closed forty-five days thereafter. See,

In 1994, the General Assembly amended subsection (e) to allow an O.C.G.A. § 9-15-14 motion to be brought “at any time during the course of the action but not later than” forty-five days after final disposition. That change in statutory language broadens the application so that if a party engages in abusive tactics during the course of a case, the opposing party may seek sanctions during the pendency of the case. Thus, discovery abuses may be challenged during the pendency of the action and, if found to be abusive, may be the basis of an award. This expansion to allow motions for attorney’s fees during the pendency of an action gives both the opposing party and the court a powerful weapon to deter dilatory litigation tactics and discovery abuse. Bouve and Mohr, LLC v. Banks, 274 Ga. App. 758, 618 S.E.2d 650, cert denied (2005) (denial of pretrial motion for attorney’s fees regarding spoliation of evidence not premature; remanded for consideration on merits).

essence, any judgment sufficiently final to give a right of appeal is final for the purpose of determining if an O.C.G.A. § 9-15-14 motion is timely filed. For example, when a trial court grants judgment for a defendant on one count of a multi-count complaint and expressly directs entry of a final judgment under O.C.G.A. § 9-11-54, the statute requires the defendant to move for a § 9-15-14 award, if at all, within 45 days of the entry of that judgment. Little v. General Motors Corporation, 229 Ga. App. 781, 495 S.E.2d 572 (1997). For fees caused by conduct after the final deposition, the motion can be brought afterward. Id. 229 Ga. App. at 782.

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


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

A party against whom sanctions are sought has a basic right to confront and challenge the evidence against him, including the reasonableness and necessity of the fees and expenses awarded. Where no evidentiary hearing is afforded, the award must

A party may, however, waive the right to a hearing on a motion for attorney’s fees. MacDonald v. Harris, 266 Ga. App. 287, 597 S.E.2d 125 (2004) (citing Munoz v. American Lawyer Media, 236 Ga. App. 462, 512 S.E.2d 347 (1999)). A timely objection to the motion for attorney’s fees is sufficient to preclude a waiver. Id. The safest course to preclude reversal on appeal is to insist upon a hearing.

USCR 6.2, requiring the respondent to file a brief and any evidence within thirty (30) days of the filing of a motion, applies to O.C.G.A. § 9-15-14 motions; and, if no response is filed, the trial court does not err in refusing to permit testimony at the hearing on the motion. Forest Lakes Home Owners Ass'n v. Green Industries, Inc., 218 Ga. App. 890, 463 S.E.2d 723 (1995).

No fees may be assessed unless the trial judge makes an independent determination of both the reasonableness and necessity of the fees. If no evidence is
introduced from which the trial court can make such a determination, no award may issue. Duncan v. Cropsey, 210 Ga. App. 814, 437 S.E.2d 787 (1993). The trial court’s order awarding fees also must specify whether the award is made under the mandatory provisions of § 9-15-14(a) or the discretionary provisions of § 9-15-14(b). Boomershine,
supra.


C. To And Against Whom Awards May Be Made

An award under the Code Section is made to "any party" against whom the abusive position has been asserted. Thus, only parties to the action may seek such an award. It should be noted that any aggrieved party may recover such an award. The statute is meant to deter frivolous or abusive defenses the same as frivolous or abusive claims. In addition, an award against a prevailing party is authorized if the prevailing party improperly expanded the proceedings or otherwise violated the statute. Betallic, Inc. v. Deavours, 263 Ga. 796, 439 S.E.2d 643 (1994).

Recent authority upheld an award against an attorney who had withdrawn from a case found to be frivolous. Andrew, Merritt, Reilly & Smith, LLP v. Remote Accounting Solutions, Inc., 277 Ga. App. 245, 626 S.E.2d 204 (2006). The fact that the movant had voiced no objection to the attorney's motion to withdraw did not constitute a waiver of the right to seek fees from the attorney. Id. 277 Ga. App. at 247.

Under the mandatory provisions of O.C.G.A. § 9-15-14(a), the award may be made against the frivolous party, the party's attorney or both “in such manner as is just”. Subsection (b) permits awards against attorney, client, or both as well. It appears that if a case is legally frivolous, e.g. lacked a justiciable issue of law, it would be appropriate to sanction the attorney but not a party. The party should have the right to rely upon his or her attorney to determine the legal import of a given set of facts. But see Bircoll v. Rosenthal, 267 Ga. App. 431, 600 S.E.2d 388 (2004). If, however, an award is made against both the party and the attorney, such award may be treated as any other joint and several judgment. “As joint tortfeasors, the [] judgment debtors [are] equally liable


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

1. The Mandatory Award

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

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

Thus, an award under O.C.G.A. § 9-15-14(a) is mandatory ("shall be awarded") if the court finds that a party has asserted a position "with respect to which there existed such a complete absence of any justiciable issue of law or fact that it could not reasonably be believed that a court" would accept the position. Cavin v. Brown, 246 Ga.
2. The Discretionary Award

A permissive award of attorney's fees and litigation expenses is available under O.C.G.A. § 9-15-14(b), which provides as follows:

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

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

1) the action brought or defended, or any part thereof, lacked substantial justification. A position or action lacks substantial justification if it is "substantially frivolous, substantially groundless or substantially vexatious;"

2) the action, or any part thereof, was interposed for delay or harassment; or

3) the party or attorney unnecessarily expanded the proceedings by discovery abuse or otherwise.

3. The Good Faith Exception

The threat of sanctions for abusive litigation has the potential to chill actions that push the limits of the law. The General Assembly was aware that the law is never static
and that only by bringing actions or defenses not heretofore recognized may the law evolve and improve. In order to prevent stagnation of the law, therefore, the General Assembly included section (c) which states as follows:

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

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

1) a dissent by one or more members of the Georgia Court of Appeals or the Georgia Supreme Court advancing the position asserted;

2) cases from Federal Court applied to Georgia procedural questions or to analogous substantive questions;

3) cases from other states, particularly when a trend in the development of the law is shown; and

4) positions taken by commentators in law review articles, books or other legal papers.

In order to avoid sanctions under the "law development" provision of O.C.G.A. § 9-15-14(c), it may also be helpful to acknowledge to the trial court early in the proceeding that the action is an attempt to expand, alter or create new law or legal theories in Georgia.
4. **What Exactly is Sanctionable Conduct?**

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

A party is not entitled to an award of attorney’s fees simply because it prevailed in the case or because it had to resort to motions to compel in discovery. *Glynn-Brunswick Memorial Hosp. Auth. v. Gibbons*, 243 Ga. App. 341, 530 S.E.2d 736 (2000). In order to receive an award, it must be found that there was "no justiciable issue of law or fact" under O.C.G.A. § 9-15-14(a) or that one of the three criteria of O.C.G.A. § 9-15-14(b) has been met. Thus, a prevailing party is not perforce entitled to an award, *Hyre v. Paxson*, 214 Ga. App. 552, 449 S.E.2d 120 (1994), nor does the fact that summary judgment was granted to a party entitle that party to an award of attorney’s fees and litigation expenses. *Brown v. Kinser*, 218 Ga. App. 385, 461 S.E.2d 564 (1995).


When the facts and the law are against the plaintiff, an award may be given. Thus, an award of attorney’s fees against a party was upheld on appeal where the party knew that he had not obtained personal service on the appellees and, nevertheless, persisted in pursuing the action. *Sawyer v. Sawyer*, 253 Ga. App. 619, 560 S.E.2d 86
(2002). This applies with equal force against defendants who take positions that are frivolous. For example, a debtor who continued to deny liability for liquidated damages, despite lack of legal or factual basis to do so, could be sanctioned. Franklin Credit Management Corp. v. Friedenberg, 275 Ga. App. 236, 620 S.E.2d 463 (2005).

An award of attorney’s fees is justified when the party’s own evidence flatly contradicts the asserted position. Cavin v. Brown, 246 Ga. App. 40, 538 S.E.2d 802 (2000). Though sanctions are not addressed in many slip and fall cases, this principle seemingly could apply in circumstances presented in recent summary judgment cases. For example, in Williams v. Park Walk Apartments, 253 Ga.App. 429, 559 S.E.2d 169 (2002), the plaintiff testified in her deposition that she detoured from a sidewalk and over a grassy area where she was injured in order to reach her car more quickly. In her pleadings she asserted that she left the sidewalk because it was icy. The Court applied the Prophecy rule and excluded plaintiff’s self-contradictory testimony regarding the sidewalk being icy. Williams was found to have assumed the risk of her injury, and summary judgment in favor of the defendant was affirmed. Similarly, in Span v. Phar-Mor, Inc., summary judgment in favor of defendant was affirmed where plaintiff’s account of how a pallet loaded with soda became stuck and caused his injury varied, and he later admitted he did not know what caused the pallet jack to become stuck. Span v. Phar-Mor, Inc., 251 Ga.App. 320, 554 S.E.2d 309 (2001).

If a litigant and his counsel could have discovered “with a minimum amount of diligence” before filing suit that their claims lacked a substantial basis, an award of attorney’s fees is appropriate. Bircoll v. Rosenthal, 267 Ga. App. 431, 437, 600 S.E.2d 388, 393 (2004). In Williams v. J.J. Butler, Inc., the plaintiff claimed she fell over a ridge while crossing the owner’s parking lot, but could neither describe the ridge nor
relocate it in the parking lot at issue. *Williams v. J.J. Butler, Inc.*, 253 Ga.App. 116, 558 S.E.2d 449 (2001). Though the case dealt with the summary judgment only, such evidence may have presented a case in which attorney’s fees may have been awarded appropriately.

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

Unnecessary expansion of proceedings by a party, even if the party was justified in bringing the claim, provides a basis for an award of attorney’s fees. The court in *Bienert v. Dickerson*, 276 Ga. App. 621, 624 S.E. 2d 245 (2005), awarded over $41,000 in attorney’s fees and expenses to the losing party based, in part, upon numerous instances of improper conduct that unnecessarily expanded the proceedings. The court’s findings included:

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

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

3. Plaintiffs’ counsel filed redundant counts and amendments, even after the court had already ruled on them.
4. Plaintiffs’ counsel surreptitiously and unethically taped conversations between himself and defense counsel, and then refused requests for the tapes, requiring extensive correspondence and briefing on the issue.

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

Id. 276 Ga. App. at 626-627, 624 S.E. 2d at 250. Note that counsel, not a party, shouldered all of blame for the misconduct identified by the court in this case.

However, a party’s partial success on motions that allegedly caused unnecessary expense required reversal of an award. Fox-Korucu v. Korucu, 279 Ga. 769, 621 S.E.2d 460 (2005). Though the trial court stated that a party’s post trial motion was “frivolous and unnecessarily expended the proceedings in this case”, the Supreme Court held that the trial court’s decision to grant the party a portion of the relief she requested in that very motion to be “irreconcilably at odds with its decision to award attorney fees based on the purported frivolousness” of the motion. Notably, the party’s brief in support of the offending motion was only two pages, and the court concluded that the unsuccessful part of motion could not have caused unnecessary expense.

Trial misconduct may lead to imposition of sanctions, as the Court of Appeals suggested in Sangster v. Dujinski, 264 Ga. App. 213, 590 S.E.2d 202 (2003). There, the Court considered whether a new trial was required due to plaintiff’s counsel’s “persistent attempts [] to inject into [the jury’s] deliberations irrelevant and prejudicial matters, including those forbidden by an order in limine.” The Court found that a mistrial was the only remedy for counsel’s tactics, reversing and remanding the case for new trial. Further, the Court remanded for reconsideration of a § 9-15-14 motion.
The behavior discussed in the opinion could well have constituted “improper conduct” under (b).

Subsection (b) specifically cites to discovery misconduct as a basis for sanctions. In Carson v. Carson, supra, the Supreme Court affirmed an award of fees against a husband in a divorce action for such conduct. The trial court properly found that he had “refused to comply with wife’s multiple requests for production of documents, filed extraordinary motions, rejected multiple settlement offers, and moved to reopen discovery six months after it had concluded.”

E. The Amount of the Award

An award under O.C.G.A. § 9-15-14 may not exceed the amounts which are reasonable and necessary for defending or asserting the rights of a party. O.C.G.A. § 9-15-14(d). The Code Section may not be used to seek an award for damages other than attorney’s fees and litigation expenses. If damages other than fees and expenses are to be sought, a litigant should avail himself of the provisions of O.C.G.A. § 51-7-80, et seq. O.C.G.A. § 9-15-14, however, is the exclusive remedy for abusive litigation when the only damages sought or incurred are litigation expenses and attorney’s fees. O.C.G.A. § 51-7-83.

A recent Court of Appeals’ decision highlights the distinction between O.C.G.A. § 9-15-14 and § 51-7-83. In Sharp v. Green, Klosik & Daugherty, 256 Ga. App. 370, 568 S.E.2d 503 (2002), the plaintiff’s claim for abusive litigation under O.C.G.A. § 51-7-80 et seq. was summarily dismissed. On appeal, plaintiff contended that he had met the requirement of § 51-7-83(b) merely by pleading punitive damages, intentional infliction of emotional distress and RICO. The Court of Appeals rejected the argument, saying “the pleadings alone will not support the abusive litigation claim if the damages other
than attorney’s fees and costs do not survive summary judgment.” Id. 256 Ga. App. at 373.

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

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

Id. (emphasis added). To prevail, special damages must be proved.


At the hearing, “each attorney for whose services compensation is sought must provide admissible evidence of fees in the form of personal testimony, or through the testimony of the custodian of the applicable billing records, as an exception to the hearsay exclusion.” Oden v. Legacy Ford-Mercury, 222 Ga. App. 666, 476 S.E.2d 43 (1996). An attorney’s statement in her place, as an officer of the court, regarding attorney’s fees, coupled with documentary evidence, has been held sufficient to support

What is reasonable and necessary will, of course, depend on the nature and facts of the individual case, the degree of work required by the assertion of the frivolous position, and the skill, and experience of the attorney performing the work (and therefore the reasonableness of the fee charged).


In the case of frivolous renewal actions, the fees and expenses associated with defending the frivolous claims brought in the original suit are recoverable in a motion filed after dismissal of the renewed suit. Trotter, supra. The deadline to file a fees motion for time expended on a voluntarily dismissed suit does not begin to run until the “final disposition” of the renewed suit; thus, a motion timely filed after final disposition
of the renewed action may recover the earlier incurred attorney’s fees.  

It should be noted, however, that personal time spent by attorneys was not recoverable in an award under O.C.G.A. § 9-15-14 when the attorneys were defendants, did not appear as attorneys of record in the case, and had hired outside counsel to represent them.  

On the other hand, time spent in a professional capacity by an attorney/party is recoverable in a § 9-15-14 award.  

Pro se litigants who are not attorneys cannot recover attorney’s fees because of the lack of any meaningful standard for calculating the amount of the award.  

The attorney’s fees and litigation expenses incurred in bringing the motion are recoverable. O.C.G.A. § 9-15-14(d).

F. Appellate Issues

One does not have the right to appeal an award as a matter of right. By statute, O.C.G.A. § 5-6-35(a)(10), awards of attorney’s fees and litigation expenses are subject to the two step discretionary appeal process. The size of the award has no effect on the requirement that the O.C.G.A. § 5-6-35 procedure be followed.  

Where a direct appeal as a matter of right under O.C.G.A. § 5-6-34 has been properly filed, a party aggrieved by an O.C.G.A. § 9-15-14 award may also seek relief from that award on the direct appeal.  

Rolleston v. Huie, 198 Ga. App. 49, 400 S.E.2d
The combining of a motion under § 9-15-14 with a motion made under § 51-7-83(b) also may provide a technique for obtaining review of the decision on the motion as a matter of right.  Hallman v. Emory University, 225 Ga. App. 247, 483 S.E.2d 362 (1997). In order to take advantage of the technique approved in Hallman, however, one must have fully complied with the notice provisions of O.C.G.A. § 51-7-84. The Hallman analysis of the procedure in O.C.G.A. § 9-15-14 as part of O.C.G.A. § 51-7-83(b) has been criticized recently, so reliance on this should be with caution.

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


Regardless of the section on which the award is based, the trial court's order must include findings of fact that support the award.  Reese v. Grant, 277 Ga. 799, 596 S.E.2d
139 (2004); Porter v. Felker, 261 Ga. 421, 405 S.E.2d 31 (1991); City of Griffin, supra; Hall v. Monroe County, 271 Ga. App. 895, 611 S.E.2d 120 (2005); Rhone v. Bolden, 270 Ga. App. 712, 608 S.E.2d 22 (2004); Katz v. Harris, 217 Ga. App. 287, 457 S.E. 2d 239 (1995); Bill Parker & Associates v. Rahr, 216 Ga. App. 838, 456 S.E.2d 221 (1995). If the order does not include findings of fact that the allegedly abusive position presented "a complete absence of any justiciable issue of law or fact that it could not reasonably be believed that a court would accept the position," then no award under O.C.G.A. § 9-15-14(a) is authorized. Similarly, if the order does not include a finding of fact of at least one of the criteria of O.C.G.A. § 9-15-14(b) (lacked substantial justification, interposed for delay or harassment, unnecessarily expanded proceedings), then no award under that provision is justified. Under either provision, the court's order must find as a fact that the amount awarded was reasonable and necessary.

G. The Abusive Litigation Cause of Action – O.C.G.A. § 51-7-80

As mentioned above, the abusive litigation statute provides remedies above and beyond attorney’s fees and costs of litigation. In fact, in order to assert a claim under O.C.G.A. § 51-7-80, a party must plead and prove damages other than attorney’s fees and costs of litigation. In the context of a slip and fall case, those other damages could include damages to a defendant’s professional reputation or business income or revenue based upon the slip and fall plaintiff’s conduct, or any other damages created by the plaintiff’s conduct in the underlying litigation.

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

Any person who takes an active part in the initiation, continuation, or procurement of civil proceedings against
another shall be liable for abusive litigation if such person acts:

(1) With malice; and

(2) Without substantial justification.

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

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

O.C.G.A. § 51-7-80(5). Furthermore,

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

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

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

O.C.G.A. § 51-7-80(8).

The second element of the statutory abusive litigation claim is very similar to the “lacks substantial justification” language of 9-15-14:

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

(A) Frivolous;

(B) Groundless in fact or in law; or

(C) Vexatious.

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

In a departure from the common law claim, the legislature provided three defenses. See O.C.G.A. §§ 51-7-82(a)-(c). The first defense is procedural. A litigant may voluntarily withdraw, abandon, discontinue or dismiss the allegedly abusive position within 30 days after the mailing of the mandatory notice of claim letter or prior to a ruling of the trial court, whichever shall first occur. O.C.G.A. § 51-7-82(a); see O.C.G.A. § 51-7-84 (discussing the notice condition precedent). The second defense is substantive. A litigant acting in good faith shall not be liable. O.C.G.A. § 51-7-82(b). The third defense is a hybrid of procedure and substance. The litigant may avoid liability if he or she was substantially successful on the issue(s) forming the basis for the allegedly abusive position in the underlying civil proceedings. O.C.G.A. § 51-7-82(c). In addition to these defenses, there is also a specific notice provision, a defined statute of limitations, and an exclusive remedy provision.


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

This statute has two important meanings. First, to the winner of a 9-15-14 motion, the amount of attorneys’ fees is set. An abusive litigation claim would still be permissible, but the recovery is limited to the “other damages” and cannot include an additional award of attorneys’ fees.
More importantly, for the loser of a 9-15-14 motion, despite the slight variations of language between the elements for the abusive litigation tort and the 9-15-14 motion, the denial of a 9-15-14 motion should preclude any claim under 51-7-80 et seq. This is confirmed by the recent opinion in Freeman v. Wheeler, 277 Ga. App. 753, 627 S.E.2d 86 (2006). In Freeman, the claimant brought a 9-15-14 motion in the initial medical malpractice litigation over the defendants’ use of the peer review privilege. The court denied the motion on its merits, finding that the defendants’ raising of the privilege was not sanctionable. Following the conclusion of the medical malpractice action, the claimant then brought an abusive litigation lawsuit. The Court of Appeals upheld the application of collateral estoppel based on the denial of the 9-15-14 motion. The Court held that the parties to both actions, and the allegedly abusive conduct alleged in both actions, were identical, and thus precluded by the prior ruling. The Court did not address whether the slight variation of the elements for among 9-15-14 (a), 9-15-14 (b) and 51-7-80 et seq. would affect the preclusion issue.

IV. CONCLUSION

The use of O.C.G.A. § 9-15-14 to shift the cost of litigation to the abusive litigator is a useful deterrent to frivolous actions, defenses and litigation tactics. The statute gives the trial court broad powers to sanction abusive litigators and their clients. Though frivolous and abusive litigation continues to be a problem, the growing body of case authority regarding such sanctions hopefully will reduce and eventually eliminate this type of undesirable conduct among litigants and counsel. The sparse number of reported cases in the realm of slip and fall litigation reflecting awards for attorneys fees should not be mistaken as an indication that a defendant is unlikely to collect.
In slip and fall cases where plaintiff cannot show how she fell, gives inconsistent testimony regarding the mechanism of her fall or the defendant’s knowledge of the hazard, engages in abuses of the discovery process such as failing to provide full answers to interrogatories, failing to produce documents photographs, or failing to truthfully answer requests to admit, plaintiffs should beware of the possibility of being ordered by the court to pay the defendant’s attorney’s fees. The abusive litigation statutes are appropriate measures for defendants forced to bear the cost to defend untenable slip and fall claims brought without sufficient evidentiary support or conducted outside the parameters of the Georgia Civil Practice Act.