DEFENDING THE ABUSIVE LITIGATION CLAIM (2018)

O.C.G.A. § 51-7-80 *ET SEQ*.

Presented by:

Andy Eaton
Lewis, Brisbois, Bisgaard & Smith, LLP
1180 Peachtree St, Suite 2900
Atlanta, Georgia 30309
(404) 991-2153
www.lewisbrisbois.com

Prepared by:

Kim M. Jackson

TABLE OF CONTENTS

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

Kim M. Jackson

1. Introduction

A. Common Law Abusive Litigation Claims

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

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

The Georgia Supreme Court then adjusted the common law abusive litigation claim to sound similar to the newly enacted legislation. Adopting the same terms used

in section 9-15-14(b), the Georgia Supreme Court merged common law malicious use of process and malicious abuse of process claims into the following claim:

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

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

B. The Abusive Litigation Statute Supercedes the Common Law

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

Ga. App. 322, 327, 606 S.E.2d 336, 341 (2004) (noting that an abusive litigation claim is proper when the abusive conduct occurred in court other than a court of record).

C. The Abusive Litigation Statute

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

> Any person who takes an active part in the initiation, continuation, or procurement of civil proceedings against another shall be liable for abusive litigation if such person acts:
>
> (1) With malice; and
>
> (2) Without substantial justification.

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

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

O.C.G.A. § 51-7-80(5). Furthermore,

> "Wrongful purpose" when used with reference to any civil proceeding, claim, defense, motion, appeal, or other position results in or has the effect of:
>
> (A) Attempting to unjustifiably harass or intimidate another party or witness to the proceeding; or
>
> (B) Attempting to unjustifiably accomplish some ulterior or collateral purpose other than resolving the subject controversy on its merits.

O.C.G.A. § 51-7-80(8).

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

> "Without substantial justification" when used with reference to any civil proceeding, claim, defense, motion appeal, or other position, means that such civil proceeding, claim, defense, motion, appeal or other position is:
>
> (A) Frivolous;
> (B) Groundless in fact or in law; or
> (C) Vexatious.

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

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

The many built in, statutory defenses to an abusive litigation claim have created ample opportunity to defend abusive litigation claims at various stages of the proceedings. This is not surprising. The claim is considered one that is disfavored under the law. Land v. Boone, 265 Ga. App. 551, 552, 594 S.E.2d 741, 743 (2004). By following the legislation through its procedural and substantive elements and defenses, defendants in abusive litigation claims will often find many opportunities to prevail through dispositive motions.

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

A. The Statute

O.C.G.A. § 51-7-82(a) provides:

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

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

1. Voluntarily withdrawing, abandoning, discontinuing or dismissing the allegedly abusive position;

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

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

B. Construing O.C.G.A. § 51-7-82(a)

1. Principles of Construction

Georgia's appellate courts still have not actually construed O.C.G.A. § 51-7-82(a). In Woodall v. Hayt, Hayt & Landau, 198 Ga. App. 624, 402 S.E.2d 359 (1991), the Court of Appeals faced facts upon which O.C.G.A. § 51-7-82(a) might have been applicable but held that the abusive litigation statute was not applicable because suit had been filed prior to the effective date of the statute. Id. at 626, 402 S.E.2d at 626. Similarly, in Williams v. Binion, 227 Ga. App. 893, 490 S.E.2d 217 (1997), the Court of Appeals, stated in dicta, without analysis, that an abusive litigation claim may not be brought if the offending party "abandoned" the offending claim or tactic. Id. at 894, 490 S.E.2d at 218.

Considering the dearth of authority directly interpreting O.C.G.A. § 51-7-82(a), the Court of Appeals has noted that the tort of abusive litigation should not be "extended beyond the plain and explicit statutory terms" because it is in derogation of the common law. Kirsch v. Meredith, 211 Ga. App. 823, 825, 440 S.E.2d 702, 709 (1994). For the same reasons, the abusive litigation statute should be "construed in order to accomplish its overriding purpose to give a prospective defendant the chance to change position and avoid liability." Paino v. Connell, 207 Ga. App. 553, 554, 428 S.E.2d 446, 447 (1993) (quoting Talbert v. Allstate Ins. Co., 200 Ga. App. 312, 314, 408 S.E.2d 125, 127 (1991)). Therefore, until a Georgia appellate court actually holds what may constitute an effective "withdrawal," abandonment," "dismissal," or "discontinuance," there is room for the defendant to argue that any meaningful change in position in the underlying claim satisfied the broad goals of O.C.G.A. § 51-7-82(a).

2. Possible Interpretations

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

a. "Dismissed"

"An action may be dismissed by the plaintiff, without order or permission of the court, by filing a written notice of dismissal at any time before the plaintiff rests his case." O.C.G.A. § 9-11-41(a). These provisions apply equally to "any counterclaim, cross-claim, or third-party claim." O.C.G.A. § 9-11-41(c). A dismissal may be filed with or without prejudice, "except that the filing of a third notice of dismissal operates as an

adjudication upon the merits." Id. Upon the filing of a first or second voluntary dismissal, the claims subject thereto:

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

O.C.G.A. § 9-2-61(a).

A voluntary dismissal with prejudice operates as an adjudication on the merits and clearly satisfies the change in position contemplated by O.C.G.A. § 51-7-82(a). Even with the possibility of renewal, a dismissal without prejudice would also appear to reflect the present intent to change the allegedly abusive position. Such a dismissal also prevents the other side from having to engage in further defense measures in response to the allegedly abusive claim or position. Unless an action or claim is actually renewed, the filing of a Rule 41 written notice of dismissal within the time frame provided by O.C.G.A. § 51-7-82(a) should provide a complete defense to a subsequent abusive litigation claim. See Paino, 207 Ga. App. at 554, 428 S.E.2d at 447; see also Stocks v. Glover, 220 Ga. App. 557, 559, 469 S.E.2d 677, 679 (1996) (citing the renewal statute, the Georgia Court of Appeals held that a voluntary dismissal without prejudice is not a "final termination" capable of supporting an abusive litigation claim).

b. "Discontinued"

While "discontinuance" has a specific common law and statutory meaning with respect to the prosecution of claims, that meaning does not translate well within the

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

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

c. "Abandoned"

A legal "abandonment" generally is defined as "[t]he surrender, relinquishment, disclaimer, or cessation of property or of rights. Voluntary relinquishment of all right,

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

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

d. "Withdrawn"

A "withdrawal" generally describes the decision not to prosecute criminal charges against a party. Black's Law Dictionary 1602 (6th ed. 1990). The abusive litigation statute does not apply to attempted criminal prosecutions. Thus, although the term presumably means something other dismissal, it is not clear what distinguishes it from

the other terms. The term appears to be a synonym for the terms "discontinuance" and "abandonment."

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

The abusive litigation statute defines the window of opportunity within which a party may take proactive steps to avoid liability as follows: "within 30 days after the mailing of the notice required by subsection (a) of Code Section 51-7-84 or prior to a ruling by the court relative to the civil proceeding, claim, defense, motion, appeal, civil process, or other position, whichever shall first occur . . . ." O.C.G.A. § 51-7-82(a). There are two important points to be taken from this provision: (1) the 30-day window is triggered by the "mailing of," and not the "receipt" of, the notice of abusive litigation – O.C.G.A. § 9-11-6 presumably would not apply; and (2) a ruling within the 30-day notice period removes the litigant's subsequent right to dismiss, discontinue, abandon or withdraw the allegedly abusive position.

4. Damages and the Timing of Notice

Under 9-15-14, no notice is required before filing the motion. The abusive litigation statute does require notice and the opportunity to correct the conduct. There has not been an appellate decision about whether damages for abusive litigation relate back to the beginning of the abusive conduct, or start from the time period of notice. It is thus unanswered how damages might be affected by the timing of notice during the underlying abusive litigation. If notice of the allegedly abusive conduct is not provided until well into the litigation, after significant potential damages have already occurred, and the position is not abandoned, the difference in damages could be large. For example, notice could be mailed just prior to an expected ruling, thus limiting the

defendant's time frame to repent and withdraw the claim. A litigant defending an abusive litigation claim under these circumstances should argue that the claimant's attorneys' fees and other damages incurred prior to the notice are barred. A claimant may also consider this risk, and has the option of pursuing all possible attorney's fees pursuant to 9-15-14 without concern for a "timing of notice" defense. The downside is that the other damages are not available, and the claimant would be bound by the Judge's ruling on the 9-15-14 motion. O.C.G.A. § 51-7-85.

5. Establish a Record

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

III. The "Good Faith" Defense

A. The Statute

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

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

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

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

B. Proving Good Faith

1. Subjective Belief Not Enough

Good faith is clearly defined as an affirmative defense "and the burden of proof shall be on the person asserting the actions were taken in good faith." O.C.G.A. § 51-7-82(b). There is certainly a subjective component within the definition of good faith. See O.C.G.A. § 51-7-80(4) (". . . to the best of a person's or his attorney's knowledge, information and belief, formed honestly, after reasonable inquiry . . . ."). Mere subjective belief alone, without accompanying objective evidence, is insufficient. Kirsch

v. Jones, 219 Ga. App. 50, 53, 464 S.E.2d 4, 7 (1995). In Kirsch, the facts were as follows: (1) On behalf of his clients, Kirsch sued Jones and Eastwood alleging that they committed legal malpractice by failing to place lis pendens notices on certain property on behalf of Exclusive Properties, Inc.; (2) Jones and Eastwood filed a third-party complaint against Kirsch alleging that he committed legal malpractice by failing to pursue post-judgment collection efforts on behalf of Exclusive Properties, Inc.; (3) the trial court granted summary judgment on the third-party claim to Kirsch, who the filed abusive litigation and defamation claims against Jones and Eastwood; (4) in support of their summary judgment motion, Jones and Eastwood submitted affidavits alleging that their third-party complaint was asserted in good faith; and (5) the trial court granted summary judgment to Jones and Eastwood, presumably based on those affidavits. Id. at 51-53, 464 S.E.2d at 6-7.

The Court of Appeals stated that Jones and Eastwood "would be entitled to summary judgment if the undisputed evidence proved that their pursuit of that third-party complaint was not malicious and was substantially justified." Id. at 52, 464 S.E.2d at 7. Since the Court found an absence of a *legal* basis for the third-party complaint, the Court of Appeals determined that the "self-serving and conclusory" affidavits submitted by Jones and Eastwood could not support the trial court's ruling in their favor. Id. at 53, 464 S.E.2d at 7 (holding the Jones and Eastwood sought to improperly substitute Kirsch as a defendant); accord Ferguson v. City of Doraville, 186 Ga. App. 430, 437, 367 S.E.2d 551, 557 (1988), overruled on other grounds by Vogtle v. Coleman, 259 Ga. 115, 376 S.E.2d 861 (1989) (interpreting 9-15-14, the Court of Appeals held that "while we have no reason to doubt that [Ferguson's] pursuance of the present action has been

characterized by good faith in a subjective sense, we are left at the end with nothing which could be said to establish as a matter of law a reasonable or substantial justification of Ferguson's claims."). This interpretation is expected, as otherwise all abusive litigation claims would be subject to summary judgment motions absent affirmative evidence of actual malice.

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

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

> Although good faith is defined in subjective terms to the extent it refers 'to the best of a person's or his or her

> attorney's knowledge, information and belief, formed honestly, . . . [*A*]*n attorney cannot establish that he or she acted in good faith by simply asserting a subjective, honest belief that a claim was well grounded in fact and warranted by existing law or by reasonable grounds to believe that an argument for changing the law may be successful.*

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

2. Defining Objective Good Faith

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

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

Id. Although a "reasonableness" standard evaluated by the "competent attorney under the circumstances" invites a swearing contest by experts, which usually results in jury questions, there are solid grounds for seeking summary judgment on this defense. The analysis applied in Kluge laid the groundwork. In evaluating the burden placed on attorneys before filing claims or taking positions in litigation, the Court of Appeals commented:

> It may be reasonable under the circumstances for an attorney, after satisfying the reasonable inquiry requirement, to file a claim on behalf of a client based on facts which may not be sufficient to establish a triable issue, but do supply at least a colorable inference in support of the claim, and then pursue discovery or investigation to confirm whether or not a factual basis can be developed for continuing the claim . . . Of course, an abusive litigation claim would be appropriate where an attorney files a claim on behalf of a client without any factual or legal support or supported only by guess or sheer speculation, or in cases where a claim having arguable factual or legal support is filed in good faith for the purpose of pursuing discovery, but continued by the attorney after discovery reveals there is no basis for the claim.

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

The "continuing duty to evaluate" and reasonable inquiry requirements announced in Kluge extend until the actual resolution of the allegedly abusive claims or positions. Kendrick v. Funderburk, 230 Ga. App. 860, 864-65, 498 S.E.2d 147, 151 (1998). While the determination of whether an action had basis in law at its inception "is a legal issue for the trial court," subsequent disputed facts regarding the motives for the continuation of litigation will defeat a motion for summary judgment predicated on good faith. Id. at 865, 498 S.E.2d at 151 (inconsistent positions taken by the attorney defendant regarding her fee agreement with the plaintiff resulted in jury question). Likewise, a client relying on good faith must establish a continuing belief in her attorney's representations and reasonable inquiries into the facts and law forming the basis of the allegedly abusive claim if the claim is continued after notice O.C.G.A. § 51-7-84. See e.g., Payne v. Kanes, 234 Ga. App. 524, 527-28, 507 S.E.2d 266, 269 (1999).

A 2007 Court of Appeals opinion expanded on this analysis. In Bacon v. Volvo Servs. Ctr., Inc., 2007 Ga. App. LEXIS 1207, 2007 Fulton Co. D. Rep. 3476 (2007), the Court held that summary judgment on the element of good faith could be established by showing "success" in certain stages of the underlying litigation. Although this subject is addressed in more detail below, in Bacon the underlying case had been brought by VSC against Bacon. VSC claims survived summary judgment, survived directed verdict, and VSC obtained a jury verdict. On appeal, however, the Court of Appeals reversed and found in favor of Bacon as a matter of law because VSC had failed to present evidence in support of its claims. The Court of Appeals held in Bacon that "given that VSC was successful at every stage of the litigation prior to the appeal, the trial court was authorized to determine as a matter of law that the company acted in good faith in filing and pursuing its claims." Bacon, at *6. The lesson here seems obvious: it gets easier to prove good faith the more often the trial court commits reversible error in your favor.

3. Practice Issues

a. Be Objective

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

and investigation, and a *continued* willingness to reevaluate the viability of the allegedly abusive claims.

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

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

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

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

b. The Client as Defendant and Reliance on Counsel

Given that the Court of Appeals analyzed objective good faith from the perspective of attorneys in Kluge, it did not comment on how clients may establish good faith as a matter of law. Absent actual evidence of ill will or an improper purpose

capable of supporting an inference of malice (which naturally would defeat good faith), clients should follow the same defense strategy discussed above to present strong dispositive motions. Furthermore, borrowing from 9-15-14 case law, clients may have the additional "good faith" argument of reliance on counsel.

While reliance on the advice of counsel is not specified as a statutory defense or a component of good faith, the Court of Appeals has implicitly recognized reliance on counsel as complete defense to a 9-15-14 claim. In Seckinger v. Holtzendorf, 200 Ga. App. 604, 409 S.E.2d 76 (1991) (physical precedence), the Holtzendorfs filed a summary judgment motion attacking Seckinger's abusive litigation counterclaim based on two theories: (1) the evidence supported their underlying fraud and conspiracy claims; and (2) their claims were brought pursuant to the advice of counsel. In support of their reliance on counsel argument the Holtzendorfs submitted an affidavit showing that they were not attorneys and did not have any legal training, they brought the fraud and conspiracy claims on the legal advice of counsel, and they were justified in relying on the advice of counsel because of counsel's legal experience (city attorney, State Court Judge and a law assistant for the Georgia Court of Appeals). Id. at 606-07, 409 S.E.2d at 79. Accepting both arguments, the Court held that "the trial court was authorized to find as a matter of law that appellees had pierced an essential element" of appellant's 9-15-14 claim. Id. *But see*, Bircoll v. Rosenthal, 267 Ga. App. 431, 437, 600 S.E.2d 388, 393 (2004) ("We find no controlling authority for the proposition that reliance on counsel's advice insulates a party from sanctions under O.C.G.A. § 9-15-14" and noting that Seckinger was physical precedent only).

The good faith defense in O.C.G.A. § 51-7-82(b) parallels the good faith language in 9-15-14. There is no reason to believe that the courts will not accept reliance on counsel as a defense to abusive litigation claims. Where a client is not actively involved in deciding which claims to assert in a lawsuit, reliance on counsel may support a strong summary judgment motion and, at minimum, should appeal to a jury at trial. The effectiveness of this defense will depend on the sophistication and legal knowledge of the client. Moreover, some caution should be taken as the attorney-client privilege likely will be waived as to the subject matters at issue once reliance on counsel is asserted. Finally, following the holding in Payne, reliance on counsel cannot be used in any case involving questions of actual malice, *i.e.*, when competent counsel is misled by his client due to ulterior motives.

C. The Elements of the Claim

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

1. "Malice"

In Owens v. Generali-U.S. Branch, 224 Ga. App. 290, 480 S.E.2d 863 (1997), Owens argued that Generali lacked any legal or factual basis for its prior subrogation claim. Id. at 290-91, 480 S.E.2d at 864. Specifically, in opposing Generali's motion for

summary judgment, Owens argued that "there was ample binding statutory and case law precedent" prohibiting direct insurer tort actions for medical payments. Id. at 293, 480 S.E.2d at 866.

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

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

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

Following Owens, the Court of Appeals again rejected an abusive litigation claim premised only on the absence of legal authority supporting the underlying claim. See Backman v. Packwood Indus., Inc., 227 Ga. App. 416, 418-19, 489 S.E.2d 135, 137-38 (1997). Since Backman failed to oppose the motion for summary judgment with any evidence to support other elements, the Court of Appeals held "we further conclude that

it cannot be said that the [abusive claim] was done either with malice or without substantial justification." Id. at 419, 489 S.E.2d at 138.

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

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

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

B. Without Substantial Justification

Whether a claim is without substantial justification is a question that begs for judicial determination, though it is not clear that this element is always a legal question. Certainly many cases are found to be substantially justified on different grounds.

In Petroleum Reality II, LLC v. Morris Manning & Martin, LLP, 317 Ga. App. 102, 728 S.E.2d 896 (2012), the Court of Appeals upheld the granting of a motion to dismiss an abusive litigation claim on the basis that the lis pendis filed on a piece of property could not be said to have lacked substantial justification. The complaint argued that the lis pendens was left on the property long after it had any viability because the underlying Florida litigation that affected the property had been dismissed. The defendant countered that the judgment remained non-final subject to appeal until the Florida litigation was final, and that the relevant order could not be appealed immediately. The Court of Appeals agreed, and found that given that the judgment remained non-final and subject to an appeal, the lis pendens did not lack substantial justification.

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

C. Strategy

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

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

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

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

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

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

IV. The "Substantial Success" Defense

A. The Statute

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

B. Possible Definitions of Substantial Success

1. Defeating a Motion for Summary Judgment

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

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

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

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

By ruling that Ibrahim offered no evidence in support of the elements of "malice" and "without substantial justification," the Court of Appeals was not required to comment on the potential effect of the trial court's decision. See, e.g., Talbert v. Allstate Ins. Co., 200 Ga. App. 312, 314, 408 S.E.2d 125, 127 (1991) (the Court of Appeals did not comment on the effect of the trial court's denial of a motion for summary judgment when ruling that Talbert failed to provide proper notice to Allstate of his abusive litigation claim).

A more recent decision appeared to move the bar on substantial success. In Davis v. Butler, 240 Ga. App. 72, 522 S.E.2d 548 (1999), a legal malpractice action was brought against Davis with the supporting affidavit required by O.C.G.A. § 9-11-9.1. After the lawsuit was transferred to a new county, Davis and his firm moved for summary judgment and alleged that the malpractice action was brought "without substantial justification" and "with malice." Davis, 240 Ga. App. at 72, 522 S.E.2d at 549. The trial court denied the motion for summary judgment, finding that genuine issues of material fact existed with respect to the lawyers' services and management of client funds. Id. Thereafter, the lawsuit was dismissed without prejudice. Id. at 73, 522 S.E.2d at 549. Following this dismissal, the law firm filed a separate action under the abusive litigation statute and successfully moved for summary judgment before the trial court. Id.

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

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

Id. (emphasis added). While this holding appears to clearly state a rule, it has a caveat.

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

summary judgment" it could not be sanctioned under OCGA § 9-15-14 absent the special circumstances noted in Porter).

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

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

In one respect, this case does not seem that groundbreaking. The Court held that Bacon was prevented from prevailing on its abusive litigation claim unless he could show

something more than winning on appeal. That is not surprising. What makes this case important is that it establishes a rule that a trial court's denial of summary judgment, directed verdict, and a jury award against the abusive litigation plaintiff will be defenses to an abusive litigation claim as a matter of law *even if the trial court and jury verdict were in error as a matter of law*. As discussed above, the Court went further to hold that this same procedural history (of trial court and jury error) established Volvo's good faith defense as a matter of law.

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

Based on the foregoing authority, the trial court's denial of a motion for summary judgment is apparently treated as "substantial success" absent unusual circumstances. The application of this rule is quite friendly to the litigant that is willing to lie and thus avoid summary judgment. The Court of Appeals recognized this, in dicta, in Morrison v. J. H. Haney, Inc., 256 Ga. App. 38, 40, 567 S.E. 2d 370, 372 (2002). In Morrison, a dispute over the day of the incident was dispositive. The claimant testified as to a later date, and the defendant had overwhelming evidence of an earlier date, including the

plaintiff's signature on dated medical records. Despite the overwhelming documentary and other evidence, the plaintiff's testimony created a fact issue, though the Court stated that it "did not mean to imply that [the defendant] could not assert that [plaintiff's] position backed substantial justification under [9-15-14]." Id. Maybe not, but the holding in Bacon would suggest otherwise.

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

2. Defeating a Motion for Directed Verdict

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

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

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

Monroe v. Siegler, 256 Ga. 759, 761, 353 S.E.2d 23, 25 (1987) (emphasis in original). Following the same logic, the Court of Appeals held that the trial court's denial of a motion for directed verdict, which required the submission of the case to the jury,

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

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

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

3. Prevailing Before the Trial Court

If a party actually prevails at the trial court level and later is sued for abusive litigation, presumably as a result of a reversal on appeal, O.C.G.A. § 51-7-82(c) again provides a complete defense.

In LoSonde v. Chase Mortgage Co., 259 Ga. App. 772, 577 S.E.2d 822 (2003), the Court of Appeals found that the abusive litigation defendant had prevailed in an underlying writ of possession litigation. That writ had not been appealed. Thus, the failure to prevail was a complete defense to the claim. Id. at 774, 577 S.E.2d at 824-25.

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

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

4. Conclusion

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

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

A. The Statute

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

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

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

B. The Notice Decisions

In four decisions, the Court of Appeals has held that O.C.G.A. § 51-7-84(a) requires that an abusive litigation defendant be named in the notice letter as a party

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

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

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

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

case could subject it to abusive litigation damages. There were likely several other deficiencies in the notice that the Court did not discuss.

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

VI. The Statute of Limitations for Abusive Litigation Claims

A. The Statute

The legislature limited the statute of limitation for an abusive litigation claim as compared to its common law predecessor which had a two year statute. "An action or claim under [the abusive litigation statute] requires the final termination of the

proceeding in which the alleged abusive litigation occurred and must be brought within one year of the date of final termination." O.C.G.A. § 51-7-84(b). The legislation did not define the terms "final termination" or "proceeding" as used in O.C.G.A. § 51-7-84(b).

B. The "Final Termination of the Proceeding"

1. What is the "Proceeding"?

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

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

Cobb County v. Sevani, 196 Ga. App. 247, 248, 395 S.E.2d 572, 574 (1990) (pre-acquisition activities were irrelevant to an analysis of a 9-15-14 claim)).

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

One clarification of "proceeding" has been suggested, however, by the Court of Appeals. The Court of Appeals, in dicta, recently stated that an abusive litigation claim was more appropriate than a 9-15-14 motion where the claimant had special damages in addition to attorney's fees, or where the abusive conduct occurred outside of a court of record. Condon v. Vickery, 270 Ga. App. 322, 606 S.E.2d 336 (2004) (noting that an abusive litigation claim is proper when the abusive conduct occurred in a court other than a court of record).

Nevertheless, until the appellate courts construe the term "proceeding" two additional arguments are available to abusive litigation defendants: (1) a ripeness challenge to premature claims filed before the final termination of the lawsuit; and (2) a statute of limitations challenge to claims filed more than one year after the discrete "proceeding" in which the allegedly abusive conduct occurred, to the extent that the conduct may be isolated to a given "proceeding."

2. The "Final Termination"

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

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

The Court of Appeals has adopted a narrow construction of the term "final termination" which significantly clarifies when abusive litigation claims must be brought. It might be said generally that "final termination means an adjudication on the merits so that the action cannot be recommenced." Land v. Boone, 265 Ga. App. 551, 554, 594 S.E.2d 741, 744 (2004).

a. Dismissal Without Prejudice

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

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

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

In response to Hallman's appeal of the award of attorneys' fees, Emory moved to dismiss the appeal on jurisdictional grounds, citing to authority under 9-15-14 prohibiting direct appeals of ancillary fee awards. Id. at 248, 483 S.E.2d at 364. Relying on O.C.G.A. § 51-7-83(b), which provides that abusive litigation claims for attorneys' fees and expenses only shall be brought pursuant to the procedures provided in 9-15-14, the Court of Appeals held that the fee award to Emory was subject to a direct appeal. Id. at 248-49, 483 S.E.2d at 365. Therefore, the Court of Appeals treated the fee petition as an independent cause of action brought *under the abusive litigation statute* within the 45-day period provided by section 9-15-14. Id.

Next, the Court of Appeals turned to whether the fee award was entered after the final termination of the underlying proceeding. Recognizing that the trial court modified its order dismissing Hallman's complaint from with prejudice to without prejudice, the Court first commented that "[u]nder O.C.G.A. § 51-7-84(b), a 'final termination of the proceeding' means that the case has been finally concluded and has nothing ancillary pending . . ." Id. at 249, 483 S.E.2d at 365. In determining that Emory's action under the abusive litigation statute was not ripe, the Court held:

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

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

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

b. Settlement

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

precludes a subsequent abusive litigation action as a matter of law. 226 Ga. App. at 900-01, 487 S.E.2d at 394.

c. Jury Verdict

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

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

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

Compare Fairburn Banking Co., 263 Ga. at 794, 439 S.E.2d 483 with Scott, 168 Ga. App. at 816, 310 S.E.2d at 773.

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

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

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

Georgia's appellate courts have explicitly allowed for 9-15-14 motions to be held while a case's substantive issues are being appealed. Avren v. Garten, 289 Ga. App. 186,

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

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

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

Id. at 816, 310 S.E.2d at 773.

D. Appeals

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

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

VII. The Exclusive Remedy Defense

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

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

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

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

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

390 (2000) (plaintiff could not avoid requirements of abusive litigation statute by filing claims for negligent and intentional infliction of emotional distress resulting from a lawsuit).

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

VIII. The Other Damages Requirement

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

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

Thus, if the underlying proceeding took place in a court of record, O.C.G.A. § 51-7-83(b) requires that a claimant must allege and be entitled to recover damages in addition to attorneys' fees in order to maintain an abusive litigation claim. Otherwise, the party seeking recovery for only attorneys' fees must use the procedure provided by 9-15-14. This can serve as a defense to an abusive litigation claim. If the claim does not arise out of a court of record, e.g., the abusive litigation took place in Probate Court, then an abusive litigation claim is allowed. Condon v. Vickery, 270 Ga. App. 322, 327, 606 S.E.2d 336, 341 (2004) (noting that an abusive litigation claim is proper when the abusive conduct occurred in court other than a court of record).

Although the statute states only that damages other than attorneys fees must be "claimed," the Court of Appeals has interpreted this to mean that such other damages

must arise out of a viable claim. In Sharp v. Greer, Klosik & Daugherty, 256 Ga. App. 370, 568 S.E.2d 503 (2002), Sharp's abusive litigation claim was brought along with claims for intentional infliction of emotional distress and RICO. The Court of Appeals held that the intentional infliction of emotional distress claims and RICO claims were properly dismissed from the case. Thus, Sharp's only remaining claim was for attorneys' fees and costs. The Court of Appeals held that the claimant was limited to a 9-15-14 remedy, and his abusive litigation claim was dismissed. Adding a count for punitive damages was not sufficient to overcome the other damages rule. Id. at 373, 568 S.E.2d at 506. Thus, when defending an abusive litigation claim, the ability to obtain partial summary judgment on claims for damages other than attorneys' fees and costs could result in a dispositive motion on the abusive litigation claim.

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

In a manner consistent with the workers' compensation subrogation cases, however, it will be important to make the jury itemize the various damages. Otherwise, the Court will likely conclude that the jury negotiated the total claim, and refuse to say that the award was just for attorneys' fees if other damages might have been part of the general verdict.

IX. Victory In Prior O.C.G.A. § 9-15-14 Motion

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

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

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

X. Courts And Proceedings In Which Abusive Litigation Claim May Be Made

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

XI. Conclusion

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

Accordingly, if you are an attorney that receives an abusive litigation letter during the course of litigation, follow these rules of thumb:

- Immediately provide your client with notice of the abusive litigation letter, in writing and, preferably, by certified or registered mail;

- Immediately provide your client with a status report on the facts and law analyzing the merits of the allegedly abusive claim or position;

- Confirm the facts provided by your client and known witnesses, and continue your "reasonable inquiry" into those facts;

- Secure a second opinion from members of your firm;

- Consult with the client about securing a second opinion from a respected attorney familiar with the subject matter at issue;

- Preferably with these additional opinions, advise your client on whether to continue litigating the allegedly abusive claim or position;

- Document, document, document – by all means, confirm your advice in writing, including the "pros" and "cons" discussed with your client;

- Advise opposing counsel in writing of your position without revealing your mental impressions; and
- If you continue to litigate, continue to investigate until the conclusion of the claim or position at issue.

If you are a client that receives notice of alleged abusive litigation, the fundamental rule of thumb is one of objective distrust. With a 30-day window of opportunity at your sole election, you need to evaluate the true value of the claim or position at issue, and the advice provided by your attorney with respect to that claim or position. Consider hiring another attorney to evaluate the claim or position. Consider whether you have been completely honest with yourself and your attorney. Most importantly, check your emotions at the door, as your emotions may result in years of unwarranted and costly litigation.

If you are an attorney defending an abusive litigation claim, presumably because one or more of the above rules were discarded somewhere along the way, consider these "phase one" options, preferably in their order of appearance:

- Review the abusive litigation notice letter to determine its sufficiency and, specifically, whether your client was named as a party from whom damages may be sought;

- Determine whether the plaintiff seeks damages other than attorneys' fees so as to warrant a separate lawsuit, as opposed to a section 9-15-14 proceeding;

- Review the pleadings to determine whether a "final termination of the proceeding" has been secured by the plaintiff;

- Determine whether the "final termination of the proceeding" occurred within one-year of the inception of the current lawsuit;

- Determine whether the "final termination of the proceeding" was secured by a voluntary dismissal without prejudice, thereby triggering a ripeness challenge pursuant to Hallman and Stocks;

- Determine whether your client arguably took advantage of the 30-day window of opportunity defense provided in O.C.G.A. § 51-7-82(a) via any meaningful "discontinuance" of the proceedings;

- Determine whether the underlying claims survived a motion for summary judgment or more;

- Determine whether your case exclusively involves questions of law and, therefore, warrants an early motion for summary judgment that actually may be heard by the trial court; and

- Determine whether a reliance on counsel defense is feasible, especially considering the accompanying waiver of the attorney-client privilege.

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

XI. Abusive Litigation Statutes

O.C.G.A. § 51-7-80 (2006)

§ 51-7-80. Definitions

As used in this article, the term:

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

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

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

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

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

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

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

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

(C) Vexatious.

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

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

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

O.C.G.A. § 51-7-81 (2006)

§ 51-7-81. Liability for abusive litigation

Any person who takes an active part in the initiation, continuation, or procurement of civil

proceedings against another shall be liable for abusive litigation if such person acts:

(1) With malice; and

(2) Without substantial justification.

O.C.G.A. § 51-7-82 (2006)

§ 51-7-82. Defenses

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

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

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

O.C.G.A. § 51-7-83 (2006)

§ 51-7-83. Measure of damages

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

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

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

O.C.G.A. § 51-7-84 (2006)

§ 51-7-84. Notice of claim asserted; when action must be brought

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

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

O.C.G.A. § 51-7-85 (2006)

§ 51-7-85. Exclusive remedy

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