

**IN THE SUPERIOR COURT OF COBB COUNTY
STATE OF GEORGIA**

 EFILED IN OFFICE
CLERK OF SUPERIOR COURT
COBB COUNTY, GEORGIA
19101664
G. GRANT BRANTLEY
MAY 30, 2025 11:56 AM

ORDER DENYING COUNSEL FOR DEFENDANT MOTION TO DISMISS

Before this Court is Counsel for Defendant Motion to Dismiss (“Motion”).

Having carefully considered the briefing of both parties on the issues and the record in this case, the Court Orders as follows.

Counsel for Defendant Motion to Dismiss filed April 22, 2025 is hereby
DENIED

O.C.G.A. § 9-15-16

The subject of the Motion is the newly enacted O.C.G.A. § 9-15-16 in Senate Bill 68, which Governor Kemp signed on April 21, 2025. O.C.G.A. § 9-15-16 states as follows in relevant part:

(a) In any civil action, no party shall recover the same attorney's fees, court costs, or expenses of litigation more than once pursuant to one or more statutes authorizing awards of attorney's fees, court costs, or expenses of litigation, whether such statute or statutes authorize such awards for compensatory or punitive purposes, unless the statute or

statutes specifically authorize the recovery of duplicate attorney's fees, court costs, or expenses of litigation. . . .

The remainder of the code section is not applicable to counsel for Defendant's Motion.

Section 9 of Senate Bill states as follows regarding the effective date of the Act:

(a) This Act shall become effective upon its approval by the Governor or upon its becoming law without such approval.

(b) Sections 6 and 7 of this Act shall apply only with respect to causes of action arising on or after the effective date of this Act, and any prior causes of action shall be governed by prior law. It is the intention of the General Assembly that all other provisions of this Act shall apply to causes of action pending on the effective date of this Act, unless such application would be unconstitutional.

O.C.G.A. § 9-15-16 appears in Section 4 of Senate Bill 68. Consequently, the General Assembly apparently intended for O.C.G.A. § 9-15-16 to apply to causes of action pending on the effective date of the Act.

Relevant Facts

Plaintiff filed this action six years ago on March 5, 2019. This Court held a bench trial during August 19-23, 2024, October 31, 2024, and November 1, 2024 and entered a Final Judgment against Defendant on November 1, 2024. Plaintiff filed Plaintiff's Motion for Attorneys' Fees and Expenses of Litigation Against Defendant and His Counsel ("Plaintiff's 9-15-14 Motion") pursuant to O.C.G.A. § 9-15-14 on November 21, 2024.

Plaintiff seeks portions of her reasonable attorneys' fees and expenses of litigation pursuant to O.C.G.A. § 9-15-14, jointly and severally, from Defendant and from Defendant's counsel of record, Frank F. Pape, Jr., from the date Mr. Pape filed Defendant's Answer and Counterclaim and entered his appearance in this action on April 15, 2019 through the date of the hearing on Plaintiff's 9-15-14 Motion. Feb. 26, 2025 Hr'g Tr. 61:13-62:8, 66:1-67:3. Plaintiff also seeks portions of her reasonable attorneys' fees and expenses of litigation pursuant to O.C.G.A. § 9-15-14, jointly and severally, from Defendant and from Defendant's other counsel of record, Nicole Jennings Wade and Wade, Grunberg & Wilson, LLC, from the date they filed their Notice of Appearance in this action on September 23, 2020 through the date of the hearing on Plaintiff's 9-15-14 Motion. *Id.* At the hearing on Plaintiff's 9-15-14 Motion, Plaintiff presented evidence of her reasonable attorneys' fees and expenses of litigation incurred because of the alleged sanctionable conduct of Defendant and his counsel through March 13, 2025. Mar. 13, 2025 Hr'g Tr. 44-97; Pl.'s Exs. 323-327.

Plaintiff does not seek a double recovery of her fees and expenses. Feb. 26, 2025 Hr'g Tr. 118:16-120:24. Although the Final Judgment awarded Plaintiff her reasonable attorneys' fees and expenses of litigation against Defendant pursuant to O.C.G.A. § 13-6-11 and O.C.G.A. § 53-12-302(a)(4), Plaintiff has only requested a single recovery of attorneys' fees and expenses of litigation against Defendant and

his counsel, jointly and severally. *Id.* Plaintiff has already recovered from Defendant a portion of the attorneys' fees awarded in the Final Judgment. *Id.* If this Court grants Plaintiff's 9-15-14 Motion and enters Plaintiff's proposed Order, then Plaintiff would only be permitted to recover the remainder of her attorneys' fees and expenses once from Defendant and/or his counsel. *Id.*

Thus far, this Court has held two days of hearings on Plaintiff's 9-15-14 Motion on February 26, 2025 and March 13, 2025. The Court scheduled the hearing on Plaintiff's 9-15-14 Motion to resume on May 27, 2025 and to continue thereafter from day to day until concluded.

Georgia Law on Statutory Interpretation

O.C.G.A. § 1-3-1(a) and (b) provides as follows regarding the construction of statutes:

(a) In all interpretations of statutes, the courts shall look diligently for the intention of the General Assembly, keeping in view at all times the old law, the evil, and the remedy. Grammatical errors shall not vitiate a law. A transposition of words and clauses may be resorted to when a sentence or clause is without meaning as it stands.

(b) In all interpretations of statutes, the ordinary signification shall be applied to all words, except words of art or words connected with a particular trade or subject matter, which shall have the signification attached to them by experts in such trade or with reference to such subject matter.

The Supreme Court of Georgia has held that “[t]he cardinal rule in construing a legislative act, is to ascertain the legislative intent and purpose in enacting the law,

and then to give it that construction which will effectuate the legislative intent and purpose.” *Carringer v. Rodgers*, 276 Ga. 359, 363 (2003) (citations and punctuation omitted).

The Supreme Court of Georgia has also held as follows:

When determining the meaning of a statute, we start with the statutory text itself, because “[a] statute draws its meaning from its text.” In construing a statute, “we must afford the statutory text its plain and ordinary meaning,” view it “in the context in which it appears,” and read it “in its most natural and reasonable way, as an ordinary speaker of the English language would.” “[F]or context, we may look to other provisions of the same statute, the structure and history of the whole statute, and the other law — constitutional, statutory, and common law alike — that forms the legal background of the statutory provision in question.”

Alston & Bird, LLP v. Hatcher Mgmt. Holdings, LLC, 312 Ga. 350, 353-354 (2021) (citations omitted).

“The legislature is presumed to know the condition of the law and to enact statutes with reference to it” *Williams v. State*, 299 Ga. 632, 634 (2016) (citations omitted). *See also Haley v. State*, 289 Ga. 515, 526 (2011) (stating that “we often presume that the General Assembly was aware of how courts had previously interpreted the language it included in a statute”).

**The Express Purpose of O.C.G.A. § 9-15-16 is to
Bar a Double Recovery of Attorneys’ Fees and Expenses**

This Court finds that the express purpose of O.C.G.A. § 9-15-16 is to bar parties from the double recovery of attorney’s fees and expenses of litigation

pursuant to two or more statutes authorizing the award of such fees and expenses.

This Court further finds that the legislative intent of O.C.G.A. § 9-15-16 is to overturn the Supreme Court's decision in *Junior v. Graham*, 313 Ga. 420 (2022).

The enactment of O.C.G.A. § 9-15-16 is a reaction to the Supreme Court's decision in *Junior v. Graham*, which held that a party may receive a double recovery of attorneys' fees and expenses pursuant to O.C.G.A. §§ 13-6-11 and 9-11-68. *Junior*, 313 Ga. at 420.

The Supreme Court summarized its decision in *Junior v. Graham* as follows:

This case involves the harmonization of two statutory provisions. The first, OCGA § 13-6-11, authorizes a jury in a civil suit to assess as damages certain legal expenses of a prevailing party when that party has specifically requested them and when the jury finds that the opposing party "has acted in bad faith, has been stubbornly litigious, or has caused the plaintiff unnecessary trouble and expense" prior to the initiation of litigation. The second, OCGA § 9-11-68 (b) (2), provides a sanction in the form of attorney fees and litigation expenses incurred after the failure to accept what the statute defines as a reasonable settlement offer. In *Junior v. Graham*, 357 Ga. App. 815, 817-818, 849 S.E.2d 536 (2020), the Court of Appeals determined that the sanction contemplated by OCGA § 9-11-68 (b) (2) necessarily includes a set-off for the amount of damages awarded under OCGA § 13-6-11.

We granted certiorari to consider whether a plaintiff may receive a full recovery under both statutory provisions. Because we conclude that the provisions provide for different recoveries despite using somewhat similar measures for calculating the respective amount of damages or sanction, a prevailing plaintiff may recover under each statutory provision without regard to any recovery under the other. Accordingly, we reverse the decision of the Court of Appeals and remand this case with direction that the case be remanded to the trial court for reconsideration of the plaintiff's claim for attorney fees and litigation

expenses pursuant to OCGA § 9-11-68 (b) (2) in a manner consistent with this opinion.

Id. at 420.

O.C.G.A. § 9-15-16 states the following prohibition in relevant part: “no party shall **recover** the same attorney’s fees, court costs, or expenses of litigation **more than once . . .**” (emphasis added). O.C.G.A. § 9-15-16 then states the following exception to the prohibition: “unless the statute or statutes specifically authorize the **recovery of duplicate** attorney’s fees . . .” (emphasis added). To “recover” “more than once” means a double recovery. The “recovery of duplicate attorney’s fees” means a double recovery. The purpose of O.C.G.A. § 9-15-16 is not to bar the award of attorneys’ fees under two or more statutes. The express purpose of O.C.G.A. § 9-15-16 is to bar double recoveries.

“Georgia, as part of its common law and public policy, has always prohibited a plaintiff from a double recovery of damages; the plaintiff is entitled to only one recovery and satisfaction of damages, because such recovery and satisfaction is deemed to make the plaintiff whole.” *Ga. Northeastern R.R. Co., Inc. v. Lusk*, 277 Ga. 245, 246 (2003). “While a party may pursue inconsistent remedies, he is not permitted a double recovery of the same damages for the same wrong. He is entitled to only one satisfaction of the same damages, in either contract or tort.” *Marvin Nix Dev. Co. v. United Community Bank*, 302 Ga. App. 566, 568 (2010) (citations and punctuation omitted).

The Georgia Supreme Court in *Junior v. Graham* quoted the same language from the *Georgia Northeastern Railroad* and *Marvin* cases to state the general prohibition against a double recovery. *Junior*, 313 Ga. at 424-425. This rule is also codified in O.C.G.A. § 9-2-4, which states that “[a] plaintiff may pursue any number of consistent or inconsistent remedies against the same person or different persons until he shall obtain a satisfaction from some of them.” *See also Olden Camera & Lens Co., Inc. v. White*, 179 Ga. App. 728, 728 (1986) (holding that a plaintiff may obtain a judgment against two defendants based on the same claim because O.C.G.A. § 9-2-4 does not prohibit joint liability; the purpose of O.C.G.A. § 9-2-4 is to prohibit a “double recovery”). When Georgia appellate courts use the term “double recovery,” they mean to receive satisfaction of the same damages twice.

The Georgia Supreme Court in *Junior v. Graham* recognized that:

An exception to this decisional rule [against double recoveries], of course, is where a greater recovery is authorized by statute. Many examples of this are found in the Georgia Code. See, e.g., OCGA §§ 16-14-6 (c) (providing for recovery of treble damages in a civil suit arising from a violation of Georgia’s RICO Act); 44-5-48 (c) (providing for treble damages for a willful violation of the statute’s provisions pertaining to requirements for deeds conveying interest in real property that has been used as a commercial landfill)

Junior, 313 Ga. at 425.

The Court in *Junior v. Graham* recognized another exception to the general prohibition against a double recovery where attorneys’ fees and expenses of litigation are recovered under O.C.G.A. § 13-6-11 as compensatory damages, and

the same fees are recovered again under O.C.G.A. § 9-11-68 as a sanction. *Id.* at 420-429. The Supreme Court’s allowance of a double recovery hinged upon the distinction between a compensatory damage and a sanction. The Court reasoned that each statute contemplated awards based on different conduct because “damages allowed under [OCGA § 13-6-11] are compensatory,” while “an award of attorney fees and litigation expenses under OCGA § 9-11-68 (b) is properly understood as a sanction.” *Id.* at 425-426.

The General Assembly made it clear that it intended to overturn the Georgia Supreme Court’s holding in *Junior v. Graham* because O.C.G.A. § 9-15-16 states that “no party shall recover the same attorney’s fees, court costs, or expenses of litigation more than once pursuant to one or more statutes authorizing awards of attorney’s fees, court costs, or expenses of litigation, **whether such statute or statutes authorize such awards for compensatory or punitive purposes**” (emphasis added). The General Assembly expressly addressed the distinction made in *Junior v. Graham* between a statute awarding attorney’s fees for a compensatory purpose versus a statute awarding attorney’s fees for a punitive purpose (*i.e.*, a sanction). The Supreme Court’s decision in *Junior v. Graham* is the “old law” or “evil,” and O.C.G.A. § 9-15-16 is the General Assembly’s “remedy.” O.C.G.A. § 1-3-1(a).

The introductory paragraph of Senate Bill 68 states as follows in relevant part regarding the purpose of the Act, but does not provide any further explanation of O.C.G.A. § 9-15-16:

To amend Titles 9, 40, and 51 of the Official Code of Georgia Annotated, relating to civil practice, motor vehicles, and torts, respectively, so as to provide for substantive and comprehensive revision of provisions regarding civil practice, evidentiary matters, damages, and liability in tort actions; . . . to provide for attorney's fees, court costs, and litigation expenses . . . to provide for related matters; to provide for an effective date and applicability; to repeal conflicting laws; and for other purposes.

In other words, no further information regarding legislative intent can be gleaned from the introductory paragraph to Senate Bill 68. The General Assembly did not change the proposed O.C.G.A. § 9-15-16 from the time the legislation was first introduced until it was signed into law.

Governor Kemp, however, issued press releases when he first unveiled the tort reform legislation and again after he signed it into law explaining the intent of O.C.G.A. § 9-15-16. After signing the legislation, Governor Kemp issued a press release on April 21, 2025 stating in relevant part that:

Below are the specific policy areas addressed by the legislation:

. . .

Eliminates Double Recovery of Attorney's Fees: Closes a misused loophole that allowed plaintiff's counsel to recover their fees twice for the same lawsuit. Courts will remain able to award attorney fees—but only once.

Press Release, Governor Brian Kemp, Gov. Kemp Signs Historic Legislation Delivering Commonsense, Meaningful Tort Reform (Apr. 21, 2025)

<https://gov.georgia.gov/press-releases/2025-04-21/gov-kemp-signs-historic-legislation-delivering-commonsense-meaningful> (emphasis added). The Supreme Court's decision in *Junior v. Graham* permitting the "double recovery" of attorneys' fees appears to be the "loophole" referenced by Governor Kemp.

On January 30, 2025, after unveiling the proposed legislation, Governor Kemp made the same statement that the legislation would eliminate the "double recovery" of attorney's fees. Press Release, Governor Brian Kemp, Gov. Kemp Unveils Plan to Tackle Tort Reform and Stabilize Insurance Costs for Hardworking Georgians (Jan. 30, 2025) <https://gov.georgia.gov/press-releases/2025-01-30/gov-kemp-unveils-plan-tackle-tort-reform-and-stabilize-insurance-costs>. Again, Governor Kemp stated that the purpose of O.C.G.A. § 9-15-16 is to prevent a double recovery of attorneys' fees.

Plaintiff does not seek a double recovery of her attorneys' fees and expenses of litigation. Plaintiff's proposed Order on Plaintiff's 9-15-14 Motion subtracts the \$1,100,297.74 that Plaintiff has already recovered out of the remaining assets of the Trust for her reasonable attorneys' fees and litigation expenses. Pursuant to the proposed Order, Plaintiff may only receive a "future additional maximum recovery by Plaintiff for Plaintiff's reasonable attorneys' fees and litigation expenses in this

action of \$892,990.31 from Defendant, Frank F. Pape, Jr., Nicole Jennings Wade, and/or Wade, Grunberg & Wilson, LLC.” The proposed Order makes it impossible for Plaintiff to receive a double recovery of her attorneys’ fees and expenses of litigation. Therefore, O.C.G.A. § 9-15-16 does not bar Plaintiff’s 9-15-14 Motion.

The Retroactive Application of O.C.G.A. § 9-15-16 is Unconstitutional

Even if O.C.G.A. § 9-15-16 was interpreted to bar Plaintiff’s 9-15-14 Motion, the retroactive application of O.C.G.A. § 9-15-16 is unconstitutional under Article 1, Section 1, Paragraph X of the Georgia Constitution because it takes away and impairs Plaintiff’s vested substantive rights.

Section 9 of Senate Bill 68 states that “[i]t is the intention of the General Assembly that all other provisions of this Act shall apply to causes of action pending on the effective date of this Act, unless such application would be unconstitutional.” Consequently, the General Assembly stated its intent for O.C.G.A. § 9-15-16 to apply to causes of action pending on the effective date of the Act.

Article 1, Section 1, Paragraph X of the Georgia Constitution states that “No bill of attainder, ex post facto law, retroactive law, or laws impairing the obligation of contract or making irrevocable grant of special privileges or immunities shall be passed.”

The Supreme Court of Georgia has held as follows regarding retroactive laws:

“Laws prescribe … for the future; they cannot impair the obligation of contracts, nor, ordinarily, have a retrospective operation.” OCGA § 1–

3–5.... But, a statute does not operate retrospectively in its legal sense simply “ ‘because it relates to antecedent facts, ... it [must be] intended to affect transactions which occurred or rights which accrued before it became operative as such, and which ascribe to them essentially different effects, in view of the law at the time of their occurrence.’ ” That is, retrospective operation “ ‘takes away or impairs vested rights acquired under existing laws or creates a new obligation, imposes a new duty, or attaches a new liability in respect to transactions or considerations already past.’ ” But where the statute merely cures defects, enforces existing obligations, or confirms existing rights, it does not impair the substantive rights of the party and is not void.

In summary, legislation which involves mere procedural or evidentiary changes may operate retrospectively; however, legislation which affects substantive rights may only operate prospectively. The distinction is that a substantive law creates rights, duties, and obligations while a procedural law prescribes the methods of enforcing those rights, duties, and obligations.

...

“[T]he legislature may not enact a statute to apply retrospectively in violation of our constitutional provision barring retroactive laws.”

Fowler Props., Inc. v. Dowland, 282 Ga. 76, 77-78 (2007) (citations omitted). See also *Crane Composites, Inc. v. Wayne Farms, LLC*, 296 Ga. 271, 272 (2014).

The Georgia Supreme Court previously held as unconstitutional the retroactive application of O.C.G.A. § 9-11-68, a statute which awards attorneys’ fees incurred in litigation after a party rejects a settlement offer, if certain conditions are met. *Fowler*, 282 Ga. at 78-79. In the *Fowler* case, O.C.G.A. § 9-11-68 became effective during the pendency of the litigation. *Id.* at 77. After trial, the defendant filed a motion for attorney fees and expenses of litigation against the plaintiff pursuant to O.C.G.A. § 9-11-68. *Id.* at 76-77.

Despite the express intention of the General Assembly for O.C.G.A. § 9-11-68 to apply retroactively, the Georgia Supreme Court held that the retroactive application of the statute was unconstitutional pursuant to Article 1, Section 1, Paragraph X of the Georgia Constitution and explained its reasoning as follows:

When Dowland instituted her tort action on December 18, 2002, the possibility that she may be responsible for paying the opposing party's attorney fees and expenses of litigation by rejecting an offer of settlement did not exist because OCGA § 9-11-68 did not take effect until more than three years later. OCGA § 9-11-68(b)(1) does not merely prescribe the methods of enforcing rights and obligations, but rather affects the rights of parties by imposing an additional duty and obligation to pay an opposing party's attorney fees when a final judgment does not meet a certain amount or is one of no liability. By creating this new obligation, the statute operates as a substantive law, which is unconstitutional given its retroactive effect to pending cases like this one.

Id. at 77-78.

See also Hargis v. Dep't of Human Resources, 272 Ga. 617 (2000) (holding that the retroactive application of a statute which extinguished the right to jury trial in a paternity suit unconstitutionally denied the putative father the right to jury trial under Art. 1, § 1, ¶¶ X and XI of the Georgia Constitution because his right to a jury trial vested when he demanded one before the effective date of the statute); *Greenwald v. Sugarloaf Residential Prop. Owners Ass'n, Inc.*, 341 Ga. App. 451 (2017) (holding that O.C.G.A. § 9-11-68 was unconstitutionally applied in an action that was filed before the effective date of the statute, even though the defendants amended their counterclaims after the effective date of the statute); *Chepstow Ltd.*

v. Hunt, 381 F.3d 1077 (11th Cir. 2004) (holding that O.C.G.A. § 18-2-22 gave creditors a vested substantive right to overturn a fraudulent conveyance, which could not be constitutionally extinguished by the repeal of O.C.G.A. § 18-2-22 after the date of the fraudulent conveyance, even though the General Assembly stated its intent to apply the new law retroactively).

Like O.C.G.A. § 9-11-68, O.C.G.A. § 9-15-16 operates as a substantive law because it affects the rights of parties to obtain a double recovery of their attorneys' fees and expenses under two or more statutes. O.C.G.A. § 9-15-16 was not enacted until after Defendant and his counsel engaged in sanctionable conduct and after Plaintiff incurred attorneys' fees and expenses of litigation because of the sanctionable conduct. Plaintiff had a vested substantive right to seek recovery of her fees and expenses pursuant to O.C.G.A. § 9-15-14 long before the enactment of O.C.G.A. § 9-15-16. Plaintiff also asserted her right by filing Plaintiff's 9-15-14 Motion long before the enactment of O.C.G.A. § 9-15-16. O.C.G.A. § 9-15-16 cannot be applied retroactively to take away or impair Plaintiff's vested substantive right to recover her fees and expenses against Defendant and his counsel under O.C.G.A. § 9-15-14.

Plaintiff's Claim Under O.C.G.A. § 9-15-14 Includes Fees and Expenses That Were Not Awarded in the Final Judgment

Even if O.C.G.A. § 9-15-16 barred the award of fees and expenses to Plaintiff under O.C.G.A. § 9-15-14 incurred before the Final Judgment, and even if the

retroactive application of O.C.G.A. § 9-15-16 was constitutional, Plaintiff's 9-15-14 Motion also seeks her reasonable attorneys' fees and expenses incurred after the entry of the Final Judgment. At the hearing, Plaintiff presented evidence that she incurred an additional \$267,874.03 in attorneys' fees and expenses of litigation because of the sanctionable conduct of Defendant and his counsel after the entry of the Final Judgment through March 13, 2025. Mar. 13, 2025 Hr'g Tr. 44-97; Pl.'s Exs. 323-327. At a minimum, Plaintiff has asserted a claim under O.C.G.A. § 9-15-14 that would not be barred by O.C.G.A. § 9-15-16, even if O.C.G.A. § 9-15-16 were interpreted differently, and even if its application to this action were constitutional.

However, because this Court has determined that O.C.G.A. § 9-15-16 does not bar Plaintiff's 9-15-14 Motion, Plaintiff is not barred from seeking an award of her reasonable attorneys' fees and expenses of litigation against Defendant and his counsel, jointly and severally, incurred before and after the Final Judgment.

Signature page of Order Denying Counsel for Defendant Motion to Dismiss, *Lucia A. Persiani v. Paul M. Persiani*, Superior Court of Cobb County, State of Georgia, Civil Action File No. 19101664-49

Dated at Marietta, Cobb County, Georgia, this 30th day of
May, 2025.


G. Grant Brantley, Senior Superior Court Judge
State of Georgia

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