IN THE SUPERIOR COURT OF GWINNETT COUNTY

STATE OF GEORGIA

JAMIE LEE MUENSTER and JAMES H. MUENSTER, Individually and on behalf of their children, CHRISTINE MUENSTER, KIMI MUENSTER, and CINDY MUENSTER,

Plaintiffs,

vs.

BRIAN S. SUH, YONG S. SUH, and CHAI L. SUH,

Defendants,

CIVIL ACTION

FILE NO.: 03-A-01873-4

ORDER

The above-styled matter came before the Court on August 15, 2005 for a hearing on the defendants' *Motion for Attorney's Fees and Costs pursuant to O.C.G.A. § 9-11-68* and the plaintiffs' *Motion to Declare the Statute Unconstitutional*. Upon consideration of the record, applicable law, argument of counsel, and all matters appropriate, the Court finds and rules as follows:

The above-styled complaint for tort damages was filed on February 21, 2003. In 2005 the Georgia Legislature passed certain "tort reform" legislation (Senate Bill 3). The legislation enacted the statute O.C.G.A. § 9-11-68, which became effective upon the Governor's approval and signature on February 16, 2005. The provisions of O.C.G.A. § 9-11-68 became applicable to all causes of action pending on its effective date.

On February 25, 2005 the defendants made a $6,300.00 "offer of judgment" to the plaintiffs pursuant to the newly enacted O.C.G.A. § 9-11-68. The plaintiffs rejected the offer, and the case was tried before a jury on May 2 - 5, 2005. The jury returned a verdict in favor of the plaintiffs in the amount of $2,859.93 and the Court entered a Judgment on the verdict on May 17, 2005. The defendants have moved the Court for an award of attorney's fees and costs pursuant to O.C.G.A. § 9-11-68 because the plaintiffs' verdict was not at least 25% more favorable than the defendants' offer of judgment. The defendants claim that their attorney's fees and costs incurred after the rejection of the offer total $4,590.85 which, when applied toward the plaintiffs' verdict, would leave a remaining balance of $1,730.92 that the plaintiffs owe the defendants.

The Court finds that the application of O.C.G.A. § 9-11-68 and it attorney's fees provision is unconstitutional. By authorizing attorney's fees to be awarded against plaintiffs who assert their right to prosecute their claims in court, secure a judgment in their favor, but fail to win as much damages as they had hoped, the statute violates Ga. Const. Art. I, § 1, ¶ 12, which guarantees that "[n]o person shall be deprived of the right to prosecute . . .[their] cause in any of the courts of this state." No constitutional right is more indispensable than the right of access of the courts, as it would be virtually impossible for an individual to protect or enforce his rights without having "'meaningful access to justice.'" McNeal v. State, 263 Ga. 397, at 398, 435 S.E.2d 47, at 49 (1993). Our Georgia Supreme Court has previously held that "[n]o man is bound to forego litigation at the expense of yielding rights apparently well founded, much less those which prove to be so founded in the end." Tift v. Town, 63 Ga. 237, at 239 (1879).

"Where there is a bona fide controversy . there should be no burdening of one with the counsel fees of the other, unless there has been wanton or excessive indulgence in litigation." *Id.* In the instant case, the Court finds that the jury's verdict, which happened to be less than the defendants' offer of judgment, does not necessarily indicate a wanton or excessive indulgence in litigation by the plaintiffs. The amount that the jury awarded to the plaintiffs as damages may have been based upon a variety of factors, i.e. - the credibility of witnesses and their manner of testifying, performance of respective counsel, as well as the plaintiffs' courtroom presence, etc., not just the relative strengths or weaknesses of the specific claims themselves. The fact remains that the jury decided **in favor** of the plaintiffs in this cause of action, and the plaintiffs should not bear the burden of having to pay for the defendants' attorney's fees and costs just because they exercised their right to present their claims for determination by the enlightened conscience of a jury, particularly when they prevailed on their claims.

Even *losing* parties cannot be compelled to pay the winning parties' attorney's fees absent a showing of either bad faith or misconduct during the course of litigation. *See* Tift v. Town, supra; Trader's Ins. Co. v. Mann, 118 Ga. 381, 45 S.E. 426 (1903); Georgia R. & B. Co. v. Gardner, 118 Ga. 723, 45 S.E. 4001 (1903); Fender v. Ramsey & Phillips, 131 Ga. 440, 62 S.E 527 (1908); West v. Haas, 191 Ga. 569, 13 S.E.2d 376 (1941); Roberts v. Scott, 212 Ga. 87 90 S.E.2d 413 (1955); General Refractories Co. v. Rogers, 240 Ga. 228 239 S.E.2d 795 (1977); Latham v. Faulk, 265 Ga. 107 454 S.E.2d 136 (1995). The principle that a showing of bad faith, misconduct, or wanton or excessive indulgence in litigation is required before a penalty of attorney's fees and costs can be imposed applies with even greater force where, as is the case

here, the party from whom attorney's fees are demanded actually prevailed in their case and were awarded damages for their claims, albeit not as much as they had desired. O.C.G.A. § 9-11-68 ignores this long standing principle of law. The defendants have not alleged, much less established, that the plaintiffs' conduct before or during litigation entitles them to an award of attorneys' fees and costs. To penalize the *winning* parties simply for *not winning enough*, as the statute apparently permits, would effectively chill "the right to prosecute or defend" a cause of action in the courts of this state - a right that is secured and protected from legislative interference by Art. I, § 1, ¶ 12 of the Constitution of the State of Georgia.[1] For the above and foregoing reasons, the Court finds that O.C.G.A. § 9-11-68 is violative of Ga. Const. Art. I, § 1, ¶12 and is, therefore, unconstitutional.

Unlike the offer of judgment/settlement statutes enacted by Congress and the majority of states which apply to all civil cases, O.C.G.A. § 9-11-68 is limited to tort cases. The Georgia statute provides unique and special benefits to tort defendants, while imposing correspondingly unique and special burdens on tort plaintiffs. For these reasons, O.C.G.A. § 9-11-68 may

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[1] Courts in states with "access to the courts" guarantees similar to Georgia's have addressed the effect that attorney fee awards have on litigation. See, e.g., Head v. McCracken, 102 P.3d 670 (Okla., 2004)("attorney fee awards against the non-prevailing party has a chilling effect on our . . . access to courts guarantee."); Patrick v. Lynden Transport, Inc., 765 P.2d 1375 (Alaska, 1998); Hawkins v. City of Jennings, 709 So.2d 292 (La.App. 1998). See also F.D. Rich Co. v. U.S. ex rel. Industrial Lumber Co., Inc., 417 U.S. 116 (1974)("'[O]ne should not be penalized for merely defending or prosecuting a lawsuit.'")(cit. omitted); North Texas Production Credit Association v. McCurtain County National Bank, 222 F.3d 800 (10th Cir., 2000).

constitute a "special law" within the meaning of Ga. Const. Art. III, § 6, ¶ 4 (a). The legislature may enact special laws affecting special classes, but it cannot do so if it has previously legislated in that area by general law nor may it do so if the classification of those affected is unreasonable. The requirement of reasonable classification comes from the equal protection guarantee found in Art. I, § 1, ¶ 2 of the Georgia Constitution. Celotex Corp. v. St. Joseph's Hospital, 259 Ga. 108, 376 S.E.2d 880 (1989).

When the legislature could have enacted a general law (that affects *all* civil litigants) rather than a special law (that affects *only* tort litigants) "the burden of proving that the . . . classification has a reasonable relation to the subject matter of the law and . . . furnishes a legitimate ground for differentiation is upon the party who seeks to uphold the validity of the special laws." Regency Club v. Stuckey, 253 Ga. 583, 324 S.E.2d 166 (1984). In assessing the ostensible need and reasonableness of special laws, Georgia courts have engaged in a more rigorous scrutiny than the "rational basis test" often used in challenges based on equal protection and due process. *Compare* Celotex Corp. v. St. Joseph's Hospital, supra; Pawnmart, Inc. v. Gwinnett County, 279 Ga. 19, 608 S.E.2d 639 (2005)(equal protection challenge); Love v. Whirlpool Corp., 264 Ga. 701 449 S.E.2d 602 (1994)(due process challenge).

The party seeking to uphold the validity of a special law must show that the challenged legislation is "reasonable" in the following respects: 1) that the statute is, in fact, "reasonably related" to the real "needs of the state," Building Authority of Fulton County v. State of Georgia, 253 Ga. 242, 321 S.E.2d 97 (1984); 2) that "the classes included or excluded from [the statute's] general effect are reasonable and not arbitrary," Matthews v. Macon Water Authority, 273 Ga.

436, 542 S.E.2d 106 (2001); and 3) that "the law applies uniformly to the . . . classes of persons or things affected." *id.* In this case, the defendants have not shown, and nothing in the statute's legislative history demonstrates, that Georgia has a need for an offer of judgment/settlement statute, in general, or that O.C.G.A. § 9-11-68 is "reasonably related" to the "needs of the state." The defendants have not shown, and nothing in the legislative history of the statute establishes, that an offer of judgment/settlement statute is needed *only in tort cases*, and that the classes included or excluded from from O.C.G.A. § 9-11-68's general effect are reasonable and not arbitrary. A review of the various offer of judgment/settlement statutes of other states indicates that an overwhelming number of the statutes are applicable to all civil cases, not just *tort* cases.[2] The defendants have not explained, and nothing in the statute's legislative history justifies,

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[2] Most of the offer of judgment/settlement statutues of other states are patterned on Fed.R.Civ.P. 68. *See, e.g.*, Alabama R.Civ.P. 68; Alaska R.Civ.P. 68; Alaska Statute § 9.30.065 (2001); Arizona R.Civ.P. 68; Arkansas R.Civ.P. 68; California Civil Procedure Code § 998 (2002); Colorado Rev.Statutes Ann. § 13-17-202 (2002); Conn. Gen. Statutes Ann. § 52-195 (2002); Del. Code Ann. Tit. VII, § 68 (2002); D.C. R.Civ.P. 68; Fla. Statutes Ann. § 768.79 (2002); Hawaii R.Civ.P. 68;Idaho R.Civ.P. 68; Indiana R.Civ.P. 68; Kansas Civil Procedure Code Ann. § 60-2002 (2001); Kentucky R.Civ.P. 68; Maine R.Civ.P. 68; Mass. R.Civ.P. 68; Michigan R.Civ.P. 2.405; Minn. R.Civ.P. 68; Miss. R.Civ.P. 68; Montana R.Civ.P. 68; Nebraska Rev. Statutes § 25-901 (2001); Nevada R.Civ.P. 68; New Jersey R.Civ.P. 4:58-1 to -3; New Mexico R.Civ.P. 1-068; New York C.P.L.R. 3221 (McKinney 2002); North Dakota R.Civ.P. 68; Ohio R.Civ.P. 68; Oklahoma Statutes Ann. Tit. 12, § 940 (2002); Oregon R.Civ.P. 54; Pennsylvania R.Civ.P. 238; Rhode Island R.Civ.P. 68; South Carolina Statutes Ann. § 15-35-400 (2005); South Carolina R.Civ.P. 68; South Dakota Codified Laws § 15-6-68 (2002); Tenn. R.Civ.P. 68; Utah R.Civ.P. 68; Vermont R.Civ.P. 68; Washington R.Civ.P. 68; West Virginia R.Civ.P. 68; Wisconsin Statutes Ann. § 807.01 (2002);Wyoming R.Civ.P. 68 (2003).

O.C.G.A. § 9-11-68's requirement that tort plaintiffs must meet higher burdens than tort defendants in order to qualify for an award of attorney's fees. Thus, the defendants have not shown that O.C.G.A. § 9-11-68 applies uniformly to the classes of persons affected by it, or that its distinctions between tort defendants and plaintiffs are reasonable and not arbitrary. As O.C.G.A. § 9-11-68's scope is restricted to tort cases only, and because the formula utilized by the statute tilts towards tort defendants by placing a heavier burden on plaintiffs in qualifying for attorney's fees (or avoiding the imposition of attorney's fees), the Court finds that the statute suffers from the same type of infirmities that caused the Georgia Supreme Court in Celotex Corp. v. St. Joseph's Hospital, supra, to unanimously strike down a similar tort "reform" statute as violative of Ga. Const. Art. III, § 6, ¶ 4 (a).

In addition, the Constitution of Georgia prohibits the passage of "retroactive laws." Ga. Const. Art. I, § 1, ¶ 10. A statute which creates a new obligation, or destroys or impairs vested rights, is deemed to be retroactive. A statute may be applied retroactively, however, if the statute is merely procedural and not substantive in nature, i.e. - that it does not destroy or impair substantive rights. DeKalb County v. State, 270 Ga. 776, 512 S.E.2d 284 (1999). The Court finds that O.C.G.A. § 9-11-68 is substantive because it creates rights, duties and obligations for the parties. The statute does not merely prescribe the methods of enforcing those rights and obligations. Although the statute may have some procedural aspects, its primary purpose is to impose the additional obligation on one party to pay the attorney's fees of the other party. The creation of this potentially substantial obligation makes the statute a substantive law which is unconstitutional if given retroactive effect to pending cases. In Minter v. Tyson Foods, Inc., 271

Ga. App. 185, 609 S.E.2d 137 (2004) the Georgia Court of Appeals refused to apply [to an existing case] a newly enacted statute which awarded litigation costs. In upholding the superior court's refusal to award litigation costs, the Court of Appeals recognized that the newly enacted statute was substantive law, not merely procedural law, because it created rights, duties, and obligations with regard to the payment of litigation expenses which was not applicable to the case or available to the parties prior to the new law.

Additionally, the retroactive application of O.C.G.A. § 9-11-68 in this case affects the plaintiffs' fundamental constitutional right to bring and maintain their action in court for determination by a jury. *See* Ga. Const. Art. I, § 1, ¶ 12. "[O]nce a right of action is reduced to a petition, filed as a law suit in a court of competent jurisdiction and parties litigant served, it then becomes a vested right in both the plaintiff and defendant to have said cause tried . . . and such right is not subject to be divested by legislation enacted subsequently to the filing of said action . . . to the detriment of either party." National Surety Corporation v. Boney, 99 Ga. App. 280, at 284, 108 S.E.2d 342 (1959), *affirmed in part and reversed in part on other grounds*, 215 Ga. 271, 110 S.E.2d 406 (1959). The plaintiffs' right to proceed to trial on their tort claims, particularly when substantial discovery and trial preparation has already taken place and significant expenses incurred, should not be destroyed or impaired by subsequent legislation during the pendency of their lawsuit.[3]

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[3] In addition to the effect on the plaintiffs, the statute affects the contractual right of the plaintiffs' attorneys to recover their share of the verdict under their contingency fee contract with the plaintiffs. It has also created the need for the attorneys to expend substantial time and expenses in

The plaintiffs filed their complaint in 2003. The plaintiffs pursued discovery and incurred expenses preparing their case for trial During the pendency of this action the Georgia Legislature changed the law relating to tort litigation. When the plaintiffs filed their complaint their out-of-pocket financial risk was limited to a foreseeable universe of litigation costs, primarily the costs of discovery and obtaining evidence for use at trial. At the time the plaintiffs decided to file their suit, the possibility that they would be liable for the defendants' attorney's fees was not foreseeable. If O.C.G.A. § 9-11-68 is given effect and the defendants' motion for an award of attorney's fees and costs pursuant to said statute is granted, the effect on the plaintiffs' vested right to bring this lawsuit would be substantial. In pursuing their claims, the plaintiffs relied upon the law as it existed when they filed their complaint and incurred considerable expense in reliance upon the law in effect at the time. While this case was pending, the Georgia Legislature passed the "tort reform" legislation (Senate Bill 3) which effectively changed the rules of the game while the game was in progress. When the defendants made their "offer of judgment" pursuant to the new law, the plaintiffs were faced with the unenviable choice of whether to accept the minimal offer from the defendants and abandon years of effort and thousands of dollars invested in litigation costs or proceed with the case while facing the prospect of paying the defendants' attorney's fees in the event they did not win a sufficient judgment. In either case, the plaintiffs faced the possible forfeiture of substantial sums of money. This possibility did not exist at the time the plaintiffs filed suit. The Court finds that

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preparing for the hearing on this motion which was not (and could not possibly have been) contemplated at the time the attorneys entered into the contingency fee contract with the plaintiffs.

O.C.G.A. § 9-11-68 is substantive law, not merely procedural, and its retroactive application in this case is unconstitutional.

The Georgia Legislature apparently recognized that the tort reform legislation (Senate Bill 3) may, upon application, have an unconstitutional effect on litigants. Section 15 of the bill states that the General Assembly intended for certain provisions of the Act (including O.C.G.A. § 9-11-68) to apply to causes of action pending on its effective date "*unless such application would be unconstitutional.*" The lawmakers apparently recognized that previous attempts to apply new statutes retroactively were frowned upon by the courts. In Enger v. Erwin, 245 Ga. 753, 267 S.E.2d 25 (1980) the defendant moved to dismiss the plaintiff's complaint based upon a newly enacted Family and Domestic Relations Law which had superseded the alienation of affection statute upon which the plaintiff's claim was based. The General Assembly had explicitly provided that the abolition of the earlier statute *would apply to any pending proceedings.* The trial court found that, *despite the precatory words of the legislature,* retroactive application of the new statute was unconstitutional and denied the defendant's motion to dismiss. The Supreme Court affirmed the trial court, relying on the general rule that "laws usually may not have retrospective application." *Id.* (Citing Ga Code Ann. § 102-104, now codified as O.C.G.A. § 1-3-5). The Supreme Court held that vested rights giving rise to a substantive claim under a statute cannot be constitutionally extinguished [or impaired] through the retroactive application of legislation, even if the statute states that it was intended to operate retroactively. In enacting Senate Bill 3, the General Assembly recognized that decisions regarding the constitutionality of the provisions of the Act (including O.C.G.A. § 9-11-68) should be left for determination by the

courts on a case-by-case basis. In this case, the Court finds that the application of O C G A. § 9-11-68 would have an unconstitutional retroactive effect of the plaintiffs' vested rights.

The Court notes that the plaintiffs have raised the argument that the entire tort reform legislation passed by the General Assembly (Senate Bill 3), which includes the enactment of O.C.G.A. § 9-11-68, should be declared unconstitutional. The plaintiffs contend that Senate Bill 3 violates Ga. Const. Art. III, § 5, ¶ 3 because it legislates on more than one subject. The Court finds it unnecessary to make a determination as to this issue and refuses to do so.

Upon consideration of the record, argument of counsel, applicable law, and for the above and foregoing reasons, the Court finds that O.C.G.A. § 9-11-68 is unconstitutional. Therefore, the defendants' *Motion for Attorney's Fees and Costs Pursuant to O.C.G.A. § 9-11-68* is DENIED.

IT IS SO ORDERED, this 22nd day of September, 2005, **nunc pro tunc to August 15, 2005.**

Michael C. Clark
Judge Superior Court
Gwinnett Judicial Circuit

cc:
Vincent D. Sowerby, Esq.
LAW OFFICE OF VINCENT D. SOWERBY, P.C.
P.O. Box 539
Brunswick, Georgia 31521-0539

Richard E. Glaze, Jr., Esq.
1291 Riverfall Rd., Suite 100
Lawrenceville, Georgia 30043

Paul L. Groth, Esq.
SHARON W. WARE & ASSOCIATES
2400 Century Parkway, Suite 200
Atlanta, Georgia 30345-3118