

**THIRD DIVISION
BLACKBURN, P. J.,
ADAMS and DOYLE, JJ.**

**NOTICE: Motions for reconsideration must be
physically received in our clerk's office within ten
days of the date of decision to be deemed timely filed.
(Court of Appeals Rule 4 (b) and Rule 37 (b), February 21, 2008)
<http://www.gaappeals.us/rules/>**

March 30, 2010

In the Court of Appeals of Georgia

A09A2105. CITIZENS FOR ETHICS IN GOVERNMENT, LLC
et al. v. THE ATLANTA DEVELOPMENT AUTHORITY et al.

A09A2312. CITIZENS FOR ETHICS IN GOVERNMENT, LLC
et al. v. THE ATLANTA DEVELOPMENT AUTHORITY et al.

A10A1040. CITIZENS FOR ETHICS IN GOVERNMENT, LLC
et al. v. THE ATLANTA DEVELOPMENT AUTHORITY et al.

ADAMS, Judge.

Citizens for Ethics in Government, LLC (“CEG”) and John F. Woodham (“Woodham”) (collectively referred to herein as “Intervenors”)¹ filed these appeals in connection with two bond validation proceedings filed under the Revenue Bond Law, OCGA § 36-82-60 et seq., involving the Atlanta Development Authority (the

¹ Woodham, who is a member of the State Bar, represents himself pro se in this action and also represents CEG. Woodham is the controlling member/manager of CEG, which the Developers assert he formed two days after the State filed its bond validation petitions.

“Authority”), 13th Street Holdings, LLC (“13th Street”) and Mezzo Development, LLC (“Mezzo”) (13th Street and Mezzo collectively referred to herein as the “Developers”).

On October 29, 2008, the district attorney, on behalf of the State of Georgia, filed a Petition and Complaint for Bond Validation pursuant to OCGA § 36-82-75 in each of the two proceedings. The first petition sought to confirm and validate the issuance of taxable lease-purchase bonds by the Authority in an amount of up to \$70 million for a project developed by 13th Street, and the second petition sought the same for bonds in an amount up to \$60 million for a project developed by Mezzo. Each of these projects involved multi-family apartment developments. The Intervenors sought to intervene in each of these proceedings under OCGA § 36-82-77 (a) by appearing at the bond validation hearings on November 17, 2008, and filing complaints in open court. The trial court continued the validation hearings to allow for discovery and to allow the Authority and the Developers to respond to the Intervenors’ complaints.

The December 15 Hearing

The trial court scheduled a status conference on December 15, 2008, and the Intervenors, who had previously filed notices to produce, filed subpoenas in anticipation of that hearing. The Authority and the Developers filed motions to quash

the notices and subpoenas on December 12, 2008, and the trial court heard argument on those motions at the December 15 hearing.

During argument, Cary Ichter, counsel for the Developers, represented that Woodham had phoned Scott Leventhal, president of Tivoli Properties, Inc., the manager of both Developers, on November 19, 2008, two days after the Intervenors filed their complaints. Patricia Roy, outside counsel for the Developers, was also a party to the phone call. Ichter represented that in that conversation, Woodham said he had no issue with the Developers but was prepared to litigate with the Authority all the way to the Supreme Court. According to Ichter, Woodham suggested that the Developers could avoid the costs of this extended litigation if they paid the Intervenors \$1.3 million, or one percent of \$130 million, the amount of the combined bond issuance. These allegations were also included in the motions to quash filed by the Developers and the Authority. Woodham refused to discuss these allegations at the hearing, citing privilege. But Woodham noted that what Ichter “has described is not the nature of what I intended to do” and had Ichter returned his phone calls, Ichter “would know that any discussions that we may have had would have been dramatically different than he has described.”

The trial court granted the motions to quash and sua sponte ordered a continuance of the hearing until January 30, 2009. The trial judge indicated that at that time, 1) he would determine whether the bond validation issue presented strictly a question of law or whether it involved factual issues; 2) if he determined that the matter presented a legal question, he would rule upon the bond validation; 3) if factual issues were presented, he would determine if discovery was necessary; 4) he would consider whether John Woodham's actions warranted sanctions, including attorney fees or a referral to the State Bar; and 5) he would "hear any motions I deem appropriate with respect to this case." The judge cautioned Woodham to prepare for those issues. This hearing was subsequently re-scheduled for February 27, 2009.

First Motion to Recuse

Meanwhile, on December 19, the Intervenor filed a motion to recuse the trial judge. The motion asserted, inter alia, that the trial judge should be recused because he had allowed Ichter "to make a series of grossly inflammatory remarks in open court" over the Intervenor's objection at the December 15 hearing. At the trial judge's request, the clerk of court randomly assigned the motion to another judge for consideration. After reviewing the motion with supporting affidavit and briefs, "the entirety of the clerk's file" and the transcript of the December 15 hearing, the assigned

judge issued an order on January 9, 2009, denying the motion and finding that the Intervenor had failed to establish any ground for recusal. The Intervenor apparently did not seek reconsideration or permission to appeal that order.²

Anti-SLAPP Motions

Additionally, on December 20, 2008, Woodham sent Ichter a letter invoking the Anti-Strategic Lawsuits Against Public Participation (“anti-SLAPP”) statute, OCGA § 9-11-11.1. The letter requested verification of the motions to quash under that statute, as follows:

To the extent the foulmouthed invective set forth in your Motions to Quash filed December 15, 2008 . . . purports to set forth or assert a claim against Intervenor Parties or the undersigned counsel, Intervenor Parties and the undersigned hereby bring to your attention that the verifications required under OCGA § 9-11-11.1 (b) are missing.”

On February 25, over two months after sending this letter and two days before the scheduled February 27 hearing, the Intervenor filed Motions to Strike and To Dismiss with Prejudice under OCGA § 9-11-11.1 (d) in each case. Each motion stated

² We note that the parties chose not to provide this Court with the full record on appeal, and instead each side designated or requested this Court to order that certain portions of the file below be included in the record on appeal. Accordingly, the filings did not come to us in chronological order and we are left with something of a piecemeal view of the proceedings below.

in underlined type that “[t]he filing of this Motion automatically stays, by operation of law, all pending discovery and hearings in this proceeding.” The motions asserted that the Developers and their counsel made “certain slanderous allegations and claims against Intervenors” in their earlier motions to quash. The Intervenors contended that the motions to quash should have been verified under OCGA § 9-11-11.1 (b), and the Developers failed to do so.

The next day, the Developers’ attorneys e-mailed the trial court to announce that they were ready to proceed with the February 27 hearing and to request the court to confirm that the parties were required to appear at that hearing, notwithstanding the Intervenors’ “11th Hour filings.” The trial court replied by e-mail to all parties, that they were “required to appear at the bond validation hearing scheduled for tomorrow, 2/27/2009, at 9 a.m. . . .” Woodham responded that the February 27 hearing was stayed under OCGA § 9-11-11.1, and the “Intervenors will not be attending any hearings which have very clearly been stayed by operation of law.”

February 27 Hearing

The hearing took place as scheduled the next day with the Authority and the Developers, and their respective counsel in attendance, but without the Intervenors. The trial court noted at the beginning of the hearing that the Intervenors were not

present despite the fact that the hearing was noticed “at least 30 days ago,” and again the previous evening. The court also noted that the Intervenors had filed motions based upon the Anti-SLAPP proceeding, which they contended stayed the hearing, but the trial court found the motions to be “completely meritless” and denied them from the bench. The trial court found, therefore, that no stay applied, and the hearing should go forward.

The trial court then heard evidence from the Developers in connection with the court’s consideration of sanctions against the Intervenors. Scott Leventhal testified about his telephone conversation with Woodham in November 2008, and the Developers presented a recording and transcript of that conversation. Leventhal testified that Woodham made multiple calls to his office asking to speak to an attorney who was not bond counsel, and would not speak to Leventhal without such alternate counsel. Woodham said that he did not wish to speak with Leventhal’s bond counsel because bond attorneys did not find him credible. Leventhal contacted attorney Roy at her office and the parties engaged in a three-way conference call, with each party at a separate location.³

³ Ichter represented that before speaking to Roy and Leventhal, Woodham extracted a promise from Roy that she would not record the conversation. While Roy did not record the phone call, unbeknownst to her, Leventhal did record the call and

Leventhal testified that during that conversation, Woodham said that he did not have a problem with the Developers and that he did not fault them for getting into the deals offered by the Authority, but Woodham said he criticized the Authority for offering such deals. He noted that if no one intervened in the validation process, such deals are automatically validated by the courts. But Woodham emphasized several times that he had been involved in a prior bond validation proceeding, which he had taken to the Supreme Court. He did not mind taking any case that far, and he did so “out of the taxpayers’ perspective.” Woodham said that he was not looking for anything from the Developers, but he was prepared to litigate this matter with the Authority “all the way to the Supreme Court.” Nevertheless, Woodham suggested that a possible resolution, to avoid the attorney fees involved in such litigation, would be for the Developers to pay the Intervenors one percent of the bond issuance, which would total \$1.3 million. He reiterated, “if you guys want to prevent [litigation to the Supreme Court] from happening, you have a way out, and I just suggested it.”

Attorney Ichter also questioned Leventhal about a letter Woodham sent on December 17, 2008, addressing the allegations Ichter raised at the December 15 hearing. Ichter read Woodham’s statement from the letter that if either Roy or Ichter

it was his recording that was introduced into evidence.

had returned Woodham's e-mails or phone messages they would have learned that he was asking for .1 percent, not one percent, of the bond value and that he was intending that such funds be paid in the form of a donation to a homeless shelter. Leventhal testified, however, that Woodham never made any reference to .1 percent of the bond issuance, nor did he ever mention any donation to a homeless shelter. Instead, when Roy and Leventhal specifically asked Woodham to whom the one percent payment should be made, he replied "to the Intervenors."

The trial court found that Leventhal's testimony was credible and the court relied upon this uncontroverted testimony in reaching a decision, while the recording of the phone call "had very little bearing on the court." The trial court found that Woodham had handled the matter "in an unethical manner" because he admitted that the Developers had done nothing wrong, but still solicited a payment to make the litigation "go away." The trial court indicated that it would refer the matter to the State Bar for investigation and ruled that Woodham pay the litigation costs and attorney fees of both the Authority and the Developers. The trial court further dismissed the Intervenors' complaints and granted the bond validations after hearing argument and testimony on the issue.

March 26 Order

On March 26, 2009, the trial court entered a written order, prepared by the Developers' attorneys, which denied the Interveners' Motions to Strike and Dismiss under OCGA § 9-11-11.1, nunc pro tunc as of February 27.

Second Motion to Recuse

Approximately one month later, on April 21, 2009, the Interveners filed a second motion to recuse. That motion cited the first recusal motion and additionally asserted that the trial judge had held "one or more unlawful [ex parte] hearings" in violation of the stay provisions of OCGA § 9-11-11.1 (d). In particular, the Interveners took issue with the judge's statement at the February 27 hearing that "It [becomes] clear to the court [that . . .] this was an unethical and perhaps illegal way to conduct business This is what gives lawyers a bad name. [. . .] This is why they have jokes about lawyers outside [of the courtrooms.]"⁴ The Interveners asserted that these remarks demonstrated that the trial judge "has stepped into the role of prosecutor and is not able to act as a neutral arbiter in this matter." The Interveners also objected to a proposed amendment submitted by attorney Roy to a proposed final

⁴The bracketed changes indicate differences between the quote as recited in the motion and the quote as transcribed at the hearing.

order submitted earlier. That amendment proposed a ruling that the Intervenors could not file any lawsuit or intervene in any other bond validation proceeding until they presented an affidavit showing that they had paid the attorney fees and litigation costs awarded in this case.

May 11, 2009 Hearing and May 8, 2009 Order

In response, the trial court ordered the parties to attend a hearing on May 11, 2009. At the hearing, the trial court distributed a "Final Order" entered May 8, 2009, imposing sanctions against the Intervenors, including the dismissal of their complaints and payment of attorney fees and costs. Additionally, the trial court adopted the Developers' proposed amendment requiring payment of attorney fees before the Intervenors could file any new lawsuit. The order also validated both bond issues.

The trial court then heard argument from the parties on Woodham's Second Motion to Recuse. Woodham, who filed emergency motions to disqualify the trial judge, for continuance and for assignment to another judge the morning of the hearing, challenged the trial judge's authority to hear the second motion to recuse. In order not to waive this objection, Woodham refused to argue the merits of his recusal motion. He also objected to the issuance of a Final Order until his Motion to Recuse was decided.

The Developers and the Authority countered that under Rule 25.3 of the Uniform Rules of the Superior Court, a trial judge is first required to determine if the motion to recuse was timely and substantive before referring it to another judge. They asserted that the Intervenors' motion was both substantively flawed and untimely, and they asked that the motion be denied. They also asked the judge, "out of an abundance of caution," to withdraw its May 8, 2009 final order, which was issued while the Motion to Recuse was pending, and to issue another order after denying the Motion to Recuse.

The trial court denied the motion to recuse as untimely. The trial judge further stated he would "re[-]sign" the May 8 order "out of [an] abundance of caution." The judge also warned Woodham against filing any more "frivolous" motions to recuse, which the court would find contemptuous.

The First Appeal on May 11

Woodham filed a Notice of Appeal the same day, May 11, 2009, from the trial court's May 8 order and the March 26 order denying the Anti-SLAPP motions ("First Appeal").

May 13, 2009 Order

Subsequently, on May 13, 2009, the trial court signed a written order 1) denying the second motion to recuse as untimely; 2) noting that the court had vacated and withdrawn the May 8 order at the May 11 hearing and withdrawing and vacating that order in writing as of May 11; 3) denying the Intervenors' emergency motions to disqualify, for continuance and for re-assignment; 4) denying the Intevenors' request for a Certificate of Immediate Review; 5) ordering Intervenors not to file any other motions to recuse or any other pleadings concerning prior proceedings; and 6) setting a hearing on the reasonableness of the attorney fees requested by the Developers and the Authority for June 12, 2009.

May 21, 2009 Orders

On May 21, 2009, the trial court issued an order granting the motion of the Developers and the Authority to dismiss the First Appeal because the March 26 order was not a final, appealable order, and the May 8 order had been withdrawn and vacated prior to the appeal.

That same day, the trial court also signed a Final Order imposing sanctions and validating the bonds.

Emergency Motion to Court of Appeals

On May 29, 2009, however, the Intervenors filed an emergency motion with this Court pursuant to Ct. App. R. 40 (b), to stay further proceedings by the trial court pending their appeal of the May 8 order in the First Appeal. This Court denied the motion on June 12, 2009, finding on the basis of the trial court's assertion in the May 13 order that the trial court had sustained the Intervenors' objection to the May 8 order at the May 11 hearing, that the court had withdrawn and vacated the May 8 order at that time, which ruling was then formalized in the May 13 order. The Intervenors subsequently moved for reconsideration of that decision, arguing that a transcript of the May 11 hearing would demonstrate that the trial court actually did not withdraw and vacate the May 8 order at the May 11 hearing. This Court denied the motion for reconsideration on June 24, 2009, noting that the trial court's May 13 order was entitled to the presumption of regularity and Intervenors had not demonstrated anything to rebut that presumption.

The Current Appeals

The Intervenors filed a second Notice of Appeal on May 26, 2009 from 1) the May 21, 2009 Final Order; 2) the May 21, 2009 Order dismissing the May 11, 2009 Notice of Appeal; and 3) the May 13, 2009 Order, denying, inter alia, the second

motion to recuse and withdrawing and vacating the May 8 order. That appeal is docketed as Case No. A09A2105.

The trial court subsequently held an evidentiary hearing on June 30, 2009 to determine the amount of attorney fees. The trial court issued an order on July 6, 2009, awarding the Developers attorney fees and expenses in the amount of \$132,705.97 and awarding the Authority attorney fees and expenses in the amount of \$303,141.89. The Intervenors appealed that order and in Case No. A09A2312, they argue that their May 26 Notice of Appeal divested the trial court of jurisdiction to rule on the attorney fees issue; that the trial court failed to follow proper procedure at the June 30 hearing; and that the award is not supported by law or evidence.

On September 8, 2009, the Developers and the Authority filed a motion for supersedeas bond, and on November 4, 2009, the trial court granted that motion and ordered the Intervenors to post bond in the amount of \$479,432.64, which represents the full amount of attorney fees and costs awarded against them, together with costs and interest. The Intervenors appeal that order in Case No. A10A1040 asserting that their May 26 Notice of Appeal divested the trial court of jurisdiction to enter that order.

Case No. A09A2105

1. The Intervenors contend that the trial court erred in failing to recognize that the February 27 hearing was stayed by operation of law under OCGA § 9-11-11.1 (d)⁵ upon the filing of their motions to strike. They further argue that the trial court violated their due process rights in holding the hearing ex parte without notifying the Intervenors that their motions to strike would be argued at that time.

The General Assembly adopted the anti-SLAPP statute in order “to encourage participation by the citizens of Georgia in matters of public significance through the exercise of their constitutional rights of freedom of speech and the right to petition government for redress of grievances.” OCGA § 9-11-11.1 (a). “With the anti-SLAPP statute, the General Assembly sought to prevent the chilling effect that abusive lawsuits would have on the valid exercise of these rights.” (Citation omitted.) *Hawks v. Hinely*, 252 Ga. App. 510, 512 (1) (556 SE2d 547) (2001). Thus whenever anyone files a “claim” arising from a protected act as defined in the statute, he must provide

⁵ That statute provides in pertinent part that “[a]ll discovery and any pending hearings or motions in the action shall be stayed upon the filing of a motion to dismiss or a motion to strike made pursuant to subsection (b) of this Code section.” OCGA § 9-11-11.1 (d)

a detailed verification of that claim or the claim may be stricken. Id.; OCGA § 9-11-11.1 (b).

The Intervenors' motions to strike asserted that the Developers should have provided OCGA § 9-11-11.1 (b) verifications in connection with the motions to quash argued at the December 15 hearing. Although those motions made allegations about Woodham's statements in the November 19 phone call, they asserted no claims against the Intervenors. Rather, the motions were defensive in nature, merely seeking relief from the obligation to produce documents. Although the allegations in the motions prompted the trial court to set a hearing to consider sanctions against the Intervenors, that action was taken by the trial court sua sponte and not at the Developers' request. The Intervenors have provided no authority, and we have found none, to support their assertion that the Developers had an obligation to provide a 9-11-11.1 (b) verification of a defensive motion. Under these circumstances, in the absence of any claim against the Intervenors, the anti-SLAPP statute did not apply. The trial court was therefore entitled to find that the motions to strike were meritless on their face and that no stay barred the scheduled hearing.⁶

⁶ Moreover, the Intervenors first raised the issue of verification under the anti-SLAPP statute on December 20, 2008, but waited over two months later, until just two days before the scheduled hearing, to file their motions. Accordingly, the trial court

And even if the Developers' subsequent presentation of evidence and argument at the February 27 hearing could be construed as a "claim" for sanctions, the anti-SLAPP statute does not apply to a claim based upon abusive litigation. The coverage of the anti-SLAPP statute extends to "abusive litigation that seeks to chill exercise of certain First Amendment rights. . . . It plainly does not extend to protecting those who abuse the judicial process." (Citation and punctuation omitted.) *EarthResources v. Morgan County*, 281 Ga. 396, 401 (4) (638 SE2d 325) (2006) (holding anti-SLAPP statute inapplicable to claim for OCGA § 9-15-14 attorney fees filed after plaintiff's claims found meritless). *Id.*

That the hearing turned out to be *ex parte* was attributable solely to Woodham's failure to appear as directed by the trial court. This failure was not induced by any acts or conduct of the Developers or the court. Woodham was on notice that the court intended to proceed in spite of his claimed stay, yet he chose not to appear, not even to make a limited appearance to argue the stay. Thus Woodham was not denied the opportunity to be heard; rather, he chose not to take advantage of the opportunity

also would have been authorized to conclude the motions were interposed merely to delay the proceedings.

presented. “[I]nduced error cannot form the basis of a due process claim. [Cit.]” *Wallace v. State*, 294 Ga. App. 159, 161 (2) (669 SE2d 400) (2008).⁷

In any event, the Intervenors have not pointed us to anything in the record indicating that they asked for reconsideration of the trial court’s February 27 ruling, requested an opportunity to be heard on the merits of their motions to strike, or raised their due process arguments before the trial court.⁸ Thus they have not pointed us to any ruling by the trial court on the issue of due process, notice or the ex parte hearing. The failure to obtain a ruling by the trial court on these issues waives their consideration on appeal. *The John Hardy Group v. Cayo Largo Hotel Assoc.*, 286 Ga. App. 588, 589 (1) (649 SE2d 826) (2007); *McCurry v. Harding*, 270 Ga. App. 416, 419-420 (3) (606 SE2d 639) (2004).

2. We turn next to the Intervenors’ argument that the First Appeal divested the trial court of jurisdiction and thus all subsequent orders, including the order

⁷ We note, moreover, that OCGA § 9-11-11.1 (d) provides that the trial court may hold a hearing, “on noticed motion and for good cause shown . . . notwithstanding [the stay provisions of] this subsection.”

⁸ Instead, the Intervenors cited the ex parte hearing as a basis for their second recusal motion, the denial of which they do not appeal in this case.

dismissing that appeal, are null and void.⁹ In the First Appeal, filed May 11, 2009, the Intervenors appealed, inter alia, from the “Final Order” entered on May 8. They argue that supersedeas attached when they paid the court costs on May 12,¹⁰ divesting the trial court of jurisdiction to enter its May 13 order. Although that order vacated and withdrew the May 8 Order “as of May 11, 2009,” the Intervenors assert that the trial court actually did not vacate the May 8 order at the May 11 hearing, and thus it lacked the power to enter a written order nunc pro tunc dating back to that date. They assert the May 8 order remained in place and the First Appeal was valid. We must determine, therefore, whether the trial court vacated the May 8 order at the May 11

⁹ As noted above, this argument was the subject of the Intervenors’ emergency motion to this Court seeking a stay in June 2009. Under Ct. App. R. 40 (b), this Court has the authority to issue an emergency order or to give “such direction to the trial court as may be necessary to preserve jurisdiction of an appeal or to prevent the contested issue from becoming moot.” This Court’s finding that the Intervenors failed to establish a ground for emergency relief in June 2009 does not prevent us from revisiting the merits of their argument in this appeal. Notably, the appellate record now contains a transcript of the May 11 hearing, which apparently was not available to the Court at the time of the emergency motions.

¹⁰ See OCGA § 5-6-46 (a) (“in civil cases, the notice of appeal . . . shall serve as supersedeas upon payment of all costs in the trial court by the appellant.”).

hearing and thus whether the May 13 order simply memorialized that ruling nunc pro tunc or whether it represented a new ruling by the trial court.¹¹

“A court’s power to amend nunc pro tunc is the power to correct inadvertent errors or omissions in the record to reflect the truth of what happened; it does not include the power to supply judicial omissions so as to include what a court might or should have decided, but did not actually so decide.” (Citation and punctuation omitted.) *Paine v. Nations*, 301 Ga. App. 97, 100 (2) (686 SE2d 876) (2009). Accordingly, “[t]he purpose of entering an order nunc pro tunc is to record some previously unrecorded action actually taken or judgment actually rendered. It may not be used to supply an order not yet made by the court.” (Citations and punctuation omitted.) *Andrew L. Parks, Inc. v. SunTrust Bank*, 248 Ga. App. 846, 848 (545 SE2d 31) (2001).

At the May 11 hearing, the Intervenor’s “objected to a final order being entered prior to the motion to recuse hearing “ relying upon U. Sup. Ct. R. 25.3, which provides that

¹¹ Although the Intervenor’s take issue with the fact that the May 13 order does not use the phrase “nunc pro tunc,” we find no merit to their argument on this point. The May 13 order does vacate and withdraw the May 8 order “as of May 11, 2009,” which has the same effect as an order issued nunc pro tunc.

[w]hen a judge is presented with a motion to recuse, or disqualify, accompanied by an affidavit, *the judge shall temporarily cease to act upon the merits of the matter* and shall immediately determine the timeliness of the motion and the legal sufficiency of the affidavit, and make a determination, assuming any of the facts alleged in the affidavit to be true, whether recusal would be warranted.

(Emphasis supplied.) The opposing parties also expressed “concern” regarding the trial court’s entry of the May 8 order while the motion to recuse was pending and requested “out of an abundance of caution” that the court withdraw the May 8 “Final Order.”

After denying the motion to recuse, the trial court recognized that “there was another issue with respect to the order . . . that the court signed.” The trial court explained:

At the time that I signed the order, I was aware of the motion to recuse. I was also aware of the dates in which the motion to recuse had been filed. And at that point in time it was very easy to look at the date stamped on the motion and see that it was untimely.¹² Very simple for a

¹² Under U. Sup. Ct. R.25.1, a recusal motion accompanied by an affidavit must be filed and presented to the judge:

not later than five (5) days after the affiant first learned of the alleged grounds for disqualification, and not later than ten (10) days prior to the hearing or trial which is the subject of the recusal or disqualification,

court to do. That is a threshold issue that I had the right to determine, and I did that. And so I went ahead and signed the order because based [up]on the filing[] itself, the motion was untimely. That being said, out of [an] abundance of caution I will happily re[-]sign the [order]. That's not a problem. So I will do that.

While this pronouncement does not expressly state that the trial court was withdrawing and vacating the May 8 order, we find that such a ruling is implicit in the trial court's statement that he would re-sign the order. Obviously, there would be no need to sign a new order if the May 8 order remained in effect. Moreover, this pronouncement must be considered in its context. The Intervenors objected to the May 8 order in light of the pending recusal motion, and the Developers also requested that the trial court withdraw that order "out of an abundance of caution." The trial court echoed those words in stating that he would re-sign the order. Thus it appears that the trial court was granting the relief the parties requested.

unless good cause be shown for failure to meet such time requirements.

The motion and affidavit cited alleged grounds occurring at either the December 15, 2008 or February 27, 2009 hearings, and the second motion to recuse was not filed until April 21, 2009, well outside these time requirements. Although the motion also took issue with the proposed amendment filed by the Developers, which was filed within the time period, the motion did not explain how that document provided a ground for the judge's recusal.

Accordingly, as we interpret the trial court's ruling, the May 8 order was withdrawn at the time of the hearing,¹³ and the court planned to sign a new order in the future. Under these circumstances, the Intervenor's subsequent appeal of that order was without effect and the trial court retained jurisdiction to enter its May 13 order nunc pro tunc. See 5 Ga. Procedure: Verdicts and Judgments § 6:15 ("An entry nunc pro tunc functions to correct the record to reflect a prior ruling made in fact but defectively recorded.")

3. The Intervenor also raise a number of issues in connection with the trial court's imposition of sanctions. They first assert that the trial court erred in awarding attorney fees under OCGA § 9-15-14 (b) without proper notice and a hearing. "Before attorney fees may be awarded against a party under OCGA § 9-15-14 (b), the party must be given notice that an award of attorney fees under that Code section is under consideration so that he or she has an opportunity to challenge the basis on which the fees are assessed." (Punctuation and footnote omitted.) *Wall v. Thurman*, 283 Ga. 533, 534 (3) (661 SE2d 549) (2008).

¹³ Accordingly, the Intervenor's argument on appeal that the trial court entered the May 8 order in violation of U. Sup. Ct. R. 25.3 is moot.

In this case, the trial court gave the Intervenors ample notice of its intent to consider the imposition of sanctions based upon allegations that Woodham sought \$1.3 million in personal gain to drop his public interest lawsuit, even though he acknowledged that the Developers had done nothing wrong. At the December 15 hearing, the trial court specifically told Woodham to be prepared for the issues of bond validation and the possibility that sanctions, including attorney fees and a bar referral, might be imposed based upon Woodham's conduct. Woodham knew that this issue of sanctions was raised upon the court's own motion, and thus no other motion was required to give him notice that attorney fees could be imposed against the Intervenors. The fact that the hearing was continued from January 30 to February 27 does not alter this notice. Neither does the court's e-mail referring to a bond validation hearing, as Woodham knew that the trial court intended to take up sanctions at the same hearing it considered the bond validation.

And although the trial court did not specifically state it was considering an award of attorney fees under OCGA § 9-15-14 (b), we find that the Intervenors received sufficient notice of the potential sanctions. A trial court may award fees under OCGA § 9-15-14 (b) if it finds:

(1) that an attorney or party brought or defended an action, or part of an action, that lacked substantial justification; or (2) that the action, or part of it, was interposed for delay or harassment; or (3) that an attorney or party unnecessarily expanded the proceedings by other improper conduct. The statute defines “lacked substantial justification” as, “substantially frivolous, substantially groundless, or substantially vexatious.”

(Footnote omitted.) *MacDonald v. Harris*, 266 Ga. App. 287, 288 (597 SE2d 125) (2004). Thus an award under OCGA § 9-15-14 (b) involves consideration of “the conduct of the party against whom an award is sought, and the conduct of the party’s counsel . . . along with the impact of that conduct on the attorney fees incurred by the opposing party.” (Citation omitted.) *Williams v. Cooper*, 280 Ga. 145, 147 (1) (625 SE2d 754) (2006).

Here, the Intervenors were on notice that the trial court would be considering the imposition of attorney fees on the court’s own motion based upon evidence of Woodham’s actions. Thus they had sufficient notice to challenge the basis for the attorney fee award in this case. Compare *Wall v. Thurman*, 283 Ga. at 534 (3) (award reversed where attorney did not receive notice that trial court was considering an award of attorney fees against him under OCGA § 9-15-14 award *or a hearing on that issue*); *Williams v. Cooper*, 280 Ga. at 147 (1) (attorney fee award reversed where

divorce hearing under OCGA § 19-6-2 imposing fee award based upon financial situation gave no reasonable opportunity to challenge award under OCGA § 9-15-14 (b)).

Although Woodham was on notice that the imposition of attorney fees based upon his conduct would be considered at the February 27 hearing, he made the conscious choice not to attend that hearing. Woodham therefore rejected the opportunity to be heard on this issue. Under these circumstances, we find that the Intervenor received adequate notice and opportunity to be heard as to the appropriateness of an attorney fee award in this case.

4. The Intervenor also contend that the trial court erred in awarding attorney fees based upon a finding that Woodham had violated the Rules of Professional Conduct. But the May 21 "Final Order" states that the trial court was awarding fees under its inherent power and under OCGA § 9-15-14 (b). The trial court concluded that the intervention complaints had been filed for "an improper purpose" and in "bad faith." Thus the trial court did not award attorney fees upon a finding of unethical conduct. Although the trial court was disturbed by Woodham's conduct and stated at the February 27 hearing that it was unethical and possibly illegal, the Final Order demonstrates that the court's reliance upon that finding was confined to its decision

to refer the matter to the State Bar of Georgia for further investigation. We find no error. Compare *Stevens v. Thomas*, 257 Ga. 645, 646-647 (1) (361 SE2d 800) (1987) (attorney fee award reversed where based solely and expressly upon attorney's violation of disciplinary rules).

5. The Interveners further argue that the trial court erred in failing to make the findings necessary to support an award under OCGA § 9-15-14 (b). They also assert that the trial court erred in improperly awarding a lump sum of attorney fees.

A trial court is required "to make express findings of fact and conclusions of law as to the statutory basis" for an award of attorney fees under OCGA § 9-15-14. *Bailey v. McNealy*, 277 Ga. App. 848, 849 (1), 627 SE2d 893 (2006). The Final Order here recites the facts surrounding Woodham's suggestion that \$1.3 million would make the intervention go away and his subsequent attempt in a letter to re-characterize that demand as a donation of .1 percent of the bond issue to a homeless shelter. Based upon these facts, the trial court found that the "Interveners intervened in these bond validation proceedings for an improper purpose and, thus, acted in bad faith by demanding a \$1.3 million payment from parties against whom Interveners had no legal claims, as a condition for dismissing [their] Complaints in Intervention." But OCGA § 9-15-14 (b) does not specifically authorize an award of attorney fees based

upon a finding that litigation was instituted for an “improper purpose”¹⁴ or a finding that a party has acted in bad faith.¹⁵

In *In re Serpentfoot*, 285 Ga. App. 325, 328 (4) (a) (646 SE2d 267) (2007), the defendant moved for attorney fees on the ground that the plaintiff’s “conduct in seeking [a] name change was ‘frivolous and an obvious attempt to use the name change statute for wrongful personal pursuits . . .,’” but did not specify a statutory basis for the motion. The trial court found that the plaintiff’s request for a name change was based upon “improper motives” and was made for “improper purposes.” *Id.* The trial court also found that appellant “has been unreasonably and stubbornly litigious and has been frivolous in her conduct in these proceedings.” *Id.* The trial court based its fee award to the defendant on these findings without specifying the statute it relied upon for that award. *Id.*

¹⁴ Rule 11 of the Federal Rules of Evidence authorizes the award of attorney fees based upon such a finding. We note that this Court has found that “Rule 11 and OCGA § 9-15-14 are analogous. Rule 11 authorizes the court in which an action is brought to award reasonable attorney fees and other expenses where pleadings or motions are presented for an improper purpose or where claims or defenses are without legal or evidentiary support.” (Footnote omitted.) *Great Western Bank v. Southeastern Bank*, 234 Ga. App. 420, 422 (507 SE2d 191) (1998). See also Fed. R. Evid. R. 11 (b) (1)-(4).

¹⁵ OCGA § 13-6-11 authorizes an award upon a finding of bad faith.

On appeal, this Court noted that while OCGA § 13-6-11 authorized an award of attorney fees for being stubbornly litigious, that statute generally only authorizes a fee award for a plaintiff. *Id.* The Court also found that the trial court's order did not contain the elements required for an award of attorney fees under OCGA § 9-15-14 (b), and determined that "the issue of attorney fees must be remanded for an explanation of the statutory basis for the award and any findings necessary to support it." (Punctuation and footnote omitted.) *Id.* at 329 (4) (a).

Here, although the trial court stated that it relied upon OCGA § 9-15-14 (b), the court failed to specify a ground for awarding attorney fees under that statute, but rather cited standards found in other comparable statutes. Although the trial court found that Intervenors' complaints were filed for an improper purpose and the Intervenors acted in bad faith, the court did not enter a finding that the complaints lacked substantial justification, that they were interposed for delay or harassment or that Woodham unnecessarily expanded the proceedings by his conduct as required under OCGA § 9-15-14 (b). Accordingly, we vacate the portion of the May 21 Final Order awarding attorney fees and remand "for an explanation of the statutory basis of the award and any findings necessary to support it." *Id.* Cf. *Moore v. Moore-McKinney*, 297 Ga. App. 703, 711 (4) (678 SE2d 152) (2009) (where order did not

cite specific statute, finding at hearing that party had expanded the litigation by “mak[ing] it more difficult than it ought to be” did not support OCGA § 9-15-14 award).¹⁶

Further, the Intervenors are correct that under OCGA § 9-15-14 (a) or (b), the trial court “must limit sanctions to those fees incurred because of [the] sanctionable conduct.” *Harkleroad v. Stringer*, 231 Ga. App. 464, 472 (6) (499 SE2d 379) (1998). Because we have vacated the award of attorney fees, however, we need not reach the issue of whether the trial court’s award of attorney fees was proper in that regard.

6. For the same reason, we need not reach the Intervenors’ argument that the trial court erred in requiring them to furnish an affidavit showing payment of such fees before initiating another action in the trial court.

7. The Intervenors also argue that the trial court erred in striking their complaints and dismissing them as parties as a sanction for Woodham’s conduct. In support of that sanction, the trial court found that “Intervenors were notified and admonished at the December 15, 2008 hearing that the Court would conduct an

¹⁶ We are aware that the trial court also purports to rely upon its “inherent powers” in awarding attorney fees. But to the extent that the trial court relied upon the express authority of OCGA § 9-15-14 (b), it must find a sanctionable basis under that statute for the imposition of fees.

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FILED IN OFFICE

IN THE COURT OF APPEALS
STATE OF GEORGIA

SEP 14 2009

CLERK, COURT OF
APPEALS OF GEORGIA

CITIZENS FOR ETHICS IN)
GOVERNMENT, LLC ET AL.,)

Appellants,)

v.)

CASE NO. A09A2312

THE ATLANTA DEVELOPMENT)
AUTHORITY ET AL.,)

Appellees.)

APPELLANTS' BRIEF

Appellants Citizens for Ethics in Government, LLC and John F. Woodham ("Appellants") file this Appellants' Brief and show this Honorable Court of Appeals as follows:

Part I: STATEMENT OF THE CASE - PROCEDURAL BACKGROUND

This is a companion case to Case No. A09A2105, now pending before this Court. On June 30, 2009, the trial court conducted a hearing (Supp. R. 8/18/09, V. 2, MT. 6/30/09) to determine the amount of fees purportedly awarded under O.C.G.A. § 9-15-14(b) in its May 2009 Final Order. Late on the afternoon of June 29, 2009, Appellants received various affidavits and attached billing statements from law firms representing the various Appellees. Appellants received the Affidavit of Matthew J. Calvert of the firm of Hunton & Williams representing the

Atlanta Development Authority (“ADA”). (8/18/09 Supp. R., p. 135) Appellants received the Affidavit of Gregory M. Evans of the Law Office of Gregory M. Evans, PC, also representing the ADA. (8/18/09 Supp. R., p. 119) Appellants received the Affidavit of Erika C. Birg of the firm of Seyfarth Shaw (8/18/09 Supp. R., p. 207) representing the developers 13th Street Holdings, LLC and Mezzo Development, LLC (together, the “Developers”). Appellants further received the Affidavit of Cary Ichter of Adorno & Yoss, also representing the Developers. (8/18/09 Supp. R., p. 231)

As more specifically set forth below, the fees sought were “lump sum” amounts, in essence all fees and expenses opposing counsel allegedly incurred from and after Appellants’ November 17, 2008 intervention in the bond proceedings pursuant to O.C.G.A. § 36-82-77(a). On 7/6/09, the trial court entered its Order Setting Amount of Attorneys’ Fees and Litigation Expenses Awarded to Defendants (the “Fees Order”) (R., p. 23) The Fees Order entered by the trial court awarded every dollar requested, totaling \$435,847.86 (R., p. 25-26). Contrary to well-settled case law, the Fees Order makes no attempt to restrict the fees awarded to any specific sanctionable conduct under O.C.G.A. § 9-15-14(b). Nor does the Fees Order even attempt to apportion the fees awarded between the two separate validation proceedings. The Fees Order is simply one enormous lump sum fees

award, with, again, no attempt to limit the amount awarded to O.C.G.A. § 9-15-14(b).

Appellants filed a direct Notice of Appeal with respect to the Fees Order on 7/17/09 (R., p.1), noting therein that a direct Notice of Appeal of the Fees Order is expressly authorized, notwithstanding O.C.G.A. § 5-6-35(a)(10), under the prior Georgia Supreme Court decisions in *Haggard v. Bd. of Regents*, 257 Ga. 524, 526 (1987); *Mitcham v. Blalock*, 268 Ga. 644, 646-647 (1997), and that the appeal is related to Case No. A09A2105 docketed in the Court of Appeals on June 30, 2009. (R., p.2) Appellants filed an Amended Notice of Appeal on 8/5/09, adding reference to the transcript of the 6/30/09 hearing. (8/18/09 Supp. R., p.296)

The fees hearing was no “evidentiary hearing” at all. Though the affidavits were submitted on the afternoon of June 29, 2009, the court commenced the “evidentiary” portion of the hearing the morning of June 30, 2009 by summarily announcing that he had reviewed the affidavits, that they speak for themselves, and that he had no questions. The court then immediately placed the burden on Appellants for cross-examination, though no direct testimony had been offered by Appellees. The affidavits had not even been formerly tendered into evidence. (MT. 6/30/09, p.20, lines 7-16, p.21, lines 5-16) It was clear the court commenced the hearing, having already determined to award the “lump sum” amounts set forth

in the affidavits, without the need for any testimony as to the reasonableness, necessity or value of the fees requested.

As set forth below, during the course of the hearing, Appellants were denied the right to cross-examine most of the attorneys billing time in these matters. Many of those attorneys simply did not appear at the hearing. Other attorneys who were in the courtroom simply refused to subject themselves to cross-examination, all with the blessing of the trial court.

As further described below, the 6/30/09 hearing and the resulting Fees Order were themselves nullities, in that the trial court was without jurisdiction to enforce the May 2009 Final Order already on appeal. The companion case, Case No. A09A2105, was docketed in this Court on June 30, 2009, the same day as the fees hearing, the record in Case No. A09A2105 having been transmitted by the trial courts clerk's office to this Court on June 23, 2009.

Part II: ENUMERATION OF ERRORS

1. The Trial Court Erred By Failing to Conduct an Actual Evidentiary Hearing As To The Reasonableness, Necessity and Value of the Fees Awarded Under O.C.G.A. § 9-15-14(b).
2. The Trial Court Erred By Awarding Lump Sum Attorneys Fees Instead of Limiting The Fees Award to Sanctionable Conduct Under O.C.G.A. § 9-15-14(b).

3. The Trial Court Erred in Denying Appellants the Right to Cross-Examine All Attorneys.

4. The Trial Court Erred to the Extent it Awarded Fees Based on its “Inherent Power”.

5. The Trial Court Was Without Jurisdiction to Hold the June 30, 2009 Hearing and Enter the July 6, 2009 Fees Order, and the Same Are Therefore Null and Void.

This Court has jurisdiction over this appeal pursuant to Art. VI, Sec. V, Par. III of the Constitution of the State of Georgia.

The standard of review of an award under O.C.G.A. § 9-15-14(b) is abuse of discretion. *C.A. Gaslowitz & Associates, Inc. v. ZML Promenade, L.L.C.*, 230 Ga. App. 405, 406 (1998).

Part III: ARGUMENT AND CITATION OF AUTHORITY

1. The Trial Court Erred By Failing to Conduct an Actual Evidentiary Hearing As To The Reasonableness, Necessity and Value of the Fees Awarded Under O.C.G.A. § 9-15-14(b).

The June 30, 2009 fees “hearing”, if that is the term we are really going to ascribe, was nothing short of “Alice in Wonderland” in terms of an evidentiary hearing, where the burden is supposedly on the parties seeking the fees award to prove the reasonableness, necessity and value of the fees. “An attorney cannot

recover for professional services without proof of their value. [Cite.] Generally, a party will proffer the opinion testimony of his present counsel as well as that of other attorneys in an effort to show what constitutes a reasonable attorney fee in light of the litigation history of the case. [Cits.]” *Fiat Auto USA, Inc. v. Hollums*, 185 Ga. App. 113, 116 (1987). An award of attorneys fees is unauthorized if appellee failed to prove the actual costs of the attorney and the reasonableness of those costs. *Id.*

A party opposing a claim for attorneys fees has a basic right to confront and challenge testimony as to the value and need for legal services. *C.A. Gaslowitz & Associates, Inc. v. ZML Promenade, L.L.C.*, 230 Ga. App. 405, 406 (1998) (“the judgment must be reversed and remanded *for an evidentiary hearing* to determine a reasonable amount for reasonable and necessary attorneys fees”) (emphasis supplied); *Mitcham v. Blalock*, 214 Ga. App. 29, 32-33 (1994). “This subsection [O.C.G.A. § 9-15-14(f)] makes it clear that in assessing attorney fees against a party, or the party’s attorney, pursuant to O.C.G.A. § 9-15-14, *the trial judge must make an independent determination concerning the reasonableness and necessity of the fees.*” *Duncan v. Cropsey*, 210 Ga. App. 814, 816 (1993). The trial judge cannot make such a determination *unless evidence of the value of the legal services* is presented. *Id.* (emphasis supplied)

On the afternoon of June 29, 2009, an attorney from each firm submitted an affidavit, with billing sheets attached. On June 30, 2009, the hearing commenced with Appellants first stating for the record certain preliminary and objections, with argument back and forth (MT. 6/30/09, p.4-20), which objections were all denied. “The Court: Okay. I’ve heard the motions. I have heard the arguments supporting the motions. I find them to be without merit, so the motions are denied. Okay.” (MT. 6/30/09, p.20, lines 4-6)

With that out of the way, the so-called “evidentiary hearing” was convened as follows: “Mr. Ichter: Your honor, we have filed affidavits. We are prepared to answer any questions the court may have. If Mr. Woodham intends to conduct cross-examination, we are prepared to go forward with that. The Court: *The court doesn’t have any questions. I have had an opportunity to review the affidavits. Mr. Woodham, if you wish to conduct cross-examination of the witnesses, you are free to do that.*” (MT. 6/30/09, p.20, lines 7-16) (emphasis supplied)

“The Court: Mr. Woodham, *I have had an opportunity to review the affidavits. I have had an opportunity to speak to my law clerk about the affidavits. The court doesn’t have any questions with respect to the affidavits. They are very clear. They speak for themselves.* However, if Mr. Woodham would like to cross-examine any of the witnesses or have any questions respecting the billing of the

persons who put forward the affidavits, he is perfectly free to do that at this time. I will give him the floor. *I'll give him an opportunity to exercise his right to cross-examine the witnesses.*¹ Mr. Woodham, you have the floor.” (MT. 6/30/09, p.21, lines 5-16) (emphasis supplied)²

This was to be an evidentiary hearing (as required by well-settled case law), where the parties seeking fees have the burden of putting on evidence. There was no direct testimony or evidence offered at the hearing by any of the parties seeking fees, as to the reasonableness, necessity or value of the fees sought. There was no direct testimony even to tender the affidavits into evidence. They simply rested on their affidavits sent to the court the day before. The court stated it had reviewed the affidavits and had no questions. By its own statements, the trial court clearly commenced the “hearing” having already determined the outcome, based solely on the affidavits which had not even been tendered into evidence. Appellants thus immediately objected to the affidavits as hearsay, but were overruled. (MT.

¹ That right to cross-examine witnesses would later be largely denied, as set forth in Section 3 below.

² The court made similar statements at the conclusion: “The Court: Okay. All right. As I stated, this would be the time for argument. But I don’t need any argument. *The affidavits and the accompanying information are sufficient.*” (MT. 6/30/09, p.161, lines 7-10) (emphasis supplied)

6/30/09, p. 20, lines 17-24) This was no evidentiary hearing. This was bizarre. This alone requires remand and/or reversal. Instead of any direct testimony from Appellees, the trial court immediately placed the burden on Appellants for calling witnesses for cross-examination, when no direct testimony, not even for purposes of tendering the affidavits, had even been offered. Appellants thus had the burden of cross-examining not live witness testimony, but affidavits and billing sheets received late on the afternoon of the day before, which had not been introduced as evidence.

This is an impossible task, yet Appellants attempted nonetheless to go through the billing sheets and inquire as to the time and fees incurred. Appellants were thus tasked by the trial court to prove a negative, that the fees incurred were not reasonable, necessary and of value, rather than Appellees proving the affirmative. And even though this task is basically impossible and completely reverses the burden of proof in a fees hearing, the trial court continually interfered with Appellants' attempts to perform the impossible. The court ignored Appellants' objections to being unable to question attorneys not present, and prevented

Appellants' from calling as witnesses certain attorneys who were in the courtroom.³ Moreover, the court repeatedly admonished and berated Appellants for failing to subpoena the attorney witnesses that Appellants wished to examine.⁴ This reasoning and approach by the trial court simply defies logic. First, Appellants did not receive the affidavits and billing sheets (naming all the attorneys) until late on the afternoon of June 29, so issuing subpoenas for those attorneys to appear on June 30 was impossible. Second, this was Appellees' evidentiary hearing as to the necessity, reasonableness and value of their requested fees, where Appellees' carry the burden of proof. As Appellants' observed, "Your honor, I did not subpoena them, and I do not have to subpoena them to be here to testify under the law relating to competency as relating to work performed by an attorney." (MT. 6/30/09, p.100, lines 8-11) It was not Appellants' responsibility to make sure all Appellees' necessary witnesses were in attendance. It was Appellees' "evidentiary

³ See Section 3 below where Appellants' inability to cross-examine is fully discussed.

⁴ (MT. 6/30/09, p.78, lines 4-10); (MT. 6/30/09, p.79, lines 2-8); (MT. 6/30/09, p.100, lines 2-14, line 25); (MT. 6/30/09, p.101, lines 1-17); (MT. 6/30/09, p.103, lines 3-12, lines 18-22); (MT. 6/30/09, p.105, lines 11-18); (MT. 6/30/09, p.135, lines 15-19)

hearing”. Appellees offered no direct testimony, not even to introduce the affidavits and billing sheets into evidence.

This was not an evidentiary hearing at all. It was yet another fruitless exercise in procedure and due process, which shows again what Appellants have had to deal with throughout these proceedings.⁵ This requires remand and/or reversal of the Fees Order.

2. The Trial Court Erred By Awarding Lump Sum Attorneys Fees Instead of Limiting The Fees Award to Sanctionable Conduct Under O.C.G.A. § 9-15-14(b).

A trial court must limit the fees award to those fees incurred because of the sanctionable conduct. *Harkleroad v. Stringer*, 231 Ga. App. 464, 472 (1998); *Trotter v. Summerour*, 273 Ga. App. 263, 266 (2005) (“As such, the trial court erred

⁵ The “hearing” of June 30, 2009 is quite consistent with the court’s statement in connection with the illegal, ex parte, unconstitutional, unnoticed and sua sponte O.C.G.A. § 9-15-14(b) award on 2/27/09: “All right, what I would suggest or what I will need [is] some documentation with respect to fees that were extended (sic). *Whether or not we will need to take testimony, I don’t know. But an affidavit and a submission of whatever the fees are would probably be appropriate.*” (Companion Case No. A09A2105, R., V.10, MT. 2/27/09, p.52, lines 15-21) (emphasis supplied)

in assessing fees for the entire litigation”⁶ “Lump sum” attorneys fees awards are not permitted in Georgia. *Huggins v. Chapin*, 233 Ga. App. 109 (1998). The affidavits and billing statements submitted for the three firms show the fees requested for each firm were lump sum amounts, more or less every hour billed by each firm from and after November 17, 2008, the date of the original validation hearings.

The first time entry for Hunton & Williams is on 11/18/08 (8/18/09 Supp. R., p. 148) and basically goes on unabated until 4/27/09 (8/18/09 Supp. R., p. 202). The first time entry for Seyfarth Shaw is on 11/17/08 (8/18/09 Supp. R., p. 215) and goes unabated until 6/2/09 (8/18/09 Supp. R., p. 224). The first time entry for Adorno & Yoss is on 11/21/08 (8/18/09 Supp. R., p. 237) and basically goes unabated until 5/31/09 (8/18/09 Supp. R., p. 253) The first time entry for Gregory

⁶ “A trial court’s order must include findings of conduct that authorize an award under O.C.G.A. 9-15-14, or the order must be vacated.” *Porter v. Felker*, 261 Ga. 421, 422 (1991); *Cason v. Cason*, 281 Ga. 296, 300 (2006); *Moore v. Moore-McKinney*, Ga. App. Slip Opinion (Case No. A09A0262) (May 6, 2009). “[A] trial court is required to make express findings of fact and conclusions of law as to the statutory basis for an award of attorneys fees under OCGA 9-15-14,” and “[i]n such findings, the court must specify the conduct upon which the award is made.” *Brown v. Gadson*, Ga. App. Slip Opinion (Case No. A09A0413) (July 1, 2009).

Evans is on 11/17/08 (8/18/09 Supp. R., p. 124) and goes on unabated until 4/1/09 (8/18/09 Supp. R., p. 126). These are all lump sum fee requests, which the court summarily approved, without any questioning or inquiry, apparently before the hearing even commenced.

In the same regard, the affidavits do not attempt to limit any fees sought to sanctionable conduct, but simply to the “Interventions”. “I describe below the attorneys’ fees and expenses billed to the Authority, which fees and expenses were incurred due to the Interventions.” *Affidavit of Calvert*, ¶3 (8/18/09 Supp. R., p. 136) “I describe below the attorneys’ fees and expenses billed to the Authority, which fees and expenses were incurred due to the Interventions.” *Affidavit of Evans*, ¶3 (8/18/09 Supp. R., p. 120) *See e.g. Affidavit of Birg*, ¶15 (8/18/09 Supp. R., p. 211); *Affidavit of Ichter*, ¶7 (8/18/09 Supp. R., p. 234); *Affidavit of Calvert*, ¶10 (8/18/09 Supp. R., p. 139-140); *Affidavit of Evans*, ¶6 (8/18/09 Supp. R., p. 121-122)

The lump sum nature of the fee request and award is further exhibited by cross-examination testimony. “Q And to be clear, none of the matters that I have described so far relate to a claim of extortion. They relate to intervention, you know, bond validation? Is that a correct characterization? A [Mr. Calvert] I believe, as I have said before, we have identified the work we did on account of the

intervention, and it's set forth in that response to the judge's order of May (sic) 27. It said we were entitled to our fees on the account of intervention." (MT. 6/30/09, p. 45, lines 6-14)

"And so [the court speaking], everything in here, based on what I am seeing, is in response to your intervention. So that's pretty clear, they responded to your intervention. I don't think any of these bills come prior to your intervention. I think it -- Would that be correct? The Witness: [Mr. Calvert] That's correct, your honor. The Court: Everything in here comes as a result of the intervention. So I don't think that the Atlanta Development Authority is going to deny that. The bill in here came as a result of your intervention and the findings that the court made. Would that be a correct statement? The Witness: [Mr. Calvert] That's correct, your honor. Mr. Woodham: I need to -- your honor, I need to establish for the record that the fees awarded relate only to what could be termed as activity under 9-15-14(B). Now, I am entitled to cross-examine these folks who asserted fees. And you're -- the court is telling me that I am not entitled to establish that record. I think I am entitled to establish the record. So it's clear that these fees incurred pertained only to the bond validation." (MT. 6/30/09, p. 49, lines 4-25, p. 50, line 1)⁷

⁷ Similar testimony was obtained from Mr. Evans. (MT. 6/30/09, p. 151, lines 3-25, p. 151 lines 1-4) and Ms. Birg (MT. 6/30/09, p. 91, lines 17-25, p. 106, lines 15-24)

3. The Trial Court Erred in Denying Appellants the Right to Cross-Examine All Attorneys.

In a hearing to determine fees under O.C.G.A. § 9-15-14(b), the party opposing the fees award has the right to cross-examine all attorneys purporting to have performed work for which fees are being sought. *See Williams v. Cooper*, 280 Ga. 145, 147 (2006) (“Williams complains on appeal that she was not provided an opportunity to cross-examine one of the attorneys whose work was represented by the claim for fees. . . On remand, Ms. Cooper’s counsel each will need to establish by evidence the impact on their billing of Williams’ conduct.”).

Appellants were specifically denied by the trial court the opportunity to cross-examine the majority of attorneys whose work was represented by the claim for fees.

A. Hunton & Williams.

The Affidavit of Matthew J. Calvert of Hunton & Williams (R., p. 135) identified six (6) Hunton & Williams attorneys whose work was represented in the ADA’s fees claim: Matthew J. Calvert, Douglass P. Selby, Ashley Cummings, Benjamin F. Johnson IV, Kelly Campanella and Rachel L. Devenow. Of particular note, the Calvert Affidavit states Ms. Cummings billed 296.75 hours at the rate of

\$450 per hour (R. p. 137, ¶6), so that Ms. Cummings' time alone accounted for \$133,537.50 of the Hunton & Williams total fees claim.

During the June 30, 2009 hearing, in respect of Hunton & Williams, Appellants first called Mr. Calvert for cross-examination (MT. 6/30/09, p. 21). During the course of the cross-examination of Mr. Calvert regarding the time Mr. Calvert had billed in the matter, the trial court determined that the cross-examination of Mr. Calvert had lasted long enough, and that Appellants should move onto another witness. "The Court: Two minutes. . . Mr. Woodham: Well, the court says there's two minutes. I will certainly leave the court's discretion to -- in testimony of a particular witness, I would object for the record that the witness that I have not had the time to complete what I consider is my right to confront and challenge the testimony as to the value and need for legal services." (MT. 6/30/09, p. 66, lines 13-24)

"So I have given you the opportunity to question Mr. Calvert. . . *The affidavits speak for itself. I am not sure what else we need to do.* . . . But I have given you the opportunity to do that. You had him on the stand for almost an hour. And so it's now time to *move on to another witness.*" (emphasis supplied) (MT. 6/30/09, p. 70, lines 5-12). A few minutes later, Appellants responded to the court in respect of Appellants' desire to continue to cross-examine Mr. Calvert regarding his billed

time: “It also depends on what you do and the necessity of what you’ve done. That’s why it’s necessary, in my opinion, to go through what each attorney, line by line, of what they did, whether it’s necessary, valuable and reasonable. And if the court wants to cut me off in that endeavor, that’s – certainly, the court can –can do that over my objection. and --”. (MT. 6/30/09, p. 72, lines 9-16)

Then, the trial court, after just a few minutes earlier having cut off Appellants’ cross-examination of Mr. Calvert as to Mr. Calvert’s billed time and telling Appellants “to move onto another witness”, the court actually prevented Appellants from in fact moving onto other witnesses in respect of cross-examining other attorneys of Hunton & Williams. “Mr. Woodham: Your honor, I am going to ask questions of the other attorneys and -- The Court: Not necessarily. That’s based on whether I feel the need for them to come up here.” (MT. 6/30/09, p. 74, lines 4-7) After citing the court to *Williams, supra*, (MT. 6/30/09, p. 74, lines 19-25, p. 75, lines 1-2), Appellants requested to cross-examine the other Hunton & Williams attorneys. (MT. 6/30/09, p. 75, lines 16-20).

After Mr. Calvert was dismissed as a witness, Appellants requested whether Ben Johnson or Kelly Campanella (two other Hunton & Williams attorneys) were in the courtroom and was told they were not. Appellants thus noted for the record the inability to cross-examine Mr. Johnson and Ms. Campanella. (MT. 6/30/09, p.

76, lines 22-25, p. 77, lines 1-11) Appellants next called as a witness Ashley Cummings, a Hunton & Williams partner who had billed the most hours. Ms. Cummings was in the courtroom. Mr. Calvert objected to Ms. Cummings being put on the witness stand, even though she was in the courtroom. The court sustained the objection. Appellants next called Mr. Selby, the Hunton & Williams bond counsel partner who had billed 117 hours at the rate of \$468 per hour (8/18/09 Supp. R., p. 137, ¶5), thus accounting for \$54,756.00 of the Hunton & Williams fees. Mr. Selby was also present in the courtroom. Mr. Calvert also objected to Mr. Selby being called for cross-examination. The court sustained this objection as well. (MT. 6/30/09, p. 77-79). Appellants noted for the record the inability to cross-examine Ms. Cummings and Mr. Selby, two Hunton & Williams partners who were in the courtroom. (MT. 6/30/09, p. 79, lines 2-4)

As such, Appellants were given the opportunity to cross-examine only one Hunton & Williams attorney as to his time, Mr. Calvert, and that cross-examination was cut short. “Mr. Woodham: I did question him. The Court: I understand – I understand your objection, and your objection is noted for the record. Mr. Woodham: Okay. I did – I did question Mr. Calvert at least part way through as to his activity, and was not able to complete that as well for the record.” (MT. 6/30/09, p. 79, lines 14-19) Mr. Calvert billed 89.75 hours at the rate of \$578 per

hour (8/18/09 Supp. R., p. 137, ¶4), thus accounting for \$51,875.50 of the Hunton & Williams fees. The three Hunton & Williams partners in the courtroom, Ms. Cummings (\$133,537.50), Ms. Selby (\$54,756.00) and Mr. Calvert (\$51,875.50), together accounted for \$240,169 of the \$283,434.25 billed by Hunton & Williams. Appellants' examination of Mr. Calvert was incomplete and cut off, and Ms. Cummings and Mr. Selby, with the court's blessing, refused to be cross-examined.

B. Seyfarth Shaw.

The Affidavit of Erika J. Birg of Seyfarth Shaw, LLP (8/18/09 Supp. R., p. 209, ¶7) identified six (6) Seyfath Shaw attorneys whose work was represented in the Developers' claim: Ms. Birg, Daniel M. McCrae, Griffin F. Pitcher, Christopher Compton, Michelle Barnett and Matthew N. Foree. (8/18/09 Supp. R. p. 209, ¶7) Of particular note, the Birg Affidavit states that Mr. McCrae, Seyfath Shaw's bond partner in the transactions, billed 68.4 hours at \$480 per hour, accounting for \$32,832.00 of fees (8/18/09 Supp. R. p. 209, ¶8, p. 211, ¶17), nearly half of the total Seyfarth Shaw fee of \$67,605.00 (8/18/09 Supp. R. p. 212, ¶23) Ms. Birg, the alleged lead attorney for Seyfarth Shaw, billed only 7.6 hours for a total of \$3,504.00 (8/18/09 Supp. R. p. 212, ¶22)

Appellants first called Ms. Birg for cross-examination in respect of her work on the matters. (MT. 6/30/09, p. 80) After spending some minutes questioning Ms.

Birg, Appellants asked if the other Seyfarth Shaw attorneys were present in the courtroom, and was told they were not present and thus not available as witnesses. (MT. 6/30/09, p. 99, lines 16-25, p. 100, lines 1-6) “Q Ms. Birg, how am I supposed to cross-examine individuals if they are not here today?” (MT. 6/30/09, p. 101, lines 8-9) “Mr. Woodham: Your honor, I don’t – I really don’t want to argue with you, but I think the law in the State of Georgia is clear that a party opposing an attorney’s fee claim has the opportunity to challenge and cross-examine each counsel.” (MT. 6/30/09, p. 102, lines 23-25, p. 103, lines 1-2) “Now, Mr. Woodham, I understand what you are trying to say and you’ll have the opportunity to argue this to the Court of Appeals. And they may agree with it. I don’t. But they might. But certainly, your objection is noted that these other attorneys are not here.” (MT. 6/30/09, p. 105, lines 19-23)

C. Adorno & Yoss.

The Affidavit of Cary Ichter of Adorno & Yoss, LLC (8/18/09 Supp. R., p. 231) identified two (2) Adorno & Yoss attorneys whose work was represented in the Developers’ claim: Mr. Ichter and Patricia Roy (8/18/09 Supp. R. p. 234, ¶8), though subsequent testimony identified a third attorney, Ms. Premis. Of particular note, the Ichter Affidavit states that Ms. Roy billed 112.27 hours at \$290 per hour producing fees of \$33,991.10. (8/18/09 Supp. R., p. 234, ¶8)

Appellants first called Mr. Ichter for cross-examination in respect of his work. (MT. 6/30/09, p. 110) After spending many minutes questioning Mr. Ichter, Appellants requested the opportunity to cross-examine the two other attorneys from Adorno & Yoss, Ms. Premis and Ms. Roy. Ms. Premis was not in the courtroom, so was unavailable for cross-examination. (MT. 6/30/09, p. 135, lines 8-17) Ms. Roy was in the courtroom, but Mr. Ichter objected to Ms. Roy taking the stand. The court sustained the objection by not requiring Ms. Roy to take the stand. (MT. 6/30/09, p. 137, lines 15-16)

4. The Trial Court Erred to the Extent it Awarded Fees Based on its “Inherent Power”.

The Fees Order includes a statement that the “Court has the inherent power to sanction parties and their counsel by awarding attorneys’ fees.” (R., p. 24) This is an inaccurate statement of Georgia law. It is very well-established in Georgia that attorneys fees are recoverable only where authorized by some statutory provision or by contract. *Walker v. Walker*, 266 Ga. 414 (1996); *Glynn County Federal Employees Credit Union v. Peagler*, 256 Ga. 342, 344 (1986); *Sinkwich v. Conner*, 288 Ga. App. 320, 321 (2007) (“Conner correctly concedes that the trial court had *no inherent authority to award attorneys fees . . .*”) (emphasis supplied). This

statement is nothing but *obiter dictum*, albeit *obiter dictum* which is directly contrary to Georgia law. Nonetheless, to the extent the Fees Order is based on the trial court's so-called "inherent power", the Fees Order must be reversed.

5. The Trial Court Was Without Jurisdiction to Hold the June 30, 2009 Hearing and to Enter the Fees Order, and the Same Are Therefore Null and Void.

A notice of appeal to a final judgment deprives the trial court of jurisdiction to take further proceedings towards enforcement of the judgment superseded. *Walker v. Walker*, 239 Ga. 175, 175-176 (1977) ("It therefore follows that the December 7, 1976, judgment of the trial court holding the appellant in contempt, *having been entered at a time when the court had no jurisdiction to render it, was a nullity and must be reversed.*") (emphasis supplied); *Smiway, Inc. v. Department of Transportation*, 178 Ga. App. 414, 419 (1986). In the proceedings at hand, this would include lack of jurisdiction, pending appeal, with regard to any further hearings by the trial court to determine the amount of attorneys' fees purportedly awarded in the trial court's Final Order in Companion Case No. A09A2105. *Atlanta Propeller Service, Inc. v. Hoffman GMBH & Co. KG*, 191 Ga. App. 529, 531 (1989).

The lower court's order granting appellee's motion for attorneys fees and costs was entered on March 28, 1988. The order recited that the amount of the award would be determined after a separate hearing on a later date. The final order granting the award of \$84,079.15 was entered on May 27, 2008. During the intervening period, on May 20, 2008, appellant filed its notice of appeal. *Appellant argues that the order specifying the amount of the award is a nullity, because the filing of the notice of appeal served as supersedeas so that the trial court lacked jurisdiction to issue the second order. However, the record shows that the appellant did not pay the costs assessed by the trial court until June 8, 2008, after the order setting the amount of the award of attorney fees and costs was entered.* The filing of a notice of appeal serves as supersedeas only upon the payment of all costs in the trial court. [cits.] *Consequently, the lower court did not lack jurisdiction to enter the order setting the amount of the award of attorneys fees and costs. Id.* (emphasis supplied)

The subject proceedings are nearly identical to the facts in *Atlanta Propeller*, except that Appellants in the subject proceedings paid court costs in respect of Companion Case No. A09A2105 on 5/12/09,⁸ well in advance of the 7/6/09 entering of the Fees Order, and in fact the record in Companion Case No. A09A2105 was actually transmitted from the trial court clerk's office on June 23, 2009 and docketed in this Court on June 30, 2009, the same day as the fees hearing, and prior to the entering of the Fees Order on 7/6/09. The trial court thus lacked jurisdiction to enter the Fees Order, and the Fees Order is therefore null and void.

⁸ See Record in Companion Case No. A09A2105 (R.,V.4, p.6-10) showing costs paid on 5/12/09.

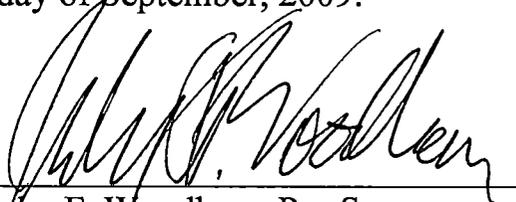
Moreover, Appellants' direct Notice of Appeal filed in Companion Case No. A09A2105 suspended the trial court's May 2009 Final Order, pursuant to O.C.G.A. § 9-12-19 ("Where a judgment is entered and, within the time allowed for entering an appeal, an appeal is entered, the judgment shall be suspended.")⁹ Such suspension of the May 2009 Final Order further divested the trial court of jurisdiction to take action to enforce the May 2009 Final Order in Companion Case No. A092105, by holding the 6/30/09 fees hearing and entering the Fees Order. *See e.g. Amstead v. McFarland*, 287 Ga. App. 135, 140 (2007). For the foregoing reasons, the June 30, 2009 hearing and the Fees Order are each nullities and void as a matter of law, and the Fees Order should therefore be reversed.

⁹ Appellants objected to the 6/30/09 fees hearing being held at all (moved to be suspended under 9-12-19) in light of O.C.G.A. § 9-12-19 and O.C.G.A. § 5-6-46 at the commencement as preliminary matters. (MT. 6/30/09, p. 5, lines 1-8, p. 7, lines 11-17, p. 15, lines 9-21) Those motions and objections were denied. (MT. 6/30/09, p. 20, lines 4-6)

CONCLUSION

For all the foregoing reasons, the Fees Order should be reversed and/or remanded.

Respectfully submitted, this 14th day of September, 2009.



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CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the within and foregoing Appellants' Brief on counsel of record by placing same in the United States Mail, with proper postage thereon to ensure delivery, addressed to:

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CASE NO. A09A2312

IN THE COURT OF APPEALS OF GEORGIA

JOHN F. WOODHAM and CITIZENS FOR ETHICS IN GOVERNMENT, LLC
FILED IN OFFICE

Intervenors - Appellants

OCT 05 2009

V.

CLERK, COURT OF
APPEALS OF GEORGIA

THE ATLANTA DEVELOPMENT AUTHORITY,
13TH STREET HOLDINGS, LLC and MEZZO DEVELOPMENT, LLC

Defendants - Appellees

ON APPEAL FROM THE SUPERIOR COURT OF FULTON COUNTY

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I. INTRODUCTION & SUMMARY OF ARGUMENTS

This is a companion case to Case No. A09A2105, pending before this Court, wherein Appellants John F. Woodham (“Woodham”) and Citizens for Ethics in Government (“CEG”) (collectively “Woodham”) appealed the bond validation and sanctions order entered against Woodham on May 21, 2009 (the “Final Order”).¹ This appeal is limited to the trial court’s July 6, 2009 Order Setting Amount of Attorneys’ Fees and Litigation Expenses Awarded to Defendants (the “Fees Order”), which was entered following an evidentiary hearing devoted solely to that supplemental issue.

Woodham advances the baseless argument that no evidentiary hearing took place because detailed affidavits and billing records filed with the court before the fee hearing were not tendered into evidence at the hearing, because he was not able to cross-examine each and every timekeeper listed on the billing records, and

¹ Woodham is the sole member/manager of CEG, which was not formed until two days after the State of Georgia filed its Petitions for Bond Validation. For efficiency’s sake and accuracy, Woodham and CEG will collectively be referred to hereafter as “Woodham.” [CC V3/R.248].

because the lawyers who executed the affidavits describing the work performed by their respective firms did not offer “direct testimony” at the hearing.

Woodham’s arguments are all without merit. First, the affidavits and billing records were filed and accepted by the court as evidence of the fees incurred and services performed. Second, Georgia law does not require that each and every timekeeper who performs services testify at a fee hearing. The affidavits were based on the personal knowledge of each firm’s supervising attorney and were accompanied by detailed billing records describing the time each firm devoted to the litigation because of Woodham’s bad faith intervention. Third, the affidavits and comprehensive time records were clear and spoke for themselves. The evidentiary hearing lasted several hours, virtually all of which was devoted to Woodham’s cross-examination of the four affiants. Hence, Woodham had ample opportunity to inquire about the necessity and reasonableness of their fees, including the work performed by all timekeepers.

Woodham asserts incorrectly the trial court improperly awarded Appellees a “lump sum” award. The fees could not be segregated among different claims because there was only one “claim” by Woodham — the intervention itself. The trial court found that Woodham’s *entire* intervention was brought for an improper

and unconscionable purpose: to extract a “pay-off” of \$1.3 million from the developers.

Additionally, Woodham contends that the trial court did not have jurisdiction to hold a fee hearing because of his pending appeal of the Final Order. The evidentiary hearing and Fees Order, however, was limited to the issue of the reasonableness and necessity of the attorney’s fees sought and the amount to be awarded. Those issues did not modify the Final Order in any way and were merely supplemental to it. Accordingly, the Fees Order should be upheld.

II. COUNTERSTATEMENT OF THE CASE

A. The Court’s May 21, 2009 Order Sanctioning Woodham

The two cases that are the subject of Woodham’s appeal — the 13th Street Holdings, LLC (“13th Street”) Action and the Mezzo Development, LLC (“Mezzo”) Action — are bond validation proceedings under O.C.G.A. § 36-82-60 and § 36-82-85.² On May 21, 2009, the court entered its Final Order validating the issuance of bonds by the Authority in an amount not to exceed \$70,000,000 for 13th Street and \$60,000,000 for Mezzo and sanctioning Woodham, including dismissing his Intervention and awarding Appellees their costs of defending

² 13th Street and Mezzo are collectively referred to as the “Developers.”

against the wrongful intervention. [Companion Case (“CC”) A09A2105, V.2, R.301-302]. The Final Order details the court’s findings of fact and conclusion that Woodham intervened in the proceedings for an improper purpose and in bad faith, as evidenced by Woodham’s demanding a \$1.3 million payment from parties against whom Woodham had no legal claims, as a condition for dismissing the Complaints in Intervention. [CC MT-47-51, 2/27/09].

The Final Order makes clear that the court awarded sanctions against Woodham pursuant to its inherent powers to sanction as well as the power conferred upon it by O.C.G.A. § 9-15-14(b) in instances where the court, on its own motion, finds that an attorney or party has asserted a position or pursued an action for purposes of harassment, for vexatious reasons or other improper purpose. [CC MT-50, 2/27/09; V.2, R. 307]. The court awarded Appellees costs incurred due to Woodham’s improper intervention. [CC MT-50, 2/27/09]. The Final Order is the subject of Woodham’s appeal in the Companion Case.

B. Woodham Knew on December 15, 2008 that He Faced Possible Attorney’s Fees Award, Yet He Conducted No Discovery on Attorney’s Fees

At the December 15, 2008 status conference, the trial court, on its own motion, scheduled a hearing for January 30, 2009, to hear evidence regarding

Woodham's efforts to use the intervention to extract a "pay off" from the developers. [MT 12/15/08 pp. 23-25].³ The trial judge announced in open court that if the evidence demonstrated that Woodham had intervened in an attempt to obtain \$1.3 million, "sanctions or penalties and fees would be handed down as well as potentially a reference to the bar." [MT 12/15/08, pp. 24-25].

As a consequence, Woodham knew as early as December 15, 2008, that he faced the sanction of attorney's fees. Woodham could have dismissed his vexatious intervention then. Instead, he continued to file baseless motions seeking to delay and enlarge the proceedings.⁴

³ Pursuant to notice to the parties, the hearing was later rescheduled on February 27, 2009.

⁴ This includes filing serial frivolous motions and engaging in extraordinary conduct, for example: moving to join the Fulton County Board of Tax Assessors and promptly dismissing that motion after responses were filed [CC R.246-47; 295-298]; attempting to have the Honorable Michael D. Johnson recused after the December 15, 2008 status conference (motion denied by the Honorable Melvin K. Westmoreland) [CC R.288-289]; filing a purported "anti-SLAPP" motion on the

Moreover, Woodham refused to attend the February 27, 2009 hearing despite having been notified of the hearing and directed to attend. [MT 2/27/09, p. 6]. At that hearing, the court, after receiving evidence and awarding fees, requested that affidavits and billing records be submitted as proof of fees incurred and stated that supporting testimony on fees might be necessary at the subsequent fee hearing. [MT 2/27/09, p. 52]. Despite this declaration by the court, Woodham never conducted any discovery regarding Appellees' costs before the June 30, 2009 fees hearing.⁵

eve of the February 27, 2009 hearing [CC R.299-309]; refusing to attend the February 27 hearing; moving again to recuse Judge Johnson for the same reasons rejected by Judge Westmoreland [CC R. 288-298]; and filing an "emergency" motion with the Chief Judge of the Fulton County Superior Court asking that another judge be assigned to the proceedings [CC R. 288-298].

⁵ The June 30, 2009 fees hearing was originally scheduled for June 12, 2009, but due to Woodham's Rule 40(b) motion and motion for reconsideration, see MD-09-021, the hearing was postponed until the Court of Appeals ruled.

C. Affidavits of All Supervising Attorneys and Verified Billing Records Were Filed Before the Fees Hearing

On June 29, 2009, Appellees each filed affidavits offering evidence of their costs of litigation as follows: Matthew J. Calvert (Partner, Hunton & Williams LLP for the Authority), Greg Evans (Partner, Law Firm of Greg Evans, for the Authority), Erika Birg (Partner, Seyfarth Shaw for 13th Street and Mezzo), and Cary Ichter (Partner, Adorno & Yoss, LLC for 13th Street and Mezzo). [R.119-126; 135-227; 231-266]. Each affidavit was based on the personal knowledge of the affiant and set forth the time spent by *each* attorney and paralegal (where such fees were sought), the hourly rates for each, the level of experience for each person, a description of the work performed in the matters, and a statement as to why the fees charged were reasonable and necessary on account of Woodham's intervention. [*Id.*]. Each affidavit attached and verified the firm's detailed billing records.

D. The June 30, 2009 Attorney's Fees Hearing

The trial court conducted a four hour evidentiary hearing on the issue of the amount and reasonableness of the attorney's fees to be awarded. At the outset of the hearing, the court rejected Woodham's contention that the affidavits were untimely filed. [MT 6/30/09, pp. 14, 17, 20]. The court received the attorneys'

affidavits into evidence, overruling Woodham's hearsay objection. [MT 6/30/09, pp. 20, 161-162]. After the court stated that it had reviewed the affidavits and that they were clear and spoke for themselves, the court afforded Woodham the opportunity to cross-examine each affiant. [Id. at 21]. Woodham then cross-examined each attorney who had submitted an affidavit.

Woodham devoted much of that time to irrelevant questions, editorial comments, and baseless procedural objections. [MT 6/30/09, pp. 1-20, 47, 72, 130]. Eschewing inquiries into relevant topics related to the the reasonableness and necessity of the fees charged, Woodham argued with the court, read case law and statutes to the witnesses, and sought to inquire into matters that were wholly unrelated to the subject matter of the hearing. [Id. at 29-31, 46-48, 49-52, 66-75, 78-79, 101-106, 122-125].

Woodham complained that he wished to examine other timekeepers in each affiant's law firm. The court told Woodham that he should ask the lead attorneys about the work that the other lawyers had done, and that if the lead attorney could not answer Woodham's questions, the court would allow Woodham to cross-examine other attorneys. [Id. at 73, 78]. Instead, Woodham proclaimed: "I don't want to ask, [Mr. Calvert] . . . I want to ask the folks that are in the billing sheets,"

thereby refusing to ask the supervising attorney questions about the reasonableness and necessity of fees incurred by other attorneys in the firm. [Id. at 74 & 75].

Woodham cross-examined Mr. Calvert for almost an hour. [Id. at 70]. Mr. Calvert testified that he was lead counsel and oversaw the litigation necessitated by Woodham's intervention, that he supervised and was personally familiar with Hunton & Williams' work and that the work of all timekeepers was reasonable and necessary. [Id. 2-27, 31]. He also opined as to the reasonableness of hourly rates and fees. [Id. 27, 40-41, 57-58, 76; R.135-204]. Mr. Calvert also testified that all of his firm's fees related to defending against Woodham's intervention and that no fees were sought for work performed prior to the time Woodham intervened. [Id. at 29, 31-32, 45, 49, 76].

Mr. Woodham had an opportunity to thoroughly question Mr. Calvert about work performed by Mr. Calvert's partners Mr. Selby and Ms. Cummings, and associates whose work was included in the billings and whose rates, experience levels and time spent on the matter were included in Mr. Calvert's affidavit. [Id. at 54-57]. Woodham asked specifically about some work performed by those other timekeepers. [Id. at 39-40, 43-45, 52-57].

Woodham also cross-examined the lead attorneys from each of the other

three law firms involved in this matter: Ms. Birg, Mr. Ichter, and Mr. Evans. [Id. at 55-57, 80-138, 138-164]. Ms. Birg also testified that she was the lead litigation counsel [Id. at 88-89], that her firm charged no fees incurred prior to Woodham's intervention, [Id. at 90], that she could testify as to the fees billed and work performed by herself and the other timekeepers [Id. at 107], and that the fees charged by the firm were reasonable and customary [Id. at 110].

Mr. Ichter, like Mr. Calvert and Ms. Birg, testified that his hourly rate was reasonable [Id. at 112, 126]. Woodham primarily questioned Mr. Ichter on irrelevant matters, such as prior cases his former firm had handled [Id. at 113]. Mr. Ichter also testified as to the necessity of the work performed by his firm and his associates. [Id. 132-33].

The hearing concluded with the court stating that it had had ample opportunity to review the affidavits, heard the evidence, and found the witnesses to be credible. The court reiterated that it had accepted the affidavits and had relied on them. [Id. at 161-162].

E. The Court's July 6, 2009 Fees Order [R.285-288]

The court's independent findings on the reasonableness and necessity of the attorney's fees are also set forth in its July 6, 2009 Fees Order. [R.285-288]. The

court stated that in advance of the June 30, 2009 hearing, counsel for the Developers and for the Authority submitted affidavits concerning the attorney's fees and expenses incurred by them for which recovery was sought, and each affidavit attached detailed billing records. [R.286]. The court found that the attorney's fees sought were directly related to the Interventions and that the court had considered the time and labor required as a result of the interventions and the associated sanctioned conduct of Woodham. The court also considered the novelty and difficulty of the questions involved, the skill requisite to perform the legal service properly, the fees customarily charged in Atlanta for similar legal services, and the experience, reputation, and ability of the lawyers performing the services. [R.287].

The court concluded that the hourly rates charged by counsel for the Developers and the Authority to be reasonable given these factors. The court further stated that they were reasonable in view of Woodham's aggressive tactics and the filing of serial motions and other pleadings. [R.288]. Accordingly, the court awarded the Developers their fees totaling \$132,705.97 and the Authority's fees totaling \$303,141.89. [R.288].

III. STANDARD OF REVIEW

The award of attorneys' fees pursuant to O.C.G.A. § 9-15-14(b) is discretionary. Therefore, the standard of review to be applied in this appeal is abuse of discretion. See Marchelletta v. Seay Construction Services, Inc., 265 Ga. App. 23, 29, 598 S.E.2d 64, 67 (2004); see also Waits v. Waits, 280 Ga. App. 734, 735, 634, S.E.2d 799, 800 (2006) (explaining generally that the Court "will not disturb the trial court's decision awarding attorney fees unless it can be clearly shown by the appellant that the trial court committed grievous error or a gross abuse of discretion."). The same abuse of discretion standard of review applies to an award of fees base on the court's inherent authority to impose sanctions. Woodham concedes the "abuse of discretion" standard but has failed to demonstrate any abuse of discretion by the trial judge. [Br. at p. 5].

IV. ARGUMENT AND CITATION TO AUTHORITY

A. The Trial Court Did Not Fail to Conduct an Evidentiary Hearing as to the Reasonableness, Necessity and Value of the Fees Awarded

Despite that the trial court afforded Woodham several hours of cross-examination time on the issue of fees, Woodham claims that no evidentiary hearing occurred because there was no direct testimony and no evidence submitted or

independent determination made as to the reasonableness and necessity of the fees. These arguments have no merit.

The affidavits of the supervising attorneys, including verified billing records, satisfied Appellees' burden of proving the reasonableness, necessity and value of the attorney's fees sought. Contrary to Woodham's argument, the case law is clear that "direct" testimony is not necessarily required: "To show the reasonableness of the actual costs demonstrated by the billing records, parties will usually proffer the opinion testimony of their counsel or other attorneys. But such testimony is not an invariable requirement." Santora v. American Combustion, Inc., 225 Ga. App. 771, 485 S.E.2d 34 (1997) (citing Carpet Transport, Inc. v. Kenneth Poley Interiors, Inc., 219 Ga. App. 556, 466 S.E.2d 70 (1995)). In fact, in T.A.I. Computer, Inc. v. CLN Ent., Inc., 237 Ga. App. 646, 648, 516 S.E.2d 340 (1999), the Court of Appeals "clarified that 'an award of attorney fees which is based solely on an affidavit is not necessarily erroneous, so long as the affidavit meets the requisite level of proof.'" Koncul Ent., Inc. v. Nationscredit Financial Services, Co., 2001 WL 34052996, No. 400CV141 at *9 (S.D. Ga. Aug. 13, 2001)(analyzing Georgia law on attorney's fees)(quoting T.A.I. Computer, Inc., 237 Ga. App. at 648, 516 S.E.2d at 342).

Though not required to offer direct testimony, the Appellees made their supervising attorneys available for examination by the court and Woodham. During cross-examination by Woodham, each affiant offered additional testimony establishing the reasonableness and necessity of the fees and actual costs incurred.

Woodham quotes Fiat Auto U.S.A., Inc. v. Hollums, 185 Ga. App. 113, 116, 363 S.E.2d 312, 316 (1987), for the proposition that “[g]enerally, a party will proffer the opinion testimony of his present counsel as well as that of other attorneys in an effort to show what constitutes a reasonable attorney fee in light of the litigation history of the case.” [Br. at 6]. The facts of Fiat are far different than this case. In Fiat, “no evidence concerning attorney fees was ever placed before the jury” nor was there any proffer concerning the reasonableness of the attorney’s fees sought. Fiat, 185 Ga. at 116. Here, the trier of fact was the court. The court received detailed affidavits from each law firm, including verified billing records that set forth every charge, time spent, a description of work performed, and a statement regarding the reasonableness of the fees and necessity of the work.

Woodham relies on C.A. Gaslowitz & Assoc., Inc. v. ZML Promenade, LLC, 230 Ga. App. 405, 406, 496 S.E.2d 470, 471 (1998), for the proposition that he has a right to confront and “challenge testimony” as to the value and need for

legal services. [Br. at p. 6]. This is simply a statement of the general rule. In Gaslowitz, the court awarded attorney's fees by *motion only*—when it granted defendant's motion for attorney's fees pursuant to O.C.G.A. § 9-15-14(a) and (b). Id. The Court of Appeals remanded because the record did not show that any hearing had taken place. Id. Woodham wants this Court to ignore the fact that during the June 30, 2009 evidentiary hearing he had ample opportunity to cross-examine all four of the affiants/supervising attorneys and to challenge the affidavits and billing records that were received by the court. [See generally MT 6/30/09 pp. 1-162].

Woodham cites another inapplicable case, Mitcham v. Blalock, 214 Ga. App. 29, 32-33 (1994), for the same proposition. In Mitcham, the Court of Appeals found that the evidence did not support an award of attorney fees because: (1) *none* of the attorneys who worked on the matter were present for cross-examination; (2) the billing statements appeared to contradict the information in the attorney's affidavit; and, (3) the affiant attorney lacked personal knowledge of services performed by the associate attorney and paralegal whose time was included on billing statements. See id. at 32-33, 447 S.E.2d at 86-87. None of these infirmities exists in this case.

Next, Woodham argues that the trial judge failed to make an independent determination concerning the reasonableness and necessity of the fees because Appellees did not present evidence of the value of their legal services [Br. at p. 6]. Woodham cites Duncan v. Cropsey, 210 Ga. App. 814, 816, 437 S.E.2d 787, 789 (1993), for this general rule of law set forth in O.C.G.A. § 9-15-14(f).

Duncan is also unavailing. This Court in Duncan found that the attorney failed to submit evidence sufficient to establish the attorney fees because his affidavit did not set forth the number of hours he spent on the matter or verify that the award was reasonable. See id. at 815, 437 S.E.2d at 789. Here, the affidavits and billing records itemize the hours devoted by every individual, describe in detail all work performed and include opinions of highly experienced litigation attorneys attesting to the reasonableness of fees and necessity of the services provided in opposing Woodham's improper intervention. Those opinions were reiterated on the witness stand during cross-examination by Woodham. [See, e.g. MT, 6/30/09, p. 76]. The Fees Order also sets forth in detail the court's independent findings as to the reasonableness of the fees awarded and the necessity of the work.

Woodham also complains that he was forced to "cross-examine" affidavits and billing sheets, which he had received only the day before, rather than live

witness testimony. [Br. at p. 9]. The affidavits were the effective equivalent of direct testimony. The court found that the affidavits were clear and spoke for themselves and did not have any questions about them. [MT, 6/30/09, p. 21, lines 5-16]. Rather than consume time with superfluous direct examination, the court devoted virtually the entire hearing to Woodham's cross-examination. Significantly, Woodham never objected that there was no "direct" testimony at the hearing, as he now argues, *nor did he ask for a continuance* for more time to review the affidavits and billing records.

Finally, Woodham complains that the court admonished him for failing to subpoena the attorney witnesses that Appellants wished to examine. [Br. at p. 10]. Woodham argues that he could not subpoena witnesses because he did not receive the affidavits and billing records until June 29. The Georgia Supreme Court held in Martin v. Henry County Water and Sewerage Authority, 279 Ga. 197, 200, 610 S.E.2d 509, 511-512 (2005), that it is not error to submit or offer affidavits and billing records into evidence on the day of the hearing on attorney's fees, particularly where, as is the case here, opposing counsel was notified of the hearing on fees several months in advance and yet conducted no discovery on the issue. The affidavits of counsel were filed in accordance with the schedule established by

the trial court. [MT, 6/30/09, pp. 14, 17, 20]. Moreover, Woodham knew on December 15, 2009, that he faced the prospect of an award of fees, and yet conducted no discovery on the issue.

B. The Trial Court Properly Awarded Attorneys Fees Directly Related to Woodham's Sanctioned Conduct (EE 2)

Appellees acknowledge that “lump sum” fees are not permitted in Georgia. Huggins v. Chapin, 233 Ga. App. 109 110, 503 S.E.2d 356, 357 (1998). This case does not involve a “lump sum” award. The cases upon which Woodham relies describe lump sum awards as fee awards that cover all services rendered in a case rather than services devoted to defending against or responding solely to sanctionable claims or conduct. Such is the case where the award covers fees incurred in defending against those claims for which a litigant prevails, but also includes fees on claims for which a litigant does not prevail, without any apportionment. See id. at 109, 503 S.E.2d at 357 (court erred in not stating how or whether it apportioned fees where litigant prevailed on securities violation claims as opposed to ongoing fraud claims); Harkleroad v. Stringer, 231 Ga. App. 464, 472, 499 S.E.2d 379, 385 (1998)(court erroneously included fees incurred in post-judgment collection after sanctioned firm had withdrawn, appellate court proceedings, which is unauthorized by O.C.G.A. § 9-15-14, and bankruptcy court

proceedings); Trotter v. Summerour, 273 Ga. App. 263, 266, 614 S.E.2d 887, 890 (2005)(the court erred by not apportioning fees between those incurred in defending against the claims deemed frivolous and those defending against the nonfrivolous claims).

The award of “all fees” incurred in defending against Woodham’s sole claim (i.e., intervention) is not a prohibited “lump sum” fee award. The award was limited to the sanctionable conduct, which in this case was Woodham’s entire intervention, which the court found was brought for an improper purpose. There were no separate claims for which fees had to be apportioned, and Woodham does not assert that there are any. None of the bills submitted were for work that occurred *before* Woodham’s intervention. [MT 6/30/09, p. 49, lines 4-25, p. 50, line 1)]. Thus, the costs requested and awarded did not include substantial time devoted to drafting and negotiating the bond documents (indenture, lease, guaranty agreement, bond resolution, etc.), nor did it include the time and expense of preparing and responding to the petition and complaint filed prior to Woodham’s intervention.

Furthermore, after Woodham filed the Complaints in Intervention and appeared at the initial hearing on November 17, 2008, the 13th Street and Mezzo

actions were combined for purposes of subsequent hearings and orders. Motions and pleadings were typically dual captioned or filed in both cases. Accordingly, fees could not have been apportioned between the two validation proceedings. Nor did Woodham request that the actions be addressed separately by the court. In fact, had the two proceedings not been consolidated, more fees and costs would have been incurred and awarded.

C. Appellants Cross-Examined All Affiants Who Supervised the Work Performed and had No Right to Cross-Examine Every Timekeeper (EE-3)

Georgia law does *not* afford a party opposing a fee award the right to cross-examine each and every timekeeper who rendered services, as Woodham argues. [Br. p. 15]. Rather, a party such as Woodham has the right to cross-examine each witness who attempts to establish the amount and reasonableness of the fees and costs requested. See Santora v. American Combustion, Inc., 225 Ga. App. 771, 485 S.E.2d 34 (1997). Contrary to Woodham's argument, "the witnesses need not be the attorneys or paralegals who performed the work." Id. at 775, 485 S.E.2d at 38; see also Carpet Transport, Inc. v. Kenneth Poley Interiors, Inc., 219 Ga. App. 556, 558, 466 S.E.2d 70, 73 (1995)(stating that "it has never been held that opinion testimony of attorneys to show what constitutes a reasonable attorney fee is an invariable requirement").

Woodham's argument is based on a single case, Williams v. Cooper, 280 Ga. 145, 625 S.E.2d 754 (2006). Williams, a child support contempt action, is distinguishable on at least two grounds. First, fees were improperly awarded against a party's attorney (Williams) because the attorney was afforded no notice that an award of fees against her was under consideration. See id. at 147, 625 S.E.2d at 755. Second, Williams was not allowed to cross-examine one of the attorneys for the opposing party who had submitted affidavits in support of the fee request. Though Williams had stipulated to the consideration of affidavits, she had only done so when she believed that the only claim for attorney's fees was under O.C.G.A. § 19-6-2, and not O.C.G.A. § 9-15-14. See id. at 147, 625 S.E.2d at 756. As a consequence, the Supreme Court reversed the award on grounds that each of Cooper's counsel would need to "establish by evidence" the impact on their billing of Williams' conduct. Id. Although the facts are not clear, it appears that all attorneys who had submitted affidavits had not made themselves available for cross-examination at the original fee hearing. Id. That is not the case here. In any event, Williams did not hold that every law firm attorney whose time is included in a fee affidavit must be produced for cross-examination.

Yet that is the standard of proof Woodham argues should now be required in

Georgia. Woodham complains that he should have been afforded the opportunity to cross-examine every single timekeeper listed on the billing records attached to each supervising attorney's affidavit. The hearing transcript, however, demonstrates that Woodham established no basis to examine every timekeeper. The court told Woodham in no uncertain terms that he should ask the lead attorneys about the work that the other timekeepers had done, as described in the affidavits and accompanying business records of the firms, and that if the lead attorney could not answer Woodham's questions, *then the court would allow Woodham to cross-examine those other attorneys*. [Id. at 73-74, 78]. The court observed that instead of doing so, Woodham was attempting a form of harassment by refusing to ask such questions of the lead attorneys in an attempt to call every timekeeper to the stand instead. [Id. at 72-73]. Having failed to establish that the affiants lacked sufficient knowledge to describe work performed by other timekeepers at their firms on account of Woodham's intervention, Woodham established no basis to cross-examine other attorneys.

D. The Trial Court Did Not Err in Awarding Fees Based on Its "Inherent Power" (EE-4)

The Final Order stated, among other things, that "the Court has the inherent power to sanction parties and their counsel by awarding attorneys' fees. Such

authority is also conferred by O.C.G.A. § 9-15-14(b) in instances such as this where the Court, on its own motion, finds that an attorney or party has asserted a position or pursued an action for purposes of harassment, for vexatious reasons or other improper purpose.” [CC R.24]. Had Woodham sought to take issue with the trial court’s exercise of its inherent authority to award fees, he should have assigned that as error in the Companion Case, which is an appeal from the Final Order. The Fees Order, which is the subject of the instant appeal, simply acknowledges that the court’s May 21, 2009 ruling awarding fees was based on both O.C.G.A. § 9-15-14(a) and the court’s inherent power to sanction parties and their counsel by awarding fees. In short, Enumeration of Error 4 is improper.

Even if this issue were properly raised in the appeal of the order setting the amount of fees, it is without merit. Woodham argues that courts do not have the inherent power to award fees because attorney’s fees are recoverable only where authorized by some statutory provision or by contract. [Br. p. 21]. Though Woodham correctly recites the American Rule with respect to prevailing parties in litigation, this general rule does not address the issue of attorney’s fees awarded as sanctions, and not awarded merely because a party prevailed in litigation.

In fact, Georgia courts have recognized many times that the superior court has the inherent power to award attorney's fees in a variety of contexts. See Stephenson v. Board of Commissioners of Cobb County, 261 Ga. 399, 401 n.1, 405 S.E.2d 488, 490 (1991); Ford v. Ford, 245 Ga. 569, 570, 266 S.E.2d 183, 183-84 (1980)(holding it is within the inherent power of the court to grant attorneys' fees to a spouse contesting a divorce action and is usually left to the sound discretion of the trial judge); Cohen v. Feldman, 219 Ga. App. 90, 91, 464 S.E.2d 237, 239 (1995), *overruled on other grounds by*, Williams v. Cooper, 280 Ga. 145, 625 S.E.2d 754 (2006) (stating that whether court's award of attorney's fees was pursuant to its inherent authority to award fees or a *sua sponte* award of attorney fees under O.C.G.A. § 9-15-14(b), the court had authority to make the award).

O.C.G.A. § 15-1-3 codifies the superior court's inherent powers. Under O.C.G.A. § 15-1-3(4), every court has the power "[t]o control, in the furtherance of justice, the conduct of its officers and all other persons connected with a judicial proceeding before it, in every matter appertaining thereto." See, e.g., Courtesy Leasing v. Christian, 266 Ga. 187, 187, 465 S.E.2d 443, 443 (1996); Zant v. Brantley, 261 Ga. 817, 817, 411 S.E.2d 869, 869 (1992); Wallace v. Wallace, 225 Ga. 102, 111, 166 S.E.2d 718, 727 (1969); Eichelkraut v. Camp, 236 Ga. App. 721,

725, 513 S.E.2d 267, 270 (1999). Thus, when a superior court awards fees pursuant to its inherent powers conferred by O.C.G.A. § 15-1-3, it is not inconsistent with the case law cited by Woodham, in that such an award is, in fact, based on statutory authority.

Woodham's reliance on the lone case of Sinkwich v. Conner, 288 Ga. App. 320, 321, 654 S.E.2d 182, 183 (2007), for the proposition that trial courts have no inherent authority to award fees is unavailing. In fact, Woodham deliberately omits the important part of the quotation he relies upon, where Woodham represents that the court held that "Conner correctly concedes that the trial court had *no inherent authority to award fees . . .*" (emphasis supplied). [Br. p. 21]. Woodham omits the most important part of the quote, giving a misleading impression of the court's holding. The court actually stated that "Conner correctly concedes the trial court had no inherent authority to award attorney fees *merely because the case involved issues of visitation and child support.*" Id. at 321, 654 S.E.2d at 183. Sinkwich clearly did not hold that a trial court lacks the inherent authority to sanction a party by awarding attorney's fees, as Woodham would have this Court believe.

E. The Trial Court Had Jurisdiction to Hold the June 30, 2009 Hearing on Attorneys' Fees and to Enter the Fees Order (EE-5)

Woodham argues that the trial court lacked jurisdiction to hold the June 30, 2009 evidentiary hearing on the amount of attorney's fees to be awarded because he had filed a notice of appeal of the court's May 21, 2009 Final Order.⁶ As a consequence, Woodham contends that the Fees Order is null and void. [Br. at p. 22]. Appellees agree that a trial court may not modify a judgment that is on appeal. See O.C.G.A. § 5-6-46; Cohran v. Carlin, 249 Ga. 510, 512, 291 S.E.2d 538, 540 (1982). "But the notice of appeal supersedes *only* the judgment appealed; it does not deprive the trial court of jurisdiction as to other matters in the same case not affecting the judgment on appeal." Id. (emphasis added).

The Final Order awarded the Defendants their reasonable attorneys' fees and litigation expenses and instructed the Authority and the Developers "to submit affidavits and other sufficient proof of their reasonable fees and litigation

⁶ Woodham advanced this same argument in his unsuccessful Rule 40(b) Motion to Stay Further Action by Trial Court Pending Appeal (pp. 2-4), filed in this Court on May 29, 2009. See MD-09-021, order denying Rule 40(b) Motion entered June 12, 2009 and order denying motion to reconsider entered June 24, 2009.

expenses,” advising that the trial court would hold a hearing on the reasonableness of those fees and expenses at a later date. [R.29]. A determination of the amount of fees and expenses to be awarded could not modify the Final Order or change the issues on appeal — i.e., whether Woodham’s conduct was properly sanctioned.

Second, parties must request attorneys’ fees and expenses under O.C.G.A. § 9-15-14 within 45 days after the entry of final judgment. See O.C.G.A. § 9-15-14(e). Interpreting this section, the Supreme Court has noted: “[R]equiring that the question of entitlement to attorney fees be presented to the trial court shortly after the case has concluded in that court has the virtue of raising the issue while the trial court’s memory of events is still fresh.” See Fairburn Banking Co. v. Gafford, 263 Ga. 792, 793, 439 S.E.2d 482, 483 (1994). The same is true regarding the amount to be awarded: presenting the trial court with proof of the fees and costs sought “while the trial court’s memory of events is still fresh,” including the nature and course of the litigation, will better allow the trial court to evaluate whether the amount requested is commensurate with what was reasonable and necessary.

Woodham cites Atlanta Propeller Service, Inc. v. Hoffman GMBH & Co. KG, 191 Ga. App. 529, 531, 382 S.E.2d 109 (1989), for the proposition that his

first or second Notices of Appeal barred the trial court from conducting the fees hearing. [Br. at p. 22]. In that case, the Court held that the filing of a notice of appeal did not divest the trial court of jurisdiction to set the amount of an award of attorneys' fees because the appellant did not pay the requisite court costs until after the order setting the amount of the award was entered. Id. at 530, 382 S.E.2d at 112. Woodham contends that he, by contrast, has paid the requisite court costs. Atlanta Propeller Service does not, however, hold that the trial court is prohibited while an appeal is pending from determining the amount of the attorneys' fees and costs to be assessed. See id.

Indeed, if the trial court had not conducted the June 30 hearing and had waited until after all appeals of these matters were concluded to determine the amount of fees and costs to be awarded, Woodham *then* would argue that under Fairburn Banking Co., once 45 days from entry of the trial court's final judgment has passed, the trial court no longer has jurisdiction to do so. See Fairburn Banking Co., 263 Ga. at 793, 439 S.E.2d at 483 (trial court lacked jurisdiction to consider motion for fees under O.C.G.A. § 9-15-14 brought more than 45 days after entry of final judgment); cf. CSX Transp., Inc. v. Deen, 278 Ga. App. 845, 846, 630 S.E.2d 119, 121 (2006) (where trial court expressly reserved the issue of

attorneys fees and sanctions before the notice of appeal was filed, it had jurisdiction to award fees to the plaintiff for the defendant's discovery abuses).

V. CONCLUSION

Woodham has identified no abuse of discretion by the trial court or other basis to set aside the fee award. Accordingly, the trial court's July 6, 2009 Fees Order should be affirmed.

Respectfully submitted this 5th day of October 2009.

The Atlanta Development Authority

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CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the foregoing **BRIEF OF APPELLEES** by U.S. First Class Mail, addressed to the following:

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CLERK, COURT OF
APPEALS OF GEORGIA

IN THE COURT OF APPEALS
STATE OF GEORGIA

CITIZENS FOR ETHICS IN)
GOVERNMENT, LLC ET AL.,)

Appellants,)

v.)

CASE NO. A09A2312

THE ATLANTA DEVELOPMENT)
AUTHORITY ET AL.,)

Appellees.)

APPELLANTS' REPLY BRIEF

Appellants Citizens for Ethics in Government, LLC and John F. Woodham ("Appellants") file this Appellants' Reply Brief to the Brief of Appellees The Atlanta Development Authority, 13th Street Holdings and Mezzo Development, LLC ("Appellees") and show this Honorable Court of Appeals as follows:

1. Failure to Conduct an Actual Evidentiary Hearing.

Appellees' apparently concede they rested on affidavits and billing statements delivered to the court the day prior to the hearing and not even tendered into evidence at the hearing, but attempt to argue this is sufficient under Georgia law. "The affidavits of the supervising attorneys, including verified billing records, satisfied Appellees' burden of proving the reasonableness, necessity and value of the attorney's fees sought." *Br. at 13*. Interestingly, Appellees cite *Santora v.*

American Combustion, Inc., 225 Ga. App. 771 (1997) as their primary authority for this proposition. In *Santora*, there was actually direct testimony from counsel, who introduced billing statements into evidence and explained how counsel computed the amount of the fees sought. “American’s attorney *introduced her detailed billing records, explained how she computed the amounts attributable to the unnecessary litigation*, and was cross-examined by Santora’s counsel.” *Santora at 774*. (emphasis supplied).

The Court in *Santora* also noted: “*In Oden, supra, no billing statements were introduced, and no personal testimony was given*. The only evidence introduced in support of attorneys fees was the affidavit of lead counsel, which stated only that a certain number of hours had been performed by associates. No evidence was introduced showing that the affiant had personal knowledge of these matters.” *Santora at 775*. (emphasis supplied). In the case now before this Court, not only was there no personal direct testimony given, the affidavits and billing statements were not even introduced into evidence. There was simply no evidence offered at all.

Appellees attempt to argue “the affidavits were the effective equivalent of direct testimony.” *Br. at 17*. Appellees not only fail to cite any authority for this proposition, but more importantly, the affidavits were not tendered into evidence.

Affidavits not introduced into evidence cannot conceivably be deemed a substitute for personal, sworn testimony. Moreover, in a somewhat bizarre argument, Appellees assert it was Appellants' duty to "object" that Appellees that had failed to offer any direct testimony and evidence. "Significantly, Woodham never objected that there was no "direct" testimony at the hearing" *Br. at 17*. Appellants have no duty to ensure that Appellees are establishing a proper evidentiary record. If Appellees elect a hearing strategy of resting after having failed to introduce any evidence, then so be it. It is not Appellants' responsibility to call attention to Appellees' strategic mistake.

Appellees next cite *Martin v. Henry County Water and Sewerage Authority*, 279 Ga. 197 (2005), a case in which the Georgia Supreme Court upheld a trial court's denial of a party's motion for continuance to review billing statements. *Br. at 17*. The more interesting aspect of *Martin*, which confirms the discussion above, is the party seeking attorneys fees in *Martin* actually offered testimony and introduced billing statements into evidence. *Martin at 200*. We also see in *Martin* there were "billing records that the appellee's attorney *offered into evidence on the day of the hearing*" and "*the appellee's attorney testified at the hearing on attorneys fees and was [then] subjected to cross-examination.*" *Id.* As noted above, these are elements missing from the case now before this Court.

2. Lump Sum Attorneys Fees Award.

It is clear the trial court's award was a "lump sum" fees award, which is prohibited in Georgia. *Huggins v. Chapin*, 233 Ga. App. 109, 110 (1998). The problem now confronted by Appellees, is that in light of the mangled, verbatim Fees Order prepared by counsel for Appellees, which purports to rely both on the trial court's so-called "inherent power" as well as O.C.G.A. 9-15-14(b) for its justification, it is impossible to disentangle the O.C.G.A. 9-15-14(b) fees award, which must be limited to specific conduct under that statute, from the fees award purportedly made under the trial court's so-called "inherent power" to award fees, which power does not exist in this State.

Even more problematic for Appellees, is that since Appellees assert the Fees Order was the result of "Woodham's entire intervention, which the court found was brought for an improper purpose" (*Br. At 19*), inasmuch as "brought for an improper purpose" is not a standard set forth in O.C.G.A. § 9-15-14(b) and in fact is unconstitutionally vague on its face, it necessarily follows that this "brought for an improper purpose" standard must be the progeny of the so-called "inherent power" theory, which does not exist in this State. As such, the entire fees award, being clearly "lump sum" in nature, cannot be the product of O.C.G.A. § 9-15-

14(b), and therefore must result solely from the non-existent “inherent power”. Accordingly, there is no basis for this fees award under Georgia law.

3. Right to Cross-Examine All Attorneys.

“Williams complains on appeal that she was not provided an opportunity to cross-examine one of the attorneys whose work was represented by the claim for fees. . . On remand, *Ms. Cooper’s counsel each will need to establish by evidence the impact on their billing of Williams’ conduct.*” *Williams v. Cooper*, 280 Ga. 145, 147 (2006). (emphasis supplied) *Williams*, a 2006 unanimous decision of the Georgia Supreme Court, represents the current state of the law in the State of Georgia in respect of the right of a party opposing an attorneys fees claim to cross-examine each attorney whose work was represented by the claim for fees.

Appellees try to diminish the Georgia Supreme Court’s holding in *Williams* by simply stating: “Woodham’s argument is based on a single case” *Br. at 21*. The fact and importance that this so-called “single case” is a recent, unanimous pronouncement by the Georgia Supreme Court does not seem to dawn on Appellees. Moreover, the Georgia Supreme Court in *Williams* expressly relied on this Court’s holding in Division 2 of *Oden v. Legacy Ford-Mercury, Inc.*, 222 Ga. App. 666, 668-669 (1996). *Williams at 147*. In Division 2 of *Oden*, this Court stated: “In the case sub judice, appellee’s counsel lacked the personal knowledge

required to testify to the actual hours and functions *performed by another attorney under his supervision*, and the relevant portions of his affidavit are, therefore inadmissible as hearsay.” *Oden at 668*. (emphasis supplied)

In so holding, this Court in *Oden* was relying on this Court’s prior decision in *Mitcham v. Blalock*, 214 Ga. App. 29 (1994). *Oden at 668*. In *Mitcham*, this Court concluded that “since there was no admissible evidence supporting the trial court’s award of attorney fees in the amount of \$1,286.25 and *since plaintiff was not provided opportunity to cross-examine the two attorneys and the paralegal who purportedly worked-up the motion to compel, the trial court’s award of attorney fees in the amount of \$1,286.25 was not authorized.*” *Mitcham at 33*. See also *Southern Company v. Hamburg*, 220 Ga. App. 834, 842 (1996).

Appellees, however, base their argument solely on *Santora v. American Combustion, Inc.*, 225 Ga. App. 771 (1997), for the proposition that only the “lead” attorney is subject to cross-examination. *Br. at 20*. This Court in *Santora* distanced itself from the prior holdings in *Mitcham* and *Hamburg*, and thus Appellees are relying on *Santora* for the proposition that only the so-called “lead” attorney be required to testify regarding attorneys fees. *Santora at 775*. The problem faced by Appellees is (i) there was not even any direct testimony in the present case, and (ii) the Georgia Supreme Court in *Williams* has expressly reaffirmed the *Oden*,

Mitcham and *Hamburg* line of cases. Appellees' reliance on *Santora* is thus misplaced. *Williams* represents the law in this State, and the trial court therefore abused its discretion in denying Appellants the opportunity to cross-examine all attorneys whose work was represented by the claims for fees.

4. No "Inherent Power" to Award Fees.

Appellees, who prepared the trial court's verbatim Fees Order, continue to pursue the meritless argument that the trial court has "inherent power" to award attorneys fees, notwithstanding the well-settled principle in Georgia that attorneys fees are recoverable only where authorized by some statutory provision or by contract. *Walker v. Walker*, 266 Ga. 414 (1996); *Glynn County Federal Employees Credit Union v. Peagler*, 256 Ga. 342, 344 (1986). Appellees first cite *Stephenson v. Board of Commissioners of Cobb County*, 261 Ga. 399 (1991). *Br* at 24. *Stephenson* did not concern the award of attorneys' fees in favor of one party against the other.

Stephenson dealt with whether the Clerk of Superior Court of Cobb County could require reimbursement from Cobb County for attorneys fees incurred by the Clerk in defending a mandamus case brought by an inmate. *Stephenson* is a separation of powers case pertaining to which governmental entity (the Clerk or the Board) had the authority to engage counsel, and whether the Clerk could compel

reimbursement from the Board by way of mandamus. The trial court held the Clerk could not compel reimbursement, and the Georgia Supreme Court affirmed. Appellees are apparently relying on a footnote on page 401 of *Stephenson* which states: “However, there may be some instances in which a superior court might exercise its inherent power to require the payment of attorneys fees *for the clerk of superior court when separation of powers considerations require it.*” *Stephenson* at 401. (emphasis supplied) A court’s power to deal with a possible separation of powers issue as to the responsible governmental entity for reimbursement of attorneys fees incurred has no relation to an award of attorneys in favor of one party against another. *Stephenson* is completely inapplicable to the issues before this Court, and Appellees’ citation to *Stephenson* is perplexing at best.

Appellees next cite *Ford v. Ford*, 245 Ga. 569 (1991), which is a divorce case. *Br. at 24*. It is well-settled that an award of attorneys fees in a divorce case is considered temporary alimony. *Brown v. Brown*, 224 Ga. 90, 91 (1968). Further, attorney’s fees are expressly authorized in this situation by the statutory provisions of O.C.G.A. § 19-6-2. The case now before this Court is not a divorce case, so Appellees’ reliance on *Ford* clearly does not obtain. Appellees next cite *Cohen v. Feldman*, 219 Ga. 90 (1995). *Br. at 24*. Cohen involved an apparent finding of civil contempt. “Courts have inherent powers to impose punishments for contempt.”

Cohen at 91. However, it is also well-settled that courts do not possess the power to punish criminal contempt by awarding attorneys fees. *Rolleston v. Cherry*, 237 Ga. App. 733, 739 (1999). The case before this Court does not involve civil or criminal contempt, so Appellees again cite as authority a case having no relation to the issues before this Court. More importantly, the well-settled principle set forth in *Rolleston*, limiting the ability of a trial court to award attorneys fees in contempt cases, completely bottoms out any assertion that a trial court in this State possesses unbridled “inherent power” to sanction parties and their counsel by awarding fees.

Appellees next turn to O.C.G.A. § 15-1-3 as the purported codification of the “superior court’s inherent powers.” *Br. at 24*. Appellees thus create the contorted argument that a trial court’s award of attorneys fees pursuant to its so-called “inherent authority” is in fact based on statutory authority under O.C.G.A. § 15-1-3. *Br. at 25*. This borders on the absurd. First, none of the cases cited by Appellees on page 24 of their brief involve the award of attorneys fees, so Appellees are not able to cite to a single case which supports this argument. Second, if O.C.G.A. § 15-1-3 does indeed codify the court’s “inherent powers”, then the failure of the General Assembly to expressly include the award of attorneys fees anywhere in O.C.G.A. § 15-1-3 is a clear showing of legislative intent that there is no such “inherent power” to award attorneys fees. Appellees thus attempt to infer an attorneys fees award

provision into O.C.G.A. § 15-1-3 which does not exist. The rules of statutory construction do not allow this. “The ‘golden rule’ of statutory construction requires us to follow the literal language of the statute unless it produces contradiction, absurdity or such an inconvenience as to ensure the legislature meant something else.” (cits.) *City of Winder v. McDougald*, 276 Ga. 866, 869 (2003). “Where, as here, the language of a statute is plain on its face, judicial construction is not only unnecessary, but is forbidden.” *Minnix v. Dept. of Transportation*, 272 Ga. 566, 571 (2000).

The statutory authority to award attorneys must be specifically set forth in the statute. *Walker, supra* at 414 (“Neither the statutes providing for quia timet against all the world . . . nor the statutes providing for statutory portioning . . . *provide specifically for attorneys fees* . . .”). (emphasis supplied) Appellees’ attempt to infer statutory authority for a court’s power to award attorneys fees under O.C.G.A. § 15-1-3 clearly does not obtain. Moreover, O.C.G.A. § 15-1-3 pertains to the power of trial courts as well as appellate courts (“Every court has power: . . . “). It is well-settled that an attorneys fees award cannot be assessed by an appellate court except for a frivolous appeal pursuant to O.C.G.A. § 5-6-6 and the Rules of the appellate court. *Evans County Board of Commissioners v. Claxton Enterprise*, 255 Ga. App. 656, 660 (2002); *Harkleroad v. Stringer*, 231 Ga. App. 464, 472 (1998)

“OCGA § 9-15-14 does not does not authorize an award for the expenses of litigation incurred during proceedings before an appellate court of this state”). If O.C.G.A. § 15-1-3 provided courts of this State some unstated, implicit “inherent power” to award attorneys fees, such power would inure to the appellate courts of this state as well as trial courts. Inasmuch as this Court does not assert O.C.G.A. § 15-1-3 as providing this Court “inherent power” to award attorneys fees, such “inherent power” purportedly arising under O.C.G.A. § 15-1-3 likewise does exist in the trial courts of this State.

5. No Jurisdiction to Hold the 6/30/09 Hearing and to Enter the Fees Order.

A notice of appeal to a final judgment deprives the trial court of jurisdiction to take further proceedings towards enforcement of the judgment superseded. *Walker v. Walker*, 239 Ga. 175, 175-176 (1977); *Smiway, Inc. v. Department of Transportation*, 178 Ga. App. 414, 419 (1986) (“Smiway having appealed from the judgment entered on a verdict awarding all compensation in favor of Mrs. Schiffer and none to it, the trial court erred in granting Mrs. Schiffer’s motion for writ of execution.”); *Harrison v. CGU Insurance Company*, 269 Ga. App. 549, 555 (2004).

Appellees simply ignore this principle and instead attempt to alter and re-configure the basis of Appellants’ enumeration of error. “Appellees agree that a trial court may not modify a judgment that is on appeal.” *Br. at 26*. Appellants do

not assert the trial court by way of the Fees Order seeks to “modify” the Final Order on appeal in Companion Case No. A09A2105. Appellants show the Fees Order seeks to enforce a portion of the Final Order, while the Final Order is on appeal. The trial court has no jurisdiction or authority to do this.

Appellees cite *Cohran v. Carlin*, 249 Ga. 510 (1982), which case stands for the proposition the notice of appeal supercedes only the judgment appealed but does not deprive the trial court of jurisdiction as to other matters in the same case not related to the judgment on appeal. *Br. at 26*. The *Cohran* principle is an exception to the well-settled rule stated in *Walker* that a court is divested of jurisdiction to enforce a judgment on appeal. The decision in *Cohran* relies in large part on this Court’s decision in *Bivins v. McDonald*, 50 Ga. App. 299, 302 (1934) (“Matters independent of and distinct from the questions involved in the appeal are not taken from the jurisdiction of the trial court.”).

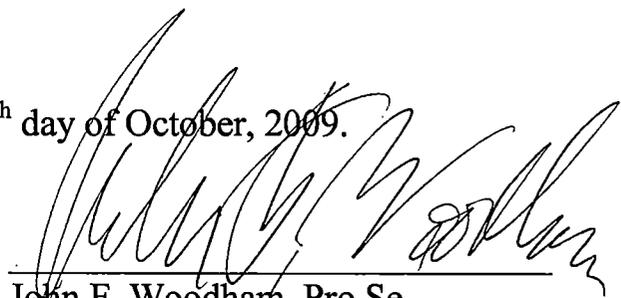
This exception is clearly not present in the case now before this Court. The Fees Order is directly related to an issue on appeal, that being the award of attorneys fees in the Final Order. The Fees Order is not “independent of and distinct from the questions involved in the appeal” of the Final Order in Companion Case No. A09A2105. As stated, the Fees Order is an attempted enforcement of a portion of the Final Order, and thus the trial court had no jurisdiction to enter the Fees

Order. Appellees next cite the O.C.G.A. § 9-15-14 requirement that a motion for attorneys fees be filed within 45 days of the final judgment, including a citation to *Fairburn Banking Co v. Gafford*, 263 Ga. 792 (1994). *Br. at 27*. The 45-day requirement for filing a motion for attorneys fees following final judgment is not applicable in this case, since the attorneys fee award was made in the Final Order itself, in the form of an illegal, sua sponte award made by the court without motion of the Appellees or even the court's own noticed motion.

Appellees then attempt to argue *Atlanta Propeller Service, Inc. v. Hoffman GMBH & Co. KG*, 191 Ga. 529 (1989) does not support Appellants' position. *Br. at 27-28*. *Atlanta Propeller* presents a factual situation almost identical to the one now before this Court, except that the appealing party in *Atlanta Propeller* had not paid court costs prior to the entry of the order setting the amount of fees. *Atlanta Propeller* at 531. This Court in *Atlanta Propeller* did not rule against the appellant because the Court had made a determination that the supersedeas rule preventing enforcement of a judgment on appeal did not apply. The Court simply found the appellant had not paid costs, such that supersedeas had not been triggered. As hard as Appellants try, they cannot pretend away this Court's holding in *Atlanta Propeller*.

Interestingly, Appellees at the end of their brief cite to this Court's decision in *CSX Transp., Inc. v. Deen*, 278 Ga. App. 845 (2006). *Br at 28-29*. The particularly notable language from *Deen* is: "Immediately upon the receipt by its clerk of the remittitur from the appellate court, the trial court's jurisdiction to address the remaining pending issued resumed." *Deen* at 847. One of the remaining issued in *Deen* was determination of attorneys fees for discovery abuses. *Deen* thus supports Appellants' position that filing of the notice of appeal coupled with payment of costs divested the trial court in the subject proceeding of jurisdiction to determine fees, but such jurisdiction can be returned to the court following resolution of the appeal.

Respectfully submitted, this 26th day of October, 2009.



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CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the within and foregoing Appellants' Reply Brief on counsel of record by placing same in the United States Mail, with proper postage thereon to ensure delivery, addressed to:

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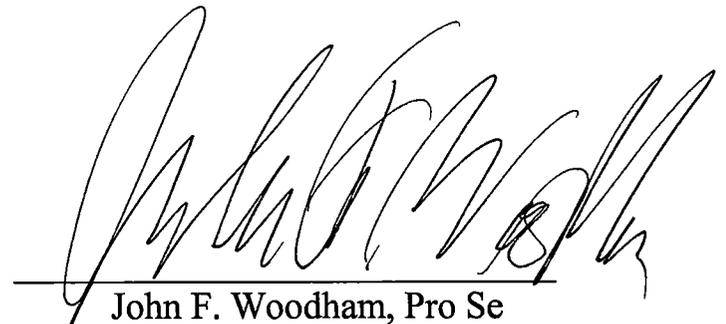
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IN THE COURT OF APPEALS
STATE OF GEORGIA

CITIZENS FOR ETHICS IN)
GOVERNMENT, LLC ET AL.,)

Appellants,)

v.)

THE ATLANTA DEVELOPMENT)
AUTHORITY ET AL.,)

Appellees.)

CASE NO. A09A2105

CASE NO. A09A2312

CLERK OF COURT APPEALS
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CLERK, COURT OF
APPEALS OF GEORGIA

APPELLANTS' SUPPLEMENTAL BRIEF

Appellants Citizens for Ethics in Government, LLC and John F. Woodham ("Appellants") file this Appellants' Supplemental Brief and show this Honorable Court of Appeals as follows:

On or about February 8, 2010, the Fulton County Taxpayer's Foundation, Inc. (the "Foundation") filed a Brief of Amicus Curiae Fulton County Taxpayers Foundation, Inc. in Favor of Appellants John F. Woodham and Citizens for Ethics in Government, Inc. On March 3, 2010, Appellee The Atlanta Development Authority ("ADA") filed its Supplemental Brief of Appellee The Atlanta Development Authority Responding to Brief of Amicus Curiae.

Appellants have reviewed the ADA's Supplemental Brief and find, among others, one particular assertion utterly baseless, yet so typical of the frivolous,

deceptive and contemptuous statements of the ADA and the other Appellees made throughout these proceedings, both at the lower court and on appeal. The particular assertion of the ADA in question is the following: “The Foundation – *likely at Woodham’s behest* – has submitted an amicus brief” *Supplemental Brief*, p. 2. (emphasis supplied) This unsupported assertion is a blatant fabrication, and the ADA owes an immediate apology to the Foundation, or some sort of sanction should be imposed upon the ADA and its counsel.

The ADA goes on to state: “The uncontradicted evidence of his conduct and the trial court’s related findings of fact are a matter of record.” *Supplemental Brief*, p. 2. This statement is just plain absurd. The so-called “uncontradicted evidence” is the result of an illegal, unconstitutional, null and void hearing held on February 27, 2009, in violation of the automatic stay imposed by O.C.G.A. 9-11-11.1(d). Moreover, the text of the telephone call illegally recorded by Mr. Leventhal¹

¹ It was agreed prior to the telephone call in question that the call would not be recorded. Patricia Roy agreed by e-mail that the call would not be recorded. (MT. 2/27/09, p. 29, lines 15-20 in Case No. A09A2105). The agreement made by Ms. Roy obviously covered herself and her client, Mr. Leventhal. As such, no party to the call consented to the call being recorded. This means that Mr. Leventhal is guilty of O.C.G.A. 16-11-62 (which is a felony punishable up to five years of imprisonment), and the exception contained in O.C.G.A. 16-11-66 is not applicable,

actually exonerates Appellants, yet Appellees, not surprisingly, have distorted and misrepresented that communication to the point of debasing judicial system and the subject trial court proceedings into a sham.

Besides the felony committed by Mr. Leventhal, the other substantial misconduct inflicted upon the judicial system in these proceedings was courtesy of Mr. Ichter and Ms. Roy, counsel for Appellees 13th Street Holdings, LLC and Mezzo Development, LLC, the companies associated with Mr. Leventhal. The nature and extent of Ichter's and Roy's conduct did not become fully apparent until Ichter was placed under oath, on cross-examination, at the June 30, 2009 illegal, null and void fees hearing.

In multiple pleadings and arguments before the court in Case Nos. 2008CV159232 and 2008CV159238 in the Superior Court of Fulton County (Appellants being parties to these proceedings, pursuant to O.C.G.A. § 36-82-77(a)), Cary Ichter accused Appellants of "extortion". Extortion is a crime in the State of Georgia, not a civil tort. *Rolleston v. Huie*, 198 Ga. App. 49, 50 (1990); *Markowitz*

because Mr. Leventhal consented and agreed through his attorney that the call would not be recorded. Again, it should be noted that the actual transcript of the recording is exonerating to Appellants, but this does not alleviate the severity of the felony committed by Mr. Leventhal.

v. *Wieland*, 243 Ga. App. 151, 157, n. 11 (2000) (threatening civil suit does not violate O.C.G.A. § 16-8-16 nor does it state a tort claim). It was not until Mr. Ichter was finally placed on the witness stand under cross-examination did he finally confess that his frivolous claim of extortion was a made up criminal accusation, asserted solely to obtain advantage in a civil matter. Before he conceded the claim was a frivolous criminal accusation, he admitted under oath that he had indeed accused Appellants of extortion in multiple pleadings and in open court. However, because he first conceded there is no civil tort of extortion in the State of Georgia, he by necessity conceded his accusation of extortion was a criminal accusation.

Q ***Do you understand that in Georgia, there is no civil tort to extortion?***

A Yes.

Q Okay. Well then why did you sue Turner Construction, the general contractor for Mezzo Development, for extortion?

The Court: What's the difference – Okay. How is that relevant to the fees that he is asking for in this case?

Mr. Woodham: ***It's relevant to the frivolous claims of extortion that Mr. Ichter has a history of bringing against people. And the fees is in this case he is asking for are result of a frivolous claim,*** and therefore –

(MT. 6/30/09, p.115, lines 3-16 in Case No. A09A2312; *see excerpts from the 6/30/09 hearing attached hereto as Exhibit "A"*) (emphasis supplied)

After first conceding extortion is not a civil tort in Georgia (thus it is necessarily a crime), Mr. Ichter admitted to having accused Appellants of the crime of extortion.

Q Mr. Ichter, *did you accuse me in multiple pleadings and in open court of extortion?*

A Yes.

Q Okay. Is that a civil complaint?

A Well, it's just a statement of fact.

Q Expound on that.

The Court: How is that relevant, again? How is this relevant?

Mr. Woodham: *This is the core issue of the case.*

The Court: Just listen to me. Just listen to me. How is it relevant to the specific fees they are asking for with respect to this case?

Mr. Woodham: It's very relevant *because if it is a frivolous claim made for purposes of seeking advantage in a civil matter, not only is it a violation of the State Bar, it would render –*

The Court: Okay. Well, Let me just say this to you, Mr. Woodham.

Mr. Woodham: -- *Recovery of any fees in this case without merit.*

(MT. 6/30/09, p.116, lines 6-25, p. 117, lines 1-2 in Case No. A09A2312; *see Exhibit "A"*) (emphasis supplied)

Then, after having conceded there is no civil tort for extortion in Georgia, Mr. Ichter conceded the elements of the crime of extortion were not present in the case, so we have a situation where Mr. Ichter was accusing Appellants of a crime, extortion, knowing fully well that the criminal accusation was a misrepresentation to the court, false, non-meritorious, frivolous, vexatious, and being asserted only for purposes of harassment and obtaining an advantage in a civil matter.² Among other things, this is a gross violation of Georgia Rule of Professional Conduct 3.4(h).

² It is for this reason, the frivolous and harassing claim of the crime of extortion, that Appellants originally sought the protections afforded under the Georgia Anti-SLAPP statute, O.C.G.A. § 9-11-11.1.

Q You have stated there is no civil tort extortion in the State of Georgia. Can you recite the elements for the Court -- Can you recite for the court the requisite elements under O.C.G.A. Section 16-8-16, "Yes" or "No"?

The Court: That's not -- Okay. That question is irrelevant as it pertains to the billings here today and the fees that they are asking for. Next Question.

Mr. Woodham: Your honor --

The Court: You can take exception with that, but that is the court's ruling. Move one.

Mr. Woodham: It relates to extortion. Extortion – *I have been accused of extortion in multiple pleadings and in open court. Extortion in either a civil tort or it's a crime. He said it's not a civil tort. He has accused me of committing a crime.*

The Court: I understand what you are saying Mr. Woodham.

Mr. Woodham: *I want to know whether he thinks the elements of the crime of extortion had been met in this case.*

The Court: Mr. Woodham. Let me say a couple of things to you. *First of all, please don't raise your voice.* I am trying to give you the opportunity, afford you the opportunity to ask the questions I think you need to ask. . .

Mr. Woodham: *I am not going to sit down.*

The Court: Well, don't interrupt me. Then ask him the questions specifically about the fees that he is asking for.

Mr. Woodham: May I ask him the following question whether his client has sworn out a criminal complaint?

The Court: *I don't know whether his client has sworn out a criminal complaint. Are you seeking fees for any sort of criminal complaint?*

The Witness: *No.*

(MT. 6/30/09, p. 121, lines 2-25, p. 122, lines 15-25, p. 123, lines 1-2 in Case No. A09A2312; see Exhibit "A") (emphasis supplied)

Q Explain your use of the word "extort".

A Somebody who threatens to do something improper in order to receive a payment.

Q Is that a civil case?

A No. It is, in this case, a violation of 9-15-14, pursuing litigation for an improper purpose. *It's neither a tort in this context nor a violation of the criminal statute.* It has to do with the intent of the Intervenor in pursuing the litigation.

Q ***So you have just stated that your allegation of extortion is neither a tort, it's neither a crime in this case. It is merely a violation of 9-15-14(B)?***

A I think you heard me right.

Q ***I hope a lot of people heard that.***

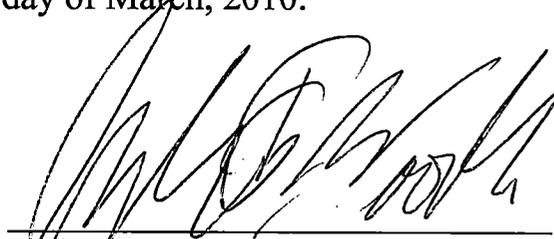
(MT. 6/30/09, p. 133, line 1, p. 134, lines 1-13 in Case No. A09A2312; *see Exhibit "A"*) (emphasis supplied)

The foregoing sworn testimony of Mr. Ichter, once he was finally placed on the witness stand, under oath, and subjected to forceful cross-examination and forced to reveal his egregious tactics in open court, makes out a clear, *prima facie* case of a violation of Rule 3.4(h). Mr. Ichter's actions also implicate, (i) 3.1 (non-meritorious claims), (ii) 3.3 (candor toward the tribunal, and (iii) 8.4(a)(4) (engaging in professional conduct involving dishonesty, fraud, deceit or misrepresentation), as well as Standard 45 (b) of Rule 4-102 of the Canons and Ethics existing prior to January 1, 2001.

Interestingly, despite language from the trial court's May Final Order that the matter would be reported "to the Office of General Counsel of the State Bar of Georgia for further investigation." (R.,V.2, p. 232 in Case No. A09A2105), the trial court never took that action. Presumably, Cary Ichter's "Jimmy Swaggart" like confession on June 30, 2009 persuaded the trial court that no bar violation was implicated with respect to Appellants, and in fact, the court would in reality have to report to the State Bar Mr. Ichter's admitted, *prima facie* violation of Rule 3.4(h).

The testimony elicited from Mr. Ichter on June 30, 2009 unquestionably showed his eager willingness to flaunt the Georgia Rules of Professional Conduct to obtain legal advantage in these civil proceedings. Clearly, neither Mr. Ichter, his clients, nor the ADA should benefit by the egregious behavior and tactics of Cary Ichter.

Respectfully submitted, this 9th day of March, 2010.



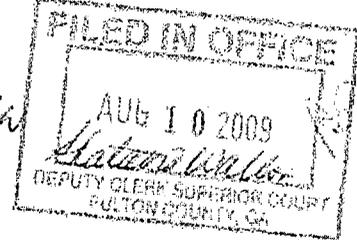
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EXHIBIT "A"

IN THE SUPERIOR COURT OF FULTON COUNTY

STATE OF GEORGIA



STATE OF GEORGIA,)
)
 PLAINTIFF,)
)
 V.)
)
 THE ATLANTA DEVELOPMENT AUTHORITY)
 AND MEZZO DEVELOPMENT, LLC,)
)
 DEFENDANTS,)
)
 AND)
)
 JOHN F. WOODHAM AND CITIZENS)
 FOR ETHICS IN GOVERNMENT, LLC.,)
)
 INTERVENORS.)

CIVIL ACTION
FILE NO. 2008CV159238

MOTION

TRANSCRIPT OF PROCEEDINGS BEFORE
THE HONORABLE MICHAEL D. JOHNSON,
COMMENCING ON JUNE 30, 2009.

IONIE TAYLOR, RPR
OFFICIAL COURT REPORTER B-1647
T-8705 FULTON COUNTY JUSTICE CENTER
ATLANTA, GEORGIA 30303

COPY

1 WITH IT. LET'S MOVE ON.

2 BY MR. WOODHAM:

3 Q DO YOU UNDERSTAND THAT IN GEORGIA, THERE IS NO CIVIL
4 TORT TO EXTORTION?

5 A YES.

6 Q OKAY. WELL, THEN WHY DID YOU SUE TURNER
7 CONSTRUCTION, THE GENERAL CONTRACTOR FOR MEZZO DEVELOPMENT,
8 FOR EXTORTION?

9 THE COURT: WHAT'S THE DIFFERENCE -- OKAY. HOW IS
10 THAT RELEVANT TO THE FEES THAT HE IS ASKING FOR IN THIS
11 CASE?

12 MR. WOODHAM: IT'S RELEVANT TO FRIVOLOUS CLAIMS OF
13 EXTORTION THAT MR. ICHTER HAS A HISTORY OF BRINGING
14 AGAINST PEOPLE. AND THE FEES IN THIS CASE THAT HE IS
15 ASKING FOR ARE RESULT OF A FRIVOLOUS CLAIM, AND
16 THEREFORE --

17 THE COURT: THE FEES THAT'S ASKING FOR, I AM
18 ASSUMING, PERTAINS TO ALL OF THE FILINGS AND ALL OF THE
19 WORK THAT HE HAD TO DO TO CONTEST YOUR INTERVENTION.
20 NOW, IF YOU WANT TO POINT TO SOMETHING, A SPECIFIC FILING
21 THAT HE HAS MADE WITH RESPECT TO HIS FEES, THAT'S FINE.
22 I DON'T WANT TO SPEAK IN GENERAL TERMS ABOUT WHAT HE DID
23 IN SOME CASE AT SOME POINT IN HISTORY. I WANT YOU -- HE
24 HAS ASKED FOR THE FEES IN HIS AFFIDAVIT. I HAVE REVIEWED
25 HIS AFFIDAVIT.

1 NOW, YOU HAVE AN OPPORTUNITY TO CROSS-EXAMINE
2 MR. ICHTER AS IT PERTAINS TO HIS AFFIDAVIT, AND THE FEES
3 IN THIS AFFIDAVIT ARE THE FEES HE IS ASKING FOR. DO
4 THAT. I MEAN, I AM GIVING YOU THIS OPPORTUNITY.

5 BY MR. WOODHAM:

6 Q MR. ICHTER, DID YOU ACCUSE ME IN MULTIPLE PLEADINGS
7 AND IN OPEN COURT OF EXTORTION?

8 A YES.

9 Q OKAY. IS THAT A CIVIL COMPLAINT?

10 A WELL, IT'S JUST A STATEMENT OF FACT.

11 Q STATEMENT OF FACT?

12 A YES.

13 Q EXPOUND ON THAT.

14 THE COURT: HOW IS THIS RELEVANT, AGAIN? HOW IS
15 THIS RELEVANT?

16 MR. WOODHAM: THIS IS THE CORE ISSUE OF THIS CASE.

17 THE COURT: JUST LISTEN TO ME. JUST LISTEN TO ME.

18 HOW IS IT RELEVANT TO THE SPECIFIC FEES THEY ARE
19 ASKING FOR WITH RESPECT TO THIS CASE?

20 MR. WOODHAM: IT'S VERY RELEVANT BECAUSE IF IT IS A
21 FRIVOLOUS CLAIM MADE FOR PURPOSES OF SEEKING ADVANTAGE IN
22 A CIVIL MATTER, NOT ONLY IS IT A VIOLATION OF THE STATE
23 BAR, IT WOULD RENDER --

24 THE COURT: OKAY. WELL, LET ME SAY THIS TO YOU,
25 MR. WOODHAM.

1 MR. WOODHAM: -- RECOVERY OF ANY FEES IN THIS CASE
2 WITHOUT MERIT.

3 THE COURT: MR. WOODHAM, YOU CAN ARGUE THAT TO THE
4 COURT OF APPEALS IF WOULD YOU LIKE. THE COURT HAS
5 ALREADY MADE ITS DETERMINATION THAT FEES ARE APPROPRIATE.
6 THEY ARE ASKING FOR APPROXIMATELY SIXTY-FIVE, \$66,000 IN
7 FEES. SO YOU HAVE THE OPPORTUNITY TO NOW QUESTION
8 MR. ICHTER SPECIFICALLY ABOUT THE FEES. ASK HIM
9 SPECIFICALLY ABOUT THE FEES THAT HE IS REQUESTING.

10 MR. WOODHAM: THEY ARE FEES THAT RELATE TO THE
11 ALLEGATION OF EXTORTION.

12 THE COURT: ASK HIM ABOUT THE FEES. POINT OUT THE
13 FEES YOU WANT TO ASK HIM. ASK HIM ABOUT THE FEES.

14 MR. WOODHAM: HOW MANY -- WHAT'S THE FEES -- AND,
15 AGAIN, I WILL -- THE ADMISSIBILITY OF THE AFFIDAVIT AND
16 THE STATEMENTS AND BILLING STATEMENT THAT I OBJECT TO IS
17 HEARSAY, FOR THE RECORD.

18 THE COURT: ALL RIGHT. MR. ICHTER, CAN YOU EXPLAIN
19 TO THE COURT HOW THE -- HOW YOU CAME UP WITH THIS
20 AFFIDAVIT AND THE BILLING IN THE AFFIDAVIT?

21 THE WITNESS: ON A REGULAR BASIS, WHEN WE PERFORM
22 VARIOUS TASKS DURING THE COURSE OF THE DAY, WE WILL
23 EITHER RECORD THEM ON TIME SHEETS, WHICH IS MY PRACTICE,
24 OR RECORD THEM INTO OUR COMPUTER SYSTEM. THOSE ARE
25 CONTEMPORANEOUSLY KEPT RECORDS THAT REFLECT THE

1 BY MR. WOODHAM:

2 Q YOU HAVE STATED THERE IS NO CIVIL TORT EXTORTION IN
3 THE STATE OF GEORGIA. CAN YOU RECITE THE ELEMENTS FOR THE
4 COURT -- CAN YOU RECITE FOR THE COURT REQUISITE ELEMENTS UNDER
5 O.C.G.A. SECTION 16-8-16, "YES" OR "NO"?

6 THE COURT: THAT'S NOT -- OKAY. THAT QUESTION IS
7 IRRELEVANT AS IT PERTAINS TO THE BILLINGS HERE TODAY AND
8 THE FEES THAT THEY ARE ASKING FOR. NEXT QUESTION.

9 MR. WOODHAM: YOUR HONOR --

10 THE COURT: YOU CAN TAKE EXCEPTION WITH THAT, BUT
11 THAT'S THE COURT'S RULING. MOVE ON.

12 MR. WOODHAM: IT RELATES TO EXTORTION. EXTORTION --
13 I HAVE BEEN ACCUSED OF EXTORTION IN MULTIPLE PLEADINGS
14 AND IN OPEN COURT. EXTORTION IS EITHER A CIVIL TORT OR
15 IT'S A CRIME. HE SAID IT'S NOT A CIVIL TORT. HE HAS
16 ACCUSED ME OF COMMITTING A CRIME.

17 THE COURT: I UNDERSTAND WHAT YOU ARE SAYING,
18 MR. WOODHAM.

19 MR. WOODHAM: I WANT TO KNOW WHETHER HE THINKS THE
20 ELEMENTS OF THE CRIME OF EXTORTION HAD BEEN MET IN THIS
21 CASE.

22 THE COURT: MR. WOODHAM, LET ME SAY A COUPLE OF
23 THINGS TO YOU. FIRST OF ALL, PLEASE DON'T RAISE YOUR
24 VOICE. I AM TRYING TO GIVE YOU THE OPPORTUNITY, AFFORD
25 YOU THE OPPORTUNITY TO ASK THE QUESTIONS I THINK YOU NEED

1 TO ASK. BUT IF I DON'T FEEL THAT THE QUESTIONS ARE
2 RELEVANT, YOU DON'T NEED TO ASK. IT'S REALLY JUST THAT
3 SIMPLE. I DON'T FEEL LIKE THIS QUESTION IS RELEVANT AS
4 IT PERTAINS TO WHETHER OR NOT THE FEES THAT THEY ARE
5 ASKING FOR ARE APPROPRIATE. THAT'S THE ONLY ISSUE THAT
6 WE ARE HERE TO DETERMINE, NOT WHETHER OR NOT MR. ICHTER
7 RIGHTLY OR WRONGLY ACCUSED YOU OF EXTORTION. THAT'S NOT
8 THE ISSUE. I DETERMINE THE ISSUE, NOT YOU. I DO.

9 NOW, I AM AFFORDING YOU THE OPPORTUNITY -- THOUGH
10 YOU MAY NOT LIKE THE WAY I AM DOING IT, I AM AFFORDING
11 YOU THE OPPORTUNITY TO QUESTION MR. ICHTER ABOUT THE
12 APPROPRIATENESS OF THE FEES THAT HE IS REQUESTING. YOU
13 CAN TAKE THE OPPORTUNITY AND ASK HIM QUESTIONS
14 SPECIFICALLY ABOUT THE FEES, OR YOU CAN SIT DOWN.

15 MR. WOODHAM: I AM NOT GOING TO SIT DOWN.

16 THE COURT: THOSE ARE YOUR CHOICES.

17 MR. WOODHAM: I'M NOT GOING TO SIT DOWN.

18 THE COURT: WELL, DON'T INTERRUPT ME.

19 THEN ASK HIM THE QUESTIONS SPECIFICALLY ABOUT THE
20 FEES THAT HE IS ASKING FOR.

21 MR. WOODHAM: MAY I ASK THE FOLLOWING QUESTION
22 WHETHER HIS CLIENT HAS SWORN OUT A CRIMINAL COMPLAINT?

23 THE COURT: I DON'T KNOW WHETHER HIS CLIENT HAS
24 SWORN OUT A CRIMINAL COMPLAINT.

25 ARE YOU SEEKING FEES FOR ANY SORT OF CRIMINAL

1 COMPLAINT?

2 THE WITNESS: NO.

3 THE COURT: ALL RIGHT. LET'S CONTINUE.

4 BY MR. WOODHAM:

5 Q DIDN'T YOU RECEIVE CORRESPONDENCE FROM ME LAST
6 DECEMBER PROPOSING POSSIBLY RESOLVING THESE MATTERS BY WAY OF
7 A DONATION TO A HOMELESS SHELTER BY YOUR CLIENT -- AND I HAVE
8 GOT A COPY OF THE LETTER IF YOU WOULD LIKE TO LOOK AT IT --
9 "YES" OR "NO"?

10 A I RECALL SOMETHING ALONG THOSE LINES.

11 MR. WOODHAM: CAN I APPROACH?

12 THE COURT: YOU MAY APPROACH.

13 BY MR. WOODHAM:

14 Q COULD YOU READ THE LETTER FOR THE COURT.

15 THE COURT: I DON'T SEE HOW THAT'S RELEVANT. IF YOU
16 WANT TO ASK HIM SPECIFICALLY ABOUT A FEE THAT HE IS
17 ASKING FOR AS IT PERTAINS TO ANYTHING THAT HE WROTE OR
18 DRAFTED, THEN YOU MAY DO THAT.

19 MR. WOODHAM: YOUR HONOR, IT GOES TO THE NECESSITY
20 OF THE FEES.

21 THE COURT: YOU HAVEN'T EVEN TALKED ABOUT THE FEE.
22 I DON'T EVEN KNOW THAT THERE IS, IN FACT, A FEE. TALK --
23 ASK HIM ABOUT THE FEE THAT'S CONNECTED WITH WHATEVER IT
24 IS THAT YOU HAVE SHOWN.

25 MR. WOODHAM: I WOULD LIKE TO ASK ABOUT THE LETTER.

1 A REVIEW AND ANALYSIS OF WRITTEN DISCOVERY, REQUESTS FROM THE
2 INTERVENORS IN PREPARING OBJECTIONS TO THOSE. SHE ATTENDED
3 THE DECEMBER 15TH, 2008 HEARING. SHE ATTENDED THE FEBRUARY
4 27TH, 2009 HEARING, AND ALSO ASSISTED IN PREPARATION FOR BOTH
5 OF THOSE EVENTS. AND I BELIEVE SHE ALSO ATTENDED THE MAY
6 11TH, 2009 HEARING.

7 Q TELL ME WHAT PART -- ON PARAGRAPH 7, PAGE 4 AS IT
8 RELATES TO THE SANCTIONAL CONDUCT -- SANCTIONABLE CONDUCT.

9 A IT IS OUR POSITION THAT EVERYTHING THAT HAPPENED
10 ASSOCIATED WITH THE INTERVENTION HAD TO DO WITH SANCTIONABLE
11 CONDUCT. ONE OF THE THINGS THAT 9-15-14 TALKS ABOUT IS
12 LITIGATION THAT IS PURSUED FOR AN IMPROPER PURPOSE. AND THE
13 IMPROPER PURPOSE HERE WAS TO EXTORT MONEY FROM THE DEVELOPER
14 BY TELLING THE DEVELOPER THAT THE BOND VALIDATION ISSUE WOULD
15 BE PURSUED ALL THE WAY UP TO THE SUPREME COURT.

16 MR. WOODHAM: YOU ARE USING THE WORD "EXTORTING" --

17 THE COURT: PLEASE DO NOT INTERRUPT THE WITNESS.

18 THE WITNESS: THAT, WE WERE TOLD --

19 THE COURT: JUST A SECOND. JUST A SECOND.

20 THE WITNESS: -- MY CLIENT WAS TOLD THAT THE MATTER
21 WOULD BE PURSUED ALL THE WAY TO THE SUPREME COURT IF THE
22 CLIENT, THE DEVELOPER, DID NOT COME FORWARD WITH
23 1 PERCENT OF THE BOND AMOUNT.

24 BY MR. WOODHAM:

25 Q EXPLAIN YOUR USE OF THE WORD "EXTORT."

1 A SOMEBODY WHO THREATENS TO DO SOMETHING IMPROPER IN
2 ORDER TO RECEIVE A PAYMENT.

3 Q IS THAT A CIVIL CASE?

4 A NO. IT IS, IN THIS CASE, A VIOLATION OF 9-15-14,
5 PURSUING LITIGATION FOR AN IMPROPER PURPOSE. IT'S NEITHER A
6 TORT IN THIS CONTEXT NOR A VIOLATION OF THE CRIMINAL STATUTE.
7 IT HAS TO DO WITH THE INTENT OF THE INTERVENOR IN PURSUING THE
8 LITIGATION.

9 Q SO YOU HAVE JUST STATED YOUR ALLEGATION OF EXTORTION
10 IS NEITHER A TORT, IT'S NEITHER A CRIME IN THIS CASE, IT IS
11 MERELY A VIOLATION OF 9-15-14(B)?

12 A I THINK YOU HEARD ME RIGHT.

13 Q I HOPE A LOT OF PEOPLE HEARD THAT. NOW, YOU ARE
14 AWARE THAT IN THE STATE OF GEORGIA, LUMP SUM FEES ARE NOT
15 ALLOWED IN TERMS OF 9-15-14, AREN'T YOU?

16 A I DON'T KNOW THAT OFF THE TOP OF MY HEAD.

17 Q YOU DON'T?

18 A USUALLY, IF I AM CONFRONTED WITH A LEGAL ISSUE, I
19 RESEARCH IT.

20 Q OKAY. WELL, LUMP SUM FEES AREN'T AVAILABLE IN THE
21 STATE OF GEORGIA.

22 A IS THERE A QUESTION EMBEDDED IN THAT SOMEWHERE?

23 Q NOPE. THE STATEMENT THAT YOUR INABILITY TO
24 DISTINGUISH BETWEEN SANCTIONABLE CONDUCT AND MATTERS
25 PERTAINING TO BOND VALIDATION RENDERS YOUR ENTIRE CLAIM

CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the within and foregoing Appellants' Supplemental Brief on counsel of record by placing same in the United States Mail, with proper postage thereon to ensure delivery, addressed to:

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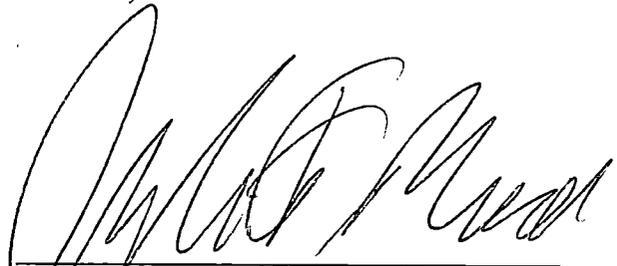
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IN THE COURT OF APPEALS
STATE OF GEORGIA

FILED IN OFFICE

JUL 20 2009

CLERK, COURT OF
APPEALS OF GEORGIA

CITIZENS FOR ETHICS IN)
GOVERNMENT, LLC ET AL.,)

Appellants,)

v.)

CASE NO. A09A2105

THE ATLANTA DEVELOPMENT)
AUTHORITY ET AL.,)

Appellees.)

APPELLANTS' BRIEF

Appellants Citizens for Ethics in Government, LLC and John F. Woodham ("Appellants") file this Appellants' Brief and show this Honorable Court of Appeals as follows:

Part I: STATEMENT OF THE CASE - PROCEDURAL BACKGROUND

On 10/29/08, in a case styled *State of Georgia v. The Atlanta Development Authority and 13th Street Holdings, LLC*, Civil Action File No. 2008CV159232, Superior Court of Fulton County, the State of Georgia filed a Petition and Complaint for Bond Validation to confirm and validate the issuance of taxable lease purchase bonds in the aggregate principle amount not to exceed \$70,000,000 (the "13th Street Project"). (R.,V.3, p. 8) On the same day, in a case styled *State of Georgia v. The Atlanta Development Authority and Mezzo Development, LLC*, Civil

Action File No. 2008CV159238, Superior Court of Fulton County, the State of Georgia filed a Petition and Complaint for Bond Validation to confirm and validate the issuance of taxable lease purchase bonds in the aggregate principle amount not to exceed \$60,000,000 (the “Mezzo Project”). (R.,V.5, p.8).

An initial validation hearing was for each proposed bond transaction was held on 11/17/08. (V.7, MT. 11/17/08; V.8; MT. 11/17/08) Appellants appeared at the hearings and became parties to the proceedings in accordance with O.C.G.A. § 36-82-77(a). (V.8, MT 11/17/08, p.3, lines 20-21, p.9, lines 4-15) Appellants filed objections to both bond validations in open court. (R.,V.3, p.229-243); (7/16/09 Supp. Rec., p.5-27) Appellants also summarized the objections during the hearing. (V.8, MT. 11/17/08, p.10-11, p.14, lines 22-25, p.15-17). Appellants filed an amended complaint in each proceeding on 12/8/08 (R.,V.3, p.220) (R.,V.5, p.222) On 12/15/08, the trial court held a joint status hearing in both proceedings. (V.9, MT. 12/15/08) At the status hearing, counsel for Appellants 13th Street Holdings, LLC (“13th Street”) and Mezzo Development, LLC “Mezzo”) orally accused Appellants of extortion and also served Appellants with a Motion to Quash, in which Appellees’ counsel put the claim of extortion in writing by way of written pleading. (R.,V.3, p.249-250) (R.,V.5, p.241-242) On 12/19/08, Appellants filed a motion to recuse the trial court (R.,V.5, p.288-298), which was denied by another

judge of the Fulton County Superior Court on 1/9/09. (R.,V.2, p.8) On 2/25/09, Appellants filed a Motion to Strike and to Dismiss With Prejudice in each proceeding under Georgia's Ani-SLAPP statute, O.C.G.A. § 9-11-11.1 (R.,V.3, p.299) (R.,V.5, p.312), because 13th Street, Mezzo and their counsel had failed to verify the claim of extortion within the 10-day period provided for in O.C.G.A. § 9-11-11.1(b). Despite the automatic stay imposed by O.C.G.A. § 9-11-11.1(d), the trial court held a series of illegal, ex parte and unconstitutional hearings on 2/27/09 (V.10, MT. 2/27/09), which Appellants did not attend because of the stay. On 3/26/09, the trial court entered a verbatim order prepared by counsel for Appellees denying Appellants' Anti-Slapp Motion. (R.,V.2, p.78)

On 4/21/09, Appellants filed a second motion to recuse the trial court. (R.,V.2, p.85) On 5/8/09, the trial court entered a verbatim Final Order prepared by counsel for Appellees (R.,V.2, p.221), during the pendency of the second motion to recuse, in violation of U.S.C.R. 25.3. Appellants filed a Notice of Appeal on 5/11/09 (R.,V.2, p.267) in respect of the 5/8/09 Final Order and the 3/26/09 Order, which Notice of Appeal was amended on 5/12/09. (R.,V.2, p.272) Appellants paid court costs in respect of the appeals on 5/12/09. (R.,V.4, p.6-10) Also on 5/11/09, the trial court presided at its own recusal hearing, in violation of U.S.C.R. 25.5. (V.6, MT. 5/11/09). On 5/13/09, the trial court purportedly entered another

verbatim order prepared by counsel for Appellees (R.,V.4, p.11), attempting, among other things, to deny the second motion to recuse and to withdraw and vacate the 5/8/09 Final Order. On 5/14/09, Appellees filed a motion to dismiss Appellants' 5/11/09 appeal. (R.,V.2, p.281) On 5/21/09, the trial court entered yet another verbatim order prepared by counsel for Appellees (R.,V.4, p.16), dismissing Appellants' 5/11/09 appeal. Also, on 5/21/09, the trial court re-entered its Final Order. (R.,V.4, p.20) Appellants filed a second Notice of Appeal on 5/26/09 (R.,V.4, p.1) in respect of the 5/13/09 Order, the 5/21/09 Order and the 5/21/09 Final Order, which second Notice of Appeal was amended on 6/22/09. (R.,V.1, p.1) By way of the 11th Enumeration of Error hereinbelow, Appellants argue and show that the 5/8/09 Final Order is the operative Final Order in these proceedings. Should the Court determine the 5/21/09 Final Order is the operative Final Order, then Appellants wish to clarify that the same substantive arguments made with respect to the 5/8/09 Final Order should be applied to the 5/21/09 Final Order, inasmuch as the orders are identical.

PHANTOM BONDS

The core issue in this case is the legality and legitimacy of so-called "phantom bond" transactions. Appellees Mezzo and 13th Street are both seeking "phantom bond" transactions from Appellee The Atlanta Development Authority

("ADA"). These are referred to as "phantom bond" transactions, because there is no actual financing of the project. The developer conveys fee simple title of the project to a tax exempt local development authority (such as the ADA), and simultaneously leases the property back from the authority. The developer/lessee is also the purchaser of the bonds. The sole purpose of a "phantom bond" transaction is to provide an illegal ad valorem property tax abatement to the developer.

While the core issue in this proceedings concern illegal "phantom bond" transactions, contested by Appellants as a matter of right pursuant to O.C.G.A. § 36-82-77, the proceedings were turned into a tabloid type saga, with secretly recorded phone calls, claims of "extortion", "shakedowns" and references to former Governor Blagojevich of Illinois. (V.9, MT. 12/15/09, p.5, lines 7-10, lines 18-19, lines 22-24; p.[5 – actually p. 6], lines 18-19) The foregoing being courtesy of counsel for Appellees 13th Street and Mezzo Development, in a fruitless attempt to intimidate Appellants out of the bond validation contests.

The substance of Appellees' extortion claim consists of a secretly recorded phone call (7/16/09 Supp. Ex. #4), together with certain 12/17/08 correspondence from Appellant Woodham to Cary Ichter. The 12/17/08 correspondence was introduced into evidence at the 2/27/09 hearing by Appellees as Exhibit # 5 (V.10, MT. 2/27/09, p.35), but was not transmitted to this Court with the other exhibits.

The trial court's verbatim Final Order specifically refers to the 12/17/08 correspondence. (R.,V.2, p.226-227) Appellants are in the process of having the record supplemented to include a copy of the 12/17/08 correspondence, but for convenience have reproduced the language of the correspondence below:

Dear Cary: This correspondence is intended to be privileged and confidential, and subject to O.C.G.A. § 24-3-7. Had you or Patricia bothered to return my e-mail or telephone messages, you would have learned a number of things. First, you would have learned that a reference to 1.0% was intended to be .1%. Second, you would have learned that a resolution of the matter would have involved solely a donation to a homeless shelter. Third, you would have learned that .1% was a starting figure, inviting your client to respond with a different figure for a possible donation to a homeless shelter. Despite the inflammatory remarks during the December 15, 2008 hearing, I would nonetheless invite your client to consider the above-described matters. In the interim, I will likely be filing a Rule 25.1 Motion to Recuse, as I believe Judge Johnson is no longer in the position to act as a neutral arbiter in this action, in light of the inflammatory remarks made during the December 15, 2008 hearing. Regards, John F. Woodham.

With regard to the transcript of the secretly recorded phone call, the other basis for Appellees' extortion claim, there is no demand made of Appellees. "Ms. Roy: Well, what are you looking for from my client? Mr. Woodham: I am not looking for anything from your client." (7/16/09 Supp. Ex. #4, p.7, lines 19-22). "So that is the end of the story, I am not demanding anything." (7/16/09 Supp. Ex. #4, p.9, lines 1-2) That Appellants believe the proposed bond transactions are illegal is also made clear from the transcript, with the primary culprit being the Atlanta Development Authority for engaging in the "phantom" transactions, but

with the developer being the recipient of the 50% property tax break. (7/16/09 Supp. Ex. #4, p.3, lines 9-18, p.5, lines 1-22)

Appellants could easily have dismissed the bond validation objections and quietly gone away after Appellees' initial extortion claims, which was clearly Appellees' intent. However, extortion is a crime in the state of Georgia, not a civil tort. *Rolleston v. Huie*, 198 Ga. App. 49, 50 (1990); *Markowitz v. Wieland*, 243 Ga. App. 151, 157, n. 11 (2000) (threatening civil suit does not violate O.C.G.A. § 16-8-16 nor does it state a tort claim). Appellants will not be falsely accused of committing a crime and simply walk away. After continuously propounding the extortion claim in these proceedings, Cary Ichter, counsel for 13th Street and Mezzo, finally conceded under cross-examination on June 30, 2009 that no civil claim of extortion exists in Georgia, and that the elements of the crime of extortion are not present in this case. The transcript of that cross-examination will likely be included in the record on a subsequent, related appeal.

In the interim however, it is important for this Court to understand that, after all the bluster in written pleadings and oral argument in these proceedings regarding extortion, counsel for 13th Street and Mezzo has finally admitted, under oath, the extortion claim was, in the end, all frivolous pretext; a criminal accusation made for purposes of obtaining advantage in a civil proceeding. *See Georgia Rules of*

Professional Conduct 3.4(h) Nonetheless, this claim of extortion, while frivolous from the outset and ultimately conceded by counsel for Appellees to have no legal footing, became the apparent basis for a number of sanctions imposed by the trial court against Appellants, including (i) striking Appellants' pleadings, (ii) awarding O.C.G.A. § 9-15-14(b) fees, and (iii) imposing unconstitutional restrictions on Appellant Woodham's ability to practice law. (R.,V.2, p. 229-231) All this achieved by way of a series of illegal, ex parte and unconstitutional hearings held on 2/27/09. (V.10, MT. 2/27/09) It is for this reason we have Appellate courts in this State.

Part II: ENUMERATION OF ERRORS

1. The Trial Court Erred in Failing to Stay The 2/27/09 Hearings As Required Pursuant to O.C.G.A. Section 9-11-11.1(d).
2. The Trial Court Violated Appellants' Rights to Due Process Under Art. I, Sec. I, Par. I of the Constitution of the State of Georgia and the 14th Amendment to the Constitution of the United States of America By Holding An Ex Parte, Unnoticed Hearing on Appellants' Anti-SLAPP Motion.
3. The Trial Court Erred in Awarding Attorneys Fees Under O.C.G.A. § 9-15-14(b) Without Proper Notice and Hearing.
4. The Trial Court Erred in Placing Unconstitutional Restrictions on Appellant Woodham's Ability to Practice Law.

5. The Trial Court Erred in Awarding Attorneys Fees Based Upon The Court's Apparent Findings of Violations of the Georgia Rules of Professional Conduct.
6. The Trial Court Erred in Failing to Make The Findings Necessary to Support an Award Under O.C.G.A. § 9-15-14(b).
7. The Trial Court Erred in Striking Appellants' Bond Intervention and Dismissing Appellants as Parties.
8. The Trial Court Erred in Finding the Mezzo and 13th Street Holding Bond Transactions Do Not Violate O.C.G.A. § 36-62-8(b).
9. The Trial Court Erred in Finding the Mezzo and 13th Street Holding Bond Transactions Do Not Violate O.C.G.A. § 36-62-9.
10. The Trial Court Erred in Finding the Mezzo and 13th Street Holding Transactions Do Not Violate The Georgia Local Government Public Works Construction Law, O.C.G.A. § 36-91-1, Et Seq.
11. The Trial Court Was Without Jurisdiction to Enter the May 13, 2009 Order, the May 21, 2009 Order and the May 21, 2009 Final Order, and Those Orders are Therefore Null and Void.
12. The Trial Court Entered The 5/8/09 Final Order In Violation of Uniform Superior Court Rule 25.3.

This Court has jurisdiction over this appeal pursuant to Art. VI, Sec. V, Par. III of the Constitution of the State of Georgia.

Part III: ARGUMENT AND CITATION OF AUTHORITY

1. The Trial Court Erred in Failing to Stay The 2/27/09 Hearings As Required Pursuant to O.C.G.A. Section 9-11-11.1(d).

O.C.G.A. § 9-11-11.1(d) of the Georgia Anti-SLAPP statute expressly provides, “All discovery and any pending hearings or motions in the action *shall be stayed upon the filing* of a motion to dismiss or a motion to strike made pursuant to subsection (b) of this Code section.” (emphasis supplied). “In its ordinary signification, ‘shall’ is a word of command, and the context ought to be very strongly persuasive before that word is softened into a mere permission.” *Termnet Merchant Services, Inc. v. Phillips*, 277 Ga. 342, 344 (2003). Georgia courts have already interpreted the use of the word “shall” in Georgia’s Anti-SLAPP statute, O.C.G.A. § 9-11-11.1, to be a word of command. *Davis v. Emmis Publishing Corporation*, 244 Ga. App. 795, 798 (2000); *Hagemann v. Berkman Wynhaven Associates, L.P.*, 290 Ga. App. 677, 683 (2008) (“shall” is a legislative mandate).

Because Appellants filed an Anti-SLAPP motion on 2/25/09 (R., V. 3, p.299) in respect of Appellees’ claim of extortion, the trial court was required to stay any hearings scheduled for 2/27/09. Not only did the trial court not stay the scheduled hearings, it also held an ex parte, unnoticed hearing on Appellant’s Anti-SLAPP motion, and an ex parte, unnoticed hearing giving rise to an illegal, sua sponte O.C.G.A. § 9-15-14(b) fees award. Appellants informed the court via e-mail correspondence (7/8/09 Supp. Rec., p.14-15) of Appellant’s objection to any hearing in light of the automatic stay. The court ignored the automatic stay and held

hearings anyway. O.C.G.A. § 9-11-11.1(d) provides the exclusive means of obtaining relief from the stay (“The court, on noticed motion and for good cause shown, may order that specified discovery or other hearings or motions be conducted notwithstanding this subsection.”). *O.C.G.A. § 9-11-11.1(d)*

In OCGA § 9-11-11.1(b) and (c), *the General Assembly has established a mechanism* by which the threshold question of compliance with the anti-SLAPP statute is on motion to dismiss or to strike. . . The application of this rule is made plain by OCGA § 9-11-11.1(d), which expressly provides that the trial court in its discretion may order limited discovery despite *the stay imposed when a motion to dismiss or strike is filed pursuant to subsection (b)*. . . If Metzler wished to conduct discovery . . . , he could have petitioned the trial court . . . *in accordance with the statutory provisions.*” *Metzler v. Rowell*, 248 Ga. 596, 600-601 (2001) (emphasis supplied).

The trial court in the subject proceedings failed to follow the statutory procedure for seeking relief from the stay. There was no noticed motion to lift the stay as required under O.C.G.A. § 9-11-11.1(d). Instead of lifting the stay “in accordance with the statutory provisions” *Metzler, supra*, the trial court (as shown in Section 2 below) simply held an ex parte, unnoticed and unconstitutional hearing on the merits of the Anti-SLAPP motion. Because that hearing on the merits of the Anti-SLAPP motion was unconstitutional as described below, the O.C.G.A. § 9-11-11.1(d) stay remained in effect, thereby rendering the entirety of the 2/27/09 hearings illegal, ultra vires, unconstitutional and void ab initio, as well as the orders resulting therefrom (including the Final Order). *Jennings Enterprises, Inc. v. Carte*,

224 Ga. App. 538, 540 (1997) (judgment entered in violation of automatic stay was void ab initio, without effect, and was an absolute nullity); *Chase Manhattan Bank v. Lafray*, 258 Ga. App. 183, 184 (2002) (judgment entered while stay is in effect is void ab initio).

2. The Trial Court Violated Appellants' Rights to Due Process Under Art. I, Sec. I, Par. I of the Constitution of the State of Georgia and the 14th Amendment to the Constitution of the United States of America By Holding An Ex Parte, Unnoticed Hearing on Appellants' Anti-SLAPP Motion.

A motion under O.C.G.A. § 9-11-11.1(b) must be the subject of a hearing by the court. It cannot be decided by the court without hearing. ("The motion shall be heard") O.C.G.A. § 9-11-11.1(d) Appellants were not present in the courtroom on 2/27/09, because the 2/27/09 hearings had been stayed by operation of law. Nonetheless, the trial court sua sponte held a hearing on Appellant's O.C.G.A. § 9-11-11.1(b) motion, with no notice to Appellants, in the absence of Appellants, and obviously with no opportunity for Appellants to be heard, all in violation of Appellants' rights to due process under the State and Federal Constitutions. Appellants were not even made aware the court had held a hearing on the Anti-SLAPP motion until Appellants received a copy of certain 3/18/09 correspondence from counsel for Mezzo and 13th Street addressed to the court, transmitting a proposed order on the Anti-SLAPP motion. (7/8/09 Supp. Rec., p.58) As

Appellants noted in their 3/20/09 Response to the proposed order, “This is the first time Intervenors have been made aware the Court purportedly held any such hearing on the Motion to Strike and Dismiss With Prejudice. This is so procedurally infirm as to defy any and all logic and notion of due process.” (7/8/09 Supp. Rec., p.53)

Nothing short of notice of the proceeding and an opportunity to be heard will satisfy the due process clauses of the Constitution of the State of Georgia and of the United States. *Murphy v. Murphy*, 214 Ga. 602, 605 (1958). Without notice and opportunity to be heard, there is no jurisdiction to pass judgment. *Mott v. Georgia State Board of Optometry*, 148 Ga. 55, 60 (1918). “The constitution of this state guarantees to all persons due process of law and unfettered access to the courts of this state. . . These fundamental constitutional rights require that every party to a lawsuit . . . be afforded the opportunity to be heard and to present his claim or defense, i.e., to have his day in court.” [Cits.] *Cousins v. Macedonia Baptist Church*, 283 Ga. 570, 573 (2008) “Limitations imposed by a trial judge that ‘prevent [] a full and meaningful presentation of the merits of the case’ mandate reversal.” *Cousins*, at 574. *See also Ferdinand v. City of Atlanta*, 285 Ga. 121,

124 (2009) (a party's complaint cannot "be shunted aside without regard to his procedural rights.")¹

Moreover, when a hearing is held on any motion, O.C.G.A. § 9-11-6(d) requires written notice of the hearing to be served on counsel, "if for no other reason than to avoid the appearance of ex parte contact." *Glass v. Glover*, 241 Ga. App. 838, 839 (2000), quoting *Edens v. O'Connor*, 238 Ga. App. 252 (1999) (requirement of a notice of hearing served in accordance with O.C.G.A. 9-11-5(b) is not discretionary); *see also King v. Bd. of Regents of the University System of Georgia*, 215 Ga. App. 570 (1994).

There was no O.C.G.A. § 9-11-6(d) notice of hearing served in respect of Appellants' Anti-SLAPP motion. The only notice of any hearing to be held on February 27, 2009 in these proceedings was a February 26, 2009 e-mail sent by the trial court's staff attorney, which stated: "All parties are required to appear at the *bond validation hearing* scheduled for tomorrow, 2/27/2009, at 9:00 a.m. in courtroom 8-B". (emphasis supplied) (7/8/09 Supp. Rec., p. 20) That e-mail

¹ Though Appellants were not present at the 2/27/09 hearing, these constitutional due process objections were raised by Appellants in multiple pleadings filed with the trial court prior to the Final Order. (7/8/09 Supp. Rec., p. 52-54); (7/8/09 Supp. Rec., p. 81); (7/8/09 Supp. Rec., p. 88); (7/8/09 Supp. Rec., p. 102).

correspondence obviously fails to satisfy the service requirements of requirements O.C.G.A. 9-11-5(b). More importantly, it provides no notice of any hearing on Appellants' Anti-SLAPP motion.

The sua sponte Anti-SLAPP motion hearing was held at the suggestion of Matthew Calvert, counsel for the ADA, who first recognized: "I do believe it should be noted for the record that Mr. Woodham contends that he has filed a valid motion to stay this action." (V.10, MT. 2/27/09, p.7, lines 3-7) Then Mr. Calvert recommended to the court: "Your honor, I would suggest then that the way to avoid any question about this day would be for the court to formally deny that motion. If that motion on the merits is denied, the issue to stay is moot." (V.10, MT. 2/27/09, p.7, lines 16-19) At Mr. Calvert's suggestion, the trial court then held its sua sponte hearing on Appellants' Anti-SLAPP motion. (V.10, MT. 2/27/09, p.7, lines 20-25; page 8, lines 1-11). That sua sponte hearing held with no notice to Appellants, and in the absence of Appellants, clearly deprived Appellants of their rights to due process under the 14th Amendment to the Constitution of the United States of America and Art. I, Sec. I, Par. I of the Constitution of the State of Georgia.

The notion that a trial court can convene an ex parte hearing which has been stayed by operation of law pursuant to O.C.G.A. § 9-11-11.1(d), in full knowledge the moving parties are not present because of the automatic stay and have informed

the court of same by e-mail correspondence (7/8/09 Supp. Rec., p.15-16), and first hold an unnoticed, sua sponte, ex parte hearing on the merits of Appellants' Anti-SLAPP motion at the request of an opposing party before proceeding to conduct the stayed hearings, is just so plainly offensive to our basic constitutional notions of due process and fairness as to rise to the level of sheer absurdity. This trial court apparently is of the belief that it has "inherent power" to do anything it desires. "The February 25, 2009 filing of Intervenors' Motions to Strike and Dismiss With Prejudice did not preclude or impede the Court's exercise of this inherent power on February 27, 2009 following its rulings on the Motions to Strike." (R.,V.2, p. 228) The trial court is plainly mistaken. *State v. Colquitt*, 147 Ga. App. 627, 628-629 (1978) ("While we recognize the duty of a trial court to control . . . a judicial proceeding before it (Code Ann. § 24-104(4)), this power clearly may be abused. Thus, the power to control the proceedings of the court *is subject to the proviso that in doing so a judge does not take away or abridge any right of a party under the law.*") (emphasis supplied) The trial court has no "inherent power" to violate Appellants' constitutional rights to due process. The trial court simply thumbed its nose at the Georgia Anti-SLAPP statute and the due process provisions of the State and Federal Constitutions. This is gross procedural error and must be corrected and reversed by the appellate courts of this State.

3. The Trial Court Erred in Awarding Attorneys Fees Under O.C.G.A. § 9-15-14(b) Without Proper Notice and Hearing.

After holding the ex parte, unnoticed and unconstitutional hearing on the merits in respect of Appellants' Anti-SLAPP motion, the trial court proceeded to hold an ex parte and unconstitutional fees hearing (V. 10, MT. 2/27/09, p. 20-54), with no notice to Appellants or any opportunity to be heard, following which the trial court awarded O.C.G.A. § 9-15-14(b) attorneys fees to Appellees (V. 2, R. 11, p. 230). When an O.C.G.A. § 9-15-14 (b) fees hearings is held, O.C.G.A. § 9-11-6(d) requires written notice of the hearing to be served on counsel, "if for no other reason than to avoid the appearance of ex parte contact." *Glass v. Glover*, 241 Ga. App. 838, 839 (2000), quoting *Edens v. O'Connor*, 238 Ga. App. 252 (1999) (requirement of a notice of hearing served in accordance with O.C.G.A. 9-11-5(b) is not discretionary); *see also King v. Bd. of Regents of the University System of Georgia*, 215 Ga. App. 570 (1994).

This notice requirement applies not just to motions by a party, but also to a trial court's own motion under O.C.G.A. § 9-15-14(b). *Williams v. Cooper*, 280 Ga. 145, 147 (2006). "Before attorney fees may be awarded against a party under O.C.G.A. § 9-15-14 (b), the party must be given notice that an award of attorney fees *under that Code section* is under consideration so that he or "she has an

opportunity to challenge the basis on which the fees are assessed””. *Wall v. Thurman*, 283 Ga. 533, 534 (2008), quoting *Williams*, supra, at 147. (emphasis supplied).

We hold, therefore, that without proper notice that an award of attorney fees under OCGA § 9-15-14(b) is under consideration, the party against whom fees are assessed has not been given an opportunity to challenge the basis on which the fees are assessed. What the statute [O.C.G.A. § 9-15-14(b)] provides as the means of giving proper notice is a motion for such fees filed of record by a party or some form of notice to any person potentially liable for an assessment of fees under the statute that the trial court is considering its own motion *for the impositions of the sanctions made available by the statute.*” *Williams*, at 147. (emphasis supplied).

Moreover, the Georgia Supreme Court in *Williams* expressly overruled *Cohen v. Feldman*, 219 Ga. App. 90, 92 (1995), to the extent *Cohen* could be interpreted to allow a court to assess O.C.G.A. § 9-15-14(b) fees sua sponte with no notice or hearing. *Williams*, at 147. *Williams* is a 2006 unanimous decision of the Supreme Court of Georgia. The Georgia Supreme Court in *Wall*, a 2008 unanimous decision, also reversed a trial court’s award of O.C.G.A. § 9-15-14(b) fees for lack of notice.

In the present case, the trial court determined Finkelstein was liable for attorneys fees under OCGA § 9-15-14(b) without providing notice that it was considering an award *under that Code section* or a hearing on the issue. Although the trial court did later provide a hearing to determine the amount of attorney fees that were due, this does not diminish the fact that Finkelstein had no notice or a hearing regarding whether attorney fees were warranted *under the standards set forth in OCGA § 9-15-14(b).*

Accordingly, we must reverse the trial court's grant of attorney's fees. *Wall*, at 534. (emphasis supplied).

There was no notice of hearing served on Appellants in respect of a hearing under O.C.G.A. § 9-15-14(b). As stated, the trial court's e-mail notice read: "All parties are required to appear at the bond validation hearing scheduled for tomorrow, 2/27/2009, at 9:00 a.m. in courtroom 8-B". (7/8/09 Supp. Rec., p.20) That court's e-mail correspondence, while obviously failing to satisfy the service requirements of requirements O.C.G.A. 9-11-5(b), provides no notice the court would be considering its own motion for attorneys fees under the standards set forth in O.C.G.A. § 9-15-14(b). As such, inasmuch as there was no notice, the O.C.G.A. § 9-15-14(b) award was sua sponte, not the result of the court's own noticed motion, and therefore clearly contrary to *Williams, supra* and *Wall, supra*. Counsel for Appellees 13th Street and Mezzo expressly stated such Appellees had not and were not moving for an O.C.G.A. § 9-15-14(b) award: "And I am not moving the court to impose those sanctions" (V.10, MT. 2/27/09, p.17, lines 21-22). *Williams, supra* and *Wall, supra*, and the other authorities cited above require that the O.C.G.A. 9-15-14(b) fees award contained in the trial court's Final Order be reversed. Even if Appellants had been present at the 2/27/09 hearings, the O.C.G.A. § 9-15-14(b) fees award would have been improper, illegal and unconstitutional,

because of the lack of notice of any hearing in respect of O.C.G.A. § 9-15-14(b).²

The O.C.G.A. § 9-15-14(b) award must therefore be reversed.

4. The Trial Court Erred in Placing Unconstitutional Restrictions on Appellant Woodham's Ability to Practice Law.

The Final Order states in part: Appellants “are required to pay the attorney’s fees in this matter and certify that they have done so by filing an Affidavit with the Clerk of the Court prior to the filing a claim or intervening in any bond validation or tax proceeding . . . Any action allowed to be filed or maintained by John F. Woodham . . ., or any other entity represented by . . . John F. Woodham . . . without proof of payment of attorney’s fees awarded herein, is subject to dismissal. (R.,V.2, p.231-232) These restrictions on Appellant Woodham’s ability to practice law, including practicing law as a pro se party, imposed by a superior court, are

² Nor did the trial court’s general statements at the conclusion of the 12/15/08 status hearing (V. 9, MT. 12/15/08, p. 24) with regard to a 1/30/09 hearing (which hearing never occurred) provide any notice the court would be considering its own motion under “the standards set forth in OCGA § 9-15-14(b)” at the 2/27/09 hearing, particularly in light of the 2/26/09 e-mail from the court’s staff attorney specifically describing the matters under consideration on 2/27/09 (bond validation). In short, the court never provided notice it was considering an award under O.C.G.A. § 9-15-14(b). The § 9-15-14(b) award was therefore sua sponte, and therefore impermissible.

plainly unconstitutional. *Wall, supra*, at 534 (“In its August 21, 2007 order, the trial court placed restrictions on Finkelstein’s ability to practice law. The court, however, erred in doing so.”); *see also Stevens v. Thomas*, 257 Ga. 645, 648 (1987).

This must be reversed.

5. The Trial Court Erred in Awarding Attorneys Fees Based Upon The Court’s Apparent Findings of Violations of the Georgia Rules of Professional Conduct.

The trial court’s Final Order and the transcript of the 2/27/09 hearing clearly indicate the attorneys fees award was based, not on actual findings of fact and conclusions of law in respect of O.C.G.A. § 9-15-14(b), but rather on the court’s finding of “unethical” conduct. “The Court further finds Woodham’s conduct to be unethical, particularly unbecoming of an officer of the Court, and possibly illegal.” (R.,V.2, p.227) Among other things, the trial court ordered, by way of the verbatim order prepared by counsel for Appellees, that the matter be reported “to the Office of General Counsel of the State Bar of Georgia for further investigation.” (R.,V.2, p. 232). The trial court failed to articulate the Rule of Professional Conduct in question, but the court’s motivation to award fees based on its “finding” of unethical conduct is clear from the Final Order and the 2/27/09 transcript (V.10, MT. 2/27/09, p.48, line 13; p.49, line 8, p.49; lines 18-20; p.50, lines 8-11; p.51,

lines 18-23) In fact, the trial court's award of fees and its "finding" of unethical conduct are made virtually in the same breath. (V. 10, MT. 2/27/09, p. 50, lines 8-15) This places the subject proceedings squarely within the framework of *Stevens v. Thomas*, 257 Ga. 645 (1987). In *Stevens*, the Georgia Supreme Court held that the trial court lacked authority to impose sanctions, including attorney's fees, based upon a violation of disciplinary rules. The discipline of attorneys is solely within the providence of the Supreme Court of Georgia. *Stevens*, at 648. Likewise, the trial court in these proceedings clearly imposed attorneys fees as a result of its "finding" of unethical conduct (i.e., violations of disciplinary rules). Based on *Stevens*, the trial court's award of fees based on its "finding" of a violation of disciplinary rules must be reversed.

6. The Trial Court Erred in Failing to Make The Findings Necessary to Support an Award Under O.C.G.A. § 9-15-14(b).

"A trial court's order must include findings of conduct that authorize an award under O.C.G.A. 9-15-14, or the order must be vacated." *Porter v. Felker*, 261 Ga. 421, 422 (1991); *Cason v. Cason*, 281 Ga. 296, 300 (2006); *Moore v. Moore-McKinney*, Ga. App. Slip Opinion (Case No. A09A0262) (May 6, 2009). "[A] trial court is required to make express findings of fact and conclusions of law as to the statutory basis for an award of attorneys fees under OCGA 9-15-14," and "[i]n such

findings, the court must specify the conduct upon which the award is made.”

Brown v. Gadson, Ga. App. Slip Opinion (Case No. A09A0413) (July 1, 2009).

In the 2/27/09 transcript, there is no reference to an award being made under O.C.G.A. § 9-15-14(b). (V.10, MT 2/27/09, p.50, lines 12-21) O.C.G.A. 9-15-14(b) is not mentioned at the hearing. Instead, as noted above, the fees sanction awarded at the hearing is based on the court’s “finding” of unethical conduct. That is prohibited by *Stevens, supra*. It is not until the May 2009 Final Order, prepared verbatim by counsel for Appellees, do we see any actual reference to O.C.G.A. § 9-15-14(b). “Such authority is also conferred by O.C.G.A. 9-15-14(b) in instances such as this where the Court, on its own motion, finds that an attorney or party has asserted a position or pursued an action for purposes of harassment, for vexatious reasons *or other improper purpose*. The Court, therefore awards 13th Street Holdings, Mezzo Development and the Authority their reasonable attorneys fees and other litigations expenses incurred due to Woodham and Citizen’s interventions, which the Court has determined were brought or pursued *for an improper purpose*.” (emphasis supplied) (R.,V.2, p.230) Not only does the court fail to identify Appellants’ sanctionable conduct under the standards set forth O.C.G.A. § 9-15-14(b), the court creates a legal standard which does not even exist under O.C.G.A. § 9-15-14(b), pursuing an action “for an improper purpose”. It

appears the court is attempting to bootstrap its “finding” of unethical conduct into a sanctions award under 9-15-14(b), but the trial court has no authority to do that. *Stevens, supra*.

The conduct sanctionable under O.C.G.A. § 9-15-14(b) must be identified, because in cases involving O.C.G.A. § 9-15-14 (a) or (b), the trial court must limit the fees award to those fees incurred because of the sanctionable conduct. *Harkelroad v. Stringer*, 231 Ga. App. 464, 472 (1998). “Lump sum” attorneys fees awards are not permitted in Georgia. *Huggins v. Chapin*, 233 Ga. App. 109 (1998). The trial court also states: “because of their bad faith conduct . . . [Appellants] are required to pay the attorneys’ fees in this matter . . .” (R.,V.2, p.231). The trial court’s fees award in this respect is similar to the one vacated in *Trotter v. Summerour*, 273 Ga. App. 263, 266-267 (2005). The trial court in *Trotter* had awarded a lump sum fee, reasoning “a party acting in bad faith should pay the full price for losing . . .” *Id.*, at 266. The Court in *Trotter* noted the trial court in that case had incorrectly relied on *CSX Transp. v. West*, 240 Ga. App. 209 (1999), because *CSX* involved an award under O.C.G.A. § 13-6-11, not O.C.G.A. § 9-15-14. *Id.*, at 267. Likewise, the trial court in this case has simply made a lump sum award of all fees and expenses resulting from Appellants’ intervention in the bond validations, citing “bad faith” and also “unethical conduct”, as noted above. This is

not recognizable under O.C.G.A. § 9-15-14(b). The trial court failed to make the requisite findings to support an award under O.C.G.A. § 9-15-14(b).

7. The Trial Court Erred in Striking Appellants' Bond Intervention and Dismissing Appellants as Parties.

Appellants became parties to the subject bond validation proceedings pursuant to the statutory right set forth in O.C.G.A. § 36-82-77(a). The trial court dismissed Appellants' intervention, citing O.C.G.A. § 15-6-9(8) as authority for the right to dismiss sua sponte. (R., V.2, p.229) O.C.G.A. § 15-6-9(8) pertains to the court's exercise of powers concerning its jurisdiction. As such, the cases cited for this proposition concern dismissal of matters based on jurisdiction. *Smith v. Adamson*, 226 Ga. App. 698 (1997) (courtroom not proper forum to initiate impeachment proceeding); *Georgia Receivables v. Williams*, 218 Ga. App. 313 (1995) (action barred by statute of limitations) There is no question of jurisdiction in the subject proceedings, so reliance on O.C.G.A. § 15-6-9(8) does not obtain. The other cases cited relate to the court's contempt powers, which is not at issue. The court's dismissal has no basis in the authority cited, violates O.C.G.A. § 36-82-77(a) and violates Appellants' constitutional rights to petition and seek redress in the courts. This must be reversed.

8. The Trial Court Erred in Finding the Mezzo and 13th Street Holding Bond Transactions Do Not Violate O.C.G.A. § 36-62-8(b).

Appellants allege in Objection III of both complaints that the proposed bond transactions violate O.C.G.A. § 36-62-8(b) of the Development Authorities Law, which provides: “[T]he proceeds derived from the sale of all bonds . . . issued by an authority shall be held and used for the ultimate purpose of paying . . . all or part of the cost any project” (R.,V.3, p.235-237) (7/16/08 Supp. Rec., p.12-13) The trial court ruled against this objection. (R.,V.2, p.236, p.249) As discussed above, the subject bonds are known in the industry as “phantom bonds”, because there is no real financing transaction. The developer, who is the lessee under the Lease Agreement from the development authority, is also the purchaser of the bonds. *See* Mezzo Bond Purchase Agreement (R.,V.5, p.171), wherein Mezzo is stated to be both the “Purchaser” and the “Lessee” (*See also* 13th Street Bond Purchase Agreement (R.,V.3, p.170)) Why would Mezzo pay \$60 million to purchase bonds in order to finance the development of its own project (act as its own lender), particularly when the Mezzo project has already been completed and opened for leasing? (7/16/09 Supp. Rec., p. 8, ¶¶ 14 and 15) That is nonsensical. Appellees must then argue then that the \$60 million in bond “proceeds” are not being used to finance the project, being instead are being used by the ADA to “acquire” the

already finished Mezzo Project from Mezzo. But why would Mezzo purchase those bonds from the ADA for \$60 million, just so that \$60 million in bond “proceeds” could be given right back to Mezzo as the purchase price for the ADA’s acquisition of the property?

Again, this is nonsensical, and in fact, the lease provisions prove without a doubt there is no real or actual financing transaction; construction, acquisition or otherwise. The language at the end of Section 4.3 of the Mezzo Lease Agreement blows a gaping hole through any notion that these bonds provide any real financing. “Anything contained in this Section 4.3 to the contrary notwithstanding, if the Bond Purchaser is also the Lessee, *in lieu of making a deposit into the Project Fund*, the Bond Purchaser *may make an internal book entry notation* to denote that funds have been advanced by the Bond Purchaser on behalf of the Issuer to the Lessee as payment or reimbursement of Project costs.” (emphasis supplied) (R.,V.5, p.49) (the 13th Street Lease Agreement has identical language (R.,V.3, p.48)) In this case, as shown by the Bond Purchase Agreement, Mezzo is both the “Bond Purchaser” and the “Lessee”. The “Issuer” is the ADA. Accordingly, the above-quoted language means no bond proceeds ever flow into the “Project Fund”. This is then relevant for purposes of reviewing Section 4.2 of the Lease, which states in part “[U]pon receipt of any cash proceeds derived from the sale of the Bonds, the

Issuer will deposit said proceeds received upon said sale in the Project Fund.” (R.V.5, p.48) (the 13th Street Lease Agreement has identical language (R.,V.3, p.47)) Working together, these provisions show that when the “Bond Purchaser” and the “Lessee” are the same entity, as in this case, there are no proceeds from the sale of any Bonds. The entire bond transaction is nothing more than “an internal book entry notation” on Mezzo’s (the Bond Purchaser’s) balance sheet. How can the ADA use the bond “proceeds” to “acquire” the project from Mezzo when there are no proceeds, only an accounting entry? It cannot. That is why this sham, phantom, “book entry notation” bond transaction violates O.C.G.A. § 36-62-8(b), which requires the presence of actual “proceeds derived from the sale” of the bonds to be used to finance the project. When a bond validation is contested, the burden is on Appellees to prove the material facts which are requisite to obtain validation. *Lilly v. Crisp*, 117 Ga. App. 868, 870 (1968). In the context of these proceedings, in order to comply with O.C.G.A. § 36-62-8(b), Appellees must prove actual bond proceeds will be used to finance the project. When there are no bond proceeds as is the case with a “phantom bond” transaction, Appellees cannot possibly carry this burden of proof. The trial court erred in ruling against Appellants’ Objection III in respect of both proposed bond transactions.

9. The Trial Court Erred in Finding the Mezzo and 13th Street Holding Bond Transactions Do Not Violate O.C.G.A. § 36-62-9.

Appellants allege in Objection IV of each complaint (R.,V.3, p.237) (7/16/09 Supp. Rec., p.13-14) that each the proposed bond validations violates O.C.G.A. § 36-62-9, which provides in part that “[N]o bonds . . . shall be issued by an authority under this chapter unless its board of directors adopts a resolution finding that the project . . . will increase or maintain employment in the territorial area of such authority.” The Mezzo Bond Resolution (R.,V.5, p.20-27) contains no such finding by the ADA that the Mezzo Project “will increase or maintain employment in the territorial area” of the ADA. Likewise, the 13th Street Bond Resolution (R.,V.5, p.19-26) contains no such finding by the ADA that the 13th Street Project “will increase or maintain employment in the territorial area” of the ADA. The trial court erred in ruling against Appellants’ Objection IV with respect to each bond transaction. (R., V. 2, p. 235, p. 247-248)

O.C.G.A. § 9-11-52 requires specific findings of fact and conclusions of law, which Appellants expressly requested in each complaint. (R.,V.3, p.241) (7/16/09 Supp. Rec., p. 17) O.C.G.A. § 36-82-77(a) likewise requires the trial court to “determine all questions of law and of fact.” The Final Order fails to even address the factual substance of Appellants’ Objection IV, the same being whether the

respective bond resolutions contains the factual findings expressly required under O.C.G.A. § 36-62-9. That alone requires reversal. The court improperly attempts to re-write the statutory scheme of O.C.G.A. § 36-62-9 by concluding the generic statement contained in the bond resolutions that the projects “will further the public purpose intended to be served by the Act” is a substitute for the express mandate of O.C.G.A. § 36-62-9, a finding that the projects “will increase or maintain employment in the territorial area” of the ADA. The trial court is not authorized to re-write the Georgia code for the convenience of Appellees.

In analyzing this statute, one must look to the statute itself. O.C.G.A. § 36-62-9 is entitled “Purpose of Chapter”, which indicates the clear intent of the General Assembly that the mandates set forth therein cannot be ignored. “No bonds . . . *shall be issued* by an authority under this chapter unless its board of directors adopts a resolution finding that the project for which the bonds . . . are to be issued will promote the foregoing objectives *and will increase or maintain employment in the territorial area of such authority.*” (emphasis supplied). We thus see there are two separate and distinct requirements under O.C.G.A. § 36-62-9. The resolution must first contain a general finding that the project will “develop and promote trade, commerce, industry, and employment opportunities for the public good and general welfare and to promote the welfare of the state”, and a second finding that

the project will “increase or maintain employment in the territorial area of such authority”. The trial court improperly conflates the two separate findings into a single finding, so that if the authority makes the first finding, it has substantially complied with the second required finding. This reasoning is absurd on its face and violates some very basic rules of statutory construction. The trial court’s reasoning would render the second required finding of O.C.G.A. § 36-62-9 absolutely meaningless and produce an absurd result, which the rules of statutory construction do not allow. *Vollrath v. Collins*, 272 Ga. 601, 603-04 (2000); *Wickham v. State*, 273 Ga. 563, 566 (2001) (holding an Act should not be interpreted in a manner which would produce an unreasonable and absurd result, and further stating “This Court too must be mindful of the cardinal rule in construing legislative acts, which is to ascertain the legislative intent.”)

It cannot be presumed that the General Assembly intended the second required finding of O.C.G.A. § 36-62-9 to be without meaning. *Houston v. Lowes of Savannah, Inc.*, 235 Ga. 201, 203 (1975).

The rules of statutory construction require that we follow the words of a statute literally unless the result is an absurdity, contradiction, or such inconvenience that it is clear that the legislature must have intended something else. We must seek to effectuate the intent of the legislature, O.C.G.A. § 1-3-1(a), and to give each part of the statute meaning and avoid constructions that make some language mere surplusage. All parts of a statute should be harmonized and given sensible and intelligent effect, because it is

not presumed that the legislature intended to enact meaningless language.”) *English v. State*, 282 Ga. App. 552, 554-555 (2006).

Simply ignoring the General Assembly’s requirement under O.C.G.A. § 36-62-9 that the resolution contain a finding that the project will increase or maintain employment in the territorial area of such authority clearly violates the rules of statutory construction set forth above. Further, as noted above, the use of the word “shall” in O.C.G.A. § 36-62-9 renders the requirement that the bond resolution contain the finding that the project will increase or maintain employment a command. There is nothing in the context of O.C.G.A. § 36-62-9 which is so strongly persuasive as to soften the requirement into one of permission. *Termnet, supra*.

Instead, O.C.G.A. § 36-62-9 goes on to specify in detail the two exceptions to the otherwise general mandate that the bond resolution contain the finding that the project will increase or maintain employment (subparagraph (1) pertaining to sewage and solid waste facilities and subparagraph (2) pertaining to industrial parks). The presence of such detailed exceptions to the requirement of the finding that the project will increase or maintain employment resolution, when read in light of the rules of statutory construction described above, clearly manifests the intent of the General Assembly that in all other situations, the

finding must be present. The finding is not present in either of the bond resolutions adopted by the ADA with respect to the subject proceedings, and the bond validations must therefore be denied.

10. The Trial Court Erred in Finding the Mezzo and 13th Street Holding Transactions Do Not Violate The Georgia Local Government Public Works Construction Law, O.C.G.A. § 36-91-1, Et Seq.

Appellants allege in Objection VIII of each amended complaint (R.,V.3, p.220-221) (R.,V.5, p.222-223) that each of the proposed sale-leaseback bond transactions violates The Georgia Local Government Public Works Construction Law, O.C.G.A. § 36-91-1, *et seq.* (the “Local Government Construction Law”), because Appellees failed to comply with the requirements of such law in connection with approving and entering into the proposed transactions. The trial court erred by ruling against Appellants Objection VIII (R.,V.2. p.238, p.250-251) The ADA is clearly a “government entity” as defined under O.C.G.A. § 36-91-2(9). Each project is therefore a “public works construction” as defined in O.C.G.A. § 36-91-2(12), and the proposed Lease Agreement between the ADA and each of Mezzo and 13th Street is a “public works construction contract”. Charles Whatley, the ADA Director of Commerce and Entrepreneurship testified at the 2/27/09 hearing as to the rather cursory and limited process undertaken by the ADA in

approving the Mezzo and 13th Street Projects. (V.10, MT. 2/27/09, p.60-66) Nowhere in his testimony does Mr. Whatley describe any measures taken by the ADA to ensure compliance with the Local Government Construction Law. The failure of the parties to comply with the requirements of the Local Government Construction Law renders the transactions invalid as a matter of law in accordance with O.C.G.A. § 36-91-21(g). The bond validations must therefore be denied.

11. The Trial Court Was Without Jurisdiction to Enter the May 13, 2009 Order, the May 21, 2009 Order and the May 21, 2009 Final Order, and Those Orders are Therefore Null and Void.

The 5/8/09 Final Order was appealed on 5/11/09 and costs were paid on 5/12/09. The trial court was therefore divested of jurisdiction in respect of the subject proceedings on 5/12/09 *O.C.G.A. § 5-6-46(a); Court of Appeals Rule 40(a)*. Accordingly, the 5/13/09 Order, the 5/21/09 Order purportedly dismissing the 5/11/09 appeal and the 5/21/09 Final Order, all entered after 5/12/09, are nullities and void as a matter of law. *Aetna Casualty & Surety Co. v. Bullington*, 227 Ga. 485 (1971) (the filing of notice of appeal serves to supersede a judgment and while on appeal, the trial court is without jurisdiction to modify such judgment, and therefore the judgment attempting to vacate the prior judgment was a nullity); *Fulton Paper Co., Inc. v. Reeves*, 212 Ga. App. 314, 315 (1994).

The 5/13/09 Order, another verbatim order prepared by counsel for Appellees, was the product of a recusal hearing held on 5/11/08 (V.6, MT. 5/11/09), and was entered for purposes of, among other things, vacating the 5/08/09 Final Order, because counsel for Appellees were openly concerned, rightfully so, that the trial court had illegally and improperly entered the 5/8/09 Final Order during the pendency of a recusal motion, in violation of U.S.C.R. 25.3, which requires the challenged judge to “temporarily cease to act upon the merits of the matter” pending resolution of the motion to recuse. Stated Mr. Ichter: “The court has already entered an order validating the bond, and I am a little bit concerned by that, and the reason is that the Rule, 25.3 says: . . . which means if the court, as the order indicates, signed the order on May the 8th, that after the motion to recuse - - it was filed with the court, and as a consequence, the court should not have answered the order at that point in time.” (V.6, MT. 5/11/09, p. 16, lines 10-23) After much prodding from Mr. Ichter, the trial court finally stated: “That being said, out of an abundance of caution, I will happily resign the motion. That’s not a problem. So I will do that.” (V.6, MT. 5/11/09, p. 21, lines 9-11). An oral pronouncement, particularly a prospective one describing what a court “will do”, has no effect until reduced to writing, signed and entered with the clerk. *See e.g. In re Tidwell*, 279

Ga. App. 734, 739 (2006). The court did not vacate the 5/8/09 Final Order until its order of 5/13/09 was entered, after it had been divested of jurisdiction on 5/12/09.

Nor did the 5/13/09 Order state that it was being entered “Nun Pro Tunc” to 5/11/09. (R.,V.4, p.14) Compare the 5/13/09 Order to the same trial court’s Order of 3/26/09, where on page 6 it states: “So Ordered this 26 day of May, 2009, entered NUNC PRO TUNC, as of February 27, 2009.” (R.,V.2, p.83) The 5/13/09 Order was not similarly entered “NUNC PRO TUNC”. Even if the 5/13/09 Order had been entered Nunc Pro Tunc, which by its own terms was not, it is well-settled that an order entered nunc pro tunc cannot supply non-action on the part of the court. *Pendergrass v. Duke*, 147 Ga. 10, 11 (1917); *Andrew L. Parks, Inc. v. SunTrust Bank*, 248 Ga. App. 846, 848 (2001). The 5/11/09 transcript cited above demonstrates the court did not state on May 11, 2009 that it had “withdrawn and vacated” the May 8 Final Order as of May 11, 2009. The court stated that it “will do” it. The portion of the 5/13/09 Order, drafted by counsel for Appellees, which states that the court had withdrawn and vacated the 5/8/09 Final Order effective as of 5/11/09 (R.,V.4, p.12), is therefore not an accurate reflection of what the court actually said and did at the 5/11/09 hearing. This language inserted by counsel for Appellees in the 5/13/09 Order thus purports to supply non-action by the trial court,

which an order purportedly entered “Nunc Pro Tunc” cannot accomplish (though, as stated, the subject order is not even entered “Nunc Pro Tunc”).

Further, “[T]he general rule is that nunc pro tunc entries are proper to correct clerical errors but not judicial errors.” *In the Interest of H. L. W.*, 244 Ga. App. 498-499 (2001). “A clerical error involves an error or mistake made by a clerk or other judicial or ministerial officer in writing or keeping records; it does not include an error made by the court itself. To be clerical in nature it must [be] one which is not the result of judicial reasoning or determination.” *Id* (emphasis supplied). The portion of the court’s 5/13/09 Order purporting to vacate the 5/8/09 Final Order is admittedly taken by the court so as to correct the court’s legal error of having entered the 5/8/09 Final Order contrary to the mandate of U.S.C.R. 25.3. “Nonetheless, . . . The Court withdrew and vacated its Final Order in view of U.S.C.R 25.3’s requirement that the ‘judge shall temporarily cease to act upon the merits of the matter’ pending resolution of a motion to recuse” (R.,V.4, p.12) That is not a clerical mistake. That is a legal error in the court’s reasoning and determination which can not be cured by way of a nunc pro tunc entry.

Finally, Appellants’ direct Notice of Appeal filed 5/11/09 suspended the 5/8/09 Final Order pursuant to O.C.G.A. § 9-12-19 (“Where a judgment is entered and, within the time allowed for entering an appeal, an appeal is entered, the

judgment shall be suspended.”). Accordingly, the 5/8/09 Final Order was automatically suspended on 5/11/09, and therefore could not have been vacated by the trial court at any time on or after 5/11/09. *See e.g. Amstead v. McFarland*, 287 Ga. App. 135, 140 (2007). For all of the foregoing reasons, the 5/13/09 Order, the 5/21/09 Order (dismissing the 5/11/08 appeal) and the 5/21/09 Final Order are each nullities and void as a matter of law, and the 5/8/09 Final Order therefore remains the operative Final Order in these proceedings.

12. The Trial Court Violated Entered The 5/8/09 Final Order In Violation of Uniform Superior Court Rule 25.3.

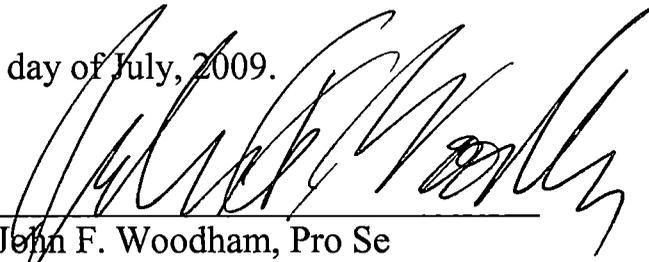
The trial court admittedly entered the 5/8/09 Final Order and decided the merits of the subject proceedings during the pendency of a recusal motion, in violation of U.S.C.R. 25.3, which requires the challenged judge to “temporarily cease to act upon the merits of the matter” pending resolution of the motion to recuse. “The clear purpose of this provision is to halt a trial court’s work on a case following an allegation of bias for or prejudice against a party until that allegation can be resolved.” *Morrow v. Vineville United Methodist Church*, 227 Ga. App. 313, 319-320 (1997). Further, O.C.G.A. § 15-1-5 provides “The rules of the respective courts, legally adopted and not in conflict with the Constitution of the United States or of this state, or the laws thereof, are binding *and must be observed.*” (emphasis

supplied) *See e.g. CEL-KO Builders & Developers, Inc. v. BX Corporation*, 136 Ga. App. 777, 781, n.1 (1975) For the forgoing reasons, the 5/8/09 Final Order, the operative Final Order, must be reversed.

CONCLUSION

For all the foregoing reasons, the 3/26/09 Order, the 5/8/09 Final Order, the 5/13/09 Order, the 5/21/09 Order and the 5/21/09 Final Order entered in these proceedings must be reversed.

Respectfully submitted, this 20th day of July, 2009.



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CASE NO. A09A2105

IN THE COURT OF APPEALS OF GEORGIA

JOHN F. WOODHAM and CITIZENS FOR ETHICS IN GOVERNMENT, LLC

Intervenors - Appellants

V.

THE ATLANTA DEVELOPMENT AUTHORITY, 13TH STREET HOLDINGS, LLC and MEZZO DEVELOPMENT

Defendants - Appellees

FILED IN OFFICE

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CLERK, COURT OF APPEALS OF GEORGIA

ON APPEAL FROM THE SUPERIOR COURT OF FULTON COUNTY

BRIEF OF APPELLEE
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INTRODUCTION & SUMMARY OF ARGUMENTS

This appeal concerns two validation proceedings under the Revenue Bond Law, O.C.G.A. § 36-82-60 *et seq.* Finding that lease-purchase transactions involving two multi-family apartment developments, the 13th Street Project and the Mezzo Project (the “Projects”), will further the development of trade, commerce, industry and employment opportunities in the City of Atlanta, the Atlanta Development Authority (the “Authority”) passed the Bond Resolutions in accordance with the discretion delegated to it under the Development Authorities Law (or the “Act”), O.C.G.A. § 36-62-1 *et seq.* Intervenors John F. Woodham and an entity he created called Citizens for Ethics in Government, LLC (collectively, “Woodham”) appeal from the Fulton County Superior Court’s judgment validating the Bonds and imposing sanctions against Woodham for his misconduct.

The Brief of Appellees 13th Street Holdings, LLC and Mezzo Development, LLC (the “Developers”) addresses the first seven enumerations of error; the Authority addresses the remaining enumerations and incorporates here by reference the Developers’ arguments. Enumerated Errors 8-10 challenge the trial court’s validation of the Bonds but identify no reversible error. This Court need address those enumerations *only* if it finds that Woodham’s interventions were

improperly dismissed (EE 7). The order validating the Bonds should be affirmed. Enumerated Errors 11-12 raise procedural challenges to the entry of orders. The Court has already rejected those challenges and should do so again.

I. COUNTERSTATEMENT OF THE CASE

A. Procedural History

The District Attorney filed the Complaints on October 29, 2008. *See* O.C.G.A. § 36-82-75. Intervenors appeared at the November 17, 2008 bond validation hearings and filed Complaints in Intervention (later amended). V7/MT-3; V8/MT-3. The trial court continued the hearings. V7/MT-4; V8/MT-19-20.

On December 15, 2008, the trial court held a status conference. The Developers argued Motions to Quash on grounds that Woodham sought discovery that was unreasonable and oppressive and intervened in these actions for an improper purpose, as evidenced by Woodham's conduct immediately following the interventions. V3/R-248; V5/R-240; V9/MT-3-12, 19-21. The trial court granted the Motions to Quash and scheduled a hearing for January 30, 2009 at which the court would receive evidence and entertain argument concerning (1) Woodham's alleged conduct and whether sanctions, including attorneys' fees, should be awarded, (2) any legal and factual issues related to the proposed bond validations,

and (3) “whatever motions I deem to be appropriate with respect to this case . . . [including] any and all matters that I feel are relevant.” V9/MT–24-27. The Court specifically admonished Woodham “you need to be prepared to come in.” V9/MT–25. The January 30 hearing was continued to February 27, 2009.

Faced with the prospect of sanctions, Woodham made every attempt after the December 15 hearing to confound the process and create error in the record, all in an effort to avoid being held accountable for his conduct. On December 19, Woodham filed a motion to recuse Judge Johnson. V5/R–288. Fulton County Superior Court Judge Westmoreland denied that motion on January 9, 2009. V2/R–8-10. Woodham does not appeal that order.

On February 25, 2009, purportedly invoking the anti-SLAPP statute, O.C.G.A. § 9-11-11.1, Woodham filed Motions to Strike what he mischaracterized as “claims” raised by the Developers in their Motions to Quash and at the December 15 hearing. V3/R–299; V5/R–312. Woodham asserted that his Motions to Strike automatically stayed all hearings under O.C.G.A. § 9-11-11.1(d). The issues raised in the Motions to Strike plainly were *not* covered by the anti-SLAPP statute. That Woodham delayed raising those purported anti-SLAPP violations for over two months reveals that Woodham’s Motions to Strike were nothing more

than an improper attempt to avoid the evidentiary hearing, at which time his alleged misconduct was to be examined. On February 26, having reviewed the Motions to Strike, the trial court instructed that all parties appear for the February 27 hearing. V2/R-127. Woodham refused to attend. V10/MT-6.

At the outset of the February 27 hearing, the trial court stated that it had considered Woodham's Motions to Strike and denied the motions as "completely meritless." V10/MT-6-8; *see* V2/R-80. Next, the trial court heard evidence and arguments concerning Woodham's alleged conduct. V10/MT-17-46, 54-69. The trial court ruled from the bench, imposing sanctions, including dismissing the Intervenors as parties to the validation proceedings. V10/MT-46-54. Then, the trial court received evidence regarding the proposed bond validations and considered Woodham's objections to validation, despite having dismissed the Complaints in Intervention. V10/MT-51-55. The trial court ruled that the Bonds and the security for those bonds were validated. V10/MT-68-69. On March 26, 2009, the trial court entered an Order denying Woodham's Motions to Strike *nunc pro tunc* as of February 27, 2009. V2/R-78-83.

On April 21, 2009, Woodham filed a second motion to recuse Judge Johnson for the same reasons rejected by Judge Westmoreland. V2/R-85. The trial court

ordered the parties to attend a hearing on May 11, 2009. At that hearing, Judge Johnson distributed an order entered May 8, 2009 addressing Woodham's conduct and validating the bonds. V2/R-221; V6/MT-3. The trial court also denied Woodham's second Motion to Recuse on grounds that it was untimely filed and the accompanying affidavit was legally insufficient. V6/MT-19. Considering objections to the May 8 Order, Judge Johnson ruled from the bench on May 11 that the May 8 Order was withdrawn and vacated. V6/MT-20-21. Woodham nevertheless filed a Notice of Appeal on May 11, purporting to appeal the previously vacated May 8 Order and the March 26 Order. Supp. R. 1/R-1.

On May 13, 2009, the trial court entered a written order memorializing its May 11 rulings.¹ V4/R-11. On May 21, 2009, the trial court granted the Appellees' motion to dismiss Woodham's May 11 Notice of Appeal on grounds that the May 8 Order is not appealable because it was withdrawn and vacated.

¹ It is not error to adopt a verbatim order prepared by counsel after the trial court announces its findings. *In re A.G.*, 293 Ga. App. 493, 497, 667 S.E.2d 662, 665-66 (2008); *see also Fuller v. Fuller*, 279 Ga. 805, 806, 621 S.E.2d 419, 421 (2005); *contra* Appellants' Brief ("Br.") at 3, 4 (challenging "verbatim order[s]").

V4/R-16. Also on May 21, the trial court entered its Final Order addressing Woodham's conduct and validating the bonds. V4/R-20. On May 26, Woodham filed a Notice of Appeal, challenging the May 13 and May 21 orders. V4/R-1.

Woodham filed a Rule 40(b) motion with this Court on May 29, 2009. The Court denied that motion, holding that "the trial court had authority to withdraw and vacate the May 8, 2009 Final Order." June 12, 2009 Order at 1. Woodham filed a motion for reconsideration, which the Court denied. *See* June 24, 2009 Order. Despite the Court's two prior rulings that the May 8 Order was withdrawn and vacated, Woodham purports to appeal from the May 8 Order and the May 13 Order (which withdrew the May 8 Order). Br. at 39. In the alternative, Woodham appeals from the May 21 Final Order. *Id.* at 4. In addition, Woodham appeals from the March 26 Order denying his Motions to Strike. *Id.* at 3.

B. The Lease-Purchase Bond Transactions

The trial court's May 21 Final Order validated the 13th Street and Mezzo Bonds, overruling Woodham's objections to those Bonds and the associated lease-purchase transactions. V4/R-31-55. In these lease-purchase transactions: (1) the Authority will issue Bonds secured by pledged revenues (Bond Resolutions ("Res."), V3/R-20-26, V5/R-21-27); (2) the Authority will have a limited

obligation to pay principal and interest on those Bonds (O.C.G.A. §§ 36-62-10, 36-82-66; Form of Indenture of Trust (“Tr. Ind.”) § 501, V3/R-137, V5/R-138); (3) the Developers will purchase the Bonds through a private placement transaction (Form of Bond Purchase Agreements, V3/R-170-92, V5/R-171-93); (4) the Authority will apply the Bond proceeds to acquire two multi-story apartment Projects within the City of Atlanta (Res. § 4, V3/R-22, V5/R-23; Form of Lease Agreements (“Lease”) §§ 4.2, 4.3(b), V3/R-47-48, V5/R-48-49), and the Authority will own those Projects in fee simple (Lease § 3.2, V3/R-45, V5/R-46); (5) the Authority will lease the Projects to the Developers (Lease § 3.1, V3/R-45, V5/R-46), and as lessee the Developers will be solely responsible for constructing, equipping and/or maintaining the Projects (Lease § 4.1, V3/R-47, V5/R-48); (6) the Developers will make lease payments to the Authority, which payments will be in amounts sufficient to cover the principal and interest owed on the Bonds (Lease § 5.3, V3/R-51, V5/R-52; Tr. Ind. § 501, V3/R-137, V5/R-138); (7) the Authority’s fee simple interest in the Projects will be exempt from *ad valorem* taxation, O.C.G.A. § 36-62-3, and the Developers’ leasehold interests in the Projects will be taxed at the leasehold value (Lease § 6.3, V3/R-54-55, V5/R-55-56); and (8) when the lease terms end, the Developers will purchase the Projects

for a nominal sum (Lease § 12.1, V3/R-80, V5/R-81). A detailed discussion of lease-purchase transactions may be found at V2/R-22-27 and V10/MT-56-59.

These transactions create a tax incentive to the Developers because a leasehold interest is taxed differently than a fee simple interest. *See Delta Air Lines, Inc. v. Coleman*, 219 Ga. 12, 16, 131 S.E.2d 768, 771 (1963). Lease-purchase transactions are widely used by development authorities in Georgia to provide tax incentives that attract new business, encourage capital investment and infrastructure development, or maintain or expand an existing business, thus promoting the development of trade, commerce, industry and employment opportunities.

II. ARGUMENT AND CITATION TO AUTHORITY

A. Standard of Review

Courts review a development authority's findings for an abuse of discretion. *Carter v. State*, 93 Ga. App. 12, 19, 90 S.E.2d 672, 678 (1955). In a validation proceeding, "[e]very presumption will be indulged in favor of the validity and legality of the official acts of public officers." *Lilly v. Crisp County Sch. Sys.*, 117 Ga. App. 868, 870, 162 S.E.2d 456, 459 (1968).

As shown by the Bond Resolutions, the exhibits thereto, and the testimony presented, the Authority made a prima facie showing that the Bonds are valid, the proceedings were lawful, and the requisite procedures were followed. *See* O.C.G.A. §§ 36-82-75, 36-82-77; *Berry v. City of East Point*, 277 Ga. App. 649, 651, 627 S.E.2d 391, 396 (2006). Thus, the burden was on Woodham to come forward with evidence to support the objections raised to the Bonds' validity. *Hay v. Newton County*, 273 Ga. App. 423, 423, 615 S.E.2d 234, 235 (2005). Despite notice of the February 27 hearing and the trial court's specific instruction to appear, Woodham elected not to appear or present evidence or argument in opposition to validation. V10/MT-6; V2/R-127.

After considering the Authority's evidence, the trial court determined that the Bonds "and the security therefor are sound, feasible and reasonable." V4/R-42, 55. This is a finding of fact that "will not be set aside if there is any evidence to support it." *Hay*, 273 Ga. App. at 423, 615 S.E.2d at 234. Moreover, the Objections raised in Woodham's Complaints in Intervention raised no material dispute of fact, *only* questions of law. *See* V3/R-229-41; Supp. R. (7/16/09)/R-5-27. The trial court properly decided those questions of law in favor of validation.

V4/R-31-55. Questions of law are reviewed *de novo*. *Greene County Bd. of Comm'rs v. Higdon*, 277 Ga. App. 350, 350, 626 S.E.2d 541, 542 (2006).

B. The Bonds Do Not Violate O.C.G.A. § 36-62-8(b) (EE 8)

1. The Bond Proceeds Will Finance the Projects' Acquisition

Woodham argues that lease-purchase transactions are invalid under O.C.G.A. § 36-62-8(b) because there is “no real financing transaction.” Br. at 26. The trial court properly rejected this argument. V4/R-35, 48.

First, there is a “financing.” To “finance” is “to supply with funds, through the payment of cash or issuance of stocks, bonds, notes, or mortgages.” Black’s Law Dictionary 630 (6th ed. 1990). The Authority will issue the Bonds to obtain the funds necessary to acquire the Projects. V3/R-20-26; V5/R-21-27; *see* O.C.G.A. § 36-62-2(6)(N) (defining “project” to include “acquisition”). This constitutes a “financing.”

Second, the financing is “real.” Woodham contends that lease-purchase transactions are not “real” — and that the Bonds are “phantom” in nature — because the entity expected to purchase the Bonds is the same entity from which the Authority will acquire the Projects and to whom the Authority will lease the Projects. But neither the Development Authorities Law nor the Revenue Bond

Law restricts who may purchase revenue bonds issued by a development authority. *See* O.C.G.A. § 36-62-1 *et seq.*; O.C.G.A. § 36-82-60 *et seq.*; *see* p. 17 *infra*.

Woodham says it is “nonsensical” that the Developers would purchase the Bonds from the Authority “just so” the Authority could use the Bond proceeds to acquire the Project from the Developers. Br. at 27. Woodham ignores basic property law. There is nothing “phantom” about the Authority’s acquisition of a fee simple interest in the Projects and the corresponding limitations placed on the Developer’s use of the Projects under the Lease Agreements. *See, e.g.*, Lease §§ 2.2(h), 6.1, 6.4, 8.2, 9.1, 9.2, 10.2, V3/R–28, V5/R–29. Nor does the fact that the same Developers who transfer fee simple interest to the Authority will, in turn, lease the Projects render the transactions “phantom.” The very nature of property is that it can be sold to, acquired by, or leased to another, thus changing the nature of the parties’ rights and relationship to property. The Bonds, the Bond Purchase Agreements and the Lease Agreements are “real,” legally enforceable obligations.

Third, there will be “proceeds derived from the sale” of the Bonds. *See* O.C.G.A. § 36-62-8(b); *contra* Br. at 28. The Developers will purchase the Bonds in accordance with the Bond Purchase Agreements, and proceeds from the sale of the Bonds will be deposited into the Project Funds. *See* V3/R–170-92, V5/R–171-

93; V3/R-104-68, V5/R-105-69. The Authority will, in turn, lease the Projects to the Developers, and the payments due under the Lease Agreements are amounts sufficient to allow the Authority to meet its limited obligation to pay the debt service (principal and interest) on the Bonds. Lease § 5.3, V3/R-51-52, V5/R-52-53; Tr. Ind. § 501, V3/R-136, V5/R-137. For the sake of efficiency and cost containment (*i.e.*, to limit the Trustee's fees), the Lease Agreements provide that "if the Bond Purchaser is also the [Lessee/Developer], in lieu of making a deposit into the Project Fund, the Bond Purchaser *may* make an internal book entry notation to denote that funds have been advanced by the Bond Purchaser on behalf of the [Authority] to the [Developer] as payment." Lease § 4.3, V3/R-47-49, V5/R-48-50. A book entry does not render the transfer any less "real." *See* Financial Accounting Standards Board (FASB) Concepts Statement No. 1, ¶ 44 (cash receipts and payments not required to generate accounting transactions); *cf.* *Delaware v. New York*, 507 U.S. 490, 495 (1993) (changes in securities ownership may be "effected through book entries rather than the unwieldy physical transfer of securities certificates"); *Dudley v. Wachovia Bank, N.A.*, 290 Ga. App. 220, 221, 659 S.E.2d 658, 660 (2008) (discussing transfer of book-entry securities).

Fourth, the proceeds derived from the sale of the Bonds will be used for the ultimate purpose of paying all or part of the Projects' cost. The Act requires that the proceeds derived from the sale of all bonds issued by a development authority be held and used "for the ultimate purpose of paying, *directly or indirectly* . . . , all or part of the cost of any project." O.C.G.A. § 36-62-8(b). "Cost of project" is defined to include "[a]ll costs of construction, purchase, or other form of acquisition." O.C.G.A. § 36-6-2(2)(A). The Bond Resolutions provide that the proceeds from the sale of the Bonds will be used to fund the Authority's cost of acquiring the 13th Street and Mezzo Projects. V3/R-20-26; V5/R-21-27. There is no requirement that bond proceeds be used only to construct a project.

Woodham says it is "nonsensical" that Mezzo would purchase bonds to finance the development of the Mezzo Project when that Project "has already been completed and opened for leasing." Br. at 27. But the Act does not prohibit an authority from acquiring a "completed" project. See O.C.G.A. § 36-6-2(2)(A) ("Cost of project" includes "[a]ll costs of construction, purchase, or *other* form of acquisition"). Even if it did, the Mezzo Project was not "completed" when the Authority approved the Mezzo Project and passed the Inducement Resolution. V10/MT-64-65. The Mezzo building was originally constructed as

condominiums. V10/MT-61. When the condominium market waned, the Mezzo Developer approached the Authority regarding a condo-to-apartment conversion, which involved significant project costs associated with adding amenities typically provided with apartments but not included in the sale of a condominium. V10/MT-62; *see* O.C.G.A. § 36-62-2(6)(N) (“Project” includes “modification, renovation,” “rehabilitation” or “furnishing of fixtures”). Woodham not only misconstrues the law but ignores the evidence regarding the Mezzo Project.

2. The Act Authorizes Lease-Purchase Transactions

The Georgia Constitution gave the General Assembly the power to authorize municipalities to create development authorities. When the General Assembly did so, it identified a list of tools that a development authority may use “to carry out and effectuate” the purposes of the Act. *See* O.C.G.A. § 36-62-6(a)(1)-(17). Lease-purchase transactions are within the powers granted to the Authority under the Act because (i) the components of the transaction are within the tools enumerated in subsection 6(a), and (ii) these transactions are within the Act’s broad general grant of power to development authorities.

A lease-purchase transaction includes: the issuance of revenue bonds; the purchase of real and personal property; and the lease of real and personal property.

See Section I.B *supra*. Subsection 6(a)(13) gives the Authority the power to issue revenue bonds. Subsection 6(a)(5) allows the Authority to acquire real or personal property. And subsection 6(a)(6) allows the Authority to lease its real or personal property. Each of the components of a lease-purchase transaction is expressly authorized under subsection 6(a).

Furthermore, the tools available to the Authority to develop and promote commerce are not limited to those listed in subsection 6(a)(1)-(16). In addition to the express power to issue bonds, and to purchase and lease real property, subsection 6(a)(17) gives the Authority the power to do “all things necessary or convenient” to further the development of trade, commerce, industry and employment opportunities. O.C.G.A. § 36-62-6(a)(17).

3. The Development Authorities Law is to be Read Broadly

The Act “shall be liberally construed” to effect the purposes of the Act — that is, to allow the Authority to take action “to develop and promote trade, commerce, industry and employment opportunities for the public good and the general welfare.” O.C.G.A. § 36-62-9. The arguments advanced above are consistent with the plain language of the Act; these are not “ultra-liberal.” *Cf. Day*

v. Dev. Auth. of City of Adel, 248 Ga. 488, 490, 284 S.E.2d 275, 277 (1981) (Hill, P.J.) (The Act is to be liberally construed, but “not ultra-liberally.”).

Chief Justice Hill authored *Day* just one month after concurring in *Dekalb County Bd. of Tax Assessors v. W.C. Harris & Co.*, 248 Ga. 277, 282 S.E.2d 880 (1981). *Harris* describes a lease-purchase transaction:

[T]he Authority issued industrial development revenue bonds and acquired fee simple title to the tracts of land in question. The property was then leased to the [developers] The Authority executed a deed to secure debt as security for the bonds. The rights of the Authority to receive rental payments under the leases were also assigned. The leases . . . each contain[] a contract whereby the Authority agrees to sell the property and the [developers] agree to purchase the property for the consideration of ten dollars, once the revenue bonds are paid in full.

Id. at 279, 282 S.E.2d 883. The question before the *Harris* court was the resulting tax consequences for the developer, after the bonds were validated and issued. But nothing in the *Harris* court’s matter-of-fact description of the underlying lease-purchase transaction suggests that it is invalid or, under *Day*, “ultra-liberal.”

Indeed, a few years later, Chief Justice Hill authored a concurrence in which he recognized the “typical authority financing plan” as follows: “A. The authority owns the property. It issues revenue bonds and uses the proceeds of the bonds to construct the project. B. The state, county, city or private industry leases the property from the authority for a period of years, and agrees to pay rent annually to the authority in amounts necessary to retire the revenue bonds issued by the authority.” *Nations v. Downtown Dev. Auth. of Atlanta*, 255 Ga. 324, 332, 338 S.E.2d 240, 247 (1985) (Hill, C.J., concurring) (decided on other grounds). The Supreme Court made no distinction regarding who would purchase the bonds — the developer (*e.g.*, privately-placed bonds) or some other entity (*e.g.*, publicly-offered bonds).

As recently as April 2009, the General Assembly recognized lease-purchase transactions as valid means of furthering the purposes of the Act: “Each local government authority that is authorized to issue revenue bonds or other revenue obligations secured by a taxable property interest, such as a taxable lease of a capital project, shall continue . . . to exercise its powers and discharge its duties, including, in the case of development authorities, the development of trade, commerce, industry, and employment opportunities.” O.C.G.A. § 36-80-16.1(e).

The Authority properly exercised its discretion in concluding that the 13th Street and Mezzo Projects will further and promote such economic development within the City of Atlanta. V4/R-35, 47; V10/MT-61-67 (“[T]o further commerce and trade in an urban setting[,] it’s very important for us to have multifamily apartments as part of the business fabric.”). Indeed, Woodham does not appeal the trial court’s finding that the Projects further the development of trade, commerce, industry and employment opportunities. These lease-purchase transactions are authorized by the Act, including O.C.G.A. § 36-62-8(b).

C. The Bonds Do Not Violate O.C.G.A. § 36-62-9 (EE 9)

The Development Authorities Law was enacted “to develop and promote trade, commerce, industry, and employment opportunities for the public good and the general welfare and to promote the general welfare of the state.” O.C.G.A. § 36-62-9. The Act requires that a development authority’s board of directors adopt a resolution finding that the proposed project “will promote the foregoing objectives and will increase or maintain employment in the territorial area of such authority.” *Id.* Woodham challenges an alleged technical deficiency in the language of the Bond Resolutions — *e.g.*, that the Bond Resolutions do not expressly state that the Projects “will increase or maintain employment in the

territorial area of such authority.” Br. at 30. The Bond Resolutions contain a specific finding that “the acquisition, construction and equipping of the Project is a lawful and valid public purpose in that it will further the public purpose intended to be served by the Act.” V3/R-21; V5/R-22. The trial court held that the Bond Resolutions “make[] the requisite findings in accordance with or are otherwise in substantial compliance with the Act.” V4/R-34, 47.

1. The Final Order Made All Requisite Findings

First, Woodham argues that the Final Order does not make the requisite findings of fact — namely, that the Final Order fails to address “the factual substance” of Objection IV, which is whether the Bond Resolutions contain the “factual findings” required under O.C.G.A. § 36-62-9. Br. at 29-30. There was no dispute of fact regarding what the Bond Resolutions say: that the Projects “will further the public purposes intended to be served by the Act.” And the Final Order recites this fact. V4/R-34, 47. The question posed by Intervenors’ Objection IV was not one of fact, but one of law: does this statement in the Bond Resolutions comply with O.C.G.A. § 36-62-9. The Final Order included the necessary findings of fact and conclusions of law.

2. The Authority Substantially Complied with the Act

Second, Woodham argues that the trial court erred in holding that the Bond Resolutions complied with the Act because the Authority did not separately find and include in the Bond Resolutions the phrase “will increase or maintain employment in the territorial area.” Br. at 30. It is a basic tenet of Georgia law that “substantial compliance with any statutory requirement, especially on the part of public officers, shall be deemed and held sufficient, and no proceeding shall be declared void for want of such compliance, unless expressly so provided by law.” O.C.G.A. § 1-3-1(c). Nowhere does the Act expressly provide that substantial compliance with the requirements of O.C.G.A. § 36-62-9 is insufficient.

According to Woodham, “the word ‘shall’ . . . renders the requirement that the bond resolution contain the finding that the project will increase or maintain employment a command.” Br. at 32 (emphasis in original). However, substantial compliance under O.C.G.A. § 1-3-1(c) is sufficient “even if the statutory requirement is expressed with the word ‘shall.’” *Dekalb County v. Buckler*, 288 Ga. App. 346, 348, 654 S.E.2d 193, 195 (2007); *see also Thebaut v. Ga. Bd. of Dentistry*, 235 Ga. App. 194, 195-96, 509 S.E.2d 125, 128-29 (1998) (upholding agency decision that substantially complied with applicable statute, which statute

used the word “shall” in its directives). Nor does any harm arise from such substantial compliance. *See id.*; Section II.C.3 *infra*.

The Legislature did not make bond validations entirely dependant on the rote recitation of “magic words.” The Authority’s finding — that “the acquisition, construction and equipping of the Project is a lawful and valid public purpose in that it will further the public purpose intended to be served by the Act” (V3/R–21; V5/R–22) — is consistent with the purposes of the Act.² The trial court did not err in holding that the Bond Resolutions passed by the Authority substantially complied with O.C.G.A. § 36-62-9.

3. Woodham’s Interpretation Elevates Form Over Substance

Woodham concedes that the Authority found that the Projects will promote, among other things, “employment opportunities for the public good and the

² Furthermore, the Authority in fact considered whether the Projects would further employment. Among the economic development criteria that the Authority considers, “the first is that we are helping to create jobs. That is the furtherance of commerce.” V10/MT–63. The Board considered whether each Project would increase or maintain employment in the City of Atlanta. V10/MT–64-65, 67.

general welfare of the state”; but Woodham maintains that the Bonds may not be validated because the Authority did not also find that the Projects will “increase or maintain employment” in the Authority’s territorial area, the City of Atlanta. Woodham’s argument does not “square with common sense and sound reasoning.” *Effingham County Bd. of Tax Assessors v. Samwilka, Inc.*, 278 Ga. App. 521, 524, 629 S.E.2d 501, 503 (2006). The Bond Resolutions make clear that the Projects contemplated are within the City of Atlanta. V3/R–20-26; V5/R–21-27. There is no dispute that the Authority made the requisite finding that the Projects will promote employment opportunities, and it is evident that those are within the *Atlanta* Development Authority’s territorial area.

Georgia law does not allow such a singular focus on a particular phrase, particularly when to do so would ignore the Legislature’s intent. *Busch v. State*, 271 Ga. 591, 592, 523 S.E.2d 21, 23 (1999) (The “meaning of a sentence may be more than that of the separate words, as a melody is more than the notes.”); *Kemp v. City of Claxton*, 269 Ga. 173, 175, 496 S.E.2d 712, 715 (1998) (“spirit and intent . . . prevails over a literal reading”). It has long been the case that “the law looks to substance rather than to form” in statutory interpretation. *Indian Springs Swim. Pool Corp. v. Maddox*, 70 Ga. App. 842, 846, 29 S.E.2d 724, 727 (1944).

The Legislature's intent was that, before undertaking a project, a development authority's board should determine that a project will promote trade, commerce, industry and employment opportunities within its territorial area. *See* O.C.G.A. § 36-62-9. The Authority's Board did just that, finding that the Projects will "further the public purpose intended to be served by the Act." V3/R-21; V5/R-22. The trial court did not err by holding that the Bond Resolutions made "the requisite findings in accordance with" the Act. V4/R-34, 47.

D. The Bonds Do Not Violate O.C.G.A. § 36-91-1 et seq. (EE 10)

Woodham contends that the trial court erred by overruling the objection that the Authority failed to comply with the Georgia Local Government Public Works Construction Law (the "PWCL"), O.C.G.A. § 36-91-1 *et seq.*

1. The PWCL is Not a Proper Subject for a Bond Proceedings

The Authority's purported failure to comply with the PWCL is not material to these proceedings. The narrow purpose of a bond validation proceeding is to evaluate whether the proceedings by the issuer of the bonds were lawful and whether the issuer followed the statutory procedures (*e.g.*, notice to district attorney, adoption of the resolution, district attorney's filing of the petition, proper public notice of the validation hearing), and to determine whether there is adequate

security for the payment of such bonds. *See* O.C.G.A. §§ 36-82-75, 36-82-77; *see also* O.C.G.A. § 36-82-78 (contemplating a judgment “confirming and validating the issuance of the bonds and the security therefor”); *Ambac Indem. Corp. v. Akridge*, 262 Ga. 773, 775, 425 S.E.2d 637, 639 (1993); *Alexander v. Macon-Bibb County Urban Dev. Auth.*, 257 Ga. 181, 181, 357 S.E.2d 62, 63 (1987).

This Court rejected a similar challenge in *Berry*. There, the intervenors argued that the East Point Building Authority “violated its internal competitive bidding procedures when it selected bond counsel and the underwriters for the bond proceeding.” 277 Ga. App. at 651, 627 S.E.2d at 396. The Court noted that intervenors in bond validation proceedings may properly raise “any question that goes to the power to issue and validity or regularity of the issuance of such bonds.” *Id.* But “a dispute as to the process for selection of the outside counsel and underwriter *is not material to the merits of the bond proposal.*” *Id.* Similarly, whether the Projects will involve contracts that are subject to the competitive bidding procedures mandated by the PWCL “is not material to the merits of” the validity of or security for the Bonds at issue in these proceedings. *Id.* The trial court properly held that the Authority’s compliance with the PWCL “is not

material to these validation proceedings as this issue does not relate to the validity or regularity of the issuance of” the Bonds. V4/R-37, 49.

2. The PWCL Does Not Apply to These Bond Transactions

Even if compliance with the PWCL were a material consideration in bond validation proceedings, Woodham’s argument fails because the Projects are not subject to the PWCL. Woodham’s simplistic argument is that the Authority is a “governmental entity,” therefore the Projects are a “public works construction.” Br. at 33-34 (citing O.C.G.A. § 36-91-2(9) (defining “governmental entity”) and § 36-91-2(12) (defining “public works construction”)). Woodham argues that the Authority did not attempt to comply with the PWCL in respect to the proposed Lease Agreements between the Authority and Developers. The trial court properly rejected these arguments, finding no violation of the PWCL. V4/R-37, 49-50.

First, the Projects will not be constructed using “public works construction contracts.” Although the term “public works construction contracts” is not specifically defined under O.C.G.A. § 36-91-2, other provisions make clear that public works construction contracts are contracts “*entered into by a governmental entity* with private persons or entities.” O.C.G.A. § 36-91-20(a); *see also* O.C.G.A. § 36-91-21(g) (“No public works construction contract *with a governing*

authority shall be valid for any purpose unless the contractor shall comply with all bonding requirements of this chapter.”). Neither the Bond Resolutions nor the Lease Agreements contemplate that the Authority will enter into any contracts to build or improve the structure at the site; instead, the Developers will enter those contracts. Lease § 4.1, V3/R-47, V5/R-48. Moreover, the Developers are not the Authority’s agents. *Id.* § 13.13, V3/R-84, V5/R-85. Nor are the Developers a “governmental entity” under O.C.G.A. § 36-91-2(9). Because the Developers — *not* the Authority — will enter the contracts contemplated by the Lease Agreements, those contracts are not public works construction contracts.

Second, to the extent Intervenors suggest that the Bond Resolutions themselves, including the contemplated Lease Agreements, constitute public works construction contracts, such a conclusion would improperly marry the Act with the PWCL. To do so would render all development authority bond resolutions involving a private entity for the purpose of developing commerce through the use of investment incentives subject not only to the Act but also to the PWCL.

This was not the General Assembly’s intent. As the Act makes clear, it is to be liberally construed and, “insofar as this chapter may be inconsistent with the provisions of any other law . . . this chapter shall be controlling.” O.C.G.A. § 36-

62-11. Courts are to construe statutes in accordance with their plain and ordinary meaning, O.C.G.A. § 1-3-1(b), and statutory interpretation “must square with common sense and reasoning.” *Effingham County Bd. of Tax Assessors*, 278 Ga. App. at 524, 629 S.E.2d at 503. To require all bond transactions to undergo a competitive bid process would undermine the purpose of the Act — effectively requiring private entities to bid on a development incentive — and would undermine development authorities’ discretion to undertake projects designed to encourage economic and commercial development.

E. The May 13 and 21 Orders Were Properly Entered (EE 11)

Woodham maintains that he appealed the May 8 Order on May 11, thereby divesting the trial court of jurisdiction to enter the May 13 Order (which withdrew the May 8 Order) and the May 21 Final Order. Br. at 34-38. Woodham made identical arguments in Appellants’ Rule 40(b) Motion (filed May 29, 2009) and Motion for Reconsideration (filed June 15, 2009). *See also* Appellees’ Response to Rule 40(b) Motion (filed June 1, 2009). Having rejected Woodham’s arguments in its June 12 and June 24, 2009 Orders, this Court need not entertain them again.

The May 13 Order formalized the trial court’s May 11 ruling from the bench sustaining Woodham’s objection and withdrawing and vacating the May 8 Order.

See June 12, 2009 Order at 1. The Court reasoned that “[c]ourts may enter an order nunc pro tunc to record an action previously taken.” *Id.* Once again elevating form over substance, Woodham complains that the May 13 Order does not use the express phrase “nunc pro tunc.” The May 13 Order states with ample clarity: “[The] Final Order dated May 8, 2009 is hereby WITHDRAWN and VACATED *as of May 11, 2009.*” *Id.*; *see* V4/R-12.

The May 13, 2009 order does not “purport[] to supply non-action by the trial court.” Br. at 36 Stated in plain English, Woodham argues that the trial court never expressly said that it was sustaining Woodham’s objection to the May 8 Order. *See id.* At the May 11 hearing, Woodham objected: “I have been handed out a final order which appears to have been entered prior to this hearing. So I would object to a final order being entered prior to the motion to recuse hearing.” V6/MT-6; *see also* V6/MT-16-17 (Developers’ objection). The trial court addressed the objections to the May 8 Order as follows:

At the time that I signed the [May 8] order, I was aware of the motion to recuse. I was also aware of the dates in which the motion to recuse had been filed. And at that point in time it was very easy to look at the date stamped on the motion and see that it was untimely. . . . That is the

threshold issue that I had the right to determine, and I did that. And so I went ahead and signed the order because based on the filings itself the motion was untimely. That being said, out of abundance of caution I will happily resign the motion. . . . So I will do that.

V6/MT-20-21. This Court was correct in holding that at the May 11 hearing the trial court “granted the relief Woodham sought.” June 12, 2009 Order at 1.

Next, Woodham argues that the trial court could not withdraw the May 8 Order nunc pro tunc because doing so purportedly corrected judicial rather than clerical error. Br. at 37. After the trial court sustained Woodham’s objection to the May 8 Order, Woodham nevertheless rushed to file a notice of appeal from the May 8 Order in hopes of creating a procedural error and delaying these proceedings. *See* Appellees’ Response to Appellants’ Rule 40(b) Motion at 12-13. Woodham’s parting comment to the trial court — “I can file an appeal at any time” — foreshadowed his plan. V6/MT-22. Woodham’s final Enumeration of Error, discussed *infra*, proves this point. Woodham should not be permitted to abuse the appellate process in this manner.

F. A Challenge to the May 8 Order is Moot (EE 12)

Woodham asks the Court to reverse the May 8 Order. Br. at 38-39. This is a moot point, because the Court has already held that the trial court withdrew and vacated the May 8 Order. See June 12 and 24, 2009 Orders. Even if the Court were to consider this enumeration of error, the trial court did not violate Uniform Superior Court Rule 25.3. See Br. at 38-39 (EE 12). That Rule provides that the trial judge presented with a motion to recuse must first decide whether the motion is timely and whether the accompanying affidavit is legally sufficient. The trial court did so before considering the May 8 Order. See V6/MT-20-21.

CONCLUSION

For the reasons set forth above and in the Developers' Brief, the trial court's March 26 Order, May 13 Order and May 21 Final Order should be affirmed.

Respectfully submitted this 10th day of August 2009.

THE ATLANTA DEVELOPMENT AUTHORITY

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CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the foregoing **BRIEF OF APPELLEE THE ATLANTA DEVELOPMENT AUTHORITY** by U.S.

First Class Mail, addressed to the following:

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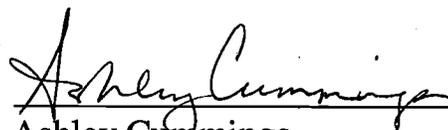
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IN THE COURT OF APPEALS
STATE OF GEORGIA

FILED IN OFFICE

CITIZENS FOR ETHICS IN)
GOVERNMENT, LLC ET AL.,)
)
Appellants,)
v.)
)
THE ATLANTA DEVELOPMENT)
AUTHORITY ET AL.,)
)
Appellees.)

CASE NO. A09A2105

AUG 31 2009
CLERK, COURT OF
APPEALS OF GEORGIA

**APPELLANTS' BRIEF IN RESPONSE TO BRIEF
OF APPELLEE THE ATLANTA DEVELOPMENT AUTHORITY**

Appellants Citizens for Ethics in Government, LLC and John F. Woodham ("Appellants") file this Appellants' Brief In Response to Brief of Appellee The Atlanta Development Authority ("Appellee") and show this Honorable Court of Appeals as follows:

1. Burden of Proof.

When a bond validation is contested, the burden is on parties seeking validation to prove the material facts which are requisite to obtain validation. *Lilly v. Crisp*, 117 Ga. App. 868, 870 (1968). In other words, the plaintiff and defendants, parties to the "straw man" bond validation lawsuit, cannot simply rest on their pleadings in a contested bond validation. However, this is precisely what Appellee Atlanta Development Authority and the developers have done in this case.

In fact, it is the evidence introduced by Appellee itself which inflicts the damage to Appellee's arguments. The specific terms of the Lease Agreements prove the violation of O.C.G.A. § 36-62-8(b). Likewise, the Bond Resolutions themselves demonstrate violation of O.C.G.A. § 36-62-9. Finally, Appellee concedes non-compliance with O.C.G.A. § 36-91-1, *et seq.*

2. The Bond Transactions Violate O.C.G.A. § 36-62-8(b).

Appellee asserts a number of misguided and specious arguments in a vain attempt to defend the indefensible: the subject bond transactions do not involve any actual proceeds from the sale of any bonds to finance the projects at question.

On page 10 of its Brief, Appellee defines "finance" as "to supply with funds . . . The Authority will issue the Bonds to obtain the funds necessary to acquire the Projects." *Br. at 10*. That statement alone instantly bottoms out Appellee's entire case. As explained in Appellants' Initial Brief, the lease documents prove there are no funds involved in the subject transactions, only book entry notations on the developer's financial statements. *Appellants' Brief (EE 8)*. There are no funds, thus there can be no financing.

Appellee next misconstrues Appellants' argument, in asserting that neither the Development Authorities Law nor the Revenue Bond Law restricts who may purchase bonds issued by a development authority. *Br. at 10-11*. The issue is not

who purchases the bonds. The issue is whether there are any actual bond proceeds. There are no bond proceeds in this case, so the subject transactions cannot comply with O.C.G.A. § 36-62-8(b). In so arguing, Appellee states: “Woodham ignores basic property law. There is nothing ‘phantom’ about the Authority’s acquisition of a fee simple interest in the Projects and the corresponding limitations placed on the Developer’s use of the Projects under the Lease Agreements.” *Br. at 11*. This is a mere continuation of Appellee’s “straw-man” argument, because the issue is whether there are any bond proceeds, not how the parties go about structuring the transaction as a sale-leaseback real estate transaction.

On page 12 of the Brief, Appellee finally concedes there are no bond proceeds, and that indeed we are dealing with a mere “internal book entry notation”. Appellee thus states: “A book entry does not render the transfer any less ‘real’”. *Br. at 12*. This statement is pure subterfuge. The “book entry” and the “transfer” of title are two completely separate issues. The “book entry” shows there are no actual bond proceeds. That the developer transfers fee title by quitclaim deed to the Atlanta Development Authority to set up the tax abatement mechanism is unrelated to whether there are actual bond proceeds involved. The FASB Statement and the cases cited by Appellee at the bottom of page 12 of the Brief are irrelevant

to the core issue, whether there are any actual bond proceeds in these transactions. There are none.

Interestingly, after conceding there are no bond proceeds (only internal book entries), Appellee continues its discussion of bond proceeds on page 13. Of course, this is once again made in the context of a “straw-man” argument. This time, Appellee argues that use of bond proceeds is not limited to mere construction, but can also be used for acquisition. “There is no requirement that bond proceeds be used only to construct a project. . . the Act does not prohibit an authority from acquiring a ‘completed’ project.” *Br. at 13*. The discussion of construction financing versus acquisition financing is meaningless for purposes of O.C.G.A. § 36-62-8(b) when there are no actual bond proceeds involved. Pages 14-15 of the Brief describe the power a development authority has to undertake a sale-leaseback transaction. That issue is not in dispute. This again is a meaningless discussion for purposes of O.C.G.A. § 36-62-8(b).

Starting on page 15, we arrive at the “fall on the sword” argument, that the law should be liberally construed. Appellee is basically conceding violation of O.C.G.A. § 36-62-8(b), but is asking for forgiveness versus permission. No reasonable construction of O.C.G.A. § 36-62-8(b), liberal or otherwise, would permit a conclusion that O.C.G.A. § 36-62-8(b) does not require actual bond

proceeds. On page 16, we are provided yet another description of a lease-purchase transaction via a citation to *DeKalb County Bd. of Tax Assessors v. W.C. Harris & Co.*, 248 Ga. 277, 279 (1981). “The question before the *Harris* court was the resulting tax consequences for the developer, after the bonds were validated and issued. But nothing in the *Harris* court’s matter-of-fact description of the underlying lease-purchase transaction suggests that it is invalid or, under *Day*, ‘ultra-liberal’”. *Br. at 16*. Appellee thus continues its attempt to obfuscate and deflect the issue at hand away from whether there are actual bond proceeds, as required under O.C.G.A. § 36-62-8(b), to whether or not a development authority can undertake a lease-purchase transaction. The latter is undisputed, as long as there are actual bond proceeds. The presence or absence of actual bond proceeds was not at issue in *Harris*. On pages 17-18 of the Brief, Appellee furthers its irrelevant, false argument of whether or not a development authority can undertake a lease-purchase transaction. This spurious discussion continues to lead nowhere. Where are the bond proceeds? The proposed bond transactions violate O.C.G.A. § 36-62-8(b).

3. The Georgia Local Government Public Works Construction Law, O.C.G.A. § 36-91-1, Et Seq.

A. Materiality

Appellee's analysis of The Georgia Local Government Public Works Construction Law, O.C.G.A. § 36-91-1, *et seq.* (the "Local Government Construction Law") is clearly misplaced. First, Appellee asserts that its failure to comply with the Local Government Construction Law is not material to the subject bond proceedings. *Br. at 23-34.* Appellee cites *Berry v. City of East Point*, 277 Ga. App. 649, 651 (2006), referencing the challenge therein to bidding procedures pertaining to selection of bond counsel and the bond underwriters. *Berry* is not remotely similar to the subject proceedings. The question at issue in these proceedings touches on the legality of the Lease Agreements (the lease payments thereunder being pledged as security for the bonds) in respect of the Local Government Construction Law, so the issue hits at the very core of the proposed bond transactions (i.e., security for the bonds), not some ancillary matter such as who is bond counsel. *See e.g. Woodham v. City of Atlanta*, 283 Ga. 95, 98-99 (2008) (a judgment in a validation proceeding is conclusive to all matters that could and should have been adjudicated during the bond validation proceeding).

Ironically, the same lawyers representing the Appellee in this appeal, Matthew Calvert and Douglass Selby of Hunton & William, were representing the City of Atlanta in *Woodham*. In *Woodham*, Hunton & Williams asserted that all claims otherwise ripe for a declaratory judgment action had to be asserted within the confines of the bond validation proceeding. Now, those same lawyers assert that a claim under the Local Government Construction Law attacking the legality of the lease transactions between the Atlanta Development Authority and the two developers are not material to, and thus cannot be litigated within, the bond validation proceeding. How strange.

The holding in *Woodham* that the declaratory judgment matters had to be heard within the confines of the bond validation proceeding was not material to the ultimate outcome of the decision in *Woodham*, because the Supreme Court nevertheless determined that the subject transaction was unconstitutional and reversed the trial court's validation order. However, Mr. Calvert and Mr. Selby must now labor under that portion of *Woodham* (which they helped create) which bottoms out their materiality argument with respect to Appellants' claim in these proceedings under the Local Government Construction Law.

Further, there is no doubt that if Appellants brought a separate declaratory judgment action following a bond validation for violation of the Local Government

Construction Law, Appellee would claim the transactions are protected from collateral attack by the bond validation. The two *Turpen* cases decided in the Georgia Court of Appeals make this clear. In *Turpen v. Rabun County Board of Commissioners*, 245 Ga. App. 190 (2000) (“*Turpen 1*”), citizens of Rabun County brought an action against the county to enjoin the county’s acquisition of a hospital under the Hospitals Acquisition Act, O.C.G.A. § 31-7-400, *et seq.* The citizens prevailed, and the hospital acquisition was found to be null and void. *Turpen 1*, at 197.

Turpen v. Rabun County Board of Commissioners, 251 Ga. App. 505 (2001) (“*Turpen 2*”) involved a bond validation proceeding for the issuance of bonds to finance the very transaction which had been declared null and void in *Turpen 1*. The Rabun County citizens who prevailed in *Turpen 1* had also intervened in the bond validation proceeding at issue in *Turpen 2*, but the citizens did not appeal the validation order, apparently out of concern regarding the surety bond imposed by the trial court in the validation proceeding under O.C.G.A. § 50-15-2. *Turpen 2*, at 510, n. 11. Because the citizens did not appeal the validation order, the transaction was allowed to stand, even though the transaction had already been found to be null and void. “We recognize that this decision produces an anomalous result, given the prior ruling that the hospital acquisition is null and void.” *Turpen 2*, at 509. The

end result in the *Turpen* cases, together with the language from *Woodham, supra*, shows that if Appellants wish to assert the subject transactions between the Atlanta Development Authority and the two developers violate the Local Government Construction Law, Appellants must assert that claim now.

B. Applicability of Local Government Construction Law

That the Local Government Construction Law applies to a development authority sale-leaseback transaction is even acknowledged to be the case by Mezzo's and 13th Street's very own bond counsel, Daniel M. McRae of Seyfarth Shaw, LLP, in his article entitled *Everything You Need to Know About Constructing Projects Under Georgia's New Procurement Law Bond* (8/18/09 Supp. Rec., p. 59-70) On page 6 of the article, Mr. McRae states: "If the language of the new law were taken literally, *it would apply to even a traditional sale-leaseback*. The hospital authority lobby has taken this issue so seriously that it got the law amended in 2001 so that in general it would not apply to hospital authorities." (emphasis supplied). (8/18/09 Supp. Rec., p. 64)¹ In Georgia, courts use the "golden rule" of statutory construction, which requires the courts to follow the literal language of the statute unless it produces contradiction, absurdity or such an inconvenience as to

¹ The hospital authority amendment is set forth at Ga. L. 2001, p. 841, which adds a new subparagraph (i) to the re-enacted O.C.G.A. § 36-91-22.

ensure the language meant something else. *Telecom*USA, Inc. v. Collins*, 260 Ga. 362, 363 (1990). The literal language of the Local Government Construction Law, as recognized by Mr. McRae, the developers own bond counsel and noted bond law expert, applies to a development authority in sale-leaseback transactions, just as it formerly applied to hospital authorities prior to the 2001 amendment.

Apparently, the development authority lobby and bond counsel bar has likewise taken this issue so seriously that it tried to get passed House Bill 1200 during the 2008 Session of the Georgia General Assembly, but the legislation failed. (8/18/09 Supp. Rec., p. 72) House Bill 1200 by its own terms was an attempt by the development authority lobby and bond counsel bar to likewise exempt development authorities from the Local Government Construction Law, which clearly indicates the understanding of the development authority lobby and bond counsel bar, as stated in Mr. McRae's article, that even the traditional development authority sale-leaseback transaction is governed by the Local Government Construction Law.

On page 7 of his article, Mr. McRae further states: "A literal interpretation of the Georgia Local Government Works Construction Law could well bring even typical development authority projects within the ambit of the law. In other situations, the policy cues in the cases discussed above indicate that such a law

would be applied if the development authority had an economic interest in the project, if grant funds were involved, or in similar cases.” (emphasis supplied) (8/18/09 Supp. Rec., p. 65) Mr. McRae’s observations segue very well into the discussion above in respect of O.C.G.A. § 36-62-8(b). Appellee asserts: “The Bond Resolutions provide that the proceeds from the sale of the Bonds will be used to fund the Authority’s cost of acquiring the 13th Street and Mezzo Projects.” *Br. at 13*. If that is the case as Appellee argues, then Appellee Atlanta Development Authority would have an economic interest in the projects, which, according to 13th Street and Mezzo’s own bond counsel, would very clearly trigger the requirements of the Local Government Construction Law, with which the parties failed to comply.

The projects are either illegal under O.C.G.A. § 36-62-8(b) for lack of any actual bond proceeds financing, or they are illegal under the Local Government Construction Law in light of the spurious bond financing economic interest in the projects asserted by Appellee in response to Appellants’ O.C.G.A. § 36-62-8(b) objection. Which is it? Appellee cannot have it both ways.

Further, Appellee Atlanta Development Authority petitioned the trial court for a surety bond in each proceeding pursuant to the Public Lawsuits Act, O.C.G.A. § 50-15-1, *et seq.* (V.10, MT. 2/27/09, p. 69, lines 15-22) Those surety bond

filings by the development authority confirm the applicability of the Local Government Construction Law to the proposed sale-leaseback transactions between the development authority and the developers. Under O.C.G.A. § 50-15-1(2), a “public lawsuit” is defined as “any action whereby the validity . . . financing or leasing of any *public improvement, project, or facility by any political subdivision, as owner . . .* is questioned.” (emphasis supplied) Therefore, by filing the surety bond petitions under the Public Lawsuits Act, Appellee Atlanta Development Authority conceded the subject projects were public works projects, thereby confirming the proposed transactions between the authority and the developers constitute “public works construction” under the Local Government Construction Law. It is not plausible to argue the projects are public improvement projects or facilities for purposes of the Public Lawsuits Act and simultaneously argue the projects are not “public works construction” for purposes of the Local Government Construction Law. The authority’s filing of the surety bond petitions under the Public Lawsuits Act thus confirms the applicability of the Local Government Construction Law, and the authority’s failure to comply with the requirements of the Local Government Construction Law with respect to the projects means the bond validations must be denied.

4. Violation of O.C.G.A. § 36-62-9.

Appellee Atlanta Development Authority refers to its obvious violation of O.C.G.A. § 36-62-9, (“[N]o bonds . . . shall be issued by an authority under this chapter unless its board of directors adopts a resolution finding that the project . . . will increase or maintain employment in the territorial area of such authority”), as “an alleged technical deficiency”. *Br. at 18*. Appellee concedes the failure to comply with O.C.G.A. § 36-62-9 by arguing for mere “substantial compliance” under O.C.G.A. § 1-3-1(c). *Br. at 20*. This argument does not obtain. In this situation, there is no compliance at all, so an argument for substantial compliance is fruitless. As noted in Appellants’ Initial Brief, one must look to the statute itself. O.C.G.A. § 36-62-9 is entitled “Purpose of Chapter”, which indicates the clear intent of the General Assembly that the mandates set forth therein cannot be ignored. “No bonds . . . *shall be issued* by an authority under this chapter unless its board of directors adopts a resolution finding that the project for which the bonds . . . are to be issued will promote the foregoing objectives *and will increase or maintain employment in the territorial area of such authority.*” (emphasis supplied). There are thus two separate and distinct requirements under O.C.G.A. § 36-62-9. Appellee’s reasoning would mean the second requirement is meaningless, mere

surplusage and can simply be ignored, which in fact is what Appellee did. The laws of statutory construction do not allow this.

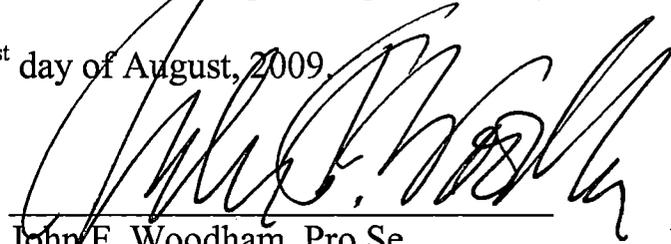
The massive flaw in Appellee's reasoning, which Appellee did not even attempt to address in its Brief, is that O.C.G.A. § 36-62-9 specifies in detail the very specific exceptions to the otherwise general mandate that the bond resolution contain the finding that the project will increase or maintain employment in the territorial area of the authority (subparagraph (1) pertaining to air and water pollution control facilities and sewage and solid waste facilities and subparagraph (2) pertaining to industrial parks).² The presence of these narrow exceptions clearly shows the legislature's intent that strict or mandatory compliance is required in all other situations. "A well-established canon of statutory construction, *inclusio unius, exclusio alterius*, provides that the

² The original version of this section of the Development Authorities Law is found at Ga. L. 1969, p. 137, § 7 (at page 143), which § 7 contained no exception to the second required finding. In 1971, we see the first exception added for air and water pollution control facilities. Ga. L. 1971, at p. 178-179. In 1976, we see a second exception added for sewage and water waste disposal facilities. Ga. L. 1976, at p. 720. In 1982, we get an exception for industrial parks. Ga. L. 1982, at p. 1709-1710.

inclusion of one implies the exclusion of others.” *Blackwell v. State*, 237 Ga. App. 896, 897 (1999).

Appellee’s construction of O.C.G.A. § 36-62-9 would mean compliance with the first required finding under O.C.G.A. § 36-62-9 necessarily results in compliance with the second required finding, under the perpetual guise of “substantial compliance”. However, the legislature’s decision to create exceptions to the second required finding, following the law’s original enactment, trumps any conceivable merit to Appellee’s ipso facto, substantial compliance theory, under the rule of *inclusio unius, exclusio alterius*. As such, Appellee’s “substantial compliance” argument fails, both because (i) there is no compliance at all, and (ii) the legislature’s subsequent creation of the specific exceptions to the otherwise mandatory requirement. That Appellee failed to even address or acknowledge the existence of the exceptions speaks loudly.

Respectfully submitted, this 31st day of August, 2009.



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CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the within and foregoing Appellants' Response Brief on counsel of record by placing same in the United States Mail, with proper postage thereon to ensure delivery, addressed to:

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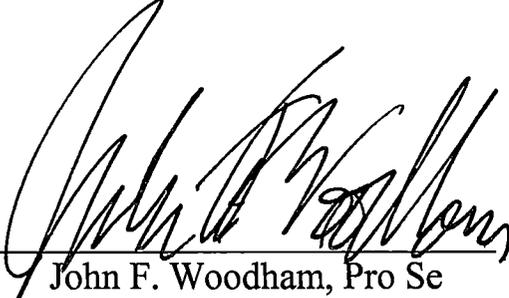
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CLERK, COURT OF APPEALS OF GEORGIA

IN THE COURT OF APPEALS
STATE OF GEORGIA

CITIZENS FOR ETHICS IN)
GOVERNMENT, LLC ET AL.,)

Appellants,)

v.)

CASE NO. A09A2105

THE ATLANTA DEVELOPMENT)
AUTHORITY ET AL.,)

Appellees.)

APPELLATS' BRIEF IN RESPONSE TO BRIEF OF APPELLEES 13TH STREET HOLDINGS, LLC AND MEZZO DEVELOPMENT, LLC

Appellants Citizens for Ethics in Government, LLC and John F. Woodham ("Appellants") file this Appellants' Brief In Response to Brief of Appellees 13th Street Holdings and Mezzo development, LLC ("Appellees") and show this Honorable Court of Appeals as follows:

1. Introduction.

Throughout the lower court proceedings, counsel for 13th Street Holdings and Mezzo Development, LLC have repeatedly accused Appellants of "extortion". Extortion is not a tort in the State of Georgia. Instead, it is a crime. *Rolleston v. Huie*, 198 Ga. App. 49, 50 (1990); *Markowitz v. Wieland*, 243 Ga. App. 151, 157, n. 11 (2000) (threatening civil suit does not violate O.C.G.A. § 16-8-16 nor does it

state a tort claim). It is for this reason that Appellants demanded that Mr. Ichter and his clients verify their “extortion” claims under the requirements of the Georgia Anti-SLAPP statute. Mr. Ichter refused to verify his extortion claim, which precipitated Appellants’ Motion under O.C.G.A. 9-11-11.1(b). It was not until June 30, 2009, while under cross examination at a fees hearing, that Mr. Ichter finally admitted there was no civil or criminal “extortion” claim present in this case. “Q. So you have just stated your allegation of extortion is neither a tort, it’s neither a crime in this case, it is merely a violation of 9-15-14(B)? A. I think you heard me right.”¹ Presenting a criminal charge solely to obtain an advantage in a legal proceeding is prohibited under Georgia Rule of Professional Conduct 3.4(h).

Mr. Ichter appears to be no stranger to throwing around accusations of extortion. In a suit filed last year against the general contractor of another condominium project of Mr. Ichter’s client, Scott Leventhal, Mr. Ichter likewise accused the contractor of “extortionate conduct”. (8/18/09 Supp. Rec., p. 48) Mr. Ichter’s boorish tactics are further shown quite strikingly in certain December 11,

¹ The Order arising out of the June 30, 2009 is the subject of Case No. A09A2312, a companion case to this Case. The above language is quoted from the 6/30/09 transcript which is part of the record in Case No A09A2312.

2007 correspondence from John L. Taylor to Kelly Farr, Executive Director of the Georgia Athletic and Entertainment Commission. (8/18/09 Supp. Rec., p. 91) The Taylor letter, particularly the statements on page 4 and 5, speaks for itself. In the subject proceedings, we hear and read from Mr. Ichter public statements such as: "If Mr. Woodham decides to proceed with his intervention, we will offer evidence to support our position, including live testimony." (7/08/09 Supp. Rec., p. 23) This public statement of course, being an effort to intimidate Appellants' to dismiss the bond intervention lest Mr. Ichter continue to prosecute his criminal claim of extortion. We also see crude e-mails from Mr. Ichter transmitted to the court and other counsel, such as the one stating: "Mr Woodham fears what awaits him or he would not beat such a cowardly retreat." (7/08/09 Supp. Rec., p. 12)

The substance of Mr. Ichter's extortion claim consisted solely of a secretly recorded phone call (7/16/09 Supp. Ex. #4), together with certain 12/17/08 correspondence from Appellant Woodham to Mr. Ichter. (8/18/09 Supp. Rec., p. 84) Such communication between attorneys regarding ongoing, contested litigation does not form the basis for a claim of extortion. In that regard, it should be remembered that counsel for the Plaintiff in the subject proceedings is Paul Howard, Fulton County District Attorney. Another party included in virtually every pleading is Thurbert Baker, Attorney General of the State of Georgia. If these

communications were criminal, as suggested by Mr. Ichter, it would logically follow that either Mr. Howard or Mr. Baker would at some point have stepped forward. That has never happened. In a similar vein, the trial court stated on 2/27/09 that it would be referring the matter to the State Bar by the end of the week. (V.10, MT. 2/27/09, p. 54) While not dispositive of the issue, as of the August 31, 2009 filing of this Brief, Appellants have received no inquiry from the State Bar regarding this matter.

2. The 2/27/09 Hearings Should Have Been Stayed.

As stated in Appellants' Initial Brief, O.C.G.A. § 9-11-11.1(d) of the Georgia Anti-SLAPP statute expressly provides, "All discovery and any pending hearings or motions in the action *shall be stayed upon the filing* of a motion to dismiss or a motion to strike made pursuant to subsection (b) of this Code section." (emphasis supplied). There is no contention from Appellees that Appellants either failed to bring the omission of the requisite verifications to the attention of Appellees or that Appellants otherwise failed to actually file a Motion to Strike or to Dismiss Under O.C.G.A. § 9-11-11.1(b). Instead, Appellees improperly focus on whether their repeated claim of extortion is a "claim" recognizable under the Anti-SLAPP statute. *Br. at 11-12.*

Appellees thus put the cart before the horse. Appellees' argument, if they wish to make it as such, is an argument to be made during a hearing on the merits in respect of the O.C.G.A. § 9-11-11.1(b) Motion itself. The framework of the Anti-SLAPP statute mandates that the filing of the motion automatically stays any further hearings, pending a hearing on the motion or a lifting of the stay in accordance with O.C.G.A. § 9-11-11.1(d). Appellees' argument that their repeated claim of extortion is not recognizable is no defense to the trial court's failure to comply with the legislative mandate of the stay. The trial court does not possess inherent power to simply ignore the stay. The court easily could have scheduled and noticed a hearing on Appellants' O.C.G.A. § 9-11-11.1(b) Motion, ruled on it one way or the other, and proceeded to conduct other hearings based on the outcome of the hearing. Alternatively, the court could have complied with the procedure for lifting the stay under O.C.G.A. § 9-11-11.1(d). What the court cannot do is just ignore the statute altogether.

2. Violation of Appellants' Rights to Due Process.

Appellees' reasoning in respect of Enumeration of Error 2 defies logic as well as the law. The 2/27/09 hearings were stayed by operation of law. O.C.G.A. § 9-11-11.1 thus deprived the trial court of jurisdiction to hold hearings on 2/27/09. As stated above, the statutory framework affords the court two ways to proceed.

Either hold a noticed hearing on the Anti-SLAPP motion, or lift the stay in accordance with O.C.G.A. § 9-11-11.1(d). The framework does not allow the court to convene otherwise stayed hearings, and out of mere convenience first hold a brief, ex parte, unnoticed hearing on the Anti-SLAPP motion at the suggestion and recommendation of opposing counsel.² This makes a mockery of the automatic stay, rendering it virtually meaningless.

The maxim mentioned in the first two cases (*Br. at 15*) cited by Appellees (“one cannot complain of a judgment, order or ruling that his own procedure or conduct aided in causing) *Fluke v. Westerman*, 271 Ga. App. 418 (2005) and *Hornsby v. Odum*, 198 Ga. App. 471 (1991), does not stand for the proposition asserted by Appellees. A close reading of those cases reveals that the complaining parties had taken procedural steps or requests approved by the court which could not be later challenged, based on the above maxim. This is not the situation now before this court. Quite the contrary, Appellants filed an Anti-SLAPP motion, fully expecting the opportunity to argue that motion on the merits on a date scheduled by the court upon proper notice. Instead, the court held an ex parte

² The fact that the Anti-SLAPP hearing was clearly held sua sponte, at the suggestion and recommendation of opposing counsel, removes any doubt that the hearing was not noticed to Appellants.

hearing on the merits with no notice to Appellants. Appellants did not request this lack of due process. Appellees proceed to cite *Blue Stone Lofts, LLC v. D'Amelio*, 268 Ga. App. 355 (2004). *Br. at 17*. This reference is also to no avail. Appellants have already conceded in their Initial Brief that they received the 2/26/09 e-mail notice from the trial court's staff attorney of a hearing scheduled for 2/27/09 on the bond validations. First, as shown above, that hearing was stayed as a matter of law under O.C.G.A. § 9-11-11.1(b). *D'Amelio* did not involve the question of an automatic stay. Second, the 2/26/09 e-mail hearing notice in respect of a bond validation was not "reasonably calculated to apprise [Appellants] of the pendency of [a hearing on the Anti-SLAPP motion] and afford [Appellants] an opportunity to present their [argument]". The trial court's 2/26/09 notice therefore fails the very *D'Amelio* due process notice standard cited by Appellees.

Next, Appellees cite *Jones v. Chatham County*, 223 Ga. App. 455 (1996). *Jones* involved a post-termination hearing the plaintiff was apprised of but refused to participate in because plaintiff had instead commenced litigation. *Jones* is unavailing. The case before this Court involves a substantive hearing on Appellants' Anti-SLAPP motion with respect to which Appellants were provided no notice. Appellees then cites two Federal Court cases, *Stewart v. Bailey*, 556 F.2d 281 (5th 1977) and *Pouliot v. Town of Fairfield*, 184 F. Supp. 2d 38 (D. ME.

2002). In *Stewart*, the party “knowingly and intelligently chose to waive his right to a hearing. . . .” *Stewart*, at 286. *Pouliot* likewise is not on point. In the case at hand, the Anti-SLAPP hearing was held sua sponte, with no notice to Appellants.

3. Attorneys Fees Under O.C.G.A. § 9-15-14(b) Without Notice and Hearing.

Appellees begin their discussion by quoting a statement from the Final Order that the court “has the inherent power to sanction parties and counsel by awarding fees”. *Br. at 18*. This is an inaccurate statement of Georgia law. It is very well-established in Georgia that attorneys fees are recoverable only where authorized by some statutory provision or by contract. *Walker v. Walker*, 266 Ga. 414 (1996); *Glynn County Federal Employees Credit Union v. Peagler*, 256 Ga. 342, 344 (1986); *Sinkwich v. Conner*, 288 Ga. App. 320, 321 (2007) (“Conner correctly concedes that the trial court had *no inherent authority to award attorneys fees . . .*”) (emphasis supplied). The court cited O.C.G.A. § 9-15-14(b) in the Final Order as its statutory basis. In light of the well-settled law limiting the court’s ability to award attorneys fees, the court’s passing reference to its “inherent power” to award attorneys fees can only be construed as *obiter dictum*, albeit *obiter dictum* which is directly contrary to Georgia law.

The court never notified Appellants of a O.C.G.A. § 9-15-14(b) fees hearing. The Appellees did not file a motion under O.C.G.A. § 9-15-14(b), nor did the judge

ever give notice of its own motion under the standards set forth in O.C.G.A. § 9-15-14(b), as required under *Wall v. Thurman*, 283 Ga. 533, 534 (2008) and *Williams v. Cooper*, 280 Ga. 145, 147 (2006). The O.C.G.A. § 9-15-14(b) award was therefore sua sponte. If the court wished to entertain its own motion under O.C.G.A. § 9-15-14(b), *Williams* and *Cooper* mandate that the court notify Appellants that it would be considering an award under that code section. The court never did that, neither at the December 15, 2008 status hearing, nor in a 2/16/09 e-mail referred to in Appellees' Brief, nor in the 2/26/09 e-mail notice stating that the purpose for the 2/27/09 hearing was for bond validation, not a hearing under O.C.G.A. § 9-15-14(b). If the court felt an award under O.C.G.A. § 9-15-14(b) was appropriate after having conducted the otherwise ex parte, unconstitutional and stayed hearings on 2/27/09, it could have scheduled and noticed a hearing under its own motion under O.C.G.A. § 9-15-14(b) for a later date. It did not do so. The Appellees likewise could have filed a motion under O.C.G.A. § 9-15-14(b). They chose not to.

4. Unconstitutional Restrictions on Appellant's Ability to Practice Law.

The trial court cannot regulate the practice of law. The ability to regulate the practice is reserved exclusively to the Georgia Supreme Court. This too is well-settled. *Atlanta v. Barnes*, 276 Ga. 449, 450 (2003); *Wallace v. State Bar of Georgia*, 268 Ga. 166, 167 (1997); *Sexton v. Jonesborough*, 267 Ga. 571, 572

(1997). Appellees respond by stating “Woodham can still represent anyone he so chooses as long as he files an Affidavit certifying that he paid the attorneys’ fees awarded in this matter.” *Br. at 21-22*. That is a precondition to the practice of law, which the trial court has no right to impose, particularly in light of the lump sum amount of attorneys fees awarded by the trial court totaling \$435,847.86.

5. Attorneys Fees Awarded Based Upon “Unethical” Conduct.

As noted in Appellants’ Initial Brief, the trial court’s Final Order and the transcript of the 2/27/09 hearing clearly indicate the attorneys fees award was based on the court’s “finding” of “unethical” conduct. The transcript is replete with these references. (V.10, MT. 2/27/09, p. 48, line 13; p. 49, line 8, p. 49; lines 18-20; p. 50, lines 8-11; p. 51, lines 18-23) As previously stated, the trial court’s award of fees and its “finding” of unethical conduct are made virtually in the same breath. (V. 10, MT. 2/27/09, p. 50, lines 8-15)

That the trial court does not articulate which Georgia Rule of Professional Conduct is actually at issue is telling, yet this is no defense to what the court was clearly doing: handing out sanctions for what it found was unethical conduct. Appellees state: “Woodham asks this Court to hold that a trial court cannot sanction attorneys who act unethically because unethical conduct is governed solely by the Supreme Court under the Georgia Code of Professional Conduct. The argument

defies reason and is not a basis for disturbing the fee award.” *Br. at 23*. Appellees fail to comprehend that this was the precise holding in *Stevens v. Thomas*, 257 Ga. 645, 648 (1987) (“The discipline of attorneys is solely within the province of the Supreme Court of Georgia.”) The Court in *Stevens* thus remanded the case back to the trial court to determine if the attorneys fees sanctions had been imposed as a penalty for contempt or as a penalty for violations of the disciplinary rules, because the trial court was not authorized to impose sanctions as a penalty for violation of disciplinary rules. *Id.*

The Appellees then state: “The trial court has the power to sanction improper conduct of counsel who appear before the court. Woodham’s contention would, if accepted, strip trial courts of that power and threaten the integrity of the judicial process.” *Br. at 23*. That statement is pure subterfuge and a misguided attempt to conflate jurisdiction over alleged unethical conduct versus contemptuous conduct. There is no question that a trial court has the power to control contemptuous conduct. However, that power to control contemptuous conduct is very different than handing out sanctions for perceived “findings” of unethical conduct. That is the precise distinction made in *Stevens*, which is why that case was remanded back to the trial court for a determination as to whether the sanctions were based on contempt or a violation of disciplinary rules. In the case at hand, the trial court

made no finding of contempt. Instead, the court made “findings” of unethical conduct and clearly awarded attorneys fees on that basis. The fact the trial court cannot point to which ethical standard is at question does not diminish what the court did, which was to award attorneys fees sanctions based on its “finding” of unethical conduct. *Stevens* does not permit this.

When one couples this notion with the sanction discussed above regarding the regulation of the practice of law, it becomes very clear that the trial court has improperly stepped into the role of the State Bar of Georgia and the Georgia Supreme Court. The trial court hands out a lump sum \$435,847.86 fees sanction based on its finding of unethical conduct, and simultaneously says you cannot practice law until those sanctions have been paid. A trial court does not possess such authority in the State of Georgia.

6. Inadequate Findings to Support Award Under O.C.G.A. § 9-15-14(b).

As stated in Appellants’ Initial Brief, “A trial court’s order must include findings of conduct that authorize an award under O.C.G.A. 9-15-14, or the order must be vacated.” *Porter v. Felker*, 261 Ga. 421, 422 (1991); *Cason v. Cason*, 281 Ga. 296, 300 (2006); *Moore v. Moore-McKinney*, Ga. App. Slip Opinion (Case No. A09A0262) (May 6, 2009). “[A] trial court is required to make express findings of fact and conclusions of law as to the statutory basis for an award of attorneys fees

under OCGA 9-15-14,” and “[i]n such findings, the court must specify the conduct upon which the award is made.” *Brown v. Gadson*, Ga. App. Slip Opinion (Case No. A09A0413) (July 1, 2009).

The Appellees primary response to this error of the trial court is to ignore O.C.G.A. § 9-15-14(b) and to instead focus on the false notion that the court possesses “inherent power” to award fees. “First, the court awarded fees based on its inherent power to sanction parties and their counsel” *Br. at 24*. For the reasons discussed in Section 3 above, the court’s *obiter dictum* regarding its “inherent power” is meaningless. Fees can only be awarded in the State of Georgia pursuant to statutory authority or contract.

The Appellees then recite “bad faith” and “unethical conduct”, yet, much like the court, fail to show or explain how any of this meets the standards under O.C.G.A. § 9-15-14(b), such as discovery abuses. *Br. at 24*. Counsel for Appellees drafted the Final Order and now must bear the consequences of an inadequate order in respect of the requisite legal and factual findings necessary to support an award under O.C.G.A. § 9-15-14(b). The substance of the phone call secretly recorded by Mr. Leventhal and the 12/17/08 correspondence to Mr. Ichter (8/18/09 Supp. Rec., p. 84) do not support an award under O.C.G.A. § 9-15-14(b). Moreover, it should be noted the court did not award fees based on O.C.G.A. § 9-15-14(a), which is an

implicit, if not explicit, recognition by the court that Appellants' objections to the bond validations were not frivolous. Finally, Appellees attempt to argue the trial court did not award "lump sum" attorneys fees. *Br. at 25*. This is precisely what the court did. The court did not identify sanctionable conduct and limit the fees award to such conduct. Instead, the court awarded in a lump sum essentially all fees incurred by Appellees from and after the date Appellants intervened in the bond validations. This will become more clear when the Court reviews the record in Case No. A09A2312, which is the companion case to the subject case, appealing the order determining the amount of fees awarded.

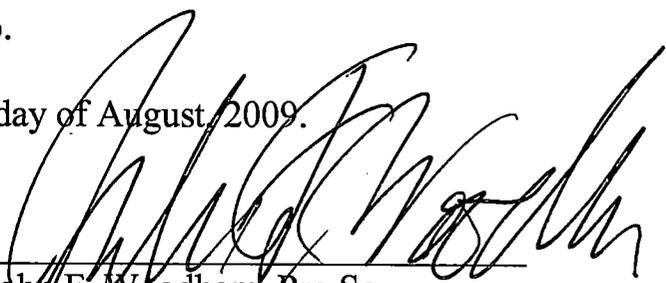
7. Striking Appellants' Intervention and Dismissing Appellants as Parties.

Appellees basically concede that O.C.G.A. § 15-6-9(8) does not provide authority for the court to strike Appellants' pleadings, which is somewhat ironic since counsel for Appellees prepared this verbatim order. *Br. at 25*. Appellees thus resort to the cited cases decided under the court's contempt powers pursuant to O.C.G.A. § 15-1-3(3) and (4). As Appellants noted in the Initial Brief, the court's contempt powers are not at issue in this case. In *Bayless v. Bayless*, 280 Ga. 153, 154 (2006), the trial court struck a party's answer and counterclaim because of the party's persistent failure to comply with multiple court directives. In *Truitt v. Housing Authority of City of Augusta*, 235 Ga. App. 92, 93 (1998), the trial court

struck a party's answer for failing to appear on the day of jury selection and then appearing five minutes late at a trial the following day, after such party's attorney had been warned the day before that the party better not be one minute late for the trial. Again, the striking of the pleading was for failure to follow court directives under the contempt powers found in O.C.G.A. § 15-1-3(3) and (4).

The trial court in the subject proceedings does not cite failure to follow court directives as its basis. Nor does it cite lack of jurisdiction. Instead, the court simply refers to "misconduct" which is "egregious". Presumably, the court is referring to a phone call and a letter, communications between attorneys occurring outside the courtroom. There is nothing "egregious" about such phone call or letter. Moreover, no case cited in the Final Order or in Appellees' Brief provides any support for a sua sponte dismissal under this scenario.

Respectfully submitted, this 31st day of August, 2009.



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This is to certify that I have this day served a copy of the within and foregoing Appellants' Response Brief on counsel of record by placing same in the United States Mail, with proper postage thereon to ensure delivery, addressed to:

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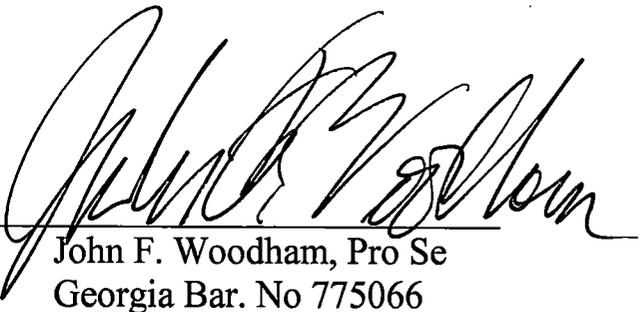
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CASE NO. A09A2105

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APPEALS OF GEORGIA

IN THE COURT OF APPEALS OF GEORGIA

JOHN F. WOODHAM and CITIZENS FOR ETHICS IN GOVERNMENT, LLC

Intervenors - Appellants

V.

THE ATLANTA DEVELOPMENT AUTHORITY,
13TH STREET HOLDINGS, LLC and MEZZO DEVELOPMENT, LLC

Defendants - Appellees

ON APPEAL FROM THE SUPERIOR COURT OF FULTON COUNTY

APPELLEES' SUPPLEMENTAL BRIEF

I. Introduction

The Atlanta Development Authority (the "Authority"), 13th Street Holdings, LLC ("13th Street") and Mezzo Development, LLC ("Mezzo")¹, pursuant to Rule 27 of the Court of Appeals and their request for leave of the Court, file this

¹ Mezzo and 13th Street may be referred to collectively as the "Developers."

Supplemental Brief in response to certain new arguments advanced in Appellants' Brief in Response to Brief of Appellee The Atlanta Development Authority ("Response"), in regard to the Georgia Local Government Public Works Construction Law, O.C.G.A. § 36-91-1, et. seq. (the "PWCL").

II. The Bonds Do Not Violate the PWCL (EE10)

Appellants' Response asserts new arguments regarding the PWCL that demonstrate a profound misunderstanding of the purpose of that statute and the issues material to validation under the Revenue Bond Law. See O.C.G.A. § 36-82-60 et seq. The trial court correctly held that the PWCL is not material to the issues raised in this validation proceeding. And even if the statute were potentially applicable to development authority sale-leaseback revenue bond transactions, it is not applicable to these specific transactions. Appellants' new arguments will be addressed in the order raised in the Response.

A. The PWCL is Not Material to these Validation Proceedings

The principal issues in these validation proceedings are the validity of the sale-leaseback bonds and the lease agreements between the Authority and the Developers which will constitute security for the bonds. Appellants attempt to rely upon the lease agreements as a basis to bootstrap an argument that the PWCL is

material to these bond validation proceedings. The lease agreements, however, are not contracts to construct any “public works,” as Appellants appear to argue. Indeed, the lease agreements are not contracts to construct works of any kind. Furthermore, the legality of any construction contracts to which the Developers may be or may become parties is not an issue in these proceedings, nor are such contracts “public works construction contracts.”

The Mezzo Project consists of a high-rise apartment building with ground floor retail space. It has already been constructed. The Authority was not and will not become a party to the contract for the construction of that project. The 13th Street Project will also entail construction of a high-rise apartment building. No general contractor has been engaged by 13th Street. No construction contract is in place. Moreover, the Superior Court was not requested to validate any construction contract that might later be entered into by 13th St.

Appellants argue that if they do not assert a PWCL challenge in these validation proceedings, they will be barred from doing so later. This flawed argument mischaracterizes the Supreme Court’s holding in Woodham v. City of Atlanta, 238 Ga. 95, 98-99 (2008) and misrepresents the position advanced by the City of Atlanta in that case. In Woodham, one of the intervenors in the instant

action, John F. Woodham, filed an action for declaratory and injunctive relief on the eve of a revenue bond validation proceeding asserting numerous challenges to validation of tax allocation bonds pertaining to the City's Beltline Redevelopment Project. The Beltline bond validation proceeding was commenced the following day.

Woodham intervened in the Beltline bond validation proceeding, pursuant to O.C.G.A. 36-82-77, and asserted objections to validation virtually identical to the legal challenges that were the basis of his separate action for declaratory and injunctive relief. The City of Atlanta successfully moved to dismiss the declaratory judgment action in the Superior Court of Fulton County, and the Supreme Court affirmed. The Response argues that the basis for the City of Atlanta's motion to dismiss was that "all claims ripe for declaratory judgment had to be asserted within the confines of the bond validation proceeding." That is incorrect. Instead, the City of Atlanta argued that Woodham's separate preemptive declaratory judgment action was improper because intervention under the Revenue Bond Law was the sole means for a citizen-intervenor to contest the validation of revenue bonds and Woodham's challenges to the bonds were required to be adjudicated in the validation proceeding. Woodham, 238 Ga. at 98-99.

It does not follow from the holding of Woodham that any “claim for declaratory relief” must (or may) be asserted as a basis for challenging bond validation. Only challenges that are material to the validation may be asserted in an intervention. Even if Woodham had standing and a basis to seek declaratory relief under the PWCL (and he does not), this validation proceeding is not the forum in which to assert any such claim. For that same reason, the Turpen cases are inapplicable.

B. The PWCL is Not Applicable to these Bond Transactions

Woodham seeks to rely on an unpublished paper authored by counsel for the Developers entitled “Everything You Need to Know about Constructing Projects under Georgia’s New Procurement Law” (the “White Paper”) for the proposition that “. . . the Local Government Construction Law . . . applies to a development authority in sale-leaseback transactions.” Response at 10. This argument fails for two reasons. First, the White Paper was not part of the record upon which the trial court based its validation order and is not properly relied upon by Woodham in this appeal. Second, even if the White Paper were part of the record in this case, it does not stand for the proposition advanced by Woodham. In fact, it contradicts Woodham’s argument.

Woodham refused to appear at the validation hearing on February 27, 2009, and declined to present any evidence or argument in support of his complaints in intervention. The complaints in intervention were dismissed on February 27, 2009, because of Woodham's vexatious conduct and the improper purpose of extracting a \$1.3 million pay-off from the Developers which motivated the intervention. Nevertheless, Woodham attempted, without leave of court, to lodge numerous documents in the record on March 2, 2009. The White Paper was among those documents. See 8/18/09 Supp. Record at 59. The court's Final Order entered May 21, 2009 states, in relevant part, as follows:

After the evidentiary record was closed on February 27, 2009 and the Court ruled on the proposed bond validations, Intervenors, without leave of Court, lodged certain briefs and documents in the Clerk's office on March 2, 2009. These documents were neither considered as argument nor admitted as evidence for any purpose because they were submitted out of time, and the Court finds no basis to reopen the record to permit these briefs and documents to be introduced. Furthermore,

having been sanctioned and dismissed as parties on February 27, 2009, Intervenors lacked standing to contest validation of the bonds.

V4/R-23. Just as the White Paper was not part of the hearing record and was not considered in the trial court, it should not be considered by this Court on appeal.

Furthermore, Woodham has misconstrued the White Paper in an effort to contrive an argument that it supports this appeal. The White Paper does not conclude that the PWCL applies to development authority sale-leaseback transactions. Instead, the White Paper says:

If the participants in a Georgia development authority project don't want the public bidding/competitive proposal provisions of the [PWCL] to apply, it is important to have the private company sign the construction contract. If this is done, the private company should do so as a principal and not as the agent of the development authority. The provisions in the bond lease and other bond documents, such as the inducement resolution, and any agency agreement, should make it

clear that the private company is not acting as an agent of the development authority in connection with any construction activities.

8/18/09 Supp. Record at 66. That is exactly the procedure that was followed with respect to the 13th Street and Mezzo Projects.

The Authority and the Developers did not enter into an agreement that the Developers were to act as the Authority's agents in constructing the Projects. To the contrary, Section 13.13 of each Lease expressly provides that: "Nothing in this Lease shall be construed to render or constitute Issuer in any way or for any purpose a partner, joint venturer or associate in any relationship with Lessee, or vice versa, other than that as lessor and lessee or landlord and tenant, nor shall this Lease be construed to authorize Issuer as agent for Lessee." V3/R-84 & V5/R-85.

The Authority will acquire title to each of the Projects by means of the Developers delivering Limited Warranty Deeds to the projects. See Section 1.1 and Section 4.1 of each Lease. V3/R-34, 47 & V5/R-35, 48. The Authority will not acquire title by hiring a general contractor (directly or through agency agreements with the Developers) to build the Projects. The PWCL simply does not apply to transactions such as these where no public body is a party to a

construction contract. As stated in the White Paper: “The public bidding/competitive proposal provisions of the Georgia Local Government Public Works Construction Law apply only to contracts entered into by a ‘governmental entity,’ and appear not to apply to contracts between a private entity lessee of property from a governmental entity and a private construction contractor.” See O.C.G.A. § 36-91-20, which requires “all public works construction contracts subject to this chapter *entered into by a governmental entity with private persons or entities*” to be in writing and provides for competitive bids or proposals. 8/18/09 Supp. Record at 65-66 (emphasis added). Read literally, as Woodham argues it should be, the PWCL cannot apply because neither the Authority nor any agent of the Authority will enter into any contract to construct any “public structure or building.”

The other flaw in Woodham’s PWCL argument is that the Projects are not “public works.” That the Projects will promote a public purpose, in conformity with O.C.G.A. § 36-62-9, (i.e. the development and promotion of trade, commerce, industry and employment) does not make the projects themselves “public works.” Indeed, Woodham has not challenged the trial court’s finding of fact and conclusion of law that the Projects will further the purpose of the Development

Authorities Law and that “the operation and management of apartment buildings is a commercial enterprise conducted for profit.” V4/R-32, V4/R-45.

Erie County Indus. Dev. Agency v. Roberts, 94 A.D.2d 532, 536-37, 465 N.Y.S.2d 301, 302-04 (4th Dept. 1983) points out the distinction between a private project that furthers the public purpose of promoting employment and a “public work.” In Erie County, industrial development revenue bonds were issued to finance the construction of a printing and binding plant. The plant was a private production facility operated by a private corporation for the sole benefit of its shareholders and not for public use. 94 A.D.2d at 536-37, 465 N.Y.S.2d at 302-304. Although the project was financed by the Industrial Development Agency’s revenue bonds in furtherance of the public purpose of promoting employment, the appellate court rejected plaintiff’s contention that the project was subject to the New York prevailing wage law applicable to “public works.” 94 A.D.2d at 540, 465 N.Y.S.2d at 306. Similarly, the PWCL does not apply to the private construction of high-rise apartment buildings operated for profit by private developers simply because the Authority’s acquisition of the projects is to be financed by sale-leaseback bonds. That the trial court validated the Leases as security for the bonds has nothing at all to do with the PWCL.

Davidson Pipe Supply Co. Inc. v. Wyoming County Indus. Dev. Agency et al., 85 N.Y.2d 281, 648 N.E.2d 468 (1995) also supports this conclusion. In Davidson Pipe, the trial court applied a public works bond statute where the Industrial Development Agency appointed a private sector entity as its irrevocable agent to construct a cogeneration project. See 156 Misc. 2d 989, 991, 595 N.Y.S. 2d 898, 899 (1993). The Appellate Division reversed the trial court. See 196 A.D.2d 240, 609 N.Y.S.2d 982 (1994). The New York Court of Appeals affirmed. See 85 N.Y.2d 281, 648 N.E.2d 468 (1995). Even the agency appointment was not enough to establish that the construction project was subject to the New York public works law. The Court of Appeals held: “[The Industrial Development Agency’s] ownership of the property was only temporary under the agreement [a sale and leaseback arrangement]. [The developer], an admittedly private entity, engaged in the cogeneration business for profit, is the ultimate beneficiary of the cogeneration plant. [The developer] is the entity which will carry on the business, and the profits and losses will belong to it.” Davidson Pipe Supply Co. Inc., 85 N.Y.2d at 286, 648 N.E.2d at 470 (1995).

Like the financing in Davidson Pipe, the Authority’s financing structure for the Mezzo Project and the 13th Street Project is a sale and leaseback arrangement.

This is one of three structures² that the Development Authorities Law permits the Authority to use when it finances the acquisition of projects like the ones at issue. See O.C.G.A § 36-62-7 (“No project acquired under this chapter shall be operated by an authority or any municipal corporation, county, or other governmental subdivision. Such a project shall be leased or sold to, or managed by, one or more persons, firms, or private corporations”) Therefore, that the Authority will hold legal title to the Mezzo and 13th projects for the duration of the leases to comply with requirements imposed by the Development Authorities Law does not convert the privately-operated apartment buildings into “public works” for purposes of the PWCL.

C. The Public Lawsuits Act Does Not Avail Appellants

Finally, Woodham argues that if these bond validation proceedings are subject to the Public Lawsuits Act, O.C.G.A. § 50-15-1 et seq., the projects are necessarily “public works construction” for purposes of the PWCL. Response at 12. Once again, Woodham is mistaken.

² The other two available structures are a sale contract structure or a management contract structure.

It is settled that contested revenue bond validation proceedings are subject to the security bond and other provisions of the Public Lawsuits Act. “Given the broad statutory definitions of the terms “political subdivision” and “public lawsuit,” we conclude that the provisions of the Public Lawsuits Act apply to proceedings under the Revenue Bond Law.” Haney v. Dev. Auth. of Bremen, 271 Ga. 403, 404, 519 S.E.2d 665, 667 (1999). This Court itself has previously applied the Public Lawsuits Act to development authority projects. See Hay v. Newton County, 246 Ga. App. 44, 538 S.E.2d 181 (2001), cert. den. (Feb. 2, 2001).

Like the industrial development agency in Erie County, the Authority “. . . performs a governmental function and operates as a governmental agency and instrumentality” 94 A.D.2d at 539, 465 N.Y.S.2d at 304-05. Even in financing the acquisition of a privately owned business, the Authority is engaged in a “public project” within the meaning of the Public Lawsuits Act through issuing revenue bonds. This is because of the underlying public purpose: the promotion of trade, commerce, industry and employment opportunities “for the public good and the general welfare and to promote the general welfare of the state.” O.C.G.A. § 36-62-9. See Erie County, 94 A.D.2d at 540, 465 N.Y.S.2d at 306 (recognizing “public purpose of the financing scheme”). That the financing promotes a public

purpose and the validation proceeding is a public lawsuit does not transform apartment buildings into “public works construction” for purposes of the PWCL. “The public purpose of the financing scheme must not be confused with the purely private purpose of the venture itself, its structure and its operation.” Erie County, 94 A.D.2d at 540, 465 N.Y.S.2d at 306.

III. Conclusion

The PWCL is not material to these validation proceedings, nor is the PWCL even applicable to the projects in issue. Woodham’s enumeration of error based on the PWCL should be rejected.

Respectfully submitted this 21st day of October 2009.

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This is to certify that I have this day served a copy of the foregoing **APPELLEES' SUPPLEMENTAL BRIEF** by U.S. First Class Mail, addressed to the following:

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STATE OF GEORGIA

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APPEALS OF GEORGIA

CITIZENS FOR ETHICS IN)
GOVERNMENT, LLC ET AL.,)

Appellants,)

v.)

CASE NO. A09A2105

THE ATLANTA DEVELOPMENT)
AUTHORITY ET AL.,)

Appellees.)

APPELLANTS' SUPPLEMENTAL BRIEF

Appellants Citizens for Ethics in Government, LLC and John F. Woodham ("Appellants") file this Appellants' Supplemental Brief and show this Honorable Court of Appeals as follows:

1. The Trial Court Violated Appellants' Rights to Due Process Under Art. I, Sec. I, Par. I of the Constitution of the State of Georgia and the 14th Amendment to the Constitution of the United States of America By Holding An Ex Parte, Unnoticed Hearing on Appellants' Anti-SLAPP Motion (Original Enumeration of Error No. 2).

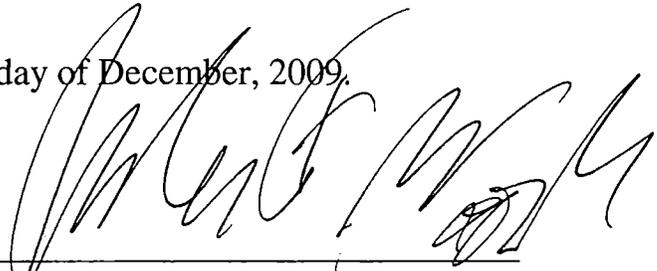
A motion under O.C.G.A. § 9-11-11.1(b) must be the subject of a hearing by the court. It cannot be decided by the court without hearing. ("The motion shall be heard . . .") O.C.G.A. § 9-11-11.1(d) Appellants were not present in the courtroom

on 2/27/09, because the 2/27/09 hearings had been stayed by operation of law. Nonetheless, the trial court sua sponte held a hearing on Appellant's O.C.G.A. § 9-11-11.1(b) motion, with no notice to Appellants, in the absence of Appellants, and obviously with no opportunity for Appellants to be heard, all in violation of Appellants' rights to due process under the State and Federal Constitutions. *Randall v. Randall*, 274 Ga. 107, 109-110 (2001) ("In the absence of any notice to Stokes that the trial court intended to hear the matter on December 13, however, a judgment rendered as a result of a hearing on that day cannot stand. *Taylor v. Chester*, 207 Ga. App. 217, 219 (427 SE2d 582) (1993). . . *The erroneous failure to satisfy the constitutional requirement* of notifying counsel for Mr. Randall of the actual scheduling of the hearing on the motion for contempt requires reversal of the denial of the motion to set aside the judgment entered against him.") (emphasis supplied) *citing Wright v. Wright*, 270 Ga. 229, 230 (1998) ("A *fundamental requirement of due process* in any proceeding which is to be accorded finality *is notice* that is reasonably calculated to inform interested parties *of an impending hearing and afford them an opportunity to present their objections.*"). (emphasis supplied)

2. The Trial Court Erred in Awarding Attorneys Fees Under O.C.G.A. § 9-15-14(b) Without Proper Notice and Hearing (Original Enumeration of Error No. 3).

After holding the ex parte, unnoticed and unconstitutional hearing on the merits in respect of Appellants' Anti-SLAPP motion, the trial court proceeded to hold an ex parte and unconstitutional fees hearing (V. 10, MT. 2/27/09, p. 20-54), with no notice to Appellants or any opportunity to be heard, following which the trial court awarded O.C.G.A. § 9-15-14(b) attorneys fees to Appellees (V. 2, R. 11, p. 230). When an O.C.G.A. § 9-15-14 (b) fees hearings is held, O.C.G.A. § 9-11-6(d) requires written notice of the hearing to be served on counsel, "if for no other reason than to avoid the appearance of ex parte contact." *Glass v. Glover*, 241 Ga. App. 838, 839 (2000), quoting *Edens v. O'Connor*, 238 Ga. App. 252 (1999) (requirement of a notice of hearing served in accordance with O.C.G.A. 9-11-5(b) is not discretionary); *see also King v. Bd. of Regents of the University System of Georgia*, 215 Ga. App. 570 (1994). Appellants further incorporate herein the principles set forth in *Randall, supra* and *Wright, supra*, discussed above in respect of Enumeration of Error No. 2.

Respectfully submitted, this 28th day of December, 2009.

A handwritten signature in black ink, appearing to read 'John F. Woodham', written over a horizontal line.

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CITIZENS FOR ETHICS IN GOVERNMENT, LLC ET AL.,)

Appellants,)

v.)

THE ATLANTA DEVELOPMENT AUTHORITY ET AL.,)

Appellees.)

CASE NO. A09A2105
CASE NO. A09A2312

BRIEF OF AMICUS CURIAE FULTON COUNTY TAXPAYERS FOUNDATION, INC. IN FAVOR OF APPELLANTS JOHN F. WOODHAM AND CITIZENS FOR ETHICS IN GOVERNMENT, LLC

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support of legal action to insure the just enactment and enforcement of laws affecting the citizens of Fulton County. The Foundation has a Board of Directors consisting of Angela Speir-Phelps, Bob Irvin, Wesley Cantrell, Harold J. Bowen, III, William E. Lane, Mark L. Kanne, Pano Karatassos, Joseph L. Kelly, Phil Kent and John S. Sherman. John S. Sherman is also the President of the Foundation.

In 2006, the Foundation had the opportunity to become well acquainted with Appellant John F. Woodham, in connection with the BeltLine tax allocation district bond validation litigation, before Judge Lane in the Superior Court of Fulton County, Civil Action File No. 2006CV119932 (the "BeltLine Litigation").¹ The Foundation and certain of its individual members intervened as parties in the BeltLine Litigation, as did Mr. Woodham in his individual capacity as a city taxpayer. The Foundation engaged as its legal counsel The Honorable Irwin W. Stolz, Jr. and Robert D. Feagin. Judge Stolz, Mr. Feagin and Mr. Woodham worked very closely on the BeltLine Litigation strategy. While the governmental entities seeking bond validation prevailed at the trial level, the collaborative work of Judge

¹ In the process of becoming acquainted with Mr. Woodham, the Foundation learned that Mr. Woodham is a native of Atlanta, a graduate of The Westminster Schools, obtained a Bachelor of Science in Business Administration from Washington and Lee University, a Master of Business Administration with a concentration in Finance from Georgia State University, and a Juris Doctorate from the University of Georgia, graduating *magna cum laude*, Order of the Coif and in the top 5% of his class.

Stolz, Mr. Feagin and Mr. Woodham established the record and legal arguments which ultimately set the stage for reversal at the Supreme Court of Georgia.

Regrettably, the Foundation did not have the financial resources to continue the BeltLine Litigation on appeal. However, Mr. Woodham took it upon himself, pro se and pro bono, as the sole intervening party to file a notice of appeal. The Foundation was thankful that Mr. Woodham would continue the work started by himself, Judge Stolz, and Mr. Feagin, to seek justice for the City of Atlanta taxpayers under the Georgia Constitution. Mr. Woodham had no client, and thus received no legal fees for any of his involvement in the BeltLine Litigation, from the filing of the original validation objections in August 2006 through February 2008. On February 11, 2008, the Supreme Court of Georgia reversed the trial court in a unanimous, 7-0 decision, *Woodham v. City of Atlanta*, 283 Ga. 95 (2008).

Following the decision in *Woodham, supra*, the Foundation has engaged Mr. Woodham as its counsel in a variety of matters. Mr. Woodham is currently representing the Foundation concerning Senate Bill 31, which is the egregious legislation adopted in 2009 requiring the ratepayers of Georgia Power to pre-pay in advance the financing costs for the construction of two new nuclear units at Plant Vogtle. Because of the Foundation's limited financial resources, Mr. Woodham agreed to accept this engagement at a fixed fee which most lawyers in Atlanta would

laugh at.² In fact, Mr. Woodham is also currently representing the Foundation's President, John Sherman, pro bono, in a case, if successful, which would end once and for all the egregious, illegal and unconstitutional "phantom bond" tax abatement scheme currently perpetrated upon City and County taxpayers by the Development Authority of Fulton County and The Atlanta Development Authority, an Appellee in these proceedings.

2. Underlying Proceedings.

The Foundation admittedly has not undertaken a detailed review of the pleadings in the underlying proceedings on appeal, but based simply on information available from the press, it seems apparent to the Foundation that the underlying proceedings (i) have made a mockery of the due process provisions of the 14th Amendment to the Constitution of the United States of America and the Constitution of the State of Georgia, (ii) are possibly the product of a relationship between the

² Because Mr. Woodham left the "large firm" legal environment after having spent approximately 10 years at the likes of Long, Aldridge and Norman (now McKenna, Long & Aldridge) and Paul, Hastings Jankofsky & Walker, Mr. Woodham enjoys the independence to take on cases which "large" firms would not dare touch for political reasons. In addition to practicing law, Mr. Woodham is one of five Trustees of the Watson-Brown Foundation, Inc., one of Georgia's largest family charitable foundations, which was chaired for many years by the one-of-kind and sorely missed Tom Watson Brown. Mr. Woodham's fellow Trustees include Tad Brown, Dr. Joab Lesegne (former President of Wofford College), Byron Attridge and Senator Wyche Fowler.

trial court and counsel for certain of the Appellees (7/08/09 Supp. Rec., p. 23 in Case No. A09A2105), (iii) appear to involve frivolous criminal accusations made at Mr. Woodham in attempt to silence his objection to the illegal “phantom bond” transactions at issue,³ which Mr. Woodham refused to be intimidated by and thus held his ground (7/08/09 Supp. Rec., p. 23 in Case No. A09A2105), (iv) ignored Mr. Woodham’s effort to resolve these matters by a simple donation to a homeless shelter (8/18/09 Supp. Rec., p. 84 in Case No. A09A2105), and (v) appear to be an attempt at “pay-back” or retribution against Mr. Woodham by Appellee The Atlanta Development Authority and its counsel of record, for the victory Mr. Woodham obtained for the City of Atlanta taxpayers in the BeltLine Litigation.⁴

Based on these press reports, the Foundation is deeply concerned by the actions of the trial court, the actions and statements of Mr. Ichter (counsel for certain

³ Presenting a criminal charge solely to obtain an advantage in a legal proceeding is prohibited under Georgia Rule of Professional Conduct 3.4(h). *See also Rolleston v. Huie*, 198 Ga. App. 49, 50 (1990); *Markowitz v. Wieland*, 243 Ga. App. 151, 157, n. 11 (2000) (threatening civil suit does not violate O.C.G.A. § 16-8-16 nor does it state a tort claim).

⁴ The Atlanta Development Authority is the “redevelopment agent” for the City of Atlanta in connection with the BeltLine tax allocation district. The primary counsel of record in these proceedings for The Atlanta Development Authority is Matthew Calvert and Douglass Selby of the law firm of Hunton & Williams LLP, and these very same lawyers were counsel of record for the City of Atlanta in the BeltLine Litigation.

of the Appellees), as well as the actions of Appellee The Atlanta Development Authority. Though not in the record, Appellee The Atlanta Development Authority actually issued a press release on July 2, 2009, regarding the sanctions issued by the trial court. A copy of that press release is attached as Exhibit "A". While the Foundation is aware of this Court's Rule 24(g), the Foundation believes it necessary to bring this press release to the attention of the Court, and moreover, this press release is a public document that remains available on the website of The Atlanta Development Authority.

<http://www.atlantada.com/documents/FORIMMEDIATERELEASE.pdf>

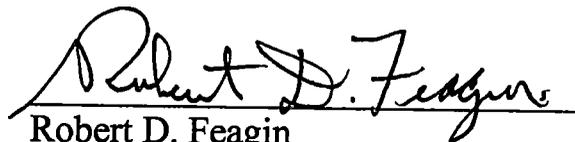
The Foundation finds this action by Appellee The Atlanta Development Authority, a governmental entity, deplorable. Not only does this press release clearly appear intended to prejudice this appeal, it also appears intended to intimidate and silence Mr. Woodham in respect of other actions involving other illegal and unconstitutional activities involving The Atlanta Development Authority, and its "sister" authority, the Development Authority of Fulton County, including the above-described action Mr. Woodham is pursuing on behalf of the Foundation's President John S. Sherman in respect of the illegal and unconstitutional tax abatements resulting from the so-called "phantom bond" transactions. Assuming this press release was reviewed and approved by counsel for Appellee The Atlanta

Development before its issuance, either by outside counsel at Hunton & Williams LLP, or The Atlanta Development Authority's in-house counsel, Veronica C. Jones, any such review and approval could implicate Rule 3.6 of the Georgia Rules of Professional Conduct.

3. Conclusion.

The Foundation knows well through its considerable interactions the high character and integrity of Mr. Woodham. As stated above, the Foundation finds many of the tactics used by Appellees to attack, slander, demean, intimidate and silence Mr. Woodham egregious and deplorable. For all of the foregoing reasons, the Foundation submits this Brief of Amicus Curiae in Support of John F. Woodham and respectfully requests this Court to reverse any and all sanctions imposed on Mr. Woodham by the trial court.

Respectfully submitted, this 8th day of February, 2010.



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CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the within and foregoing Brief of Amicus Curiae on counsel of record by causing same to be placed in the United States Mail, with proper postage thereon, addressed: to:

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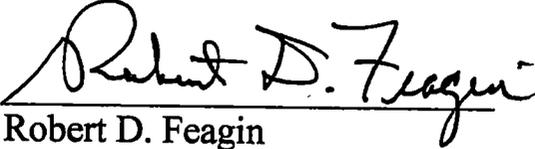

Robert D. Feagin
Georgia Bar No. 256900

EXHIBIT "A"



FOR IMMEDIATE RELEASE

July 2, 2009

Contact: Sonya Moste, Director of Marketing and Public Relations

Phone: 404.614.8281

E-mail: smoste@atlantada.com

**John F. Woodham and Citizens for Ethics in Government Sanctioned,
Must Reimburse Defendants \$430,000**

ATLANTA – Earlier this week, Fulton County Superior Court Judge Michael D. Johnson ruled in favor of the Atlanta Development Authority and its co-defendants, 13th Street Holdings, LLC and Mezzo Development, LLC, both affiliated with Georgia-based real estate and investment firm Tivoli Properties, Inc., in lease-purchase bond matters.

On November 17, 2008, attorney John F. Woodham and Citizens for Ethics in Government intervened in two bond validation proceedings, attempting to block the issuance of bonds related to two commercial developments for rental housing and retail services.

On June 30, 2009, Judge Johnson ruled that Woodham and Citizens for Ethics in Government must reimburse more than \$430,000 in attorneys' fees incurred by ADA and its co-defendants as a result of Woodham's intervention. Judge Johnson's fee award was pursuant to an Order he previously entered on May 21, 2009, holding that Woodham and Citizens for Ethics in Government intervened in the bond validation proceedings last year for an "improper purpose" and that Woodham's conduct was in "bad faith" and "unethical." Moreover, Woodham must certify by affidavit that he has paid the attorneys' fees before he can file a claim or intervene in any bond validation or tax proceeding.

Lease-purchase bonds are an economic development tool used for the past 20 years by development authorities across the state of Georgia. "Incentives like lease-purchase bonds are necessary for business and investment development," says ADA President Peggy McCormick. "We are committed to defending our use of the tools available to us. We participate in this type of transaction when we determine a project will promote and further the development of trade, commerce and employment within the city of Atlanta."

ABOUT ATLANTA DEVELOPMENT AUTHORITY

The Atlanta Development Authority is the official economic development agency for the city of Atlanta. ADA represents intown Atlanta, which has a population of 538,000 and growing. ADA is a research-based economic development organization, focused on residential, business and investment growth in the city. Visit www.atlantada.com.

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FILED IN OFFICE

IN THE COURT OF APPEALS
STATE OF GEORGIA

MAR - 8 2010

CLERK, COURT OF
APPEALS OF GEORGIA

CITIZENS FOR ETHICS IN)
GOVERNMENT, LLC ET AL.,)

Appellants,)

v.)

THE ATLANTA DEVELOPMENT)
AUTHORITY ET AL.,)

Appellees.)

CASE NO. ~~A09A2105~~

CASE NO. A09A2312

CLERK/COURT ADMINISTRATOR
COURT OF APPEALS OF GA.
John F. Woodham

2010 MAR - 8 PM 3:47

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APPELLANTS' SUPPLEMENTAL BRIEF

Appellants Citizens for Ethics in Government, LLC and John F. Woodham ("Appellants") file this Appellants' Supplemental Brief and show this Honorable Court of Appeals as follows:

On or about February 8, 2010, the Fulton County Taxpayer's Foundation, Inc. (the "Foundation") filed a Brief of Amicus Curiae Fulton County Taxpayers Foundation, Inc. in Favor of Appellants John F. Woodham and Citizens for Ethics in Government, Inc. On March 3, 2010, Appellee The Atlanta Development Authority ("ADA") filed its Supplemental Brief of Appellee The Atlanta Development Authority Responding to Brief of Amicus Curiae.

Appellants have reviewed the ADA's Supplemental Brief and find, among others, one particular assertion utterly baseless, yet so typical of the frivolous,

deceptive and contemptuous statements of the ADA and the other Appellees made throughout these proceedings, both at the lower court and on appeal. The particular assertion of the ADA in question is the following: “The Foundation – *likely at Woodham’s behest* – has submitted an amicus brief” *Supplemental Brief*, p. 2. (emphasis supplied) This unsupported assertion is a blatant fabrication, and the ADA owes an immediate apology to the Foundation, or some sort of sanction should be imposed upon the ADA and its counsel.

The ADA goes on to state: “The uncontradicted evidence of his conduct and the trial court’s related findings of fact are a matter of record.” *Supplemental Brief*, p. 2. This statement is just plain absurd. The so-called “uncontradicted evidence” is the result of an illegal, unconstitutional, null and void hearing held on February 27, 2009, in violation of the automatic stay imposed by O.C.G.A. 9-11-11.1(d). Moreover, the text of the telephone call illegally recorded by Mr. Leventhal¹

¹ It was agreed prior to the telephone call in question that the call would not be recorded. Patricia Roy agreed by e-mail that the call would not be recorded. (MT. 2/27/09, p. 29, lines 15-20 in Case No. A09A2105). The agreement made by Ms. Roy obviously covered herself and her client, Mr. Leventhal. As such, no party to the call consented to the call being recorded. This means that Mr. Leventhal is guilty of O.C.G.A. 16-11-62 (which is a felony punishable up to five years of imprisonment), and the exception contained in O.C.G.A. 16-11-66 is not applicable,

actually exonerates Appellants, yet Appellees, not surprisingly, have distorted and misrepresented that communication to the point of debasing the judicial system and the subject trial court proceedings into a sham.

Besides the felony committed by Mr. Leventhal, the other substantial misconduct inflicted upon the judicial system in these proceedings was courtesy of Mr. Ichter and Ms. Roy, counsel for Appellees 13th Street Holdings, LLC and Mezzo Development, LLC, the companies associated with Mr. Leventhal. The nature and extent of Ichter's and Roy's conduct did not become fully apparent until Ichter was placed under oath, on cross-examination, at the June 30, 2009 illegal, null and void fees hearing.

In multiple pleadings and arguments before the court in Case Nos. 2008CV159232 and 2008CV159238 in the Superior Court of Fulton County (Appellants being parties to these proceedings, pursuant to O.C.G.A. § 36-82-77(a)), Cary Ichter accused Appellants of "extortion". Extortion is a crime in the State of Georgia, not a civil tort. *Rolleston v. Huie*, 198 Ga. App. 49, 50 (1990); *Markowitz*

because Mr. Leventhal consented and agreed through his attorney that the call would not be recorded. Again, it should be noted that the actual transcript of the recording is exonerating to Appellants, but this does not alleviate the severity of the felony committed by Mr. Leventhal.

v. *Wieland*, 243 Ga. App. 151, 157, n. 11 (2000) (threatening civil suit does not violate O.C.G.A. § 16-8-16 nor does it state a tort claim). It was not until Mr. Ichter was finally placed on the witness stand under cross-examination did he finally confess that his frivolous claim of extortion was a made up criminal accusation, asserted solely to obtain advantage in a civil matter. Before he conceded the claim was a frivolous criminal accusation, he admitted under oath that the he had indeed accused Appellants of extortion in multiple pleadings and in open court. However, because he first conceded there is no civil tort of extortion in the State of Georgia, he by necessity conceded his accusation of extortion was a criminal accusation.

Q ***Do you understand that in Georgia, there is no civil tort to extortion?***

A Yes.

Q Okay. Well then why did you sue Turner Construction, the general contractor for Mezzo Development, for extortion?

The Court: What's the difference – Okay. How is that relevant to the fees that he is asking for in this case?

Mr. Woodham: ***It's relevant to the frivolous claims of extortion that Mr. Ichter has a history of bringing against people. And the fees is in this case he is asking for are result of a frivolous claim,*** and therefore –

(MT. 6/30/09, p.115, lines 3-16 in Case No. A09A2312; *see excerpts from the 6/30/09 hearing attached hereto as Exhibit "A"*) (emphasis supplied)

After first conceding extortion is not a civil tort in Georgia (thus it is necessarily a crime), Mr. Ichter admitted to having accused Appellants of the crime of extortion.

Q Mr. Ichter, *did you accuse me in multiple pleadings and in open court of extortion?*

A Yes.

Q Okay. Is that a civil complaint?

A Well, it's just a statement of fact.

Q Expound on that.

The Court: How is that relevant, again? How is this relevant?

Mr. Woodham: *This is the core issue of the case.*

The Court: Just listen to me. Just listen to me. How is it relevant to the specific fees they are asking for with respect to this case?

Mr. Woodham: It's very relevant *because if it is a frivolous claim made for purposes of seeking advantage in a civil matter, not only is it a violation of the State Bar, it would render –*

The Court: Okay. Well, Let me just say this to you, Mr. Woodham.

Mr. Woodham: -- *Recovery of any fees in this case without merit.*

(MT. 6/30/09, p.116, lines 6-25, p. 117, lines 1-2 in Case No. A09A2312; see *Exhibit "A"*) (emphasis supplied)

Then, after having conceded there is no civil tort for extortion in Georgia, Mr. Ichter conceded the elements of the crime of extortion were not present in the case, so we have a situation where Mr. Ichter was accusing Appellants of a crime, extortion, knowing fully well that the criminal accusation was a misrepresentation to the court, false, non-meritorious, frivolous, vexatious, and being asserted only for purposes of harassment and obtaining an advantage in a civil matter.² Among other things, this is a gross violation of Georgia Rule of Professional Conduct 3.4(h).

² It is for this reason, the frivolous and harassing claim of the crime of extortion, that Appellants originally sought the protections afforded under the Georgia Anti-SLAPP statute, O.C.G.A. § 9-11-11.1.

Q You have stated there is no civil tort extortion in the State of Georgia. Can you recite the elements for the Court -- Can you recite for the court the requisite elements under O.C.G.A. Section 16-8-16, "Yes" or "No"?

The Court: That's not -- Okay. That question is irrelevant as it pertains to the billings here today and the fees that they are asking for. Next Question.

Mr. Woodham: Your honor --

The Court: You can take exception with that, but that is the court's ruling. Move one.

Mr. Woodham: It relates to extortion. Extortion – *I have been accused of extortion in multiple pleadings and in open court. Extortion in either a civil tort or it's a crime. He said it's not a civil tort. He has accused me of committing a crime.*

The Court: I understand what you are saying Mr. Woodham.

Mr. Woodham: *I want to know whether he thinks the elements of the crime of extortion had been met in this case.*

The Court: Mr. Woodham. Let me say a couple of things to you. *First of all, please don't raise your voice.* I am trying to give you the opportunity, afford you the opportunity to ask the questions I think you need to ask. . .

Mr. Woodham: *I am not going to sit down.*

The Court: Well, don't interrupt me. Then ask him the questions specifically about the fees that he is asking for.

Mr. Woodham: May I ask him the following question whether his client has sworn out a criminal complaint?

The Court: *I don't know whether his client has sworn out a criminal complaint. Are you seeking fees for any sort of criminal complaint?*

The Witness: *No.*

(MT. 6/30/09, p. 121, lines 2-25, p. 122, lines 15-25, p. 123, lines 1-2 in Case No. A09A2312; see Exhibit "A") (emphasis supplied)

Q Explain your use of the word "extort".

A Somebody who threatens to do something improper in order to receive a payment.

Q Is that a civil case?

A No. It is, in this case, a violation of 9-15-14, pursuing litigation for an improper purpose. *It's neither a tort in this context nor a violation of the criminal statute.* It has to do with the intent of the Intervenor in pursuing the litigation.

Q ***So you have just stated that your allegation of extortion is neither a tort, it's neither a crime in this case. It is merely a violation of 9-15-14(B)?***

A I think you heard me right.

Q ***I hope a lot of people heard that.***

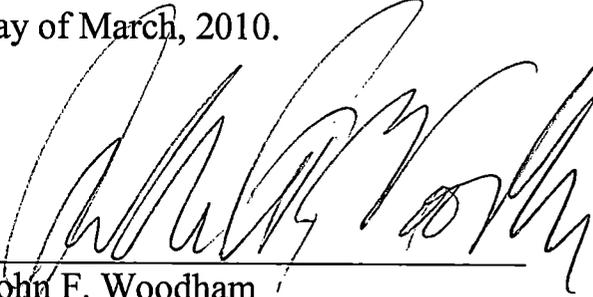
(MT. 6/30/09, p. 133, line 1, p. 134, lines 1-13 in Case No. A09A2312; *see Exhibit "A"*) (emphasis supplied)

The foregoing sworn testimony of Mr. Ichter, once he was finally placed on the witness stand, under oath, and subjected to forceful cross-examination and forced to reveal his egregious tactics in open court, makes out a clear, *prima facie* case of a violation of Rule 3.4(h). Mr. Ichter's actions also implicate, (i) 3.1 (non-meritorious claims), (ii) 3.3 (candor toward the tribunal, and (iii) 8.4(a)(4) (engaging in professional conduct involving dishonesty, fraud, deceit or misrepresentation), as well as Standard 45 (b) of Rule 4-102 of the Canons and Ethics existing prior to January 1, 2001.

Interestingly, despite language from the trial court's May Final Order that the matter would be reported "to the Office of General Counsel of the State Bar of Georgia for further investigation." (R., V.2, p. 232 in Case No. A09A2105), the trial court never took that action. Presumably, Cary Ichter's "Jimmy Swaggart" like confession on June 30, 2009 persuaded the trial court that no bar violation was implicated with respect to Appellants, and in fact, the court would in reality have to report to the State Bar Mr. Ichter's admitted, *prima facie* violation of Rule 3.4(h).

The testimony elicited from Mr. Ichter on June 30, 2009 unquestionably showed his eager willingness to flaunt the Georgia Rules of Professional Conduct to obtain legal advantage in these civil proceedings. Clearly, neither Mr. Ichter, his clients, nor the ADA should benefit by the egregious behavior and tactics of Cary Ichter.

Respectfully submitted, this 8th day of March, 2010.



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EXHIBIT "A"

IN THE SUPERIOR COURT OF FULTON COUNTY

STATE OF GEORGIA

FILED IN OFFICE
AUG 10 2009
Michael D. Johnson
DEPUTY CLERK SUPERIOR COURT
FULTON COUNTY, GA

STATE OF GEORGIA,)
)
 PLAINTIFF,)
)
 V.)
)
 THE ATLANTA DEVELOPMENT AUTHORITY)
 AND MEZZO DEVELOPMENT, LLC,)
)
 DEFENDANTS,)
)
 AND)
)
 JOHN F. WOODHAM AND CITIZENS)
 FOR ETHICS IN GOVERNMENT, LLC.,)
)
 INTERVENORS.)

CIVIL ACTION
FILE NO. 2008CV159238

MOTION

TRANSCRIPT OF PROCEEDINGS BEFORE
THE HONORABLE MICHAEL D. JOHNSON,
COMMENCING ON JUNE 30, 2009.

IONIE TAYLOR, RPR
OFFICIAL COURT REPORTER B-1647
T-8705 FULTON COUNTY JUSTICE CENTER
ATLANTA, GEORGIA 30303

COPY

1 WITH IT. LET'S MOVE ON.

2 BY MR. WOODHAM:

3 Q DO YOU UNDERSTAND THAT IN GEORGIA, THERE IS NO CIVIL
4 TORT TO EXTORTION?

5 A YES.

6 Q OKAY. WELL, THEN WHY DID YOU SUE TURNER
7 CONSTRUCTION, THE GENERAL CONTRACTOR FOR MEZZO DEVELOPMENT,
8 FOR EXTORTION?

9 THE COURT: WHAT'S THE DIFFERENCE -- OKAY. HOW IS
10 THAT RELEVANT TO THE FEES THAT HE IS ASKING FOR IN THIS
11 CASE?

12 MR. WOODHAM: IT'S RELEVANT TO FRIVOLOUS CLAIMS OF
13 EXTORTION THAT MR. ICHTER HAS A HISTORY OF BRINGING
14 AGAINST PEOPLE. AND THE FEES IN THIS CASE THAT HE IS
15 ASKING FOR ARE RESULT OF A FRIVOLOUS CLAIM, AND
16 THEREFORE --

17 THE COURT: THE FEES THAT'S ASKING FOR, I AM
18 ASSUMING, PERTAINS TO ALL OF THE FILINGS AND ALL OF THE
19 WORK THAT HE HAD TO DO TO CONTEST YOUR INTERVENTION.
20 NOW, IF YOU WANT TO POINT TO SOMETHING, A SPECIFIC FILING
21 THAT HE HAS MADE WITH RESPECT TO HIS FEES, THAT'S FINE.
22 I DON'T WANT TO SPEAK IN GENERAL TERMS ABOUT WHAT HE DID
23 IN SOME CASE AT SOME POINT IN HISTORY. I WANT YOU -- HE
24 HAS ASKED FOR THE FEES IN HIS AFFIDAVIT. I HAVE REVIEWED
25 HIS AFFIDAVIT.

1 NOW, YOU HAVE AN OPPORTUNITY TO CROSS-EXAMINE
2 MR. ICHTER AS IT PERTAINS TO HIS AFFIDAVIT, AND THE FEES
3 IN THIS AFFIDAVIT ARE THE FEES HE IS ASKING FOR. DO
4 THAT. I MEAN, I AM GIVING YOU THIS OPPORTUNITY.

5 BY MR. WOODHAM:

6 Q MR. ICHTER, DID YOU ACCUSE ME IN MULTIPLE PLEADINGS
7 AND IN OPEN COURT OF EXTORTION?

8 A YES.

9 Q OKAY. IS THAT A CIVIL COMPLAINT?

10 A WELL, IT'S JUST A STATEMENT OF FACT.

11 Q STATEMENT OF FACT?

12 A YES.

13 Q EXPOUND ON THAT.

14 THE COURT: HOW IS THIS RELEVANT, AGAIN? HOW IS
15 THIS RELEVANT?

16 MR. WOODHAM: THIS IS THE CORE ISSUE OF THIS CASE.

17 THE COURT: JUST LISTEN TO ME. JUST LISTEN TO ME.

18 HOW IS IT RELEVANT TO THE SPECIFIC FEES THEY ARE
19 ASKING FOR WITH RESPECT TO THIS CASE?

20 MR. WOODHAM: IT'S VERY RELEVANT BECAUSE IF IT IS A
21 FRIVOLOUS CLAIM MADE FOR PURPOSES OF SEEKING ADVANTAGE IN
22 A CIVIL MATTER, NOT ONLY IS IT A VIOLATION OF THE STATE
23 BAR, IT WOULD RENDER --

24 THE COURT: OKAY. WELL, LET ME SAY THIS TO YOU,
25 MR. WOODHAM.

1 MR. WOODHAM: -- RECOVERY OF ANY FEES IN THIS CASE
2 WITHOUT MERIT.

3 THE COURT: MR. WOODHAM, YOU CAN ARGUE THAT TO THE
4 COURT OF APPEALS IF WOULD YOU LIKE. THE COURT HAS
5 ALREADY MADE ITS DETERMINATION THAT FEES ARE APPROPRIATE.
6 THEY ARE ASKING FOR APPROXIMATELY SIXTY-FIVE, \$66,000 IN
7 FEES. SO YOU HAVE THE OPPORTUNITY TO NOW QUESTION
8 MR. ICHTER SPECIFICALLY ABOUT THE FEES. ASK HIM
9 SPECIFICALLY ABOUT THE FEES THAT HE IS REQUESTING.

10 MR. WOODHAM: THEY ARE FEES THAT RELATE TO THE
11 ALLEGATION OF EXTORTION.

12 THE COURT: ASK HIM ABOUT THE FEES. POINT OUT THE
13 FEES YOU WANT TO ASK HIM. ASK HIM ABOUT THE FEES.

14 MR. WOODHAM: HOW MANY -- WHAT'S THE FEES -- AND,
15 AGAIN, I WILL -- THE ADMISSIBILITY OF THE AFFIDAVIT AND
16 THE STATEMENTS AND BILLING STATEMENT THAT I OBJECT TO IS
17 HEARSAY, FOR THE RECORD.

18 THE COURT: ALL RIGHT. MR. ICHTER, CAN YOU EXPLAIN
19 TO THE COURT HOW THE -- HOW YOU CAME UP WITH THIS
20 AFFIDAVIT AND THE BILLING IN THE AFFIDAVIT?

21 THE WITNESS: ON A REGULAR BASIS, WHEN WE PERFORM
22 VARIOUS TASKS DURING THE COURSE OF THE DAY, WE WILL
23 EITHER RECORD THEM ON TIME SHEETS, WHICH IS MY PRACTICE,
24 OR RECORD THEM INTO OUR COMPUTER SYSTEM. THOSE ARE
25 CONTEMPORANEOUSLY KEPT RECORDS THAT REFLECT THE

1 BY MR. WOODHAM:

2 Q YOU HAVE STATED THERE IS NO CIVIL TORT EXTORTION IN
3 THE STATE OF GEORGIA. CAN YOU RECITE THE ELEMENTS FOR THE
4 COURT -- CAN YOU RECITE FOR THE COURT REQUISITE ELEMENTS UNDER
5 O.C.G.A. SECTION 16-8-16, "YES" OR "NO"?

6 THE COURT: THAT'S NOT -- OKAY. THAT QUESTION IS
7 IRRELEVANT AS IT PERTAINS TO THE BILLINGS HERE TODAY AND
8 THE FEES THAT THEY ARE ASKING FOR. NEXT QUESTION.

9 MR. WOODHAM: YOUR HONOR --

10 THE COURT: YOU CAN TAKE EXCEPTION WITH THAT, BUT
11 THAT'S THE COURT'S RULING. MOVE ON.

12 MR. WOODHAM: IT RELATES TO EXTORTION. EXTORTION --
13 I HAVE BEEN ACCUSED OF EXTORTION IN MULTIPLE PLEADINGS
14 AND IN OPEN COURT. EXTORTION IS EITHER A CIVIL TORT OR
15 IT'S A CRIME. HE SAID IT'S NOT A CIVIL TORT. HE HAS
16 ACCUSED ME OF COMMITTING A CRIME.

17 THE COURT: I UNDERSTAND WHAT YOU ARE SAYING,
18 MR. WOODHAM.

19 MR. WOODHAM: I WANT TO KNOW WHETHER HE THINKS THE
20 ELEMENTS OF THE CRIME OF EXTORTION HAD BEEN MET IN THIS
21 CASE.

22 THE COURT: MR. WOODHAM, LET ME SAY A COUPLE OF
23 THINGS TO YOU. FIRST OF ALL, PLEASE DON'T RAISE YOUR
24 VOICE. I AM TRYING TO GIVE YOU THE OPPORTUNITY, AFFORD
25 YOU THE OPPORTUNITY TO ASK THE QUESTIONS I THINK YOU NEED

1 TO ASK. BUT IF I DON'T FEEL THAT THE QUESTIONS ARE
2 RELEVANT, YOU DON'T NEED TO ASK. IT'S REALLY JUST THAT
3 SIMPLE. I DON'T FEEL LIKE THIS QUESTION IS RELEVANT AS
4 IT PERTAINS TO WHETHER OR NOT THE FEES THAT THEY ARE
5 ASKING FOR ARE APPROPRIATE. THAT'S THE ONLY ISSUE THAT
6 WE ARE HERE TO DETERMINE, NOT WHETHER OR NOT MR. ICHTER
7 RIGHTLY OR WRONGLY ACCUSED YOU OF EXTORTION. THAT'S NOT
8 THE ISSUE. I DETERMINE THE ISSUE, NOT YOU. I DO.

9 NOW, I AM AFFORDING YOU THE OPPORTUNITY -- THOUGH
10 YOU MAY NOT LIKE THE WAY I AM DOING IT, I AM AFFORDING
11 YOU THE OPPORTUNITY TO QUESTION MR. ICHTER ABOUT THE
12 APPROPRIATENESS OF THE FEES THAT HE IS REQUESTING. YOU
13 CAN TAKE THE OPPORTUNITY AND ASK HIM QUESTIONS
14 SPECIFICALLY ABOUT THE FEES, OR YOU CAN SIT DOWN.

15 MR. WOODHAM: I AM NOT GOING TO SIT DOWN.

16 THE COURT: THOSE ARE YOUR CHOICES.

17 MR. WOODHAM: I'M NOT GOING TO SIT DOWN.

18 THE COURT: WELL, DON'T INTERRUPT ME.

19 THEN ASK HIM THE QUESTIONS SPECIFICALLY ABOUT THE
20 FEES THAT HE IS ASKING FOR.

21 MR. WOODHAM: MAY I ASK THE FOLLOWING QUESTION
22 WHETHER HIS CLIENT HAS SWORN OUT A CRIMINAL COMPLAINT?

23 THE COURT: I DON'T KNOW WHETHER HIS CLIENT HAS
24 SWORN OUT A CRIMINAL COMPLAINT.

25 ARE YOU SEEKING FEES FOR ANY SORT OF CRIMINAL

1 COMPLAINT?

2 THE WITNESS: NO.

3 THE COURT: ALL RIGHT. LET'S CONTINUE.

4 BY MR. WOODHAM:

5 Q DIDN'T YOU RECEIVE CORRESPONDENCE FROM ME LAST
6 DECEMBER PROPOSING POSSIBLY RESOLVING THESE MATTERS BY WAY OF
7 A DONATION TO A HOMELESS SHELTER BY YOUR CLIENT -- AND I HAVE
8 GOT A COPY OF THE LETTER IF YOU WOULD LIKE TO LOOK AT IT --
9 "YES" OR "NO"?

10 A I RECALL SOMETHING ALONG THOSE LINES.

11 MR. WOODHAM: CAN I APPROACH?

12 THE COURT: YOU MAY APPROACH.

13 BY MR. WOODHAM:

14 Q COULD YOU READ THE LETTER FOR THE COURT.

15 THE COURT: I DON'T SEE HOW THAT'S RELEVANT. IF YOU
16 WANT TO ASK HIM SPECIFICALLY ABOUT A FEE THAT HE IS
17 ASKING FOR AS IT PERTAINS TO ANYTHING THAT HE WROTE OR
18 DRAFTED, THEN YOU MAY DO THAT.

19 MR. WOODHAM: YOUR HONOR, IT GOES TO THE NECESSITY
20 OF THE FEES.

21 THE COURT: YOU HAVEN'T EVEN TALKED ABOUT THE FEE.
22 I DON'T EVEN KNOW THAT THERE IS, IN FACT, A FEE. TALK --
23 ASK HIM ABOUT THE FEE THAT'S CONNECTED WITH WHATEVER IT
24 IS THAT YOU HAVE SHOWN.

25 MR. WOODHAM: I WOULD LIKE TO ASK ABOUT THE LETTER.

1 A REVIEW AND ANALYSIS OF WRITTEN DISCOVERY, REQUESTS FROM THE
2 INTERVENORS IN PREPARING OBJECTIONS TO THOSE. SHE ATTENDED
3 THE DECEMBER 15TH, 2008 HEARING. SHE ATTENDED THE FEBRUARY
4 27TH, 2009 HEARING, AND ALSO ASSISTED IN PREPARATION FOR BOTH
5 OF THOSE EVENTS. AND I BELIEVE SHE ALSO ATTENDED THE MAY
6 11TH, 2009 HEARING.

7 Q TELL ME WHAT PART -- ON PARAGRAPH 7, PAGE 4 AS IT
8 RELATES TO THE SANCTIONAL CONDUCT -- SANCTIONABLE CONDUCT.

9 A IT IS OUR POSITION THAT EVERYTHING THAT HAPPENED
10 ASSOCIATED WITH THE INTERVENTION HAD TO DO WITH SANCTIONABLE
11 CONDUCT. ONE OF THE THINGS THAT 9-15-14 TALKS ABOUT IS
12 LITIGATION THAT IS PURSUED FOR AN IMPROPER PURPOSE. AND THE
13 IMPROPER PURPOSE HERE WAS TO EXTORT MONEY FROM THE DEVELOPER
14 BY TELLING THE DEVELOPER THAT THE BOND VALIDATION ISSUE WOULD
15 BE PURSUED ALL THE WAY UP TO THE SUPREME COURT.

16 MR. WOODHAM: YOU ARE USING THE WORD "EXTORTING" --

17 THE COURT: PLEASE DO NOT INTERRUPT THE WITNESS.

18 THE WITNESS: THAT, WE WERE TOLD --

19 THE COURT: JUST A SECOND. JUST A SECOND.

20 THE WITNESS: -- MY CLIENT WAS TOLD THAT THE MATTER
21 WOULD BE PURSUED ALL THE WAY TO THE SUPREME COURT IF THE
22 CLIENT, THE DEVELOPER, DID NOT COME FORWARD WITH
23 1 PERCENT OF THE BOND AMOUNT.

24 BY MR. WOODHAM:

25 Q EXPLAIN YOUR USE OF THE WORD "EXTORT."

1 A SOMEBODY WHO THREATENS TO DO SOMETHING IMPROPER IN
2 ORDER TO RECEIVE A PAYMENT.

3 Q IS THAT A CIVIL CASE?

4 A NO. IT IS, IN THIS CASE, A VIOLATION OF 9-15-14,
5 PURSUING LITIGATION FOR AN IMPROPER PURPOSE. IT'S NEITHER A
6 TORT IN THIS CONTEXT NOR A VIOLATION OF THE CRIMINAL STATUTE.
7 IT HAS TO DO WITH THE INTENT OF THE INTERVENOR IN PURSUING THE
8 LITIGATION.

9 Q SO YOU HAVE JUST STATED YOUR ALLEGATION OF EXTORTION
10 IS NEITHER A TORT, IT'S NEITHER A CRIME IN THIS CASE, IT IS
11 MERELY A VIOLATION OF 9-15-14(B)?

12 A I THINK YOU HEARD ME RIGHT.

13 Q I HOPE A LOT OF PEOPLE HEARD THAT. NOW, YOU ARE
14 AWARE THAT IN THE STATE OF GEORGIA, LUMP SUM FEES ARE NOT
15 ALLOWED IN TERMS OF 9-15-14, AREN'T YOU?

16 A I DON'T KNOW THAT OFF THE TOP OF MY HEAD.

17 Q YOU DON'T?

18 A USUALLY, IF I AM CONFRONTED WITH A LEGAL ISSUE, I
19 RESEARCH IT.

20 Q OKAY. WELL, LUMP SUM FEES AREN'T AVAILABLE IN THE
21 STATE OF GEORGIA.

22 A IS THERE A QUESTION EMBEDDED IN THAT SOMEWHERE?

23 Q NOPE. THE STATEMENT THAT YOUR INABILITY TO
24 DISTINGUISH BETWEEN SANCTIONABLE CONDUCT AND MATTERS
25 PERTAINING TO BOND VALIDATION RENDERS YOUR ENTIRE CLAIM

CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the within and foregoing Appellants' Supplemental Brief on counsel of record by placing same in the United States Mail, with proper postage thereon to ensure delivery, addressed to:

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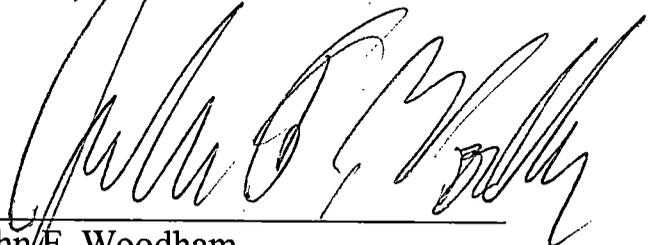
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This 8th day of March, 2010.



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IN THE COURT OF APPEALS
STATE OF GEORGIA

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CITIZENS FOR ETHICS IN)
GOVERNMENT, LLC ET AL.,)
)
Appellants,)
v.)
)
THE ATLANTA DEVELOPMENT)
AUTHORITY ET AL.,)
)
Appellees.)

CASE NO. ~~A09A2105~~
CASE NO. A09A2312

REPLY OF AMICUS CURIAE FULTON COUNTY TAXPAYERS
FOUNDATION, INC. TO SUPPLEMENTAL BRIEF OF APPELLEE
THE ATLANTA DEVELOPMENT AUTHORITY RESPONDING
TO BRIEF OF AMICUS CURIAE

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**IN THE COURT OF APPEALS
STATE OF GEORGIA**

**CITIZENS FOR ETHICS IN
GOVERNMENT, LLC ET AL.,**)
)
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 Appellants,)
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 v.)
)
 **THE ATLANTA DEVELOPMENT
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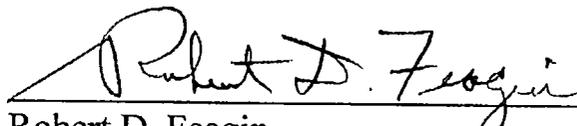
COMES NOW AMICUS CURIAE FULTON COUNTY TAXPAYERS FOUNDATION, INC. (the "Foundation"), pursuant to Rule 26, and hereby files this its Reply Brief of Amicus Curiae Fulton County Taxpayers Foundation, Inc. to Supplemental Brief of Appellee The Atlanta Development Authority Responding to Brief of Amicus Curiae, and shows the this Honorable Court of Appeals as follows:

On February 8, 2010, the Foundation filed with this Court its Brief of Amicus Curiae Fulton County Taxpayers Foundation, Inc. in Favor of Appellants John F. Woodham and Citizens for Ethics in Government, Inc. (the "Amicus Brief"). On March 3, 2010, Appellee The Atlanta Development Authority ("ADA") filed its

Supplemental Brief of Appellee The Atlanta Development Authority Responding to Brief of Amicus Curiae (the “ADA Response Brief”). The Foundation is particularly disturbed by the following statement contained in the ADA Response Brief: “The Foundation – *likely at Woodham’s behest* – has submitted an amicus brief” *ADA Response Brief*, p. 2. (emphasis supplied.) This statement is not only blatantly false, it is insulting and demeaning to the Foundation and is not worthy of a governmental agency. The undersigned filed the Amicus Brief at the express request of John S. Sherman, President of the Foundation, and Mr. Woodham did not request the Foundation to file its Amicus Brief. Moreover, “[t]he function of an amicus curiae is to call the court’s attention to law or facts or circumstances in a matter then before it that may otherwise escape its consideration.” *Village of North Atlanta v. Cook*, 219 Ga. 316, 322 (1963). This is precisely what the Foundation intended, and indeed achieved, by way of the filing of its Amicus Brief.

Respectfully submitted, this 9th day of March, 2010.

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CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the within and foregoing Reply Brief of Amicus Curiae on counsel of record by causing same to be placed in the United States Mail, with proper postage thereon, addressed: to:

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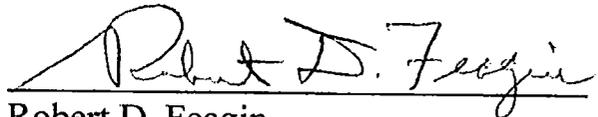
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This 9th day of March, 2010.

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IN THE COURT OF APPEALS
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CITIZENS FOR ETHICS IN)
GOVERNMENT, LLC ET AL.,)

Appellants,)

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THE ATLANTA DEVELOPMENT)
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Appellees.)

CASE NO. A09A2105

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APPELLANTS' MOTION FOR RECONSIDERATION

Appellants Citizens for Ethics in Government, LLC and John F. Woodham (“Appellants”) file this Motion for Reconsideration pursuant to Rule 37, and show this Honorable Court of Appeals as follows:

I. INTRODUCTION.

On March 30, 2010, this Honorable Court entered a decision in Case Nos. A09A2105, A09A2312 and A101040. In respect of Case No. A09A2105, Appellants respectfully request this Court to reconsider its holding with regard to Appellants’ Enumerations of Errors One, Two and Three. Georgia Court of Appeals Rule 37(e) provides: “A reconsideration will be granted on motion of the

requesting party, only when it appears that the Court overlooked a material fact in the record, a statute or a decision which is controlling as authority and which would require a different judgment from that rendered, or has erroneously construed or misapplied a provision of law or a controlling authority.”.

II. ARGUMENT AND CITATION OF AUTHORITY.

A. Enumerations of Error One and Two.

Appellants’ Enumerations of Error One and Two, which are related in some respect, are addressed in Division 1 of Case No. A09A2015. Appellants’ Enumeration of Error One states, “The Trial Court Erred in Failing to Stay The 2/27/09 Hearings As Required Pursuant to O.C.G.A. Section 9-11-11.1(d)”, and Enumeration of Error Two states, “The Trial Court Violated Appellants’ Rights to Due Process Under Art. I, Sec. I, Par. I of the Constitution of the State of Georgia and the 14th Amendment to the Constitution of the United States of America By Holding An Ex Parte, Unnoticed Hearing on Appellants’ Anti-SLAPP Motion.”

1. Enumeration of Error Two.

Division 1 of Case No. A09A2015 primarily addresses the merits of Appellants’ Motion to Strike and to Dismiss With Prejudice filed under Georgia’s Anti-SLAPP statute, O.C.G.A. 9-11-11.1. However, the trial court’s holding in

respect of the merits of Appellants' O.C.G.A. 9-11-11.1 (b) motion was not challenged on appeal. Instead, Appellants challenged the trial court's ex parte, unnoticed hearing on the motion, in violation of Art. I, Sec. I, Par. I of the Constitution of the State of Georgia and the 14th Amendment to the Constitution of the United States of America. In response, the Court states in the latter part of Division 1: "In any event, the Intervenors *have not pointed us to anything in the record* indicating that they asked for reconsideration of the trial court's February 27 ruling, requested an opportunity to be heard on the merits of their motions to strike, *or raised their due process arguments before the trial court*. Thus they have not pointed us to any ruling by the trial court on the issue of due process, notice or the ex parte hearing. *The failure to obtain a ruling by the trial court on these issues waives their consideration on appeal. The John Hardy Group v. Cayo Largo Hotel Assoc.*, 286 Ga.App. 588, 589 (1) (649 S.E.2d 826) (2007); *McCurry v. Harding*, 270 Ga.App. 416, 419-420 (3) (606 S.E.2d 639) (2004)." (emphasis supplied.)

In fact, on page 13 of Appellants' Brief, Appellants expressly brought to the attention of this Court Appellants' 3/20/09 response to the proposed order on Appellants' Anti-SLAPP motion, including quoting the following language from

the 3/20/09 response: “This is the first time Intervenors have been made aware the Court purportedly held any such hearing on the Motion to Strike and Dismiss With Prejudice. ***This is so procedurally infirm as to defy any and all logic and notion of due process.***” (7/8/09 Supp. Rec., p.53) (emphasis supplied.) For the Court’s convenience, a copy of the 3/20/09 response (less exhibits) (7/8/09 Supp. Rec., p.52-56) is attached hereto as *Exhibit “A”*. In the 3/20/09 response, Appellants further brought to the trial court’s attention the decision of the Supreme Court of Georgia in *Ferdinand v. City of Atlanta*, 285 Ga. 121 (2009), quoting from the case (Dr. Ferdinand’s complaint cannot “be shunted aside without regard to his procedural right”), and Appellants further even attached a copy of that decision as Exhibit “D” to the 3/20/09 response.

Moreover, in footnote 1 on the bottom of page 14 of Appellants’ Brief, Appellants brought to this Court’s attention multiple citations to the record, where Appellants raised the due process arguments to the trial court, prior to the entering of May 21 2009 Final Order (“Though Appellants were not present at the 2/27/09 hearing, these constitutional due process objections were raised by Appellants in multiple pleadings filed with the trial court prior to the Final Order. (7/8/09 Supp.

Rec., p. 52-54); (7/8/09 Supp. Rec., p. 81); (7/8/09 Supp. Rec., p. 88); (7/8/09 Supp. Rec., p. 102).”).

Based on the foregoing, Appellants respectfully contend that the Court’s conclusion in Division 1 that “Intervenors have not pointed us to anything in the record indicating that they . . . raised their due process arguments before the trial court” is not an accurate reflection of Appellants’ Brief in Case No. A09A2015. As such, Appellants believe “that the Court overlooked a material fact in the record”, which is one of the criteria set forth in Rule 37(e).

In addition, Appellants respectfully contend the Court’s statement in Division 1 that “the Intervenors have not pointed us to anything in the record indicating that they . . . requested an opportunity to be heard on the merits of their motions to strike” is a misapplication of the law. The Anti-SLAPP statute does not require the movant to request a hearing. The absolute right to a hearing is expressly provided for in O.C.G.A. 9-11-11.1 (d) (“The motion shall be heard”). Appellants also brought this matter (the requirement for a hearing) to the attention of the trial court in the 3/20/09 response. (7/8/09 Supp. Rec., p. 53) Appellants thus respectfully contend that this Court’s conclusion in Division 1 that Appellants must request a hearing on the merits in respect of a O.C.G.A. 9-11-11.1 (b) Anti-

SLAPP motion constitutes an erroneous construction and misapplication of O.C.G.A. 9-11-11.1 (d), and therefore such conclusion is subject to a motion for reconsideration under Rule 37(e). (“A reconsideration will be granted on motion of the requesting party, only when it appears that the Court . . . has erroneously construed or misapplied a provision of law . . .”).

Next, Appellants believe this Court’s reliance on *John Hardy Group, supra*, and *McCurry, supra*, for the proposition that “The failure to obtain a ruling by the trial court on these issues waives their consideration on appeal”, is a clear misapplication of controlling authority. That well-settled principle applies to situations where the substantive merits of the case concern a constitutional challenge, which the appellate court will not consider on appeal if the trial court does not first rule on the constitutional issue. This principle cannot apply when the court’s procedure itself is under attack pursuant to the due process provisions of the State and Federal Constitutions. Otherwise, this Court’s application of *John Hardy Group, supra*, and *McCurry, supra* would permit a trial court to subvert the safeguards embedded in the procedural due process requirements of the State and Federal Constitutions, based on the simple, self-serving whim and caprice of the trial court. “It is not without significance that most of the provisions of the Bill of

Rights are procedural. *It is procedure that spells much of the difference between rule by law and rule by whim or caprice.* Steadfast adherence to strict procedural safeguards is our main assurance that there will be equal justice under law.” *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 179, 71 S.Ct. 624, 652, 95 L.Ed. 817 (1951). (emphasis supplied.) This Court’s application of *John Hardy Group, supra*, and *McCurry, supra* to a trial court’s alleged procedural due process violations would allow a trial court to evade appellate review of its due process infirmities by simply not ruling on an asserted violation. This is not the law in this State, or under the Constitution of the United States of America.

If this were the law in this State, we would not have decisions such as *Cousins v. Macedonia Baptist Church of Atlanta*, 283 Ga. 570, 573-574 (2008) (“The trial judge's conduct of the injunction hearing was clearly improper. ‘The constitution of this state guarantees to all persons due process of law and unfettered access to the courts of this state. [Cit.] These fundamental constitutional rights require that every party to a lawsuit ... be afforded the opportunity to be heard and to present his claim or defense, i.e., to have his day in court. [Cits.]’ [Cit.] *Morrow v. Vineville United Methodist Church*, 227 Ga.App. 313, 316(1), 489 S.E.2d 310 (1997). See also Ga. Const. of 1983, Art. I, Sec. I, Pars. I, XII. Integral to these

rights is the ability to present witnesses and other lawful evidence; thus, limitations imposed by a trial judge that “prevent[] a full and meaningful presentation of the merits of the case” mandate reversal. *Newton Commonwealth Property v. G + H Montage GmbH*, 261 Ga. 269, 270, 404 S.E.2d 551 (1991).”); *Randall v. Randall*, 274 Ga. 107, 109-110 (2001) (“In the absence of any notice to Stokes that the trial court intended to hear the matter on December 13, however, a judgment rendered as a result of a hearing on that day cannot stand. *Taylor v. Chester*, 207 Ga. App. 217, 219 (427 SE2d 582) (1993). . . *The erroneous failure to satisfy the constitutional requirement of notifying counsel for Mr. Randall of the actual scheduling of the hearing on the motion for contempt requires reversal of the denial of the motion to set aside the judgment entered against him.*”) (emphasis supplied) citing *Wright v. Wright*, 270 Ga. 229, 230 (1998) (“*A fundamental requirement of due process in any proceeding which is to be accorded finality is notice that is reasonably is reasonably calculated to inform interested parties of an impending hearing and afford them an opportunity to present their objections.*”). (emphasis supplied)

The decisions in *Cousins*, *Randall*, *Taylor* and *Wright* were not predicated on the respective trial courts having first made a ruling on the trial court’s own due

process violations, before such violations could be considered at the appellate level. Application of the principle enunciated in *John Hardy Group, supra*, and *McCurry, supra* to a trial court's procedure, as measured against the due process requirements of the State and Federal Constitutions, would turn due process on its head and simultaneously and impermissibly erode the Constitutional exercise of judicial appellate review, contrary to Art. VI, Secs. V and VI of the Constitution of the State of Georgia. Based on the foregoing, Appellants respectfully contend that this Court's application of the principle enunciated in *John Hardy Group, supra*, and *McCurry, supra* to a trial court's procedural due process mandate constitutes a misapplication of controlling authority and therefore implicates Rule 37(e).

2. Enumeration of Error One.

As stated above, Appellants' Enumeration of Error One states, "The Trial Court Erred in Failing to Stay The 2/27/09 Hearings As Required Pursuant to O.C.G.A. Section 9-11-11.1(d)". The Court seems to have addressed Appellants' Enumeration of Error One with the following conclusion: "The Intervenors have provided no authority, and we have found none, to support their assertion that the Developers had an obligation to provide a 9-11-11.1 (b) verification of a defensive motion. Under these circumstances, in the absence of any claim against the

Intervenors, the anti-SLAPP statute did not apply. The trial court was therefore entitled to find that the motions to strike were meritless on their face and that no stay barred the scheduled hearing.”). This reasoning by the Court, as discussed above, is clearly “putting the cart before the horse” by this Court in addressing the merits of the trial court’s holding on the Anti-SLAPP motion, when that holding is not even challenged on appeal, because Appellants’ were never afforded a hearing on this matter. In fact, the trial court was not “entitled to find that the motions to strike were meritless on their face” without first holding a noticed hearing on the motion, as expressly mandated by Section 9-11-11.1(d).

This Court’s holding to the contrary constitutes a clear misapplication of the statutory framework of Section 9-11-11.1. The trial court is not permitted to hold this statutorily mandated hearing without first providing notice to the movant that the hearing is going to be held. The trial court never gave Appellants any notice that it would hold an Anti-SLAPP motion hearing on 2/27/09. The only reason any Anti-SLAPP motion “hearing” was held at all was based on the suggestion on 2/27/09 of opposing counsel representing the Atlanta Development Authority, Matthew Calvert, such suggestion having been made immediately prior to the Anti-SLAPP “hearing”.

“I do believe it should be noted for the record that Mr. Woodham contends that he has filed a valid motion to stay this action.” (V.10, MT. 2/27/09, p.7, lines 3-7) Then Mr. Calvert recommended to the court: “Your honor, I would suggest then that the way to avoid any question about this day would be for the court to formally deny that motion. If that motion on the merits is denied, the issue to stay is moot.” (V.10, MT. 2/27/09, p.7, lines 16-19) At Mr. Calvert’s suggestion, the trial court then held its sua sponte hearing on Appellants’ Anti-SLAPP motion. (V.10, MT. 2/27/09, p.7, lines 20-25; page 8, lines 1-11). This is nothing short of Kabuki theater.

O.C.G.A. § 9-11-11.1(d) of the Georgia Anti-SLAPP statute expressly provides, “All discovery and any pending hearings or motions in the action *shall be stayed upon the filing* of a motion to dismiss or a motion to strike made pursuant to subsection (b) of this Code section.” (emphasis supplied.) *See Hagemann v. Berkman Wynhaven Associates, L.P.*, 290 Ga. App. 677, 683 (2008) (“shall” is a legislative mandate under the Anti-SLAPP statute). O.C.G.A. § 9-11-11.1(d) provides the exclusive means of obtaining relief from the stay (“The court, on noticed motion and for good cause shown, may order that specified discovery or other hearings or motions be conducted notwithstanding this subsection.”).

O.C.G.A. § 9-11-11.1(d) The trial court did not follow this exclusive, statutorily authorized process to lift the stay, which stay was automatically imposed by the filing of Appellants' OCGA § 9-11-11.1(b) motions.

In OCGA § 9-11-11.1(b) and (c), the General Assembly has established a mechanism by which ***the threshold question of compliance with the anti-SLAPP statute is decided on motion to dismiss or to strike.*** . . . The application of this rule is made plain by OCGA § 9-11-11.1(d), which expressly provides that the trial court in its discretion may order limited discovery despite the stay imposed when a motion to dismiss or strike is filed pursuant to subsection (b). . . . If Metzler wished to conduct discovery . . . , he could have petitioned the trial court . . . in accordance with the statutory provisions.” *Metzler v. Rowell*, 248 Ga.App. 596, 600-601 (2001) (emphasis supplied).

Moreover, the OCGA § 9-11-11.1(b) motion to dismiss or to strike must be the subject of an actual noticed hearing. “The motion shall be heard not more than 30 days after service unless the emergency matters before the court require a later hearing.” *OCGA § 9-11-11.1(d)* Thus, even if the trial court believes the OCGA § 9-11-11.1(b) motion does not satisfy the standards under OCGA § 9-11-11.1, the Court cannot just issue an order declaring same without having first held a properly noticed, statutorily required hearing as mandated by the General Assembly in OCGA § 9-11-11.1(d). *Ferdinand v. City of Atlanta*, 285 Ga. 121 (2009) (Dr. Ferdinand’s complaint cannot “be shunted aside without regard to his procedural

rights.”) The trial court’s failure to stay all hearings, pending a noticed hearing in respect of the merits of Appellants’ OCGA § 9-11-11.1(b) motions, clearly violated the requirements of O.C.G.A. § 9-11-11.1(d), requiring that all “discovery and any pending hearings or motions in the action *shall be stayed upon the filing of a motion to dismiss or a motion to strike made pursuant to subsection (b) of this Code section.*” (emphasis supplied.) Based on the foregoing, Division 1 of Case No. A09A2105 demonstrates a misapplication of the statutory framework of the Georgia Anti-SLAPP statute.

B. Enumeration of Error Three.

Appellants’ Enumeration of Three is addressed in Division 3 of Case No. A09A2015. Appellants’ Enumeration of Error Three states, “The Trial Court Erred in Awarding Attorneys Fees Under O.C.G.A. § 9-15-14(b) Without Proper Notice and Hearing.” Intervenors were never given written notice, prior to the 2/27/09 hearing, that a motion for attorneys fees under O.C.G.A. 9-15-14(b) would be under consideration on 2/27/09. Notwithstanding, in Division 3 of Case No. A09A2015, this Court stated: “Here, the Intervenors were on notice that the trial court would be considering the imposition of attorney fees on the court’s own

motion based upon evidence of Woodham's actions. Thus they had sufficient *notice to challenge the basis for the attorney fee award in this case.*") (emphasis supplied.)

Appellants respectfully contend the Court's foregoing conclusion constitutes an erroneous construction and misapplication of the Uniform Rules of Superior Court, the Georgia Civil Practice Act, and recent, controlling decisions of the Supreme Court of Georgia on this exact subject matter. *Georgia Court of Appeals Rule 37(e)*.

1. No Legally Adequate Motion and Notice by the Trial Court.

First, O.C.G.A. § 9-15-14 (b) provides in part: "The court may assess reasonable and necessary attorney's fees and expenses of litigation in any civil action in any court of record if, *upon the motion of any party or the court itself*, . . .". (emphasis supplied.) The Supreme Court of Georgia in *Williams v. Cooper*, 280 Ga. 145 (2006), held that a sua sponte award of attorneys' fees by the trial court is impermissible, which means the trial court, to the extent it desires to consider its own motion under O.C.G.A. § 9-15-14 (b), must comply with the motion requirements applicable to parties under the Uniform Rules of Superior Court and the Georgia Civil Practice Act. There is no provision under Georgia law

allowing any different procedure for the prosecution of a trial court's motion as compared to a motion filed by parties.

Second, it is settled law in Georgia that Rule 6 of the Uniform Rules of Superior Court ("Motions in civil actions") is applicable to a motion for attorneys' fees under O.C.G.A. § 9-15-14. *Forest Lakes Home Owners Assn. v. Green Indus.*, 218 Ga. App. 890, 894 (1995). Further, "[T]he USCR rules, enacted by the Supreme Court pursuant to Ga. Const. 1983, Art. VI, Sec. IX, Par. I, **have the force and effect of law.**" *Whisenaut v. Gray*, 185 Ga. App. 401, 402 (1987), *reversed on other grounds, Gray v. Whisenaut*, 258 Ga. 242 (1988). (emphasis supplied.) *See also O.C.G.A. § 15-1-5* ("The rules of the respective courts, legally adopted and not in conflict with the Constitution of the United States or of this state, or the laws thereof, **are binding and must be observed.**"). (emphasis supplied.)

U.S.C.R. 6.1 provides: "In civil actions **every motion made prior to trial**, except those consented to by all parties, **when filed shall include or be accompanied by citations of supporting authorities** and, where allegations of unstipulated fact are relied upon, supporting affidavits, or citations to evidentiary materials of record. In circuits utilizing an individual assignment system, the clerk

shall promptly upon filing furnish a copy provided by the attorney of such motions and related materials to the judge.” (emphasis supplied.) “The form required for motions is set out in OCGA § 9-11-7(b) **and Uniform Superior Court Rules 6.1 and 6.2**; the Glovers' defenses and prayer for relief in their answer do not meet the requirements of a motion.” *Glass v. Glover*, 241 Ga. App. 838, 839 (2000). (emphasis supplied.) The trial court failed to comply with U.S.C.R. 6.1, so it could not have possibly filed its own motion for purposes of O.C.G.A. § 9-15-14 (b).

Moreover, a hearing on a motion for attorneys fees, by whomever filed, must be the subject of a written notice in accordance with O.C.G.A. § 9-11-6(d). “When a hearing is held on any motion, **O.C.G.A. § 9-11-6(d) requires written notice of the hearing** to be served on counsel, “if for no other reason than to avoid the appearance of ex parte contact.” *Glass, supra*, at 837, quoting *Edens v. O'Connor*, 238 Ga. App. 252 (1999) (“*King v. Board of Regents & c.*, 215 Ga.App. 570, 571, 451 S.E.2d 482 (1994), explained that if a hearing is held, OCGA § 9-11-6(d) requires notice of the hearing to be served on counsel as per OCGA § 9-11-5(b). **This is not discretionary.**”). (emphasis supplied.) “It is undisputed that King was not served with notice of the motion hearing in the manner provided by statute. . . Accordingly, the trial court erred in denying King's motion to set aside.” *King*,

supra, at 571. OCGA § 9-11-5(b), as in existence prior to July 1, 2009, stated as follows:¹

Whenever under this chapter service is required or permitted to be made upon a party represented by an attorney, the service shall be made upon the attorney unless service upon the party himself is ordered by the court. ***Service upon the attorney or upon a party shall be made by delivering a copy to him or by mailing it to him-at his last known address or***, if no address is known, by leaving it with the clerk of the court. As used in this Code section, the term 'delivery of a copy' means handing it to the attorney or to the party, or leaving it at his office with his clerk or other person in charge thereof or, if the office is closed or the person to be served has no office, leaving it at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. Service by mail is complete upon mailing. Proof of service may be made by certificate of an attorney or of his employee, by written admission, by affidavit, or by other proof satisfactory to the court. Failure to make proof of service shall not affect the validity of service. (emphasis supplied.)

Not only did the trial court fail to file its own motion under OCGA § 9-15-14(b) as required by the Georgia Civil Practice Act and Rule 6.1 of the Uniform Rules of Superior Court, the trial court likewise did not serve Appellants a notice of a hearing on any such motion, as required in accordance with O.C.G.A. § 9-11-

¹ OCGA § 9-11-5(b) was amended in Section 1 of House Bill 29 during the 2009 session of the Georgia General Assembly. The effective date of House Bill 29 was July 1, 2009.

6(d) and OCGA § 9-11-5(b). The trial court's oral statements at the 12/15/08 status hearing (V. 9, MT. 12/15/08, p. 24) are no substitute for a legally filed motion and a properly served notice of hearing thereon. This procedural infirmity is further compounded by the email sent by the trial court's staff attorney on 2/26/09 stating: "All parties are required to appear at the ***bond validation hearing scheduled for tomorrow, 2/27/2009***, at 9:00 a.m. in courtroom 8-B". (7/8/09 Supp. Rec., p.20) (emphasis supplied.)

The email notice does not satisfy the service and notice requirements of OCGA § 9-11-5(b), but even so, if the trial court had indeed properly and legally filed its own motion under O.C.G.A. 9-15-14(b), why was this not mentioned in this 2/26/09 email? How can a party to litigation be found at fault for relying on state statutes and appellate opinions construing such statutes, coupled with a notice from the trial court's staff attorney expressly excluding any mention of a hearing on a motion which the trial court did not file according to the requirements of the laws of Georgia? "I do not agree that the substantive law can 'shift and spring' according to the particular equities of individual parties' claims, or that we may disregard current law and treat similarly situated litigants differently." *Atlanta*

Oculoplastic Surgery P.C. v. Nestlehutt, (S09A1432, March 22, 2010) (special concurrence of Justice Nahmias, joined by Carley, J. and Hines, J.)

This Court's conclusion that "Intervenors were on notice that the trial court would be considering the imposition of attorney fees" based purely on statements at a 12/15/8 hearing is contrary to controlling authority, requiring actual service in the statutorily mandated manner. *Heard v. Hopper*, 233 Ga. 617, 618 (1975) ("With respect to pleadings and other matters which must be served upon an adverse party, ***it has been uniformly held that it is immaterial that the party actually received the pleading or other matter where service was otherwise improper. . . .***") (emphasis supplied.) "We note at the outset that, if there was no valid service of process, it is immaterial whether [the defendant] had actual notice of the pendency of the action." *Wilkerson v. Voyager Cas. Ins. Co.*, 171 Ga.App. 834 (1984).

Based on all the foregoing, Appellants respectfully contend that in Division 3 of Case No. A09A2015, the Court has erroneously construed and misapplied the above-described provisions of law and controlling authority in respect of the trial court having actually filed a motion under O.C.G.A. 9-15-14(b) and provided

notice of a hearing thereon in accordance with the clear requirements of the laws of the State of Georgia.

2. Court's Statements Failed to Satisfy Requirements of *Wall v. Thurman*.

As stated above, the Court's core holding in Division 3 of Case No. A09A2015 is as follows: "Here, the Intervenors were on notice that the trial court would be considering the imposition of attorney fees on the court's own motion based upon evidence of Woodham's actions. Thus they had sufficient *notice to challenge the basis for the attorney fee award in this case.*" (emphasis supplied.) Appellants respectfully contend the foregoing conclusion constitutes the Court overlooking a material fact in the record as well a misapplication of the Supreme Court of Georgia's decision in *Wall v. Thurman*, 283 Ga. 533 (2008).

In the present case, the trial court determined Finkelstein was liable for attorneys fees under OCGA § 9-15-14(b) without providing notice that it was considering an award *under that Code section* or a hearing on the issue. Although the trial court did later provide a hearing to determine the amount of attorney fees that were due, this does not diminish the fact that Finkelstein had no notice or a hearing regarding whether attorney fees were warranted *under the standards set forth in OCGA § 9-15-14(b)*. Accordingly, *we must reverse* the trial court's grant of attorney's fees. *Wall*, at 534. (emphasis supplied).

This Court's conclusion in Division 3 is directly contrary to Supreme Court's decision in *Wall*. At the 12/15/08 status hearing, while the trial court may have made reference to the possibility of the award of attorneys' fees, the trial court made no reference whatsoever to O.C.G.A. § 9-15-14(b) and "the standards set forth in OCGA § 9-15-14(b)". (V. 9, MT. 12/15/08, p. 24) In fact, the trial court made no mention whatsoever of O.C.G.A. § 9-15-14(b) at any time during the 2/27/09 hearing; the hearing date on which the trial court was purportedly conducting a hearing on its own motion under O.C.G.A. § 9-15-14(b). How could the trial court have conducted a O.C.G.A. § 9-15-14(b) fees hearing on 2/27/09 without even mentioning the statute? This is impossible.

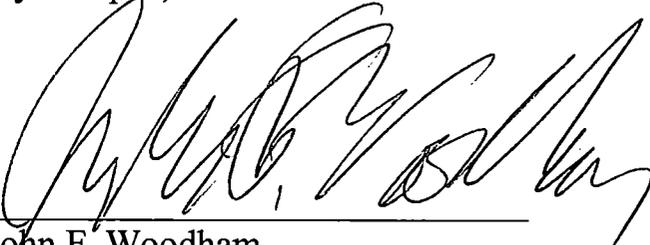
Appellants were not present at the 2/27/09 hearing, because Appellants believed the hearing was stayed as a matter of law. (7/8/09 Supp. Rec., p.14-15) Further, there was no order from the court to attend a hearing on that day. There was a simple email from the staff attorney, which failed to satisfy the statutory notice and service requirements under the Georgia Civil Practice Act discussed above. In any event, if Appellants were present, how would Appellants have prepared for the fees hearing, which was not even properly noticed? What statute was at issue? O.C.G.A. § 9-15-14(a)? O.C.G.A. § 9-15-14(b)? O.C.G.A. § 13-6-

11? Or the trial court's non-existent "inherent power"? The Supreme Court's decision in *Wall* is clear that a party is not required to blindly attend a fees hearing without notice of what statute is at issue. *See also Williams v. Cooper*, 280 Ga. 145, 147 (2006) ("We hold, therefore, that ***without proper notice that an award of attorney fees under OCGA § 9-15-14 (b) is under consideration, the party against whom fees are assessed has not been given an opportunity to challenge the basis on which the fees are assessed.***"). (emphasis supplied.) Nonetheless, this Court concluded in Division 3 that Appellants "had sufficient notice to challenge the basis for the attorney fee award in this case", even though the trial court gave no notice whatsoever "that an award of attorney fees under OCGA § 9-15-14 (b) [was] under consideration", which is the clear requirement under *Wall* and *Williams*. This constitutes a misapplication of *Wall* and *Williams*.

In fact, this is borne out by, and is consistent with, this Court's holding in Division 5 of Case No. A09A2015 vacating the award of attorneys fees, stating "although the trial court stated that it relied upon OCGA § 9-15-14 (b), the court failed to specify a ground for awarding attorney fees under that statute, but rather cited standards found in other comparable statutes." Inasmuch as the trial court never provided any notice that it would be considering an award under OCGA § 9-

15-14 (b), and the OCGA § 9-15-14 (b) statute was not even mentioned at the 2/27/09 hearing, it is not terribly shocking that the order itself failed to “specify a ground for awarding attorney fees under that statute”. Based on the foregoing, Appellants respectfully contend that the Court’s holding in Division 3 constitutes a misapplication of controlling authority, *Wall, supra* and *Williams, supra*. Moreover, because Appellees never moved for fees under OCGA § 9-15-14 (b), and because the trial court did not file a legally adequate motion under OCGA § 9-15-14 (b), a OCGA § 9-15-14 (b) fees award is now impossible because 45 days have passed since the entry of the May 21, 2009 Final Order. *OCGA § 9-15-14 (e)*

Respectfully submitted, this 9th day of April, 2010.



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CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the within and foregoing Motion on counsel of record by placing same in the United States Mail, with proper postage thereon to ensure delivery, addressed to:

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Department of Law
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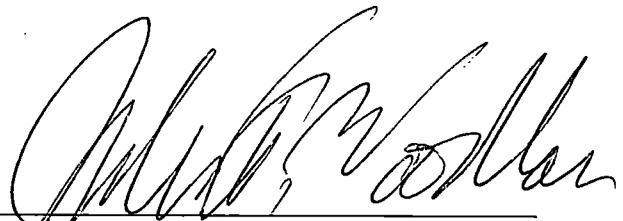
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EXHIBIT "A"

IN THE SUPERIOR COURT OF FULTON COUNTY
THE STATE OF GEORGIA

AM MAR 20 2009
Ombudsman

STATE OF GEORGIA,)
)
 Plaintiff,)
)
 v.)
)
 THE ATLANTA DEVELOPMENT)
 AUTHORITY AND 13TH STREET)
 HOLDINGS, LLC,)
)
 Defendants.)

Civil Action File No.
2008CV159232

**INTERVENORS' RESPONSE TO PROPOSED ORDER DENYING
INTERVENORS' MOTION TO STRIKE AND DISMISS WITH PREJUDICE**

COME NOW Citizens for Ethics in Government, LLC and John F. Woodham, Parties in Intervention (together, "Intervenors"), by and through counsel Woodham and Associates, LLC, and file this Response to Proposed Order Denying Intervenors' Motion to Strike and Dismiss With Prejudice, and show this Court as follows:

By correspondence dated March 18, 2009, counsel for Defendant 13th Street Holdings, LLC submitted to the Court a proposed Order Denying Intervenors' Motion to Strike and Dismiss With Prejudice (the "Proposed Order"), a copy of which correspondence and Proposed Order is attached hereto as Exhibit "A".

The correspondence and Proposed Order reveal that the Court purported to hold, on February 27, 2009, a hearing on Intervenors' Motion to Strike and Dismiss With Prejudice filed pursuant to O.C.G.A. § 9-11-11.1(b), without providing Intervenors any advance notice

of such hearing. This is the first time Intervenors have been made aware the Court purportedly held any such hearing on the Motion to Strike and Dismiss With Prejudice. This is so procedurally infirm as to defy any and all logic and notion of due process.

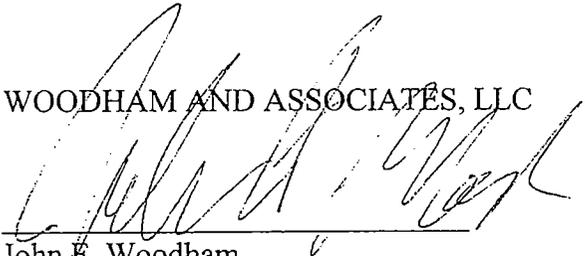
The e-mail correspondence from Steven Nathaniel Jones, Staff Attorney to the Court, on Wednesday evening, February 26, 2009, clearly stated all “parties are required to appear at the *bond validation hearing scheduled for tomorrow . . .*” (emphasis supplied). See Exhibit “B” attached hereto. Mr. Jones e-mail correspondence was in response to an e-mail from Patricia Roy, counsel for Defendant 13th Street Holdings, LLC, stating in part, “I just received the attached motions, which opposing counsel is arguing *stays the bond validation proceeding tomorrow.*” (emphasis supplied). See Exhibit “C” attached hereto. The Court’s Staff Attorney clearly indicated the purpose of the hearing on February 27, 2009 was for a bond validation. At no time did the Court indicate it would be hearing Intervenors’ Motion to Strike and Dismiss With Prejudice. Further, a motion filed under O.C.G.A. § 9-11-11.1(b) must be the subject of an actual hearing; it cannot be decided by a court on its own. See O.C.G.A. § 9-11-11.1(d) (“The motion shall be heard . . .”).

Another judge of this Court was recently admonished by the Georgia Supreme Court for violating the procedural rights of Fulton County Tax Commissioner Arthur E. Ferdinand. Ferdinand v. City of Atlanta, 2009-Ga-0311.122. See Exhibit “D” attached hereto. (Dr. Ferdinand’s complaint cannot “be shunted aside without regard to his procedural rights.”). What this Court apparently did on February 27, 2009, by holding a hearing on Intervenors’ Motion to Strike and Dismiss With Prejudice without providing Intervenors any notice of

such hearing, is certainly more egregious than procedural error of Judge Schwall in the Ferdinand case.

Respectfully submitted, this 20th day of March, 2009.

WOODHAM AND ASSOCIATES, LLC



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CERTIFICATE OF SERVICE

I hereby certify that I have this day served counsel for the opposing parties with a copy of the within and foregoing pleading by **United States Mail** in an envelope properly addressed to the following, with adequate postage thereon to ensure proper delivery:

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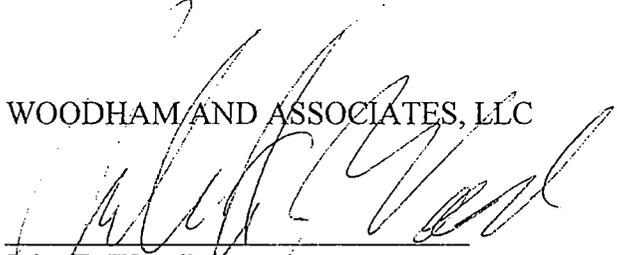
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The Honorable Thurbert E. Baker
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Department of Law
State of Georgia
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This 20th day of March, 2009.

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