IN THE SUPREME COURT OF GEORGIA

Appeal No. S24G0371

ANTHONY LOVE,

Appellant,

v.

JOHN MCKNIGHT,

Appellee.

BRIEF OF THE GEORGIA DEFENSE LAWYERS ASSOCIATION AS AMICUS CURIAE

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Statement of Interest

The Georgia Defense Lawyers Association (GDLA) is an association of more than 1,000 lawyers, including sole practitioners and members of law firms of all sizes, who engage in litigation, mainly for defendants in civil lawsuits. The GDLA is dedicated to, among other purposes, supporting and improving the civil defense bar, strengthening the adversary system of jurisprudence in our courts, and otherwise promoting improvements in the administration of justice. GDLA members routinely represent clients in negligence actions, including cases stemming from automobile accidents, in which claims for attorney's fees under O.C.G.A. § 13-6-11 are asserted. Furthermore, GDLA members and their clients face increasing and continued efforts by plaintiffs and the plaintiffs' bar to expand the scope of cases in which attorney's fees are recoverable under O.C.G.A. § 13-6-11, especially for alleged "bad faith" in the underlying transaction. All Georgia residents and companies doing business in Georgia have a strong interest in ensuring that damage awards rendered by juries in this state are reasonable, proportionate, constitutional, and authorized by the law.

Accordingly, GDLA submits this brief in support of Appellant Anthony Love.

Argument and Citations of Authority

This Court granted certiorari on the following issue: "Is evidence of traffic law violations by a party sufficient to create a jury question as to whether that party acted in bad faith for purposes of authorizing an award of the expenses of litigation under O.C.G.A. § 13-6-11?"

The correct answer, as set forth below, is no.

1. A traffic citation alone does not show "bad faith."

Georgia is not a "loser pays" state. Instead, the general rule is that "an award of attorney fees and expenses of litigation are not available to a prevailing party unless authorized by statute or contract." SRM Grp., Inc. v. Travelers Prop. Cas. Co. of Am., 308 Ga. 404, 405 (2020) (*citing* Cary v. Guiragossian, 270 Ga. 192, 195 (4), 508 (1998)).

An award of attorney's fees under O.C.G.A. § 13-6-11 for "bad faith" must be based on conduct "during the transaction out of which the lawsuit arose." Taylor v. Devereux Found., Inc., 316 Ga. 44, 89 (2023)(*quoting* Merlino v. City of Atlanta, 283 Ga. 186, 191 (2008)).

a. "Bad faith" under O.C.G.A. § 13-6-11 should require an intentional disregard of the known rights of others.

A claim of "bad faith" under O.C.G.A. § 13-6-11 should require evidence of the intentional disregard of the known rights of another. Evidence authorizing an

award of punitive damages under O.C.G.A. § 51-12-5.1(b) meets this standard and is sufficient to support an award of attorney's fees for bad faith under O.C.G.A. § 13-6-11. For example, where evidence in a sexual assault case showed a defendant acted with "that entire want of care which would raise the presumption of conscious indifference to consequences" under O.C.G.A. § 51-12-5.1(b) by being consciously indifferent to the consequences of its failure to provide appropriate and adequate supervision, that evidence also authorized the jury to award attorney's fees for bad faith under O.C.G.A. § 13-6-11. Taylor, 316 Ga. at 90. A conscious indifference to consequences authorizes a finding of "bad faith" because it is a conscious, intentional disregard of the known rights of another. Being aware of (i.e. conscious) the rights of another, but deciding to act in a manner detrimental to those known rights rises to the level of "bad faith." In Merlino, evidence showed the defendant knew that plugging a drainpipe could cause flooding on the plaintiff's property, but he nevertheless plugged the pipe anyway. 283 Ga. at 190. The defendant knew that his actions (plugging a pipe) would be detrimental to (flood) his neighbor's known rights (his property), but he did it anyway. Id. Such conduct authorized a finding of "bad faith."

This Court has frequently held that evidence of intentionality is necessary in order for a jury to find bad faith under O.C.G.A. § 13-6-11. "Every intentional tort invokes a species of bad faith that entitles a person wronged to recover the expenses

of litigation including attorney fees." *See* Ponce de Leon Condominiums v. DiGirolamo, 238 Ga. 188, 190 (1977)(citing DeKalb County v. McFarland, 231 Ga. 649, 651 (1974) and City of Dublin v. Hobbs, 218 Ga. 108, 110, 126 (1962)); Taylor, 316 Ga. at 90; and Merlino, 283 Ga. at 190.

Even in the context of statutory insurance claims, "bad faith" requires a finding of an intentional disregard of the known rights of another. O.C.G.A. § 33-4-6 authorizes statutory damages and an award of attorney's fees when, "in the event of a loss which is covered by a policy of insurance," the insurer refuses in "bad faith" to pay the covered loss "within 60 days after a demand has been made by the holder of the policy." O.C.G.A. § 33-4-6. "Bad faith" under this statute is defined as "any frivolous and unfounded refusal in law or in fact to comply with the demand of the policyholder to pay according to the terms of the policy." Meritage Homes of Georgia, Inc. v. Grange Ins. Co., 528 F. Supp. 3d 1312, 1325 (N.D. Ga. 2021)(*quoting* Southern Gen. Ins. Co. v. Kent, 187 Ga. App. 496 (1988)). Such a showing of "bad faith" is made where the facts show an insurer had no good cause for resisting and delaying payment under a policy. Id. Again, "bad faith" is present when one intentionally disregards the known rights of a person, such as when an insurer denies to pay under a policy, despite knowing payment is due.

Over time Georgia litigants and courts have conflated negligence and "bad faith." Claims for alleged "bad faith" failure to settle tort claims are primarily

negligence claims as permitted under Southern General Insurance Company v. Holt, 262 Ga. 267, 268 (1992). Under Holt, an insurance company may be liable for damages to its insured for failing to settle the claim of an injured person "where the insurer is guilty of **negligence, fraud, or bad faith** in failing to compromise the claim." Holt, 262 Ga. at 268 (emphasis added). Negligence may support a claim for a "bad faith" failure to settle under Holt, but that is not "bad faith" as contemplated by O.C.G.A. § 13-6-11. They are different. This Court should reiterate the distinction in the present case.

b. A traffic citation does not show negligence or bad faith.

A traffic citation alone does not prove bad faith. Indeed, a traffic ticket alone is not even conclusive of negligence. Proof of a citation alone is not conclusive of negligence. *See* Cox v. Allen, 256 Ga. App. 53 (2002) ; Gaddis v. Skelton, 226 Ga. App. 325 (1997). A guilty plea to a traffic violation is admissible as an admission against interest, **but does not conclusively establish negligence**; it is only a circumstance to be considered along with the other evidence in the civil action for damages. Skelton, 226 Ga. App. at 326 (*citing* Roesler v. Etheridge, 125 Ga. App. 358, 359(1) (1972); Peacock v. Strickland, 198 Ga. App. 406(1) (1991); Martini v. Nixon, 185 Ga. App. 328(1) (1987); and Thompson v. Hill, 143 Ga. App. 272, 275 (1977)). As a traffic citation is not dispositive on the issue of negligence, a traffic ticket likewise cannot alone authorize an award of "bad faith" attorney's fees.

Negligence is not "bad faith." If a ticket alone cannot establish negligence as a matter of law, a citation alone cannot authorize the award of bad faith attorney's fees under O.C.G.A. § 13-6-11.

A traffic citation alone also cannot authorize an award of attorney's fees because most traffic offenses for violations of Uniform Rules of the Road are strict liability offenses. State v. Ogilvie, 292 Ga. 6 (2012). Unless expressly indicated otherwise, the traffic offenses defined O.C.G.A. § 40-6-1, *et seq*. are "strict liability" offenses that can be committed without a culpable mental state Ogilvie, 292 Ga. at 8 (*citing* Hoffer v. State, 192 Ga. App. 378, 380 (1989)(superseded by statute on other grounds). As strict liability traffic offenses, these statutes may be violated, and citations issued, without mens rea or guilty knowledge, and "there is no requirement to prove mental fault or mens rea" to establish such offenses." Hoffer, 192 Ga. App. at 380.

The issuance of a traffic ticket, therefore, says nothing about the mental state of the cited driver. The issuance of a traffic ticket does not show or suggest "mental fault" or "guilty knowledge." Receipt of a traffic citation does not require, and proves nothing, about the mental culpability of the cited driver. On the other hand, bad faith requires a showing of mental culpability in the form of intentionality. Thus, being issued a traffic ticket in no way shows the cited driver intentionally disregarding the known rights of another person and, accordingly, does not

demonstrate "bad faith" under O.C.G.A. § 13-6-11. Indeed, the majority of traffic accidents likely occur because drivers are unaware of (whether justified or not) another driver.

The driver who incorrectly believes his traffic light to be green is not aware of the other driver approaching the intersection, nor did he knowingly disregard the rights of the other driver. The driver in traffic who thought she had enough room to stop but taps the car in front of her in a rear-end collision did not disregard the rights of the lead car. Rather, she thought she had enough room to stop but was mistaken. Police officers responding to automobile accidents do not assess the mental fault or guilty knowledge of the involved drivers and nor should they be expected to do so. Rather, after most likely not seeing the accident occur, an officer attempts to determine what happened based on the physical evidence and then quickly decides if one driver complied with the rules of the road without regard to intent. Such acts of noncompliance may validly result in citations for strict liability traffic offenses, but they do not show an intentional disregard of the known rights of others. It would therefore be wrong to impose liability for bad faith attorney's fees on a driver solely for being cited for such a strict liability traffic offense.

Moreover, if the issuance of a traffic citation now authorizes a finding of "bad faith" under O.C.G.A. § 13-6-11, this Court should consider whether proof of mental fault or mens rea must now be proven in the criminal prosecution of "strict liability"

traffic offenses. *See* Holley v. State, 363 Ga. App. 107 (2022). If Georgia courts now are to presume "bad faith" exists when a traffic citation is issued, they also ought to require the State to prove a ticketed driver had the specific intent to commit the traffic offence. Otherwise, there is a stark inconsistency between the treatment of traffic citations in criminal cases (where no specific intent needs to be proven) and in civil cases (where bad faith (i.e. specific intent) by the cited driver is presumed). Requiring proof of specific intent or mens rea for traffic citations "would result in chaos, if not carnage, on the highways, and the complete frustration of the legitimate legislative purpose sought to be achieved by the codification of the Rules of the Road…." Hoffer, 192 Ga. App. at 380 (1989)(superseded by statute on other grounds). Such unfortunate consequences, however, would be necessary to resolve the inconsistency between not requiring proof of intent in criminal cases involving traffic tickets and presuming bad faith in civil cases for the same traffic offenses.

2. O.C.G.A. § 13-6-11 should no longer apply to tort cases.

The issuance of a traffic citation also should not support an award of attorney's fees under O.C.G.A. § 13-6-11 because this Court should rule that this code section no longer applies to tort actions after 2021 for two main reasons.

First, the 2021 amendments to O.C.G.A. §§ 1-1-1 and 1-1-8 demonstrate O.C.G.A. § 13-6-11 should no longer be applied to tort actions. In 2021, O.C.G.A. § 1-1-8 was amended to add subsection (d). Subsection (d) now states as follows:

> [n]othing in this Code section shall be construed to mean that any matter contained in the Official Code of Georgia Annotated has any force of law or imprimatur of the State of Georgia **except as provided for in Code Section 1-1-1.**

O.C.G.A. § 1-1-8(d)(emphasis added). Thus, O.C.G.A. § 1-1-1 must be considered in order to determine what has the "force of law or imprimatur of the State of Georgia." That statute was also amended in 2021. Subsection (a) of O.C.G.A. § 1-1-1 was amended in 2021 and subsections (b) and (c) were added. As amended, subsection (a) now provides as follows:

> [t]he statutory portion of the codification of Georgia laws prepared by the Code Revision Commission and the Michie Company pursuant to a contract entered into on June 19, 1978, is enacted and shall have the effect of statutes enacted by the General Assembly of Georgia. The statutory portion *and numbering and arrangement of such codification, along with supplementary content determined to be useful to users*, shall be published by the state and when so published shall be known and may be cited as the "Official Code of Georgia Annotated.

O.C.G.A. § 1-1-1(a) (emphasis added). To further clarify how "numbering and arrangement" set forth in the Georgia Code constituted "supplementary content determined to be useful to users," the Legislature further amended O.C.G.A. § 1-1-1(b) as follows:

> [t]he following matter contained in the Official Code of Georgia Annotated, including all supplements and revised volumes thereof, shall be considered enacted by the General Assembly:
>
> (1) Statutory text; *and*
>
> (2) *Arrangement and numbering system, including, but not limited to, title, chapter, article, part, subpart, Code section, subsection,*

> *paragraph, subparagraph, division, and subdivision numbers and designations.*

O.C.G.A. § 1-1-1(b) (emphasis added). Thus, the Legislature has emphasized the statutory text **and** the "[a]rrangement and numbering system, including, but not limited to, title, chapter, article, part, subpart, Code section, subsection, paragraph, subparagraph, division, and subdivision numbers and designations" should all be considered when interpreting a statute. O.C.G.A. § 1-1-1(b)(2). Thus, placement a statutory provision within in the Georgia Code must therefore be considered.

For the purposes of *interpreting* code sections, "courts shall look diligently for the intention of the General Assembly, keeping in view at all times the old law, the evil, and the remedy." O.C.G.A. § 1-3-1(a). Moreover, it has also long been established that "ordinary signification shall be applied to all words" O.C.G.A. § 1-3-1(b).

There is, and can be, no dispute that O.C.G.A. § 13-6-11 is located in Title 13 of the Georgia Code. Title 13 applies to "Contacts." Title 13 is, of course, separate from Title 51 of the Georgia Code, which governs "Torts." O.C.G.A. § 13-6-11 does not appear in Title 51, nor does that code section expressly reference torts. The General Assembly could have amended O.C.G.A. § 13-6-11 to include "torts." It did not. The Legislature could have moved the code section to Title 51 or it could have enacted a similar statute under Title 51. Again, it did not.

The General Assembly also had the option not to amend O.C.G.A. §§ 1-1-1 and 1-1-8. Instead, the General Assembly extended the force of the law, not only to a code section's statutory language, but to its placement in the Code as well. The General Assembly specifically placed O.C.G.A. § 13-6-11 within Title 13 "Contracts" and has not moved it. Thus, damages sought under O.C.G.A. § 13-6-11 should not be recoverable in matters that are *not brought under* Title 13.

In light of the amendments to O.C.G.A. §§ 1-1-1 and 1-1-8, this Court should now find that the General Assembly has expressed its intent to apply O.C.G.A. § 13-6-11 to "Contracts" only and not to "Torts" which are governed by Title 51.

Second, application of O.C.G.A. § 13-6-11 to contract claims only is also consistent with this Court's approach to statutory interpretation set forth in Alton & Bird, LLP v. Hatcher Management Holdings, LLC, 312 Ga. 350 (2021)(*superseded by statute on other grounds*). The holding in Alston & Bird did not address the 2021 amendments to O.C.G.A. §§ 1-1-1 and 1-1-8. This Court, however, did set forth its approach to determining the meaning of a statute, O.C.G.A. § 51-12-33, and then applied it. This Court set forth its approach to statutory construction in Alston & Bird as follows:

> [w]hen determining the meaning of a statute, we start with the statutory text itself, because "[a] statute draws its meaning from its text." City of Marietta v. Summerour, 302 Ga. 645, 649 (2) (2017) (citation and punctuation omitted). In construing a statute, "we must afford the statutory text its plain and ordinary meaning," view it "in the context in which it appears," and read it "in its most natural and reasonable way,

> as an ordinary speaker of the English language would." Deal v. Coleman, 294 Ga. 170, 172-173 (1) (a) (2013) (citation and punctuation omitted). "[F]or context, we may look to other provisions of the same statute, the structure and history of the whole statute, and the other law — constitutional, statutory, and common law alike — that forms the legal background of the statutory provision in question." Thornton v. State, 310 Ga. 460, 462-463 (2) (2020) (citation and punctuation omitted).

Alston & Bird, LLP, 312 Ga. at 353–54.

Applying the above framework to O.C.G.A. § 13-6-11, after the 2021 amendments to O.C.G.A. §§ 1-1-1 and 1-1-8 leads to the inescapable conclusion that O.C.G.A. § 13-6-11 should not apply to tort claims. The text of O.C.G.A. § 13-6-11 does not refer to negligence or tort actions or claims. The "ordinary speaker of the English language," coming across O.C.G.A. § 13-6-11 in the Georgia code would have no reason to believe it applies to negligence or tort claims. That ordinary speaker of the English language" would also likely look to the structure and placement of O.C.G.A. § 13-6-11 to determine how it applied. Doing so, he or she would conclude, especially after the 2021 amendments to O.C.G.A. §§ 1-1-1 and 1-1-8, that O.C.G.A. § 13-6-11 does not apply to negligence or tort actions.

This Court, therefore, should answer the question at issue "no" and find that traffic citations do not give rise to a claim for attorney's fees under O.C.G.A. § 13-6-11 because that code section does not apply to tort or negligence actions after 2021.

Conclusion

"Is evidence of traffic law violations by a party sufficient to create a jury question as to whether that party acted in bad faith for purposes of authorizing an award of the expenses of litigation under O.C.G.A. § 13-6-11?"

The answer is, "no."

The answer is "no" because "bad faith" under O.C.G.A. § 13-6-11 must require evidence showing the intentional disregard of the known rights of another. A traffic citation is not even conclusive of negligence, let alone bad faith. *See* Cox v. Allen, 256 Ga. App. 53 (2002). Further, the majority of traffic offenses are "strict liability" offenses in which no mens rea or guilty knowledge need be shown. State v. Ogilvie, 292 Ga. 6 (2012). A traffic ticket, therefore, does not authorize an award of attorney's fees for "bad faith" under O.C.G.A. § 13-6-11.

The answer is also "no" because the 2021 amendments to O.C.G.A. §§ 1-1-1 and 1-1-8 demonstrate that O.C.G.A. § 13-6-11 should apply only to contract claims and not to tort or negligence claims. Such a holding is consistent with the framework of statutory construction set forth in Alton & Bird, LLP v. Hatcher Management Holdings, LLC, 312 Ga. 350 (2021)(*superseded by statute on other grounds*).

Wherefore, for the foregoing reasons, and those set forth in the brief of the Appellant, this Court should answer the question at issue "no."

This submission does not exceed the word count limit imposed by Rule 20.

This 16th day of May, 2024.

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