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Katie Anderson

Doubling Down: Supreme Court of Georgia Allows for Seemingly Double Recovery of Attorney's Fees

Katie Anderson*

I. INTRODUCTION

Never settle. Good words to live by, unless you are a civil defendant living in the state of Georgia. Following the Supreme Court of Georgia's decision in *Junior v. Graham*,[1] defendants in civil actions might have more of an incentive to settle their cases after the court allowed for a seemingly double recovery of attorney's fees.[2]

Georgia courts have consistently upheld the public policy of barring double recovery.[3] Damages in civil actions are intended to make a plaintiff whole, not punish a defendant.[4] However, in *Junior*, the court held that two statutory provisions, despite their similar measure of damages, did not constitute an impermissible double recovery.[5] Going forward, defendants could be charged with double fees if they are found liable under both statutes.[6]

As one of the first cases allowing for a plaintiff to recover attorney's fees under two separate statutes, *Junior* creates a danger for defendants who choose not to settle on their good faith belief that they are not liable

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1. 313 Ga. 420, 870 S.E.2d 378 (2022).
2. *Id.* at 429, 870 S.E.2d at 385.
3. Ga. Ne. R.R. Co. v. Lusk, 277 Ga. 245, 246, 587 S.E.2d 643, 644 (2003).
4. *Id.*
5. *Junior,* 313 Ga. at 420, 870 S.E.2d at 379.
6. *Id.*

and creates a benefit for plaintiffs who make a good faith effort to settle and are forced through frivolous litigation.[7]

II. FACTUAL BACKGROUND

The plaintiff, Joao Junior (Junior) brought an action against the defendant, Sharon Graham (Graham) to recover damages based on injuries sustained in a car accident in 2010.[8] On December 13, 2013, Junior served upon Graham a Plaintiff's Offer to Settle a Tort Claim for $600,000.[9] Graham, however, failed to respond to the offer and thus, the offer was deemed rejected.[10]

Following a trial, on September 11, 2019, *nunc pro tunc,* August 12, 2019,[11] Junior recovered $4,979,066.87 on his claims.[12] The jury awarded $1,251,554.95 of that final judgment for attorney's fees and expenses under Official Code of Georgia Annotated section 13-6-11[13] for bad faith conduct.[14] Junior then moved for recovery of attorney's fees under O.C.G.A. § 9-11-68(b)(2).[15] The basis for this recovery was Graham's failure to accept the settlement offer. The trial court denied this motion finding that the recovery under O.C.G.A. § 13-6-11 barred further award.[16] The court reasoned that despite the two code sections contemplating damages based on different conduct, the total of attorney's fees and litigation expenses was incurred "as to the same cause of action

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7. *Id.*

8. Junior v. Graham, 313 Ga. 420, 420, 870 S.E.2d 378, 379.

9. Junior v. Graham, 357 Ga. App. 815, 849 S.E.2d 536 (2020).

10. *Id.* at 815, 849 S.E.2d at 536–7.

11. *Id.* at 815, 849 S.E.2d at 537. *Nunc pro tunc* translates to "now for then." In general, a ruling *nunc pro tunc* applies retroactively to correct an earlier ruling.

12. *Id.*

13. O.C.G.A. § 13-6-11 (2023):

> The expenses of litigation generally shall not be allowed as a part of the damages; but where the plaintiff has specially pleaded and has made prayer therefor and where the defendant has acted in bad faith, has been stubbornly litigious, or has caused the plaintiff unnecessary trouble and expense, the jury may allow them.

Id.

14. *Junior,* 357 Ga. App. at 815, 849 S.E.2d at 537.

15. *Id.*; O.C.G.A. § 9-11-68(b)(2) (2023):

> If a plaintiff makes an offer of settlement which is rejected by the defendant and the plaintiff recovers a final judgment in an amount greater than 125 percent of such offer of settlement, the plaintiff shall be entitled to recover reasonable attorney's fees and expenses of litigation incurred by the plaintiff or on the plaintiff's behalf from the date of the rejection of the offer of settlement through the entry of judgment.

Id.

16. *Junior*, 357 Ga. App. at 815, 849 S.E.2d at 537.

against the same defendant."[17] Thus finding that awarding fees under O.C.G.A. § 9-11-68(b)(2) would constitute an impermissible double-recovery.[18]

Junior appealed this action contending that the language of O.C.G.A. § 9-11-68(b)(2) is "clear and unambiguous" and requires an award against Graham for her refusal of the settlement offer.[19] The Court of Appeals of Georgia also barred Junior's recovery under O.C.G.A. § 9-11-68(b)(2) but for different reasons than the trial court.[20] While it rejected the position that allowing for this recovery would constitute an impermissible double recovery, the court of appeals based its decision on the grounds that Junior was not entitled to recovery under O.C.G.A. § 9-11-68(b)(2). Junior, the court of appeals held, had no uncovered fees to which the sanction would be applied after receiving the award under O.C.G.A. § 13-6-11.[21] The court of appeals determined that Junior did not incur these fees and affirmed the decision of the trial court.[22]

The Supreme Court of Georgia granted Junior's petition for writ of certiorari to consider whether O.C.G.A. § 9-11-68(b)(2) requires a set-off or deduction in award issued by the jury in the trial court.[23] Contrary to the lower courts, the Supreme Court of Georgia held that these statutes do not require any set-off as they address different conduct from the defendant.[24] Despite the use of similar measures to calculate the damages, both based on attorney's fees and litigation expenses, the court held that it did not constitute a double recovery.[25]

III. LEGAL BACKGROUND

A. Public policy barring double recovery

Historically, courts have awarded damages as an effort to put the plaintiff in the position they were pre-tort.[26] Similarly, courts try to avoid punishment using damages in breach of contract disputes.[27] Windfalls for the plaintiff are frowned upon. Naturally, it is public policy that the

17. *Junior*, 313 Ga. at 421, 870 S.E.2d at 380.
18. *Junior*, 357 Ga. App. at 815, 849 S.E.2d at 536.
19. *Id.* at 815, 849 S.E.2d at 537.
20. *Junior,* 313 Ga. 422, 870 S.E.2d at 380.
21. *Junior,* 357 Ga. App. at 817, 849 S.E.2d at 538.
22. *Id.* at 818, 849 S.E.2d at 538.
23. *Junior,* 313 Ga. at 420, 870 S.E.2d at 379.
24. *Id.* at 422, 870 S.E.2d at 381.
25. *Id.* at 424, 870 S.E.2d at 382.
26. *Lusk,* 277 Ga. at 246, 587 S.E.2d at 644.
27. Roofers Edge, Inc. v. Std. Bldg. Co., Inc., 295 Ga. App. 294, 671 S.E.2d 310 (2008).

plaintiffs are not able to "double recover" and for the court to award them damages that make them whole.[28]

1. Georgia's consistency of upholding this public policy

As part of its common law and public policy, Georgia has always barred plaintiffs from double recovery.[29] A plaintiff is only entitled to one satisfaction of damages because the purpose is "to make the plaintiff whole," not to promote a windfall or punish a defendant.[30] In *Georgia Northeastern Railroad Inc., v. Lusk,*[31] the Supreme Court of Georgia examined whether the damages awarded constituted a double-recovery.[32] Lusk was awarded $5,400, which was approximately 60% of the estimated value of his property by acre. This appeared to be an award of the usable acreage that Lusk irreparably lost. Additionally, the jury awarded $182,755 to restore the riverbank which had been eroded. The Supreme Court of Georgia, however, disagreed that this additional award of damages was needed to restore Lusk to his pre-tort condition.[33] The Supreme Court of Georgia placed emphasis on the public policy of the state to prevent double recovery by plaintiffs, and the measure of damages in these cases of this manner are intended to place an injured party in the position they would have been had the injury never occurred.[34]

The Court of Appeals of Georgia has also held that the mere existence of alternative recovery does not give plaintiffs the entitlement to "take judgment" under both theories.[35] In *Marvin Nix Development Company et al. v. United Community Bank*,[36] the court held that recovery under a promissory note and for conversion of collateral constituted double recovery under alternative remedies.[37] While a party can pursue inconsistent remedies, this does not open the door to double recovery of

28. Ingles Markets, Inc. v. Kempler, 317 Ga. App. 190, 194, 730 S.E.2d 444, 449 (2012).

29. *Lusk,* 277 Ga. at 246, 587 S.E.2d at 644.

30. *Id.*

31. 277 Ga. at 246, 587 S.E.2d at 644.

32. *Id.*

33. *Id.* at 246–47, 587 S.E.2d at 645.

34. *Lusk*, 277 Ga. at 246, 587 S.E.2d at 644; *Ingles*, 317 Ga. App. at 194, 730 S.E.2d at 449.

35. Marvin Nix Dev. Co. v. United Cmty. Bank, 302 Ga. App. 566, 567, 692 S.E.2d 23, 25 (2010).

36. *Id.*

37. *Id.*

the same damages for the same wrong.[38] A party is only entitled to "one satisfaction of the same damages, in either contract or tort."[39]

In *Ingles Market, Inc. v. Kempler*,[40] the Court of Appeals of Georgia held that the jury's award of damages for both nuisance and negligence did not constitute an impermissible double recovery.[41] The court acknowledged it is public policy to prohibit double recovery for the plaintiffs and that each plaintiff is only entitled to one satisfaction.[42] The court held that the award of damages was not duplicate in nature and that the damages in the nuisance claim were not reflected in the damages in the negligence claim.[43] The jury, the court held, was entitled to "award additional general damages based on the parties' negligence within its 'enlightened conscience' and based on the testimony presented at trial."[44] The court in its decision did not back down on the enforcement of the public policy barring double recovery, it just interpreted the award of damages to be one satisfaction.[45]

The Supreme Court of Georgia held in *Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt*[46] that the determination of damages lies "peculiarly within the province of the jury."[47] This is because damages are typically considered an issue of fact and therefore are left up to the jury.[48] The court thus determined that the right to a jury trial also includes the right to have a jury determine damages.[49]

The policy extends past tort law and into breach of contract claims according to *Roofers Edge, Inc. v. Standard Building Company, Inc.*,[50] where the court denied the plaintiff's request for attorney's fees under O.C.G.A. § 9-15-14[51] when they had already been awarded attorney's fees under O.C.G.A. § 13-6-11.[52] The court held that any further award of

38. *Id* at 568, 692 S.E.2d at 25.
39. *Id.*
40. 317 Ga. App. 190, 730 S.E.2d 444 (2012).
41. *Id.* at 195, 730 S.E.2d at 450.
42. *Id.* at 194, 730 S.E.2d at 449.
43. *Ingles,* 317 Ga. App. at 195, 730 S.E.2d at 450.
44. *Id.* at 195, 730 S.E.2d at 450.
45. *Id.* at 194, 730 S.E.2d at 449.
46. 286 Ga. 731, 691 S.E.2d 218 (2010).
47. *Id.* at 734, 691 S.E.2d at 222.
48. *Id.*
49. *Id.*
50. 295 Ga. App. 294, 671 S.E.2d 310 (2008).
51. O.C.G.A. § 9-15-14 (2023).
52. *Roofers*, 295 Ga. App. at 294, 671 S.E.2d at 311.

attorney's fees would constitute an impermissible double recovery for the plaintiff.[53]

2. Public policy in other circuits

The Supreme Court of the United States has also extended this public policy denying double recovery.[54] The Court held that a fee award may go no farther than "to redress the wronged party 'for losses sustained.'"[55] It further held that the damages awarded may not impose punishment as an additional amount for the sanctioned party's misbehavior.[56] To have such a separate penalty, a court would need to provide "procedural guarantees applicable in criminal cases."[57] When those criminal-type protections—such as a "beyond a reasonable doubt" standard of proof—are missing, a court's shifting of fees is limited to reimbursing the victim.[58] The Court held that a plaintiff cannot be made more than whole.[59]

The United States Court of Appeals for the Ninth Circuit in *Corder v. Brown*[60] also upheld this public policy.[61] The court held that the plaintiff cannot be awarded a windfall.[62] The plaintiff, in this case, had already received damages in a settlement. The defendants argued that the attorney's fees must be offset by this amount awarded or the plaintiff would be awarded an improper windfall.[63]

When determining whether a plaintiff has received an impermissible double recovery, the court will look to the statutes the parties are attempting to recover under.

53. *Id.* at 296, 671 S.E.2d at 312.
54. Goodyear Tire & Rubber Co. v. Haeger, 581 U.S. 101 (2017).
55. *Id.* at 108.
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id* at 113–4.
60. 25 F.3d 833 (9th Cir. 1994).
61. *Id.* at 839.
62. *Id.*
63. *Id.*

B. Court's statutory analysis

1. Emphasis on context

Georgia courts rely heavily on context when interpreting statutory provisions.[64] In *Deal v. Coleman,*[65] the Supreme Court of Georgia held that statutory text is to be read by courts in the most natural and reasonable way.[66] It should, they explain, be read "as an ordinary speaker of the English language would."[67] Both the common and customary usage and context of words are important to the court when analyzing statutes. To gain context; courts may look to other provisions of the statute; the structure and history of the statute; and other law that formed the legal background of the statutory provision that is in question. This could mean looking to constitutional, statutory, and common laws to determine the legal background of the statute.[68]

When reading the statute in question, the court does not read it in isolation but rather reads it in the context of other provisions.[69] In *City of Marietta v. Summerour*,[70] the court used the context of the statutory provision to clarify ambiguity.[71] The statute in question in *Summerour* used words such as "shall" and "be guided."[72] These phrases made it ambiguous to the court as to the extent that the provisions were mandatory. However, when examining the statute within the context of the General Assembly's intentions and the presumption that they enact all statutes with full knowledge of the existing condition of the law and with reference to it, the court determined that the statute in question was best understood as mandatory, despite the ambiguous language.[73]

The Supreme Court of Georgia in *Houston v. Lowes of Savannah*[74] held that a statute "must be viewed so as to make all its parts harmonize and to give a sensible and intelligent effect to each part."[75] It is not presumed

64. Deal v. Coleman, 294 Ga. 170, 172, 751 S.E.2d 337, 341 (2013).
65. *Id.*
66. *Id.* at 172–73, 751 S.E.2d at 341.
67. *Id.*
68. *Id.*
69. City of Marietta v. Summerour, 302 Ga. 645, 649, 807 S.E.2d 324, 328 (2017).
70. *Id.* at 645, 807 S.E.2d at 324.
71. *Id.* at 649, 807 S.E.2d at 328.
72. *Id.* at 654, 807 S.E.2d at 331.
73. *Id.*
74. Houston v. Lowes of Savannah, Inc., 235 Ga. 201, 219 S.E.2d 115 (1975).
75. *Id.* at 203, 219 S.E.2d at 116.

by the courts that the legislature did not write any part of a statute without meaning.[76]

2. Analyzing statutes awarding attorney's fees

When courts analyze statutes that award attorney's fees, they must also consider the usual rule, the "American Rule."[77] This rule bars the shifting of attorney's fees from a prevailing plaintiff to a losing defendant. In *Marx v. General Revenue Corp*,[78] the Supreme Court of the United States held that under the American Rule, each party pays their own attorney's fees, win, or lose, unless a statute or contract provides otherwise.[79]

To incentivize the consideration of good-faith settlement offers, the Georgia General Assembly adopted an exception to the American Rule—O.C.G.A. § 9-11-68—which authorizes the recovery of attorney's fees incurred after a defendant rejects a good-faith settlement offer that is later vindicated by the jury's verdict.[80] As analyzed in *Georgia Department of Corrections v. Couch*,[81] the statute provides that in a case where certain prerequisites are met, the prevailing party can be compensated for the payment of reasonable attorney's fees.[82]

The award of attorney's fees is a deviation from common law.[83] The Supreme Court of Georgia held in *Harris v. Mahone*[84] that such an award must be "strictly construed against the award of such damages."[85] This means the courts are to assume "the General Assembly meant what it said and said what it meant," and to analyze the statutes in the most natural and reasonable way.[86]

Awards of litigation expenses and attorney's fees can often have a punitive effect on the defendant, but punishment is not the intention of the courts.[87] In *American Medical Transport Group, Inc. v. Glo-An, Inc.*,[88] the court held that the compensatory and deterrent goals of the

76. *Id.*
77. Marx v. Gen. Revenue Corp., 568 U.S. 371, 382 (2013).
78. 568 U.S. 371 (2013).
79. *Id.* at 378–9.
80. O.C.G.A. § 9-11-68 (2023).
81. 295 Ga. 469, 759 S.E.2d 804 (2014).
82. *Id.* at 476, 759 S.E.2d at 810–11.
83. Harris v. Mahone, 340 Ga. App. 415, 418, 797 S.E.2d 688, 692 (2017).
84. 340 Ga. App. 415, 797 S.E.2d 688 (2017).
85. *Id.* at 418, 797 S.E.2d 692.
86. *Id.* at 417–8, 797 S.E.2d at 692.
87. City of Warner Robins v. Holt, 220 Ga. App. 794, 795, 470 S.E.2d 238, 240 (1996).
88. 235 Ga. App. 464, 509 S.E.2d 738 (1998).

attorney's fees statutes O.C.G.A. § 13-6-11 and O.C.G.A. § 9-11-68 intend to compensate for unnecessary litigation resulting from litigious conduct/bad faith or the failure to accept a good faith and reasonable settlement offer.[89]

The Supreme Court of Georgia in *Hoard v. Beveridge*[90] held that awards of attorney's fees under O.C.G.A. § 9-15-14 must be limited to those incurred because of the sanctionable conduct.[91] Similarly, in *Trotter v. Summerour*,[92] the Georgia Court of Appeals held that a trial court is to exclude any fees that were not incurred as a result of the frivolous claims when the award was under O.C.G.A. § 9-15-14.[93] Although they are treated as sanctions and only allowed for sanctionable behavior, the court in *Williams v. Williams*[94] referred to the attorney's fees awarded under O.C.G.A. § 9-15-14 as damages.[95]

The Georgia Court of Appeals in *Eichenblatt v. Piedmont/Maple, LLC.*,[96] held that O.C.G.A. § 9-11-68 authorizes only a single recovery of fees incurred as the result of the failure to accept a good-faith offer.[97] In *Kennison v. Mayfield*,[98] the court held that O.C.G.A. § 9-11-68 "contains no requirement that the rejecting party have acted inappropriately before the trial court can award fees."[99] The Georgia Court of Appeals also noted in *Shaha v. Gentry*[100] that the purpose of O.C.G.A. § 9-11-68 is to encourage acceptance of good faith offers.[101]

However, in *Georgia Department of Corrections v. Couch*,[102] the Supreme Court of Georgia analyzed O.C.G.A. § 9-11-68.[103] The court held that attorney's fees under this statute are not damages.[104] In fact, they held that they were sanctions as they were based off the party's behavior

89. Both O.C.G.A. § 13-6-11 and O.C.G.A. § 9-11-68 limit the compensation to reasonable fees and expenses. *Am. Med. Transp. Grp., Inc.*, 235 Ga. App. at 467, 509 S.E.2d at 741; O.C.G.A. § 13-6-11; O.C.G.A. § 9-11-68.

90. 298 Ga. 728, 783 S.E.2d 629 (2016).

91. *Id.* at 730, 783 S.E.2d at 631.

92. 273 Ga. App. 263, 614 S.E.2d 887 (2005).

93. *Id.* at 266, 614 S.E.2d at 890.

94. 301 Ga. 218, 800 S.E.2d 282 (2017).

95. *Id.* at 226, 800 S.E.2d at 288.

96. 358 Ga. App. 234, 854 S.E.2d 572 (2021).

97. *Id.* at 236, 854 S.E.2d 574.

98. 359 Ga. App. 52, 859 S.E.2d 738 (2021).

99. 359 Ga. App. at 52 n.22, 859 S.E.2d at 748.

100. 359 Ga. App. 613, 859 S.E.2d 567 (2021).

101. *Id.* at 614, 859 S.E.2d at 569.

102. 295 Ga. 469, 759 S.E.2d 804 (2014).

103. *Id.*

104. *Id.* at 475, 759 S.E.2d at 810.

during litigation and therefore were not up to the determination of the jury.[105] The court determined the purpose of this statute to be to promote the acceptance of reasonable settlement offers rather than wasting time and resources litigating weak cases.[106] Thereby, this statute is advancing another public policy of the state—to encourage negotiations and settlements.[107]

C. Public Policy to Encourage Negotiations and Settlements

In *Couch*, the court emphasized the state's "strong public policy of encouraging negotiations and settlements."[108] The court's reasoning for this policy is "to avoid unnecessary litigation."[109] Frivolous litigation that could have been resolved with a good faith settlement clogs up the courts. The courts adopted this public policy as shown through statutory decisions. O.C.G.A. § 9-11-68 is often called the "offer of settlement statute" as the clear purpose is to "encourage litigants in tort cases to make and accept good faith settlements in order to avoid unnecessary litigation."[110] However, the courts do not allow sanctions for just any settlement rejection, the statute only applies when litigants refuse settlements the courts deem to be reasonable and made in good faith.[111]

1. How do courts determine what offers are rejectable?

The Court of Appeals of Georgia in *CaseMetrix, LLC v. Sherpa Web Studios, Inc.*[112] determined that a settlement offer must meet certain criteria.[113] To be enforceable, an agreement must contain language that is unambiguous and clear as to the scope of the claims to be resolved.[114] This means that the offer must clearly and sufficiently identify "the claim or group or category of claims that the proposal cover[s]."[115] The settlement offer must also identify the relevant conditions of the settlements because it is material to identify the scope of claims required to be relinquished by the offer.[116]

105. *Id.* at 481, 759 S.E.2d at 814.
106. *Id.* at 482, 759 S.E.2d at 814–15.
107. *Id.* at 471, 759 S.E.2d at 807.
108. *Couch*, 295 Ga. at 471, 759 S.E.2d at 807.
109. *Id.*
110. *Id.*; O.C.G.A. § 9-11-68.
111. *Couch*, 295 Ga. at 471–72, 759 S.E.2d at 808.
112. 353 Ga. App. 768, 839 S.E.2d 256 (2020).
113. *Id.* at 772, 839 S.E.2d at 259.
114. *Id.*
115. *Id.*
116. *Id.*

The court found that the public policy of encouraging litigants to accept good faith settlement proposals to avoid unnecessary litigation is not served "if the recipient of a settlement offer must guess at the offer's meaning or scope in attempting to weigh the risks and advantages of accepting a proposal as opposed to continuing litigation."[117] Therefore, the court held that "[t]he requirements of O.C.G.A. § 9-11-68(a) help to ensure that offerees will not have to labor under confusion in deciding whether to accept a settlement offer."[118]

In *CaseMetrix* the court held that the rejection of the settlement offer did not meet the requirements of O.C.G.A. § 9-11-68 because the offer was ambiguous.[119] The court held that the offer had two plausible readings, reasoning that "a word or phrase is ambiguous only when it is of uncertain meaning and may be fairly understood in more ways than one. An ambiguity, then, involves a choice between two or more constructions of the contract."[120] This lack of clarity did not meet the standards of O.C.G.A. § 9-11-68 and the offer was therefore rejectable. [121]

The element of bad faith which will support a claim for attorney's fees under this provision, must relate to the acts in the transaction itself prior to the litigation, not to the motive with which a party proceeds in the litigation.[122] "[S]tatutory recovery for stubborn litigiousness or causing unnecessary trouble and expense is authorized if there exists no bona fide controversy or dispute regarding liability for the underlying cause of action."[123] Where there is no controversy or dispute regarding a defendant's liability for the tort claim, then rejecting a settlement offer may be found to be in bad faith. [124] Just failing to accept a settlement offer is not acting in bad faith.[125]

In *Hillman v. Bord,*[126] the appellants failed to show an element of bad faith in the appellees.[127] The Court of Appeals of Georgia found that the trial court was correct in finding that the settlement was made in good faith. The trial court, to get a context of the case, looked to the appellees' counsel's affidavit and his testimony on the stand. It also looked to his

117. *Id.*
118. *Id.*
119. *Id.* at 773, 839 S.E.2d at 260
120. *Id.*
121. *Id.*
122. David G. Brown, P.E., Inc. v. Kent, 274 Ga. 849, 850, 561 S.E.2d 89, 90 (2002).
123. *Id.* at 850, 561 S.E.2d 90–1.
124. S. Gen. Ins. Co. v. Holt, 262 Ga. 267, 416 S.E.2d 274 (1992).
125. *Id.* at 269, 416 S.E.2d at 276.
126. 347 Ga. App. 651, 820 S.E.2d 482 (2018).
127. *Id.* at 657, 820 S.E.2d at 489.

e-mails which showed he believed the appellees had strong defenses to liability and limited exposure.[128] The trial court determined that the appellees intended to settle the claim, had "a reasonable basis" for making the offer, and that the [a]ppellants had failed to show "'an absence of good faith' by the [a]ppellees."[129]

D. Trends in the Eleventh Circuit

In 2020, the United States Court of Appeals for the Eleventh Circuit in *MSP Recovery Claims, Series LLC v. Ace American Insurance Company, et. al.*,[130] ruled in part that double damages were available to organizations known as downstream entities or actors.[131] These organizations contracted with Medicare Advantage Plans to help provide benefits to their employees. This decision opened the door for these organizations to sue primary plans for double damages under the Medicare Secondary Payer's private cause of action statute.[132]

IV. COURT'S RATIONALE

In *Junior v. Graham,* Justice Bethel delivered the opinion of the court with all other Justices concurring except Justice Peterson, who was disqualified.[133] The court held that Junior was able to recover attorney's fees under two statutory provisions.[134] The court held that, despite using similar measures for calculating the number of damages or sanctions, the provisions provided for different recoveries.[135]

This case, as Justice Bethel put it, involved the "harmonization of two statutory provisions."[136] The first provision, O.C.G.A. § 13-6-11, gives the jury in a civil suit the authority to award attorney's fees to a prevailing party if they find the opposing party "has acted in bad faith, has been stubbornly litigious, or has caused the plaintiff unnecessary trouble and expense" prior to the initiation of litigation.[137] The second provision, O.C.G.A. § 9-11-68(b)(2) provides for attorney's fees and litigation expenses in the form of a sanction if these expenses were incurred after

128. *Id.* at 657, 820 S.E.2d at 488
129. *Id.*
130. 974 F.3d 1305 (11th Cir. 2020).
131. *Id.* at 1314.
132. *Id.* at 1308.
133. Junior v. Graham, 313 Ga. 420, 870 S.E.2d 378 (2022).
134. *Id.*
135. *Id.* at 420, 870 S.E.2d at 379.
136. *Id.*
137. *Id.*

the failure to accept a reasonable settlement offer.[138] Contrary to the decision of the Court of Appeals of Georgia, the Supreme Court of Georgia held that the two statutory provisions did not compel a "set-off" because they are addressing different conduct.[139]

In interpreting the two provisions, the court looked to their context.[140] First, the court acknowledged that there is a presumption that the General Assembly "meant what they said and said what they meant" and that the statute should be interpreted by the plain language and be read in the most natural and reasonable way.[141] Looking to the *City of Marietta*, the court noted that it must also read the statute in the context of other statutory provisions of which it is a part.[142] Additionally, the court looked to the *Houston* case stating that "a statute must be viewed so as to make all its parts harmonize and to give a sensible and intelligent effect to each part."[143]

With those principles in mind, the court looked to the two provisions.[144] First, they acknowledged and upheld that the public policy of Georgia is to bar double recovery by plaintiffs. However, the court here held that this is typically the case for compensatory damages and that was not the situation in front of them.[145] When looking at O.C.G.A. § 13-6-11 the court held that it provided for an award of attorney's fees and litigation expenses as a form of damages. These damages were found in the *Couch* case to be compensatory. The award of attorney's fees under O.C.G.A. § 9-11-68(b)(2), however, were found in *Couch* to provide a sanction for litigation costs.[146] The award under O.C.G.A. § 9-11-68(b)(2) is not a component of tort damages but rather a potential cost for inappropriate conduct during litigation.[147]

The court went on to discuss the difference in the wording of the two statutory provisions.[148] While O.C.G.A. § 13-6-11 expressly made the litigation expenses "part of the damages" to be awarded by a jury,

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138. *Id.*

139. *Id.*

140. *Id.* at 423, 870 S.E.2d at 381.

141. *Id.*

142. *Id.* (quoting City of Marietta v. Summerour, 302 Ga. 645, 656, 807 S.E.2d 324, 332 (2017)).

143. *Id.* (quoting Houston v. Lowes of Savannah, Inc., 235 Ga. 201, 203, 219 S.E.2d 115, 116 (1975)).

144. *Id.*

145. *Id.* at 425, 870 S.E.2d at 382.

146. *Id.* at 426, 870 S.E.2d at 383 (citing Ga. Dep't of Corr. v. Couch, 295 Ga. 469, 474, 759 S.E.2d 804, 814 (2014)).

147. *Id.* at 425–26, 870 S.E.2d at 383.

148. *Id.* at 426, 870 S.E.2d at 383 (citing *Couch*, 295 Ga. at 475, 759 S.E.2d at 810).

O.C.G.A. § 9-11-68(b)(2) does not identify its award as damages. Furthermore, an award under O.C.G.A. § 13-6-11 is based on the conduct arising from the underlying cause of action, which is being litigated, while O.C.G.A. § 9-11-68(b)(2) is entirely related to the actions of the opposing party throughout the litigation.[149] The statutes also differ in that O.C.G.A. § 13-6-11 permits a jury to award attorney's fees as a part of damages whereas O.C.G.A. § 9-11-68(b)(2) *requires* that when certain statutory conditions are met, such fees be awarded.[150]

The court then turned to the intentions of the General Assembly regarding these two statutory provisions.[151] When examining the broader structure of O.C.G.A. § 9-11-68, the court held that it was clear that the General Assembly had "contemplated in other instances that an award of attorney's fees and litigation expenses under one statute might be offset by a similar recovery under another statute or that recovery under one statute bars recovery under the other altogether."[152] Additionally, O.C.G.A. § 9-11-68(e)(3) expressly prohibits that a plaintiff recover under both that statutory provision and O.C.G.A. § 9-15-14 as they both address similar claims of frivolous litigation.[153] The General Assembly specified that "[a] party may elect to pursue either the procedure specified in this subsection, or the procedure specified in O.C.G.A. § 9-15-14 but not both."[154] However, the court noted, there was no such limitation in O.C.G.A. § 9-11-68(b)(2) regarding O.C.G.A § 13-6-11. The absence of this limitation, the court held, "suggests that the General Assembly did not mean an award of fees and expenses under O.C.G.A. § 13-6-11 to limit an award under O.C.G.A. § 9-11-68(b)(2) or to require the party seeking attorney fees and litigation expenses to choose between those provisions."[155]

Ultimately, the Supreme Court of Georgia dismissed the Georgia Court of Appeal's reasoning on the grounds that the language of the statutes had been misinterpreted.[156] The Court of Appeals had held that because Junior had been compensated under O.C.G.A. § 13-6-11 the costs under O.C.G.A. § 9-11-68 were no longer "incurred."[157] The Supreme Court of Georgia held that when the Court of Appeals looked to the

149. *Id.* at 426, 870 S.E.2d at 383 (citing *Couch*, 295 Ga. at 475, 759 S.E.2d at 810).
150. *Id.* (emphasis in original).
151. *Id.* at 426, 870 S.E.2d at 383.
152. *Id.*
153. *Id.* at 426–7, 870 S.E.2d at 383.
154. *Id.* at 427, 870 S.E.2d at 383.
155. *Id.* at 428, 870 S.E.2d at 384.
156. *Id.*
157. *Id.*

dictionary definitions for "incur" they were applying the word as a present-tense definition.[158] However, "O.C.G.A. § 9-11-68(b)(2) speaks of [attorney's fees] and expenses of litigation 'incurred'—past tense."[159]

V. IMPLICATIONS

Following the Supreme Court of Georgia's decision in *Junior v. Graham,* there is additional pressure on defendants to settle, despite their own good faith belief that there is no liability. If the court or jury were to find that there is no viable argument against liability, defendants can be forced to pay up to a double award of attorney's fees and litigation expenses.

If found liable under both statutes, defendants could be hit with duplicate fees. Despite the statutes potentially being intended to remedy different conduct, the ruling in *Junior* appears to create the danger that a defendant could be liable under both statutes.

On the other hand, this decision allows for courts to further incentivize settlement and negotiation. When faced with a reasonable settlement offer, a defendant may consider more carefully the strengths of their defense and whether this could be considered frivolous. This decision also benefits plaintiffs who make a good faith effort to settle only to have to continue with litigation that is timely and expensive.

This decision is clarifying and changing the landscape of recovery in Georgia in an impactful way. In fact, Georgia treatises have been updating to reflect the decision of *Junior* and the availability of ostensible double recovery.[160]

While seemingly to many this decision goes against the public policy of allowing double recovery, the court appears to be pushing for the parties to settle their disputes outside the court and to not waste time and resources. Law firms are already expressing concern regarding this decision and have seen plaintiffs changing their complaints to include both statutes where applicable.[161]

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158. *Id.*

159. *Id.*

160. 1 Georgia Civil Practice § 8.05 (2022); Georgia Civil Procedure Forms Publication Update (2022); 2 Georgia Civil Procedure Forms O.C.G.A. § 9—11—68 (2022).

161. Sarah Daley, *Georgia Supreme Court Rules Statutes Allow For Double Recovery of Attorney's Fees,* SWIFT CURRIE, https://www.swiftcurrie.com/the-tort-report-spring-2022-Georgia-Supreme-Court-Rules-Statutes-Allow-for-Double-Recovery-of-Attorneys-Fees [https://perma.cc/N49E-6L25] (last visited Nov. 18, 2022); Sam Britt, *Supreme Court of Georgia Approves "Double Recovery" of Attorney's Fees by Plaintiffs,* MCGRAW, MILLER, BOMAR & BAGLEY, https://mmbblaw.com/Supreme-Court-of-Georgia-Approves-quotDouble-Reco [https://perma.cc/AF5E-9SS3] (last visited Nov. 18, 2022).