

**IN THE COURT OF APPEALS
STATE OF GEORGIA**

EVANS COUNTY BOARD OF)
COMMISSIONERS, ET AL.)
)
Defendant-Appellant,)
)
v.)
)
THE CLAXTON ENTERPRISE,)
)
Plaintiff-Appellee.)

FILE NO. A02A0884

**BRIEF OF AMICUS CURIAE
GEORGIA FIRST AMENDMENT FOUNDATION**

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This appeal presents an issue of first impression in Georgia: Whether the attorney fees provision of the Open Meetings Act, O.C.G.A. § 50-14-1 et seq. (“the Act”), includes attorney fees for a plaintiff’s successful appeal to enforce the Act’s provisions. Although Georgia courts have not decided this issue, substantial law from other jurisdictions and analogous law in Georgia makes clear that the express statutory provision for attorney fees to plaintiffs authorizes trial courts to award fees incurred on appeal. Therefore, the Court should hold that the trial court did not abuse its discretion in awarding appellate fees. Further, the Court should affirm the trial court’s findings that the appellant, the Evans County Board of Commissioners (“the Board” or “Appellant”), acted without substantial justification in closing its meetings in violation of the Act and that no special circumstances existed that would justify the reduction of attorney fees. The Court should thus affirm the attorney fee award.

STATEMENT OF INTEREST

The Georgia First Amendment Foundation is a Georgia non-profit corporation organized in 1994 to inform and educate the public on government access and First Amendment issues and to provide legal support in cases in which the public’s access to public institutions is threatened.

STATEMENT OF THE CASE

Appellee The Claxton Enterprise (“the Enterprise” or “Appellee”) brought this action to enforce the Georgia Open Meetings Act following two July 1999 meetings of the Board that the Evans County Superior Court and this Court held were closed in

violation of the Act. The recitation of the facts in the Board's brief is materially incorrect in several respects, as detailed in Appellee's statement of procedural history and facts, (see Brief of Appellee at 1-5), and in the following factual summary.

I. THE TRIAL COURT FOUND THAT THE BOARD VIOLATED THE OPEN MEETINGS ACT

During a July 1, 1999 meeting, the Board went into closed session in violation of the Open Meetings Act. See Claxton Enterprise v. Evans County Board of Comm'rs, 249 Ga. App. 870, 872, 549 S.E.2d 830, 833 (2001).¹ Although the Board invoked the Act's attorney-client exception to discuss "probable litigation," the county attorney was not present for the closed session." See id. at 871, 549 S.E.2d at 832. Before the Board's next meeting on July 6, 1999, the Board determined that the July 1 meeting should have been closed for "personnel reasons" rather than to discuss potential litigation. See id. Thus, at the July 6 meeting, the Board offered this substitute explanation for closing the July 1 meeting. See id., 549 S.E.2d at 833.

Again on July 6 (this time with the county attorney present), the Board closed a meeting in violation of the Act. See id. at 871, 875, 549 S.E.2d at 833, 835. In a later-filed affidavit, the Board stated that the meeting was closed to discuss a personnel matter involving a county employee and to discuss potential litigation with the county attorney.

¹ The facts stated in Parts I and II are taken from the Court's published opinion in the first appeal, Claxton Enterprise v. Evans County Board of Comm'rs, 249 Ga. App. 870, 870-72 (2001). These underlying facts are undisputed; the disputed facts relate to Appellant's erroneous or misleading description of the Court's opinion and the proceedings on remand. (See Brief of Appellant at 3, 10-11; Brief of Appellee at 3-4).

See id. at 872, 549 S.E.2d at 833. However, the discussions concerned a non-county employee, meaning that the “personnel” exception was inapplicable. See id. The official minutes and affidavits required under the Act were not filed until August 3, 1999. See id. at 871-72, 549 S.E.2d at 832-33.

The Enterprise brought suit to enforce the Act, seeking injunctive relief and statutory attorney fees and costs. See id. at 870, 549 S.E.2d at 832. Following an evidentiary hearing, the trial court concluded that the July 1 closed meeting violated the Act, a conclusion that the Board has never contested. See id. at 872, 549 S.E.2d at 833. However, the court also determined that the July 6 meeting was properly closed under the attorney-client exception. The trial court awarded attorney fees, which it reduced upon determining that the Board did not act in “bad faith.” See id.

The Enterprise appealed, inter alia, the trial court’s determination that the July 6 meeting was properly closed; the court’s failure to find a violation on the grounds that the Board’s minutes and affidavits were improper, insufficient, or untimely; and the court’s attorney fee award.² See id. at 870, 549 S.E.2d at 832.

² The Enterprise also appealed the trial court’s failure to find that the Board’s private discussions of its reasons for closing the July 1 meeting, and whether to close the July 6 meeting, violated the Act. The Court affirmed, concluding that the Board did not violate the “letter of the law” in those instances. See Claxton, 249 Ga. App. at 875, 549 S.E.2d at 835. However, the Court stated that the record “revealed a cavalier attitude” on the part of the Board regarding its duties under the Act. Id. at 876, 549 S.E.2d at 836. In emphasizing the narrowness of its holding, the Court looked to foreign law to determine that telephonic meetings could fall within the Act’s definition. See id. at 875-76, 549 S.E.2d at 835 (citing Nevada law)).

II. THIS COURT HELD THAT THE BOARD VIOLATED THE OPEN MEETINGS ACT

In Claxton Enterprise v. Evans County Board of Comm'rs, 249 Ga. App. 870, 549 S.E.2d 830 (2001), the Court reversed and held that the July 6 meeting violated the Act. Because exceptions to the Act must be narrowly construed, the Court reasoned, the attorney-client exception could not apply unless an agency showed “a realistic and tangible threat of legal action against it” Id. at 874, 549 S.E.2d at 834. The Court concluded that the Board did not make such a showing, and that its proffered justification instead “was an idle threat, a statement that, standing alone, was **insufficient to justify** closing a meeting under [the exception].” Id., 549 S.E.2d at 835 (emphasis added).

The Court also ruled in the Enterprise’s favor that “the Board’s failure to timely file the affidavit and minutes pertaining to the July 1 meeting constituted an additional violation of the Act.” Id. at 877, 549 S.E.2d at 836. Criticizing the Board’s use of form affidavits, the Court noted that “[a]n affidavit should be treated with more solemnity and care, especially one which is used to inform the public in compliance with [the Act].” Id.

The Court vacated and remanded the attorney fee award because the trial court failed to follow statutory guidelines in two respects: First, the court failed to consider whether the Board lacked “substantial justification” for violating the Act, which would mandate an attorney fees award. Second, the court improperly reduced the fee award upon a finding of mere lack of “bad faith,” rather than “special circumstances” such as would justify a discretionary reduction under the statute. See id., 549 S.E.2d at 836-37.

III. THE PROCEEDINGS ON REMAND

In its briefs and oral argument below, and now on appeal, the Board has clung to the argument that the earlier finding of “no bad faith” qualifies as both: (1) “substantial justification” for the Board’s failure to comply with the Act; and (2) a “special circumstance” warranting reduction or elimination of attorney fees. (See Brief of Appellant at 3). After briefing and oral argument, the trial court rejected the Board’s argument. (See *id.*; Order of Judge Rose dated October 9, 2001 (“October 9 Order”), at 2). The court concluded as follows:

(1) As to whether substantial justification existed for the Board’s noncompliance:

“After consideration of the record as a whole, this Court finds that there was no substantial justification . . . Defendants’ stated reasons for closure were substantially groundless in nature. Further, Defendants were without substantial justification in failing to timely record the affidavit and minutes from the July 1 meeting.” (October 9 Order at 2);

(2) On the existence of special circumstances: “[T]his Court specifically finds that no special circumstances were present which might affect an award under [O.C.G.A. § 50-14-5(b)].” (*Id.*); and

(3) As to the Enterprise’s demand for attorney fees incurred on its successful appeal under the Act: The court specifically held that to rule that “a prevailing party must absorb his or her own costs of appeal . . . would have a chilling effect on private citizens filing suit under the statute[,]” which would subvert the Act’s

very purpose: “to protect the public . . . from ‘closed door’ politics” and “the misuse of power such policies entail.” (Id. at 4).

The trial court was correct in all respects, and for the reasons set forth below and in the Enterprise’s brief, the Court should affirm the trial court’s decision.

ARGUMENT AND CITATION OF AUTHORITIES

Georgia’s Open Meetings Act, O.C.G.A. §§ 50-14-1 et seq., provides that “[a]ll meetings as defined [in the Act] shall be open to the public.” O.C.G.A. § 50-14-1(b).

The Act also provides that “[t]he minutes of a meeting . . . shall be promptly recorded . . . in no case later than immediately following the next regular meeting” O.C.G.A. § 50-14-1(e)(2). The Court has held, and the Board does not challenge, that the Board committed three separate violations of the Act. See Claxton, 249 Ga. App. at 873-76, 549 S.E.2d at 833-36. This appeal concerns only the proper award of attorney fees to plaintiffs who, acting as private attorneys general, bring actions to enforce the Act. See O.C.G.A. § 50-14-5.

The Act’s enforcement provision states, in pertinent part, that

in any action brought to enforce [the Act] in which the court determines that an agency acted without substantial justification in not complying with [the Act], the court shall, unless it finds that special circumstances exist, assess in favor of the complaining party reasonable attorney’s fees and other litigation costs reasonably incurred. Whether the position of the complaining party was substantially justified shall be determined on the basis of the record as a whole which is made in the proceeding for which fees and other expenses are sought.

O.C.G.A. § 50-14-5(b).

I. THE TRIAL COURT CORRECTLY DETERMINED THAT THE BOARD LACKED SUBSTANTIAL JUSTIFICATION FOR VIOLATING THE ACT, AND THUS PROPERLY AWARDED MANDATORY ATTORNEY FEES (1ST ENUMERATION OF ERROR)

In an action to enforce the Act, when the court determines that an agency violated the Act “without substantial justification,” the court must award attorneys fees to the plaintiff. See O.C.G.A. § 50-14-5(b); Claxton, 249 Ga. App. at 877, 549 S.E.2d at 837. An agency “lacks substantial justification” for violating the Act by failing to comply for reasons that are “substantially frivolous, substantially groundless, or substantially vexatious.” See Claxton, 249 Ga. App. at 877, 549 S.E.2d at 837. In making its determination, the court must examine “the record as a whole which is made in the proceeding for which fees and other expenses are sought.” O.C.G.A. § 50-14-5(b).

Here, the Court vacated the first attorney fee award because the trial court failed to follow strictly the statutory guidelines for determining the award. See Claxton, 249 Ga. App. at 877, 549 S.E.2d at 836-37. On remand, the court hewed jot and tittle both to the statutory language and to the Court’s remand directions. (See October 9 Order at 1-3). Examining the whole record, the court found that the Board’s actions were “substantially groundless.” (See id. at 2). Thus, the court correctly held “that there was no substantial justification for Defendants to close either of the two meetings” (Id.).³

³ The court also correctly held that “Defendants were without substantial justification in failing to timely record the affidavit and minutes from the July 1 meeting.” (October 9 Order at 2). This determination is unchallenged and stands as an independent ground for affirmance of the mandatory attorney fees award.

A. Standard Of Review⁴

The “any evidence” rule applies to the mandatory award of attorney fees when a court finds no “substantial justification” for failure to comply with the Act. See, e.g., Bankhead v. Moss, 210 Ga. App. 508, 509 (1993) (“any evidence rule” standard for mandatory award of fees under O.C.G.A. § 9-15-14(a)). Thus, the Court must affirm the attorney fee award if any evidence exists to support the trial court’s judgment.

B. Ample Evidence Exists To Support The Trial Court’s Finding

The court considered “the record as a whole” to determine whether the Board’s noncompliance lacked substantial justification. See O.C.G.A. § 50-14-5(b); (October 9 Order at 2). The record includes the following undisputed facts:

- (1) the Board’s initial assertion, and subsequent retraction, of the attorney-client exception to justify closing the July 1 meeting -- despite the fact that the county attorney was not present, see Claxton, 249 Ga. App. at 871, 549 S.E.2d at 832;
- (2) the Board’s belated substitution of the personnel exception to justify closing the July 1 meeting -- although no county employee was discussed, see id. at 872, 549 S.E.2d at 833;

⁴ In each enumeration of error, the “clearly erroneous standard” applies to the trial court’s findings of fact. See Claxton, 249 Ga. App. at 870, 549 S.E.2d at 832. The “clearly erroneous” test is the “any evidence” rule. Id. That is, “if there is any evidence to support the findings of fact,” then this Court must affirm. See id. Further, this Court must construe the evidence in favor of the judgment. See id.

(3) the Board’s assertion of the attorney-client exception to justify closing the July 6 meeting, which this Court properly found that “the record does not even support,” id. at 874, 549 S.E.2d at 835;⁵

(4) the Board’s “cavalier attitude” toward its duties under the Act, see id. at 876, 549 S.E.2d at 836;

(5) the Board’s continued reliance solely on an absence of “bad faith” to justify its actions. (See Brief of Appellant at 3).

The record shows that the Board engaged in serial violations of the Act. For illegally closing meetings, the Board asserted facially invalid justifications: attorney-client discussions with no attorney present, personnel discussions about non-county personnel, and a discussion of “potential litigation” that had never been threatened. See Claxton, 249 Ga. App. at 871, 875, 549 S.E.2d at 832, 835. For its failure to timely file affidavits, the Board has never proffered any justification. This Court rightly summed up the Board’s attitude as “cavalier.” See id. at 876, 549 S.E.2d at 836. These undisputed facts provide ample evidence to support the finding that the Board lacked substantial justification for not complying with the Act.

⁵ On appeal, this Court conducted an independent review of the record to determine whether “any evidence existed” to support the trial court’s findings. See Claxton, 249 Ga. App. at 870, 549 S.E.2d at 832. Because the Enterprise sought attorney fees incurred on the first appeal, the record “made in the proceeding for which fees and other expenses are sought” includes the proceeding on appeal, and the trial court could consider the Court’s factual determinations. See O.C.G.A § 50-14-5(b).

C. The Trial Court Correctly Determined That Absence Of Bad Faith Does Not Equal Substantial Justification

“Lacking substantial justification” for violating the Act means failing to comply for reasons that are “substantially frivolous, substantially groundless, or substantially vexatious.” See Claxton, 249 Ga. App. at 877, 549 S.E.2d at 837 (citing O.C.G.A. §§ 9-15-14(b), 9-15-15(a), 43-1-19(f)). The lack of a subjective “bad faith” intent to violate the Act cannot alone be substantial justification for noncompliance in the Open Meetings Act context, because such a rule would defeat the Act’s public interest purpose. See, e.g., Associated Press v. Board of Public Educ., 804 P.2d 376, 380 (Mont. 1991) (affirming trial court’s discretionary fee award (and awarding appellate fees) and rejecting the argument that the court abused its discretion because the actions were not in bad faith); State ex rel. Hodge v. Town of Turtle Lake, 508 N.W.2d 603, 609 (Wis. 1993) (“denying attorney's fees to a prevailing party simply because of good faith . . . would remove much incentive to privately enforce the law and, perhaps, in many cases discourage it”).

Whereas the absence of bad faith may be material in the context of sanctions for frivolous litigation, see Northen v. Frolick & Assoc., 236 Ga. App. 7, 13, 510 S.E.2d 857, 862 (1999), this is because frivolous litigation statutes’ purpose is to punish litigation abuses. See Dixon v. Home Indem. Co., 206 Ga. App. 623, 624, 426 S.E.2d 381, 382 (1992) (“Though an award . . . under O.C.G.A. § 9-15-14 also serves the incidental purpose of providing compensation to the injured party, this does not diminish the reality that awards made under it are ‘sanctions.’”). In contrast, the purpose of the Act’s

enforcement provision is not punitive, but to ensure open government and encourage citizen enforcement. See O.C.G.A. § 50-14-5; Common Cause v. Stirling, 174 Cal. Rptr. 200, 202-03 (Cal. Ct. App. 1981) (Brown Act’s attorney fee provision, analogous to O.C.G.A. § 50-14-5, was enacted “to encourage private enforcement”; “in the absence of such provision there would be little incentive to bring such lawsuits”); see also Lambert v. Fulton County, 151 F. Supp. 2d 1364, 1368 (N.D.Ga. 2000) (analogous federal attorney fees statutes, e.g., 42 U.S.C. §§ 1988, 2000e-5(k), “facilitate private enforcement of civil rights”); (October 9 Order at 4 (“to rule that a prevailing party must absorb his or her own costs . . . would have a chilling effect on private citizens filing suit under this statute”)). Because of the Act’s public interest purpose, bad faith is immaterial in the open meetings context. See Associated Press, 804 P.2d at 380.

Further, because “substantially groundless” is an objective standard, the Board’s subjective intent is irrelevant to the substantial justification analysis. See id.; Munoz v. American Lawyer Media, L.P., 236 Ga. App. 462, 465-66, 512 S.E.2d 347, 351 (affirming the trial court’s exclusion as “immaterial” affidavits attesting to a plaintiff’s “good faith” that lacked citation to legal authority in an action for attorney fees under § 9-15-14). The Board has cited no authority to support applying a subjective standard. An argument without legal authority is “mere opinion.” See id. at 465-66, 512 S.E.2d at 351.

Here, the trial court correctly found that the Board’s actions “lacked substantial justification” because “the Board’s stated reasons for closure were substantially groundless in nature.” (See October 9 Order at 2). The trial court scrupulously followed

the Court’s instructions on remand in rejecting the Board’s “no bad faith” argument. (See id. (stating that “[bad faith] is not the standard that applies in this case.”)). In light of the Act’s purpose, the trial court properly rejected the argument that lack of bad faith is “substantial justification” for violating the Act.⁶

II. THE TRIAL COURT PROPERLY DETERMINED THAT APPELLANTS SHOWED NO SPECIAL CIRCUMSTANCES TO JUSTIFY REDUCING THE ATTORNEY FEE AWARD (2D ENUMERATION OF ERROR)

After finding no substantial justification for violating the Act, a court may reduce an attorney fee award only if it finds that “special circumstances” render the award unjust. See O.C.G.A. § 50-14-5(b); Claxton, 249 Ga. App. at 877, 549 S.E.2d at 837.

A. Standard Of Review

The “abuse of discretion” standard of review applies to a discretionary reduction of attorney fees. See Mathews v. Eastern Local School Dist., 2001 WL 243501, *4 (Ohio App. 4 Dist. 2001) (slip op.) (abuse of discretion standard under Ohio Open Meetings Law); see also Bankhead v. Moss, 210 Ga. App. 508, 509, 436 S.E.2d 723, 724 (1993) (abuse of discretion standard for a discretionary fee award under O.C.G.A. § 9-15-14(b)).

⁶ On appeal, the Board appears to argue that, in addition to finding the Board’s actions substantially groundless, the court also must find the Board’s actions both “substantially frivolous” and “substantially vexatious.” (See Brief of Appellant at 8). Again, the Board cites no authority, and none exists. Courts have awarded fees for lack of substantial justification upon finding groundlessness, without frivolousness and vexatiousness. See, e.g., Brunswick Floors, Inc. v. Carter, 199 Ga. App. 110, 403 S.E.2d 855 (1991); see also Phillips v. MacDougald, 219 Ga. App. 152, 157, 464 S.E.2d 390, 396 (1995) (claim was not without substantial justification because it was not substantially groundless).

B. To Further The Act’s Purpose, “Special Circumstances” Must Be Narrowly Construed

“Any exceptions to the Act . . . must be narrowly construed” to further the Act’s public interest purpose. See Claxton, 249 Ga. App. at 873, 549 S.E.2d at 834 (quoting Atlanta Journal v. Hill, 257 Ga. 398, 399, 359 S.E.2d 913 (1987) and Kilgore v. R.W. Page Corp., 261 Ga. 410, 411(3), 405 S.E.2d 655 (1991)). The Act’s attorney fees provisions encourage enforcement by citizens acting as private attorneys general. See O.C.G.A. § 50-14-5(a); Common Cause v. Stirling, 174 Cal. Rptr. 200, 202-03 (Cal. Ct. App. 1981) (Brown Act’s attorney fee provision, analogous to O.C.G.A. § 50-14-5, was enacted “to encourage private enforcement”; “in the absence of such provision there would be little incentive to bring such lawsuits”). Thus, to further the Act’s purpose, the Court must construe narrowly the “special circumstances” exception to mandatory fee awards for substantially unjustified violations. Here, giving the exception its proper construction, the court examined the facts and found no special circumstances that would justify a reduction in the attorney fee award. (October 9 Order at 2).

C. The Trial Court Properly Concluded That Absence Of Bad Faith Is Not A Special Circumstance Under The Act

Although Georgia courts have not defined “special circumstances” in the Open Meetings Act context, other courts have held that a party’s good faith, and thus lack of bad faith, cannot alone be a special circumstance that renders attorney fees unjust. See, e.g., Associated Press v. Board of Public Educ., 804 P.2d 376, 380 (Mont. 1991) (affirming trial court’s discretionary fee award over argument that the award was an

abuse of discretion because the defendant “acted in good faith and under the presumption that their actions were” legal); State ex rel. Hodge v. Town of Turtle Lake, 508 N.W.2d 603, 609 (Wis. 1993) (“the mere presence of good faith on the part of the Board cannot alone be such a [special] circumstance” in an action to enforce Wisconsin Open Meetings Law). The Hodge court explained that “denying attorney's fees to a prevailing party simply because of good faith, without other special circumstances, would remove much incentive to privately enforce the law and, perhaps, in many cases discourage it.” Id.

Here, the trial court found that “[n]o circumstances warranting a reduction or elimination of attorney fees were submitted by Defendants at any hearing.” (October 9 Order at 2). The Board mischaracterizes this finding as the trial court “fail[ing] to give consideration to” its “no bad faith” argument. (See Brief of Appellant at 9). However, the trial court’s statement indicates merely that, although it considered the Board’s argument, it determined that absence of bad faith was not a “special circumstance” under the Act.⁷ As a result, the trial court “specifically [found] that no special circumstances were present which might affect an award under this section.”

D. The Board’s New Arguments Are Not Special Circumstances Under The Act

On appeal, the Board proposes three new, additional purported “special circumstances”: (1) the argument that no “official action” was taken while in closed session; (2) the argument that the Board had a “good faith belief” that its assertion of the

attorney-client exception was reasonable; and (3) the Board’s assertion that “this was a case of first impression” and the fact that the Enterprise was forced to resort to the appellate court to enforce the Act. See Brief of Appellant, pp. 9-10. These proffered justifications for reducing the attorney fee award are materially false, irrelevant, or inappropriate at this stage, however.

The Board’s argument that no “official action” was taken in the closed sessions addresses the merits of the violation. See O.C.G.A. § 50-14-1(a)(2). However, the holdings that these meetings violated the Act are unchallenged in this appeal.⁸ Further, one of the Act’s purposes is to “ensure public access to and input into the deliberative process.” Claxton, 249 Ga. App. at 875, 549 S.E.2d at 835. What is significant is not the end result, but whether the public had input into the process. A ruling that allows a county board to escape liability for violating the Act because it took no “official action” would be contrary to the Act’s purpose.

The argument that the Board had a “good faith belief” in the reasonableness of its actions is similarly misplaced. As noted above, the Board’s subjective “good faith” intent not relevant in the Open Meetings Act context. See Associated Press, 804 P.2d at 380 (affirming award over argument that defendants “acted in good faith and under the

⁷ The Board implicitly acknowledges this in stating that the trial court “rejected its argument.” (See Brief of Appellant at 9).

⁸ The Act does not require that official action actually be taken, only that “any public matter, official business, or policy . . . is to be discussed or presented” or that “official action is to be taken.” O.C.G.A. § 50-14-1(a)(2).

presumption that their actions were” legal); State ex rel. Hodge, 508 N.W.2d at 609. The Court said as much when, addressing the Board’s private discussion prior to closing the July 6 meeting, it stated that “[i]t does not logically follow that the decision to close a meeting should be made in private just because closing a meeting is the ‘right thing to do.’” Claxton, 249 Ga. App. at 876, 549 S.E.2d at 836.

Finally, the Board’s argument that the Enterprise’s appeal, presenting issues of first impression,⁹ constitutes a special circumstance under the Act defies logic. The bare statement of the proposition is a reductio ad absurdum: The argument would excuse all violations either that were the subject of an appeal or that had never before been challenged. Under this rule, the Board could avoid liability simply by continually devising new and creative ways to violate the Act. Clearly, this is not what the Court means by protecting the public from “misuse of power” and “foster[ing] confidence in our leaders and the decisions they make.” See id. at 873, 875, 549 S.E.2d at 834-35.

III. THE TRIAL COURT PROPERLY AWARDED ATTORNEY FEES FOR THE ENTERPRISE’S SUCCESSFUL APPEAL UNDER THE OPEN MEETINGS ACT (3D ENUMERATION OF ERROR)

The Act’s mandatory provision of attorney fees to a complaining party when a

⁹ The first appeal addressed “whether the court erred in ruling that the July 6 meeting was properly closed.” See Claxton, 249 Ga. App. at 873, 549 S.E.2d at 834. Although the Court’s decision provided additional gloss on the statutory “potential litigation” exception, prior case law had established that “exceptions to the Act . . . must be narrowly construed.” See id. (citing Atlanta Journal v. Hill, 257 Ga. 398, 399, 359 S.E.2d 913 (1987)). Thus, holding that the Board could not properly invoke the exception absent a “realistic” threat of litigation, as opposed to “an idle threat,” broke no new legal ground. See id. at 874, 549 S.E.2d at 834-35.

court finds no substantial justification for noncompliance authorizes a trial court to award attorney fees incurred by a complainant whose successful appeal enforces the Act. See O.C.G.A. § 50-14-5(b); Indianapolis Newspapers v. Indiana State Lottery Comm’n, 739 N.E.2d 144 (Ind. Ct. App. 2000); Van Alstyne v. Housing Auth., 985 P.2d 97 (Colo. Ct. App. 1999); International Longshoremen’s and Warehousemen’s Union v. Los Angeles Export Terminal, 81 Cal. Rptr. 2d 456 (Cal. Ct. App. 1999); Piazza v. City of Granger, 909 S.W.2d 529 (Tex. App. 1995); Associated Press v. Board of Public Educ., 804 P.2d 376 (Mont. 1991); Ferris v. Texas Bd. of Chiropractic Exam’rs, 808 S.W.2d 514 (Tex. App. 1991); Brown v. East Baton Rouge Parish Sch. Bd., 405 So.2d 1148 (La. Ct. App. 1981); see also Belth v. Garamendi, 283 Cal. Rptr. 829 (Cal. Ct. App. 1991) (awarding appellate fees under Open Records Act; looking to analogous state private attorney general statute).

A. Standard of Review

B. Nothing In The Statutory Language Excludes Appellate Proceedings From The Act’s Scope

The Act’s broad statutory language authorizes an award of attorney fees in “any action brought to enforce the Act,” including appellate proceedings. See O.C.G.A. § 50-14-5(b); Indianapolis Newspapers v. Indiana State Lottery Comm’n, 739 N.E.2d 144 (Ind. Ct. App. 2000).

The Act sets forth the requirements for a proper attorney fee award as follows:

(1) **any action** brought to enforce the Act; (2) a judicial determination that a violation

lacked substantial justification; (3) absence of special circumstances; and (4) a review of the record as a whole “made in **the proceeding for which fees and other expenses are sought.**” O.C.G.A. § 50-14-5(b) (emphasis added). If these requirements are met, an award of attorney fees is mandatory. See O.C.G.A. 50-14-5(b); Claxton, 249 Ga. App. at 877, 549 S.E.2d at 837.

The Act does not require that the fees be incurred at the trial level, nor does the Act contain any language that excludes fees incurred on appeal. Cf. O.C.G.A. § 9-15-14(a) (frivolous litigation statute applies “[i]n any civil action in any court of record of this state”); Style Craft Homes, Inc. v. Chapman, 226 Ga. App. 634, 635, 487 S.E.2d 32, 34 (1997) (holding that in frivolous litigation statute, “court of record” does not include appellate courts). Instead, the Act explicitly provides that the court shall assess fees in **any** enforcement action. See O.C.G.A. § 50-14-5(b) (emphasis added). Further, the Act’s specification of “the proceeding for which fees and other expenses are sought” does not exclude appellate proceedings. See, e.g., Brown v. East Baton Rouge Parish Sch. Bd., 405 So.2d 1148 (La. Ct. App. 1981) (awarding fees on appeal under statute authorizing fees to prevailing party in an “enforcement proceeding”).

The trial court properly awarded fees incurred in enforcing the Act on appeal because the statute’s broad language authorizes such an award. The trial court stated that that the Board presented “no authority which would ban an award of attorney fees for appeal” under the Act. (See October 9 Order at 3). The trial court also noted that similarly broad enforcement provisions have been interpreted to authorize appellate fees.

(See id. at 4).

For example, the court in Indianapolis Newspapers v. Indiana State Lottery Comm'n, 739 N.E.2d 144 (Ind. Ct. App. 2000) construed similar language in Indiana's Access to Public Records Act ("APRA"), West's A.I.C. § 5-14-3-9(h), to authorize appellate attorney fees in an action far removed from the enforcement action on which the Enterprise prevailed on appeal here. See id. That statute mandates an attorney fees award to a prevailing party "[i]n any action filed under this section." Id. The court concluded that this language authorized fees to the plaintiff in its appeal of whether the defendant would remain potentially liable under the APRA, despite the defendant's discharge under the interpleader statute. See Indianapolis Newspapers, 739 N.E.2d at 156; see also Brown v. East Baton Rouge Parish Sch. Bd., 405 So.2d 1148 (La. Ct. App. 1981) (awarding fees on appeal under statute authorizing fees to prevailing party in an "enforcement proceeding"). Here, the Act's language is similarly broad, and the trial court properly interpreted it to authorize fees incurred in enforcing the Act appeal.

C. Excluding Fees Incurred On Appeal
Undermines The Act's Purpose

The Act must be broadly construed to further its purpose of encouraging private citizen enforcement. See O.C.G.A. § 50-14-5; Claxton, 249 Ga. App. at 873, 549 S.E.2d at 834. To narrowly construe the Act's attorney fee provision as excluding appellate fees "would have a chilling effect on private citizens filing suit under the statute." (October 9 Opinion at 4).

The Open Meetings Act

was enacted in the public interest to protect the public -- both individuals and the public generally -- from “closed door” politics and the potential abuse of individuals and the misuse of power such policies entail. . . . To further this purpose, the Act . . . must be construed broadly, and any exceptions to the Act . . . must be narrowly construed.

Claxton, 249 Ga. App. at 873, 549 S.E.2d at 834. The broad construction due the Act, in light of its purpose, applies with equal force to the Act’s attorney fees provision. Complainants enforcing the Act function as private attorneys general; as a result of their successful efforts, important rights are protected to the benefit of the general public. See, generally, 7 Am. Jur. 2d Attorneys At Law § 256; see also Lynwood D. Jordan, “The People’s Right To Know In Georgia,” 10 Ga. St. B.J. 598, 615 (1974) (The Act “offers the citizenry of the state an opportunity to monitor the deliberations and actions of those in whom they have entrusted a measure of sovereign power [It] does, however, put the burden on the citizen to press for those rights . . . by affirmative action.”).

The narrow construction advocated by the Board here would leave the Act toothless. “A right without the means to enforce it is meaningless.” State ex rel. Hodge v. Town of Turtle Lake, 508 N.W.2d 603, 608 (Wis. 1993) (holding that attorney fees should be awarded under the Wisconsin Open Meetings Law “if an award would advance the [Law’s] purpose”).

Here, the trial court properly concluded that “Plaintiff would not have been able to enforce the provisions of the [Act] without resorting to the appellate court.” (October

9 Order at 4). Therefore, it held that to further the purposes of the Act “reasonable attorney fees arising out of appeal should be awarded in the absence of substantial justification . . . or a finding of special circumstances.” (October 9 Order at 4-5).

Other jurisdictions apply the same rule to analogous Open Meetings provisions. See, e.g., State ex rel. Hodge v. Town of Turtle Lake, 508 N.W.2d 603, 608 (Wis. 1993) (holding that attorney fees should be awarded under the Wisconsin Open Meetings Law “if an award would advance the [Law’s] purpose”); Ferris v. Texas Bd. of Chiropractic Exam’rs, 808 S.W.2d 514, 516, 519 (Tex. App. 1991) (awarding attorneys fees for prosecuting the appeal, in part because “the language of the Act clearly reveals the legislature’s intention to give it broad coverage”); Brown v. East Baton Rouge Parish Sch. Bd., 405 So.2d 1148 (La. Ct. App. 1981) (reversing denial of fees to plaintiff who only partially prevailed, and awarding fees on appeal, because the “relief sought and obtained . . . is in itself so important to the enforcement of the open meetings law”).

Similar facts were presented in Van Alstyne v. Housing Auth., 985 P.2d 97 (Colo. Ct. App. 1999), where the court reversed the denial of attorney fees under the Colorado Open Meetings Law, C.R.S. § 24-6-402(9). There, the trial court granted summary judgment to the defendant in the plaintiff’s enforcement action concluding that the claim was moot in light of the defendant’s remedial actions. See Van Alstyne, 985 P.2d at 99. The plaintiffs appealed the trial court’s failure to find a violation and its failure to award attorney fees under the statute’s enforcement provision, which is analogous to the Georgia Act’s. See C.R.S. § 24-6-402(9) (“[i]n any action in which the court finds a

violation of this section, the court shall award the citizen prevailing in such action costs and reasonable attorney fees”). The court reasoned that the successful plaintiffs-appellants were “entitled to their costs and attorney fees, as private attorneys general, who, through the exercise of their public spirit and private resources, caused a public body to comply with the Open Meetings Law.” See Van Alstyne, 985 P.2d at 100. Accordingly, the court remanded for an award of attorney fees incurred “in both the trial and appellate phases of this case.” Id.; see also Associated Press v. Board of Public Educ., 804 P.2d 376 (Mont. 1991) (awarding fees on appeal “due to the particular advantages of enforcement of the right in this case, as well as the resultant public benefits gained by plaintiffs’ efforts”).

D. Georgia Frivolous Litigation
Jurisprudence Is Inapplicable

The Board argues that the Court directed the trial court on remand that “[a]n award of attorney fees . . . must be made in accordance with the procedural aspects of O.C.G.A. § 9-15-14.” (Brief of Appellant at 12). However, the Court discussed § 9-15-14 and other frivolous litigation statutes only in the context of defining “lacking substantial justification.” See Claxton, 249 Ga. App. at 877, 549 S.E.2d at 837. The Court by no means held that attorney fee awards under the Act would be controlled by case law applying frivolous litigation statutes. Thus, the Board’s argument that the Court’s decision in Dept. of Transp. v. Franco’s Pizza & Delicatessen, Inc., 200 Ga. App. 723, 409 S.E.2d 281 (1991) bars appellate attorney fee awards under the Act is

misplaced. Such an argument ignores the markedly disparate purposes of frivolous litigation statutes and the Open Meetings Act.

The General Assembly passed the Act because “public responsibility demands public scrutiny,” Arneson v. Bd. of Trustees of Employees’ Retirement Sys. of Georgia, 257 Ga. 579, 580, 361 S.E.2d 805, 807 (1987); see also Davis v. City of Macon, 262 Ga. 407, 408, 421 S.E.2d 278 (1992) (Weltner, C.J., concurring) (“Because public men and women are amenable ‘at all times’ to the public, they must conduct the public’s business out in the open.”). Thus, the Act’s purpose is to protect the public from “‘closed door’ politics and the . . . misuse of power.” Claxton, 249 Ga. App. at 873, 549 S.E.2d at 834. Attorney fees under the Act serve to encourage citizen enforcement. See Common Cause v. Stirling, 174 Cal. Rptr. 200, 202-03 (Cal. Ct. App. 1981); see also Lambert v. Fulton County, 151 F. Supp. 2d 1364, 1368 (N.D.Ga. 2000).

In contrast, the purposes of § 9-15-14 and other frivolous litigation statutes are remedial and punitive. Fees awarded under frivolous litigation statutes are primarily punitive in nature. See Dixon v. Home Indem. Co., 206 Ga. App. 623, 624, 426 S.E.2d 381, 382 (1992) “Though an award arising from a judgment under O.C.G.A. § 9-15-14 also serves the incidental purpose of providing compensation to the injured party, this does not diminish the reality that awards made under it are ‘sanctions’ under the accepted definition of that term.” Id. Such statutes have the secondary purpose

to recompense litigants who are forced to expend their resources in contending with claim, defenses, or other positions with respect to which there exists such a complete absence of any justiciable issue

of law or fact that it could not be reasonably believed that a court would accept the asserted claim, defense, or other position.

Ferguson v. City of Doraville, 186 Ga. App. 430, 440, 367 S.E.2d 551, 559, cert. denied, 186 Ga. App. 918, 367 S.E.2d 551 (1988), overruled on other grounds, Vogtle v. Coleman, 259 Ga. 115, 376 S.E.2d 860 (1989); see also Felker v. Fenlason, 201 Ga. App. 207, 208, 410 S.E.2d 326, 328 (1991) (purposes of statute are “deterrence of litigation abuses and recompensation for legal fees and costs”).

In Kent v. David G. Brown, P.E., Inc., 248 Ga. App. 447, 545 S.E.2d 598 (2001), the Court reasoned that frivolous litigation statutes do not authorize a trial court to award attorney fees incurred on appeal because O.C.G.A. § 5-6-6 and Court of Appeals Rule 15(b) provide remedies for frivolous appeals and other sanctionable conduct before an appellate court. Thus, the court stated, an appellee has an adequate remedy under those laws. See id. at 449, 545 S.E.2d at 600. This reasoning does not apply in the Open Meetings Act context because a private action is the only means of enforcing the Act. See, e.g., Meri K. Christensen, “Opening The Doors To Access: A Proposal For Enforcement Of Georgia’s Open Meetings And Open Records Laws,” 15 Ga. St. U.L. Rev. 1075, 1075 (“Under Georgia’s access laws, the only recourse for citizens or entities seeking enforcement of these laws is to file a legal suit”).

Here, the trial court properly awarded attorney fees on appeal under the Act’s enforcement provision, and properly rejected a frivolous litigation standard, because the

statutes have different purposes and because the reasons for holding that § 9-14-15 does not authorize appellate fees are not present in the Open Meetings Act context.

CONCLUSION

On remand, the Superior Court examined the record and properly found that the Board lacked substantial justification for violating the Act and that no special circumstances were shown that would justify reducing or eliminating the reasonable attorney fees incurred both at trial and on the Enterprise's successful appeal to enforce the Act. The record contains ample evidence to support the trial court's findings, and the trial court did not abuse its discretion in awarding fees that were authorized by the Act. Accordingly, the trial court's judgment should be affirmed in its entirety.

This ____ day of May, 2002.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I have this day served the foregoing Brief of Amicus Curiae Georgia First Amendment Foundation upon all parties by causing true and correct copies thereof to be deposited in the United States Mail, first-class postage prepaid, addressed to the parties' counsel of record as follows:

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