IN THE SUPERIOR COURT OF COBB COUNTY
STATE OF GEORGIA

JUDY A. BUBNIAK and E. JEAN SOUTHWARD,	)	
Plaintiffs,	)	**CIVIL ACTION**
v.	)	**FILE NO. 13-1-8555-52**
JAMES J. KAMLER JR., INDIVIDUALLY, JAMES J. KAMLER JR., AS TRUSTEE OF THE 1998 V. KAMLER REVOCABLE TRUST, and CONNIE L. KAMLER,	)	
Defendants.	)	

ORDER GRANTING KAMLERS' MOTION FOR ATTORNEYS' FEES AND EXPENSES OF LITIGATION AGAINST PLAINTIFFS AND THEIR COUNSEL

This matter, having come before the Court on the Kamlers' Motion for Attorneys' Fees and Expenses of Litigation Against Plaintiffs and Their Counsel (the "Motion"), and the Court having carefully reviewed and duly considered the briefs of the parties and the record in this action, and the Court having presided over the trial of this action and an evidentiary hearing on the Motion, the Court hereby FINDS, CONCLUDES, and ORDERS as follows.

FINDINGS OF FACT

Plaintiffs Judy A. Bubniak ("Bubniak") and E. Jean Southward ("Southward") (collectively "Plaintiffs") filed this action on October 3, 2013 requesting an accounting of The 1998 V. Kamler Revocable Trust ("Trust") and making allegations of intentional and negligent wrongdoing against Defendants James J. Kamler Jr. ("Jim"), the Trustee of the Trust, Connie L. Kamler ("Connie"), Jim's wife, and two limited liability companies. Jim and Connie are collectively referred to herein as the "Kamlers."

Plaintiffs' counsel of record in this action who are the subject of the Motion are Broel Law, LLC (f/k/a Broel Law Group, LLC, d/b/a Georgia Probate Law Group), Erik J. Broel, Stephanie D. Banks, and Amy L. Pierson. Mr. Broel made an appearance as lead counsel for Plaintiffs when filing this action on October 3, 2013. Ms. Pierson made an appearance as counsel for Plaintiffs with the filing of a brief on August 31, 2015. Ms. Banks made an appearance as counsel for Plaintiffs with the filing of a motion on September 23, 2016. Both Ms. Pierson and Ms. Banks appeared on behalf of Plaintiffs at the trial of this action. Mr. Broel, Ms. Banks, and Ms. Pierson are all (or were at the time of trial) attorneys of the law firm Broel Law, LLC (f/k/a Broel Law Group, LLC, d/b/a Georgia Probate Law Group).

Stipulated Facts

Pursuant to the Consolidated Pre-Trial Order entered in this action, the parties stipulated to the following facts in relevant part. Plaintiffs and Jim are three of the five children of Virtue Kamler ("Virtue"). Consolidated Pre-Trial Order at p. 14 ¶ (13)(a). Connie is Jim's wife. *Id.* at p. 14 ¶ (13)(n). Brittany Kamler is Jim and Connie's daughter. *Id.* at p. 15 ¶ (13)(o).

Virtue created the Trust. *Id.* at p. 14 ¶ (13)(c). Pursuant to the Trust, Virtue was the grantor and sole beneficiary during Virtue's lifetime. *Id.* at p. 14 ¶ (13)(e). Virtue was Trustee of the Trust until May 21, 2007. *Id.* at p. 14 ¶ (13)(f). Plaintiff E. Jean Southward was Trustee of the Trust from May 21, 2007 until November 30, 2007. *Id.* at p. 14 ¶ (13)(g). Virtue was again the Trustee of the Trust from November 30, 2007 until May 17, 2008. *Id.* at p. 14 ¶ (13)(h). Virtue appointed Jim to serve as the Trustee of the Trust on May 17, 2008. *Id.* at p. 14 ¶ (13)(i). Jim has been the Trustee of the Trust since May 17, 2008. *Id.* at p. 14 ¶ (13)(j).

On August 12, 2009, Virtue moved from an assisted living institution in California to Cobb County, Georgia to live with the Kamlers. *Id.* at p. 14 ¶ (13)(l). Virtue lived in the Kamlers' home

for 780 days from August 12, 2009 until September 30, 2011. *Id.* at p. 14 ¶ (13)(m). Virtue died on April 27, 2012 in Georgia. *Id.* at p. 15 ¶ (13)(p).

On January 9, 2017, counsel for Plaintiffs received from counsel for Defendants a document entitled 1998 V. Kamler Revocable Trust Accounting Starting May 31, 2008 as of January 5, 2017. *Id.* at p. 15 ¶ (13)(q).

The parties further stipulated that Defendants' Exhibit 1, which is attached to the Consolidated Pre-Trial Order, and which was admitted into evidence at trial, is an authentic copy of the Trust. *Id.* at p. 12 ¶ (10), p. 14 ¶ (13)(d).

The Complaint for Breach of Fiduciary Duty

On October 3, 2013, Plaintiffs filed their Complaint for Breach of Fiduciary Duty ("Complaint") against Jim individually, Jim as Trustee of the Trust, Connie, Jim Kamler Properties, LLC, and Connie Lynn Kamler Properties, LLC. Jim Kamler Properties, LLC and Connie Lynn Kamler Properties, LLC are collectively referred to herein as the "LLCs." Plaintiffs alleged in their Complaint that Jim and Connie used the LLCs to acquire real property with funds wrongfully taken from the Trust.

In their Complaint, Plaintiffs asserted the following fifteen counts, some of which Plaintiffs asserted against Jim only, and some of which Plaintiffs asserted against all Defendants: (1) breach of fiduciary duty for self-dealing & failure to act in the best interests of the Trust against Jim; (2) breach of fiduciary duty for waste against Jim; (3) breach of Trust agreement for failure to adhere to non-administrative purpose of the Trust against Jim; (4) breach of Trust agreement for failure to fulfill administrative purpose of the Trust against Jim; (5) breach of Trust agreement for failure to administer the Trust expeditiously against Jim; (6) conversion against all Defendants; (7) breach of Trust agreement for failure to provide adequate accounting against Jim; (8) negligence against

Jim; (9) gross negligence against Jim; (10) negligence per se for breach of O.C.G.A. § 53-12-241 against Jim; (11) damages for loss or depreciation of value of Trust property against all Defendants; (12) damages for profit made by Trustee through breach of trust against all Defendants; (13) damages for interest that would have reasonably accrued to the Trust had there been no breach against all Defendants; (14) punitive damages against Jim; and (15) attorney's fees and expenses of litigation against Jim. In the Complaint, Plaintiffs further requested that Jim be removed as Trustee and repeatedly alleged that the damages that the Kamlers caused to the Trust were at least $461,242.00.

The Discovery Period

As a result of several Court Orders extending discovery, the parties had an eleven-month discovery period, during which the parties served written discovery and took depositions. Plaintiffs never filed a Motion to Compel or any other Motion requesting additional discovery from Defendants. Plaintiffs did not request that the Court extend the discovery period beyond eleven months.

Plaintiffs, however, filed a Motion for Protective Order requesting that the Court require Plaintiffs' depositions to be taken by video, as opposed to in-person depositions in Georgia, where Plaintiffs filed this action. Southward resides in California, and Bubniak resides in Nevada. The Court denied Plaintiffs' Motion for Protective Order and Ordered Plaintiffs to appear in Georgia to be deposed in person by Defendants' counsel.

Plaintiffs also filed a Petition for Leave to Participate in Mediation Via Telephone Conference or, in the alternative, to require the parties to mediate in person in Reno, Nevada. The Court entered an Order Denying Plaintiffs' Petition and giving the parties a deadline to mediate their disputes in person in Georgia, in a good faith attempt to reach a settlement. These two

Motions of Plaintiffs are representative of Plaintiffs' refusal throughout this action to participate in good faith, even though Plaintiffs filed this action in Georgia asserting serious claims of wrongdoing against the Kamlers.

In addition to the initial eleven-month discovery period, the Court granted the parties additional time to take discovery regarding experts. Therefore, the parties had more than one year of pre-trial discovery in this action.

Plaintiffs' Denials of Requests for Admission

On April 2, 2014, Jim served Defendant James J. Kamler's First Requests to Admit to Plaintiff E. Jean Southward and Defendant James J. Kamler's First Requests to Admit to Plaintiff Judy A. Bubniak. On May 9, 2014, Southward served Plaintiff's First Response to Defendant James J. Kamler's First Requests to Admit to E. Jean Southward, and Bubniak served Plaintiff's First Response to Defendant James J. Kamler's First Requests to Admit to Plaintiff Judy A. Bubniak. These discovery documents are filed in the record of this action.

The Requests for Admission served on Plaintiffs all pertain to the allegations Plaintiffs made in their Complaint. Most of the Requests for Admission quoted the allegations of the Complaint and asked Plaintiffs to admit that Plaintiffs do not have evidence to support the quoted allegations. Plaintiffs denied nearly every Request for Admission.

Several Requests for Admission that Plaintiffs denied addressed Plaintiffs' allegations that the Kamlers wrongly used Trust assets to acquire real property titled in the Kamlers' names. *See, e.g.*, Req. to Admit Nos. 16, 18, and 23 to Southward and Nos. 6, 8, and 13 to Bubniak. For example, both Plaintiffs were asked to admit that "[y]ou have no evidence to support your claim, in Paragraph 20 of the Complaint, that 'Mr. and Mrs. Kamler gained rental and/or interest income

from the real property acquired using Trust property.'" Req. to Admit No. 23 to Southward and No. 13 to Bubniak. Both Plaintiffs denied this Request.

Several Requests for Admission that Plaintiffs denied addressed Plaintiffs' allegations regarding the LLCs. *See, e.g.*, Req. to Admit Nos. 13, 17, and 19-22 to Southward and Nos. 3, 7, and 9-12 to Bubniak. For example, both Plaintiffs were asked to admit that "[y]ou have no evidence to support your claim, in Paragraph 15 of the Complaint, that 'Four parcels of real property were acquired by Mr. Kamler using Trust property under the auspices of Jim Kamler Properties, LLC from June 2010 through November 2011.'" Req. to Admit No. 19 to Southward and No. 9 to Bubniak. Both Plaintiffs denied this Request. Another example is that both Plaintiffs were asked to admit that "[y]ou have no evidence to support your claim, in Paragraph 17 of the Complaint, that '[O]ne parcel of real property was acquired using Trust property by Mrs. Kamler under the auspices of Connie Lynn Kamler [sic] Properties, LLC in September 2011.'" Req. to Admit No. 21 to Southward and No. 11 to Bubniak. Both Plaintiffs denied this Request.

Both Plaintiffs were asked to admit that "[y]ou have no evidence to support your claim, in Paragraph 30 of the Complaint, that 'During the . . . years that Mr. Kamler has served as Trustee, he failed to use reasonable care and skill when investing Trust property.'" Req. to Admit No. 24 to Southward and No. 14 to Bubniak. Both Plaintiffs denied this Request.

Both Plaintiffs were asked to admit that "[y]ou have no evidence to support your claim, in Paragraph 12 of the Complaint, that 'Mr. Kamler gifted Trust property to himself, Mrs. Kamler and Brittany Kamler throughout the time he has served as Trustee.'" Req. to Admit No. 15 to Southward and No. 5 to Bubniak. Both Plaintiffs denied this Request.

Both Plaintiffs were asked to admit that "[y]ou have no evidence to support your claim, in Paragraph 11 of the Complaint, that 'Mr. Kamler failed to make any . . . distributions [for the

general welfare and comfort of the Decedent] while the Decedent resided with him from August 2009 to November 2011.'" Req. to Admit No. 14 to Southward and No. 4 to Bubniak. Both Plaintiffs denied this Request.

Bubniak was asked to admit that "[y]ou were not present during any conversations Kamler had with the Decedent regarding his serving as Trustee of the Trust." Req. to Admit No. 2 to Bubniak. Bubniak denied this Request.

Motions for Summary Judgment

On May 22, 2015, Plaintiffs filed a Motion for Summary Judgment. On July 7, 2015, Jim filed a Motion for partial summary judgment, and Connie and the LLCs filed a Motion for Summary Judgment. On November 10, 2015, the Court entered an Order denying Plaintiffs' Motion for Summary Judgment. The Court never entered any Orders on Defendants' Motions for Summary Judgment. Plaintiffs filed a Dismissal with Prejudice of their Complaint against the LLCs on October 20, 2015, leaving Jim, individually and as Trustee, and Connie as the sole remaining Defendants.

The January 5, 2017 Trust Accounting

As the parties stipulated in the Consolidated Pre-Trial Order, on January 9, 2017, counsel for Plaintiffs received from counsel for the Kamlers a document entitled 1998 V. Kamler Revocable Trust Accounting Starting May 31, 2008 as of January 5, 2017 (the "January 5, 2017 Trust Accounting"). Consolidated Pre-Trial Order at p. 15 ¶ (13)(q). The January 5, 2017 Trust Accounting, which the parties stipulated is authentic (Consolidated Pre-Trial Order at p. 22), was admitted into evidence at trial as Defendants' Exhibit 101. Trial Tr. at p. 106, lines 23-25. Defendants' Exhibit 101 fills a very large three-ring binder of approximately five inches and lists all the transactions of the Trust with documentary support for each transaction (such as credit card

receipts, checks, bank statements, bills, invoices, statements, etc.) from May 31, 2008 through January 5, 2017. Pursuant to the January 5, 2017 Trust Accounting, the Trust had a remaining balance of $99,105.11 as of January 5, 2017. Defs.' Ex. 101 at Schedule A-0. Jim prepared the January 5, 2017 Trust Accounting with the help of an accountant, Michael Jaye, who Jim hired. Trial Tr. at p. 309, lines 9-21.

The Trust provides that "[t]he failure of any person to object to any accounting by giving written notice to my Trustee within 60 days of the person's receipt of a copy of the accounting shall be deemed to be an assent by such person." Defs.' Ex. 1 at § 10.09. The Trust further provides that, "[u]nless otherwise stated, whenever this agreement calls for notice, the notice must be in writing and must be personally delivered with proof of delivery, or mailed postage prepaid by certified mail, return receipt requested, to the last known address of the party requiring notice." Defs.' Ex. 1 at § 12.07(e).

Plaintiffs did not object to the January 5, 2017 Trust Accounting within 60 days of Plaintiffs' receipt of the January 5, 2017 Trust Accounting. Sixty days from January 9, 2017 (the date the parties stipulate that Plaintiffs' counsel received the January 5, 2017 Trust Accounting) was March 10, 2017. The first written objection that Plaintiffs made to the January 5, 2017 Trust Accounting was in a document entitled Objection to Accounting in its Entirety and as Supplemented, which Plaintiffs filed in this action and served on the Kamlers on July 12, 2018, more than a year too late and just four days before trial.

The Kamlers' Experts

The Kamlers identified three expert witnesses, Michael Jaye, Dr. Debra Greenwood, and Dr. Frank Marxer. Mr. Jaye is the accountant who Jim hired to help prepare the January 5, 2017 Trust Accounting. Dr. Greenwood had opinions regarding the reasonable market rates for in-home

care for Virtue Kamler in Cobb County, Georgia. Dr. Marxer had opinions regarding the need for Virtue Kamler to have 24 hour a day supervised care.

Motions Since March 13, 2017

The Court provides a summary of the Motions filed in this action since March 13, 2017 in light of the Court's conclusion below that the Kamlers are entitled to an award of their attorneys' fees and expenses of litigation from March 13, 2017 through the hearing on the Motion.

Since March 13, 2017, the parties have filed fourteen written Motions in this action. On March 30, 2017, the Kamlers filed a Motion to Dismiss This Action for Failure of Plaintiffs to Prosecute Their Claims, in which the Kamlers requested an Order Setting Deadlines in the alternative. Consequently, on May 25, 2017, the Court entered an Order Setting Deadlines for Plaintiffs to identify their experts, for discovery to be taken regarding experts, and for the parties to exchange and submit to the Court the proposed Consolidated Pre-Trial Order.

In their Response to Defendants' Motion to Dismiss This Action for Failure of Plaintiffs to Prosecute Their Claims filed on April 28, 2017, the Plaintiffs moved to recover their attorney fees and costs of litigation from the Kamlers pursuant to O.C.G.A. § 9-15-14, which the Court denied.

On April 28, 2017, Plaintiffs filed a Motion to Extend Discovery for the Purpose of Taking the Deposition of an Expert Newly Identified by Defendants. The Court never issued, and never needed to issue, an Order on Plaintiffs' Motion because, in the Motion to Dismiss This Action for Failure of Plaintiffs to Prosecute Their Claims, the Kamlers requested that this Court either dismiss this action or, in the alternative, enter an Order Setting Deadlines, including the deadline to complete the depositions requested by Plaintiffs. The Exhibits attached to the Motions and briefs on this issue also show that, before these Motions were filed, counsel for the Kamlers offered to

schedule the expert deposition, but Plaintiffs ignored the offer. These actions by Plaintiffs unnecessarily expanded the proceedings by causing the filing of Motions that would not have been needed had Plaintiffs simply prosecuted their claims against the Kamlers in good faith.

On June 29, 2017, the Kamlers filed a Motion to Exclude Plaintiffs' Experts, which the Court granted on August 21, 2017. Plaintiffs failed to honor this Court's Order Setting Deadlines with respect to potential expert witnesses. Plaintiffs' responses to expert interrogatories were also served after the deadline, failed to provide the opinions of said experts and the basis for any opinions, and failed to comply with O.C.G.A. § 9-11-26. In the Order, this Court further stated that "[t]he Defendants requested an award of their reasonable attorneys' fees and litigation expenses with respect to the subject motion. That issue shall be determined in a subsequent hearing."

On August 30, 2017, the Kamlers filed a Motion for Special Setting of Trial and a Pretrial Conference, which the Court granted.

On October 27, 2017, Plaintiffs filed a Motion for Declaratory Judgment requesting that the Court prohibit the Trustee from reimbursing himself from the Trust for legal, accountant, and expert fees incurred with respect to this action. On November 30, 2017 the Court entered an Order Denying Plaintiffs' Motion for Declaratory Judgment on several grounds. One ground was that Plaintiffs failed to file the subject Motion or to identify the issues raised in the Motion by the deadline set in this Court's Order Setting Deadlines for the Plaintiffs to submit the proposed Consolidated Pre-Trial Order to the Court. This was yet another violation by Plaintiffs of this Court's Order Setting Deadlines. Another ground was that Plaintiffs did not satisfy the elements of declaratory judgment. Another ground was that both the Trust and the law permitted the Trustee to reimburse himself from the Trust for professional fees without Court approval.

Another ground upon which the Court denied Plaintiffs' Motion for Declaratory Judgment was that Plaintiffs assented to the January 5, 2017 Trust Accounting. The issue of assent has arisen many times in this action. In the Court's Order Denying Plaintiffs' Motion for Declaratory Judgment, the Court made the following findings regarding assent:

> Third, this Court finds that Plaintiffs assented to the accounting of The 1998 V. Kamler Revocable Trust ("Trust") and cannot now contest the accounting of the Trust dated January 5, 2017. Plaintiffs admitted that, on January 9, 2017, counsel for Plaintiffs received from counsel for Defendants a document entitled 1998 V. Kamler Revocable Trust Accounting Starting May 31, 2008 as of January 5, 2017 (the "Trust Accounting"). The Trust Accounting identified that the Trustee received reimbursement from the Trust for his legal, accountant, and expert fees incurred with respect to Plaintiffs' requests for an accounting and this action. Section 10.09 of the Trust states that "[t]he failure of any person to object to any accounting by giving written notice to my Trustee within 60 days of the person's receipt of a copy of the accounting shall be deemed to be an assent by such person." Plaintiffs did not object to the Trust Accounting within 60 days of Plaintiffs' receipt of the Trust Accounting. Plaintiffs understood Section 10.09 of the Trust and how to make a proper written objection under Section 10.09 because, before Plaintiffs filed this action, Plaintiffs' counsel made such a written objection to the accounting of the Trust that the Trustee previously provided Plaintiffs on June 24, 2013 and cited Section 10.09 of the Trust. Trust transactions which have occurred after the Trust Accounting dated January 5, 2017 have not yet been assented to by Plaintiffs.
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> Fifth, a jury must ultimately decide the remaining issues. . . . A jury must resolve all of Plaintiffs' claims after a trial, including whether the expenses paid by the Trust after the Trust Accounting dated January 5, 2017 were appropriate.

The June 24, 2013 objection to the prior Trust accounting referenced in the above quote was later admitted into evidence at trial as Defendants' Exhibit 80. Trial Tr. at p. 152, lines 4-8. In the Order, this Court further stated that "[t]he Defendants requested an award of their reasonable attorneys' fees and litigation expenses with respect to the subject Motion. That issue shall be determined in a subsequent hearing."

On October 27, 2017, Plaintiffs filed a Motion to Exclude Defendants' Placeholder Exhibits, which the Court denied on November 30, 2017. One ground for denying Plaintiffs'

Motion was that Plaintiffs again failed to file the subject Motion or to identify the issues raised in the Motion by the deadline set in this Court's Order Setting Deadlines for the Plaintiffs to submit the proposed Consolidated Pre-Trial Order to the Court. This Court also found that Defendants properly described the Defendants' Exhibits that did not yet exist, but that Defendants expected would exist in the future, in the list of Defendants' Exhibits in the Consolidated Pre-Trial Order. In the Order Denying Plaintiffs' Motion to Exclude Defendants' Placeholder Exhibits, this Court further stated that "[t]he Defendants requested an award of their reasonable attorneys' fees and litigation expenses with respect to the subject Motion. That issue shall be determined in a subsequent hearing."

On November 29, 2017, the Kamlers filed a Motion to Compel Plaintiffs to Pay Expert's Deposition Fee requesting an Order compelling Plaintiffs and their counsel to pay the Kamlers' expert accountant pursuant to O.C.G.A. § 9-11-26(b)(4)(A)(ii) for his time in giving a two-day deposition, which was required by Subpoenas served by Plaintiffs' counsel. The Kamlers' counsel repeatedly asked Plaintiffs' counsel to pay the expert for his time at the deposition and gave Plaintiffs' counsel a deadline to pay the expert's fees. After the deadline expired, the Kamlers filed the Motion, and Plaintiffs paid the expert's deposition fee. This is another example of Plaintiffs unnecessarily expanding the proceedings by forcing the Kamlers to file a Motion to Compel Plaintiffs to comply with their clear obligations under the law.

In their Response to Defendants' Motion to Compel Plaintiffs to Pay Expert's Deposition Fee filed on December 28, 2017, the Plaintiffs moved to recover their own attorney fees and expenses from the Kamlers pursuant to O.C.G.A. § 9-15-14, which the Court did not grant.

On May 18, 2018, Plaintiffs filed a Motion in Limine to Exclude the Testimony of Michael Jaye on Certain Issues and to Request a Daubert Hearing. The Court held the requested hearing on June 18, 2018. The Court permitted Mr. Jaye to testify at trial.

On July 15, 2018, the Kamlers filed a Motion to Quash Notices to Produce. Plaintiffs had served the Kamlers with Notices to Produce a few days before trial. During the evidentiary hearing on the Motion, Ms. Heim testified that the Notices to Produce requested documents that existed many years ago that Plaintiffs should have requested during the discovery period. 1/16/2019 Hr'g Tr. at p. 830, lines 5-14. Once the Kamlers filed a Motion, Plaintiffs decided not to pursue the Notices to Produce, and no Court Order was necessary.

On September 6, 2018, the Kamlers filed the Motion for Attorneys' Fees and Expenses of Litigation Against Plaintiffs and Their Counsel, which is the subject of this Order. In the subject Motion, the Kamlers request that both Plaintiffs and all Plaintiffs' counsel (other than **new** counsel representing Plaintiffs and Plaintiffs' counsel on this Motion) be held to be jointly and severally liable to the Kamlers for attorneys' fees and litigation expenses.

On October 8, 2018, Plaintiffs filed a Motion to Conduct Limited Discovery Related to Defendants' Motion for Attorneys' Fees and Expenses of Litigation. The parties resolved Plaintiffs' Motion by jointly presenting the Court with a Scheduling Order giving the parties time for post-judgment discovery before the evidentiary hearing on the Kamlers' Motion.

On December 31, 2018, just before the evidentiary hearing on the Kamlers' Motion, Plaintiffs filed Motions in Limine to prohibit the Kamlers from calling Plaintiffs, Plaintiffs' counsel, or the Kamlers to testify at the hearing. The Court heard argument on Plaintiffs' Motions in Limine during the hearing. The Court permitted Plaintiff Southward to testify and ruled on

objections to privilege as they were made. The Kamlers did not call either of the other witnesses that Plaintiffs sought to exclude from testifying.

Plaintiffs' Amended Complaint for Breach of Fiduciary Duty

On August 10, 2017, just before the deadline for the parties to submit the proposed Consolidated Pre-Trial Order to the Court, Plaintiffs filed an Amended Complaint for Breach of Fiduciary Duty ("Amended Complaint"). In the Amended Complaint, Plaintiffs asserted the following four new counts against Connie, which brought the total number of counts Plaintiffs asserted to nineteen: (16) aiding and abetting against Connie; (17) O.C.G.A. § 51-12-30 against Connie; (18) attorney's fees and costs against Connie; and (19) punitive damages against Connie.

By the time that Plaintiffs filed the Amended Complaint, the discovery period in this action had long since closed. In the Amended Complaint, Plaintiffs made many allegations of intentional wrongdoing against Connie, such as the following allegation in paragraph 96:

> Defendant, Connie L. Kamler, assisted the Defendant Trustee in concealing the true allocation of fund expenditures as reflected in the *1998 V. Kamler Revocable Trust Accounting Starting May 31, 2008 as of January 5, 2017,* ("Purported Accounting"). The Accountant who prepared the Purported Accounting relied on the Defendant, Connie L. Kamler, and Defendant, James J. Kamler, to identify whether or not a particular expense was for the benefit of Virtue Kamler.

Although Plaintiffs had previously dismissed the LLCs as Defendants in this action, Plaintiffs continued to assert wrongdoing with respect to the LLCs in the Amended Complaint. For example, Plaintiffs asserted in paragraph 98 of the Amended Complaint that Connie used Trust property "for the purpose of financing Defendant Connie Kamler's purchase of real estate and conveying title to the real estate into the name of her business, Connie L Properties, LLC ('LLC')" and that "[b]oth Defendant, Connie L. Kamler, and her LLC received direct benefit from the conveyance to the detriment of the beneficiaries to the Trust." Plaintiffs further asserted in paragraph 99 that "[t]he use of the trust funds to purchase property for Defendant, Connie L.

Kamler's, LLC caused a loss to the Plaintiffs and remaining beneficiaries because the Trust contained that much less in asset value."

Although the discovery period had closed, Plaintiffs made allegations for which it was clear on the face of the Amended Complaint that Plaintiffs did not have evidence to support. For example, Plaintiffs asserted the following in paragraph 97:

> **Upon information and belief** Defendant, Connie L. Kamler, convinced the Defendant Trustee to use Trust funds to purchase property for himself and for Defendant Connie, knowing that the Trustee had a duty to protect the assets and administer the Trust in the best interest of *all* its beneficiaries.

(emphasis in bold added). Plaintiffs should not have been making allegations "upon information and belief" after the close of discovery and during year four of this action.

Other Pre-Trial Activity After March 13, 2017

This section is not intended by any means to provide an exhaustive list of the other pre-trial activity in this action after March 13, 2017. The section discusses some of the pre-trial activity that occurred in this action that was not discussed above.

Plaintiffs' counsel took a two-day deposition of the Kamlers' expert accountant, Michael Jaye, and a deposition of the Kamlers' expert on reasonable home care rates, Dr. Greenwood.

After review of the parties' proposed Consolidated Pre-Trial Order, the Court entered an Order on August 23, 2017 finding that significant issues within the proposed Order remained contested and/or undecided and that the Pre-Trial Order failed to serve its purpose. The Court further Ordered counsel to meet personally to exchange clear, legible copies of all documents to be used as trial exhibits and attempt to reach agreement as to authentication of said documents. During the evidentiary hearing on the subject Motion, Ms. Heim testified that counsel for Plaintiffs asserted new issues and claims in the proposed Consolidated Pre-Trial Order that were not previously asserted in a pleading and that counsel for Plaintiffs did not provide counsel for the

Kamlers with clear, legible copies of Plaintiffs' Exhibits, which made it impossible to stipulate as to the authenticity of Plaintiffs' Exhibits. 1/16/2019 Hr'g Tr. at p. 832, line 4 – p. 833, line 19. The Court subsequently held a pre-trial conference on October 16, 2017 and entered the Consolidated Pre-Trial Order on November 1, 2017.

In the Consolidated Pre-Trial Order at paragraphs (6), (8), and (11), Plaintiffs continued to assert the same causes of action and requests for relief that they had asserted in the Complaint and the Amended Complaint, including Plaintiffs' claims against Connie and allegations regarding the LLCs. Plaintiffs continued to assert that the value of the Trust had been depreciated by the Kamlers' alleged wrongdoing, that Jim unjustifiably gained profit through wrongful actions as Trustee, that Jim caused the Trust to lose what otherwise would have been reasonably accrued interest, that Plaintiffs sought the highest proven value of each item converted from the date of the conversion, and that Plaintiffs should be awarded punitive damages and their attorney's fees and expenses from the Kamlers. In paragraph (9) of the Consolidated Pre-Trial Order, Plaintiffs attempted to assert new causes of action for negligence per se pursuant to other statutes that were not previously asserted in the Complaint or Amended Complaint. The Kamlers objected to Plaintiffs' attempts to assert claims that were not previously asserted in the pleadings.

On May 17, 2018, the Kamlers' counsel served Plaintiffs' counsel with the 1998 V. Kamler Revocable Trust Supplemental Accounting as of May 17, 2018 ("Supplemental Trust Accounting"), which was later admitted into evidence at trial as Defendants' Exhibit 3. Trial Tr. at p. 356, lines 12-14. The Supplemental Trust Accounting accounted for all expenses and income of the Trust as of May 17, 2018 that were not included in the January 5, 2017 Trust Accounting. The only expenses of the Trust incurred after the January 5, 2017 Trust Accounting were professional fees, which consisted of attorneys' fees, expert fees, and other expenses of litigation.

On July 11, 2018, the Kamlers' counsel served Plaintiffs' counsel with the 1998 V. Kamler Revocable Trust Second Supplemental Accounting as of July 11, 2018 ("Second Supplemental Trust Accounting"), which was later admitted into evidence at trial as Defendants' Exhibit 144. Trial Tr. at p. 360, lines 1-4. The Second Supplemental Trust Accounting accounted for all expenses and income of the Trust as of July 11, 2018 that were not included in the January 5, 2017 Trust Accounting or in the Supplemental Trust Accounting. Both supplemental accounting documents were designed to update the Trust accounting up until the week before trial.

This action was previously assigned to Judge A. Gregory Poole. When the parties requested a special setting for trial to accommodate the out-of-state Plaintiffs and the expert witnesses, the Court appointed Senior Judge G. Grant Brantley to assist Judge Poole and to preside over the trial. Shortly thereafter, the Court held a pre-trial hearing on June 18, 2018 with Judge Brantley presiding.

During the June 18, 2018 hearing, counsel for the Kamlers raised the issue of Plaintiffs' assent to the January 5, 2017 Trust Accounting and brought Judge Poole's prior Order Denying Plaintiffs' Motion for Declaratory Judgment to the Court's attention. Essentially, the Kamlers' position was that Plaintiffs' assent to the January 5, 2017 Trust Accounting meant that Plaintiffs could no longer contest the transactions in the January 5, 2017 Trust Accounting. Plaintiffs' position on this issue was that "assent" is merely an assent that the transactions contained in the January 5, 2017 Trust Accounting actually occurred and that, therefore, the accounting is accurate. But Plaintiffs argued that "assent" is not an admission that a particular expense or transaction was authorized by the Trust. At the conclusion of the June 18, 2018 hearing, this Court announced that he was leaning in favor of enforcing and agreeing with Judge Poole's Order regarding assent but that he wanted to be able to determine at trial whether such a ruling would cause manifest injustice.

At the time, based on the characterization of the evidence by Plaintiffs' counsel, this Court expressed concern that an awful lot of money went out of the Trust in a two-year period. 6/18/2018 Hr'g Tr. at pp. 104-105. After hearing and seeing the evidence at trial, this Court stated that he learned that the January 5, 2017 Trust Accounting covered a nearly nine-year period, not a two-year period. 7/16/2018 Hr'g Tr. at p. 12; Trial Tr. at pp. 611-612.

During the June 18, 2018 hearing, Plaintiffs' counsel presented argument as to why this case needed to go to jury trial. Plaintiffs' counsel represented to the Court that Virtue Kamler did not want to move in with the Kamlers in Georgia, that the Kamlers put Virtue in a closet, that Plaintiffs were not allowed to speak with Virtue, that Plaintiffs were "kept away" from Virtue, and that the Kamlers eventually put Virtue into a nursing home because "the Kamlers didn't want to take care of her anymore." 6/18/2018 Hr'g Tr. at pp. 20-21.

Just a few days before trial, Plaintiffs served Dr. Frank Marxer, the Kamlers' expert regarding the need for Virtue Kamler to have 24 hour a day supervised care, with a Subpoena to appear at trial during the entire week of July 16, 2018 to testify. 1/16/2019 Hr'g Tr. at p. 834, line 20 – p. 835, line 16. Dr. Marxer had been Virtue Kamler's primary care physician from August 12, 2009 until her death on April 27, 2012. Dr. Marxer had submitted a letter, which the Kamlers properly identified as Defendants' Exhibit 24 in the Consolidated Pre-Trial Order, and which the Kamlers intended to introduce at trial as a medical report pursuant to O.C.G.A. § 24-8-826.

Dr. Marxer objected to Plaintiffs' Subpoena requiring that he cancel all his appointments with patients at the last minute to appear at a week-long trial. Dr. Marxer requested that Plaintiffs take his deposition in the evening during the week before trial instead, otherwise Dr. Marxer would be forced to file a motion to quash the Subpoena. Plaintiffs withdrew the Subpoena and also chose not to take Dr. Marxer's deposition. 1/16/2019 Hr'g Tr. at p. 834, line 20 – p. 835, line 16.

The Evidence and Lack of Evidence at Trial

The Court held the jury trial of this action from July 16, 2018 through July 19, 2018.

One of the main themes presented by the Kamlers at trial was that this case was the result of Plaintiffs' greed and jealousy of their brother, Jim, and sister-in-law, Connie. Both Plaintiffs testified that Jim was Virtue's favorite child. Trial Tr. at p. 121, lines 4-18, p. 201, lines 15-18. Southward testified that there was no affection in her family. Trial Tr. at p. 88, lines 10-11. Plaintiffs testified that they did not want Virtue to live with Jim and Connie in Georgia, even though none of Virtue's four daughters were willing to care for Virtue or allow Virtue to live in one of their homes. Trial Tr. at p. 72, lines 6-24, p. 75, lines 13-18, p. 145, line 2 – p. 146, line 15, p. 210, lines 18-20, p. 272, lines 19-24. Both Plaintiffs testified that they never visited Virtue during the two and a half years that Virtue lived in Georgia. Trial Tr. at pp. 96, 211-212. During his closing argument at the hearing on the subject Motion, new counsel for Plaintiffs even acknowledged that the heart of this case is a family dispute and that such disputes have occurred since Biblical times. 1/17/2019 Hr'g Tr. at p. 935.

The problem for Plaintiffs and their counsel is that Plaintiffs simply did not present **any** evidence to support their claims or to prove their alleged damages. The trial of this action is most notable for the total absence of evidence to support Plaintiffs' claims, rather than the evidence that was presented. Pursuing serious claims through trial because "it's at the heart of what families do" (1/17/2019 Hr'g Tr. at p. 935), as Plaintiffs' new counsel argued, without presenting any evidence to support such claims is a complete absence of any justiciable issue of law or fact such that it could not be reasonably believed that a court would accept the asserted claim. Such conduct lacks substantial justification because it is substantially frivolous, groundless, and vexatious. Such conduct is interposed for harassment and unnecessarily expands the proceedings.

During the four-day jury trial, Plaintiffs presented no evidence whatsoever of any error in the January 5, 2017 Trust Accounting, the Supplemental Trust Accounting, or the Second Supplemental Trust Accounting. Plaintiffs presented no evidence whatsoever that the Trust accountings did not properly account for all assets that went into the Trust and all assets that left the Trust during the ten-year period in which Jim was Trustee of the Trust. Plaintiffs presented no evidence whatsoever that the expenses or other transactions shown in the Trust accountings were not authorized by the Trust agreement. In fact, Bubniak testified that she did not read the Trust agreement before she filed this action and that she had only read "bits and pieces" of the Trust agreement before trial, even though Plaintiffs alleged that Jim breached the Trust agreement. Trial Tr. at p. 202, lines 6-15, p. 203, lines 10-16. Plaintiffs presented no evidence whatsoever of how much the expenses of the Trust should have been and why. Plaintiffs presented no evidence whatsoever of any damage caused by a breach or tort committed by the Kamlers.

During trial, Plaintiffs called only two witnesses, themselves, and presented only two Plaintiffs' Exhibits that were admitted into evidence. Plaintiffs attempted to introduce what Plaintiffs' counsel wrongly represented was an authentic copy of the Trust as Plaintiffs' Exhibit 45. The Court did not admit Plaintiffs' Exhibit 45 because, contrary to the representations of Plaintiffs' counsel, Plaintiffs' Exhibit 45 was not authentic and was different from Defendants' Exhibit 1, which the parties had previously stipulated in the Consolidated Pre-Trial Order is the authentic copy of the Trust. Trial Tr. at pp. 45-51.

Plaintiffs testified only about their general "beliefs" about how Jim managed the Trust, that Plaintiffs had "concerns" about the January 5, 2017 Trust Accounting, and that some expenses "seemed" to Plaintiffs to be too much. However, a mere "belief," "concern," or a wish that an expense had cost less is not proof of wrongdoing. "Concerns" or "beliefs" regarding what occurred

might be sufficient to sustain allegations in a Complaint with the good faith expectation that the evidence obtained during discovery will prove each of the elements of the causes of action asserted. However, trial is where the rubber meets the road. Each Plaintiff must present real evidence to support every element of every cause of action asserted.

Southward Testimony

During her opening statement, Ms. Pierson, Plaintiffs' counsel, represented that the Plaintiffs reviewed the January 5, 2017 Trust Accounting "in painful detail." Trial Tr. at p. 24, lines 15-16. Plaintiff Southward testified that she had read the Trust agreement "closely." Trial Tr. at p. 54, lines 6-10. Southward testified about her general "beliefs" regarding Jim's management of the Trust. For example, Southward testified that "I believe he took money, gave himself and his family gifts, and overspent the trustee by thousands of dollars." Trial Tr. at p. 55, lines 17-20. However, Plaintiffs presented no evidence that any transaction of the Trust was not authorized by the Trust agreement or was illegal. Plaintiffs presented no evidence that Jim violated any provision of the Trust agreement. Southward never opened the January 5, 2017 Trust Accounting or either of the Supplemental Trust accountings during trial and did not point out a single transaction which was alleged to be unauthorized by the Trust agreement. Southward presented no evidence of any funds missing from the Trust. Trial Tr. at p. 190, lines 1-20. Southward merely expressed unsubstantiated "beliefs" and "concerns."

Southward testified that she had four "concerns" about the January 5, 2017 Trust Accounting. Trial Tr. at p. 85, lines 5-10, p. 158, line 17 – p. 159, line 12. Southward's first "concern" was regarding the amount that Jim paid for the home care that Jim, Connie, and Brittany Kamler personally provided to Virtue Kamler. Trial Tr. at p. 85, lines 5-10, p. 158, line 17 – p. 159, line 12. The uncontested opinion from Virtue's treating physician, Dr. Marxer, was that

"Virtue Kamler from August 12, 2009 until her death on April 27, 2012 required 24 hour a day supervised care because of advanced dementia with delusions and sundowners." Defs.' Ex. 24; Trial Tr. at pp. 287-289. At trial, Southward admitted that she did not know what her mother's condition was in Georgia because Southward never came to Georgia to see for herself after Virtue moved from California. Trial Tr. at p. 96, lines 10-13, p. 159, lines 14-23, p. 160, line 24 – p. 161, line 1. Southward admitted that, in addition to receiving Trustee fees from the Trust, the Trust permitted Jim to charge the Trust for the home care services that he provided for Virtue. Trial Tr. at p. 100, line 12 – p. 101, line 1. Southward admitted that it would have been reasonable for Jim to hire someone to take care of Virtue and use the Trust to pay for it. Trial Tr. at p. 161, lines 15-21. Southward admitted that she previously talked to Jim on the phone and told him that he needed to charge the trust for the home care for Virtue. Trial Tr. at p. 163, lines 7-12. Southward admitted that, if Virtue wanted to live with Jim and Connie instead of a nursing home and have only Jim, Connie, and Brittany Kamler take care of her, instead of hiring a commercial service, Virtue was entitled to do that and use the Trust to pay for it. Trial Tr. at p. 163, line 22 – p. 164, line 2. Therefore, Southward failed to present any evidence that the home care expense was not authorized by the Trust.

Plaintiffs presented no evidence that $18 per hour for home care services was unreasonable. The Trust agreement provides that "[m]y Trustee shall distribute to me, or to such persons or entities as I may direct, as much of the net income and principal of the trust property as I deem advisable. My Trustee may distribute trust income and principal to me or for my unrestricted use and benefit, even to the exhaustion of all trust property." Defs.' Ex. 1 at § 1.04(d). Dr. Greenwood testified that $18 to $19 per hour was a reasonable rate for home care provided by one person in Cobb County, Georgia at the time the services were provided to Virtue, but that $18 per hour was

unreasonably low for home care provided by two or more persons at a time. Trial Tr. at p. 584, lines 9-16, p. 590, lines 2-8. The Trust only paid $18 per hour for the home care services the Kamlers provided, even though two or more persons at a time were often required to care for Virtue. Defs.' Ex. 101 at Schedule J-1; Trial Tr. at p. 284, line 14 – p. 285, line 3, p. 535, line 4 – p. 537, line 10. The Trust agreement further provides that "[t]he determination of my Trustee with respect to the payment of expenses shall be conclusive upon the beneficiaries." Defs.' Ex. 1 at § 11.11. Therefore, Southward presented no evidence that the home care expense was a breach of a duty by Jim or that the Trust suffered any damages as a result of her first "concern."

Southward's second "concern" was regarding a purchase of a jet ski using funds from the Trust. Trial Tr. at p. 85, lines 5-10, p. 158, line 17 – p. 159, line 12. Southward admitted that the purchase of the jet ski was properly reflected in the January 5, 2017 Trust Accounting as a draw to Jim. Trial Tr. at pp. 164-165. The draws identified in the Trust accountings were money paid to Jim from the Trust to reimburse him for an expense or to compensate him, such as compensation for Trustee fees. Defs.' Ex. 101; Trial Tr. at p. 166, line 25 – p. 167, line 4; p. 318, lines 15-16, p. 319, lines 2-6, p. 504, line 16 – p. 505, line 15. Southward admitted that the Trust had to pay Jim back for home care, trustee fees, and reimbursement for expenses. Trial Tr. at pp. 164-165. Southward's complaint was that the Trustee would write a check to a third party from the Trust bank account to buy something for himself or his family instead of first writing a check to himself and then writing a check from his personal bank account to make the purchase. Trial Tr. at pp. 164-167.

When asked, "[c]an you point to a provision in the trust document that states that if Jim is owed reimbursement for an expense from the trust or compensation from the trust . . . that that money has to be paid as a check directly to Jim as opposed to a third party?," Southward admitted

that "[t]here is no instructions in the trust that I am aware of that stipulates that." Trial Tr. at p.168, lines 2-10. Southward admitted that, if Jim was entitled to reimburse himself from the Trust for a particular expense, it made no financial difference to the Trust whether it is a check written directly to a third party to purchase a jet ski, as opposed to a check written directly to Jim that Jim deposits in his own account and then writes a check from his account to purchase the jet ski, because it is all the same money. Trial Tr. at pp. 164-165. Hence, Southward presented no evidence of a breach of the Trust agreement or of damage to the Trust as a result of her second "concern."

Southward's third "concern" was about a real estate purchase using Trust funds. Trial Tr. at p. 85, lines 5-10, p. 158, line 17 – p. 159, line 12. However, Southward admitted that the real estate purchase was properly reflected in the January 5, 2017 Trust Accounting as draws paid to Jim. Trial Tr. at p. 166, lines 2-13. Even though Plaintiffs alleged in their Complaint that the Kamlers gained rental and/or interest income from the real property acquired using Trust property, and Plaintiffs denied requests for admission that Plaintiffs did not have evidence to support such an allegation, Plaintiffs presented no evidence whatsoever at trial that the Kamlers gained rental or interest income. Again, Southward presented no evidence of a breach of the Trust agreement or of damage to the Trust as a result of her third "concern."

Southward's fourth "concern" was regarding payments to Jim, Connie, and Brittany Kamler from the Trust. Trial Tr. at p. 85, lines 5-10, p. 158, line 17 – p. 159, line 12. However, Southward admitted she had no evidence that these payments were not properly accounted for in the January 5, 2017 Trust Accounting as draws paid to Jim. Trial Tr. at p. 166, lines 20-24. Southward also admitted that Jim, Connie, and Brittany were entitled to be paid from the Trust for the home care they provided to Virtue. Trial Tr. at pp. 159-164.

The Trust agreement permitted payments to Jim, Connie, and Brittany for services provided to Virtue. The Trust agreement provides that "[a] Trustee may charge additional fees for the Trust services it provides that are not comprised within its duties as Trustee . . . ." Defs.' Ex. 1 at § 10.05. The Trust agreement further provides that "[m]y Trustee may make distributions for my benefit in any one or more of the following ways: . . . To other persons and entities for my use and benefit . . . ." Defs.' Ex. 1 at § 4.02(b).

The Trust agreement also permitted Jim to pay himself Trustee fees. The Trust agreement provides that "[a]n individual serving as Trustee, other than me [Virtue], shall be entitled to fair and reasonable compensation for the services rendered as a fiduciary." Defs.' Ex. 1 at § 10.05. Southward admitted that, in the January 5, 2017 Trust Accounting, the Trustee fees were calculated in accordance with Georgia law. Trial Tr. at p. 100, lines 8-11. Again, Southward presented no evidence of a breach of the Trust agreement or of damage to the Trust as a result of her fourth "concern."

Southward admitted that Virtue chose to live with Jim and Connie, and that Jim could use the Trust to pay for Virtue's rent and share of utilities. Trial Tr. at p. 110, lines 6-17. During trial, Plaintiffs' counsel made the argument that the Trust was charged too much for Virtue's share of the rent, without presenting any such evidence. Plaintiffs' counsel made the argument that they believed the amount charged for rent was too high when compared to the amount of Jim's monthly mortgage. Plaintiffs presented no evidence that the rental value of a home is in any way related to the amount of the home's monthly mortgage. Indeed, simply because a homeowner pays off his mortgage does not mean that the home's rental value is $0. Conversely, simply because a homeowner borrowed 100% of the purchase price of the home, and the home is underwater, does not mean that the rental value of the home is any more than the same home with no mortgage or

with a small mortgage. Jim testified that, since four people were living in the house at the time, the Trust paid one quarter of the rental value of the house for Virtue's share of the rent and one quarter of the utilities. Trial Tr. at p. 322, lines 16-24. The Trust agreement provides that "[m]y Trustee may acquire, maintain and invest in any residence for the use and benefit of the beneficiaries . . . ." Defs.' Ex. 1 at § 11.12. Thus, the Trust agreement authorized the expense. Plaintiffs presented no evidence that the amount that the Trust paid for Virtue's rent was unreasonable.

Bubniak Testimony

Plaintiff Bubniak testified that she had three "concerns" about the January 5, 2017 Trust Accounting. Trial Tr. at p. 199, lines 1-10, p. 218, line 17 – p. 221, line 7. Again, "concerns" do not prove a claim. Bubniak's first "concern" was regarding an expense at Home Depot. Trial Tr. at p. 199, lines 1-10, p. 218, line 22 – p. 219, line 10. Plaintiffs presented no evidence of the amount of the Home Depot expense. Bubniak did not open the January 5, 2017 Trust Accounting to point out the expense. Jim testified that he had to make some changes to his home to accommodate Virtue and that the Trust incurred certain expenses at Home Depot as a result. Trial Tr. at p. 278, line 21 – p. 281, line 18. Bubniak admitted that she did not know what changes the Kamlers had to make to their home to accommodate Virtue. Trial Tr. at p. 219, lines 7-10. Therefore, Bubniak presented no evidence of a breach of the Trust agreement or of damage to the Trust as a result of her first "concern."

Bubniak's second "concern" was that some medical expenses in the January 5, 2017 Trust Accounting may have been paid by Virtue's insurance or by Medicare. Bubniak singled out an ambulance bill she claimed was listed as a Trust expense. Trial Tr. at p. 199, lines 1-10, p. 219, line 11 – p. 221, line 7. Bubniak presented no evidence that the January 5, 2017 Trust Accounting

included medical expenses that were paid by insurance or Medicare. When asked to find the ambulance bill in the January 5, 2017 Trust Accounting, Bubniak admitted that she could not find it. Trial Tr. at p. 219, line 11 – p. 221, line 7. The Court gave a recess so that Bubniak would have the time to find the alleged ambulance bill in the accounting, but Bubniak did not find it. *Id.* Again, Bubniak presented no evidence of a breach of the Trust agreement or of damage to the Trust as a result of her second "concern."

Bubniak's third "concern" was regarding the home care expense. Trial Tr. at p. 199, lines 1-10, p. 218, lines 17-21. During her deposition in this action, Bubniak testified that Jim, Connie, and Brittany Kamler should not be compensated at all for the home care they provided to Virtue, not even a penny. Dep. of Bubniak at p. 24, lines 7-12. In contrast, at trial, Bubniak admitted that, if Virtue wanted to live with Jim and Connie, instead of a nursing home, she was allowed to do that. Trial Tr. at p. 217, lines 22-25. Bubniak admitted that, if Virtue only wanted Jim, Connie, and Brittany to take care of her instead of hiring a stranger to do so, she was entitled to do that. Trial Tr. at p. 218, lines 6-9. Bubniak admitted that, if Virtue wanted to have Jim, Connie, and Brittany take care of her instead of using a home care company, she was entitled to use the Trust to pay for it. Trial Tr. at p. 218, lines 17-21. Bubniak stated that the Trust may have paid too much for the home care the Kamlers provided but presented no evidence whatsoever that more was actually paid than was authorized by the Trust or of how much. Trial Tr. at p. 218, lines 17-21. Bubniak admitted that she did not visit Virtue during the two and a half years that Virtue lived in Georgia and that Bubniak did not witness Virtue's condition or the level of care that Virtue needed in Georgia. Trial Tr. at p. 212, lines 1-6, p. 213, line 25 – p. 214, line 2.

Both Plaintiffs merely testified that the Trust paid less when Virtue lived in an assisted living facility in California. Trial Tr. at p. 83, lines 10-13; p. 85, line 17 – p. 86, line 2, p. 160,

lines 15-20, p. 215, lines 2-4. However, Southward admitted that the assisted living facility did not provide Virtue with 24 hour a day supervised care and admitted that the cost of 24 hour a day supervised care would have been much greater than the amount the Trust paid to the assisted living facility in California. Trial Tr. at p. 160, line 21 – p. 161, line 5. Bubniak testified that, before Virtue moved to Georgia, Bubniak told Connie "that Virtue could pretty well take care of herself." Trial Tr. at p. 211, lines 16-19. Contrary to Bubniak's representation to Connie, Dr. Marxer's undisputed opinion was that Virtue needed 24 hour a day supervised care. Defs.' Ex. 24. Jim, Connie, and Brittany each testified that they in fact provided Virtue with 24 hour a day supervised care, described in detail the home care services they provided to Virtue, and described what each of them had to give up to provide the care that Virtue needed. Trial Tr. at pp. 270-272, 281-287, 527-528, 530-540, 559-562, 564-566. Moreover, Virtue chose to live with the Kamlers in Georgia and have Jim, Connie, and Brittany provide the home care services themselves. Trial Tr. at p. 110, lines 6-17, p. 272, lines 16-24. Plaintiffs presented no evidence of the cost to care for Virtue based on the reality of Virtue needing 24 hour a day supervised care and choosing to live with the Kamlers and having only the Kamlers provide care to Virtue.

Other Evidence and Lack of Evidence at Trial

Plaintiffs never presented any evidence at trial that the Trust was charged more than a reasonable amount for home care or more than the Trust agreement authorized. The Trust agreement provides that "[a] Trustee may charge additional fees for services it provides that are not comprised within its duties as Trustee . . . ." Defs.' Ex. 1 at § 10.05. Southward admitted that the home care services that Jim provided, such as taking Virtue to the doctor or changing her diapers, is not comprised within his duties as Trustee. Trial Tr. at p. 100, line 12 – p. 101, line 1. The Trust agreement also provides that "[m]y Trustee may make distributions for my benefit in

any one or more of the following ways: . . . To other persons and entities for my use and benefit . . . ." Defs.' Ex. 1 at § 4.02(b).

Plaintiffs did not have any expert or any other evidence to contradict Dr. Greenwood's testimony that $18 per hour for one person providing home care was reasonable, but unreasonably low if more than one person at a time provided the home care. Trial Tr. at p. 584, lines 9-16, p. 590, lines 2-8. During closing arguments, Plaintiffs' counsel, Ms. Banks, attempted to mislead the jury by stating, "[s]o what we propose, because, based upon the evidence in this case, it has come out through their own witness that $9 is a reasonable amount to pay, and so we are submitting that that $9 be used for the calculation of the home care services." Trial Tr. at p. 706, line 25 – p. 707, line 4. Dr. Greenwood clearly did not testify that $9 per hour for home care was reasonable. This Court instructed the jury that what lawyers say during closing is not evidence. A misstatement of the evidence does not present a justifiable issue of fact to the jury. Plaintiffs' wishes that the home care services cost no more than an assisted living facility that did not provide the 24 hour a day supervised care the Kamlers provided, or that the home care services cost $9 per hour, is not evidence that $18 per hour was unreasonable or was not authorized by the Trust agreement. Therefore, Plaintiffs presented no evidence of a breach of the Trust agreement or of damage to the Trust as a result of their "concerns" regarding the home care expense.

As explained above, Bubniak denied the Request for Admission that "[y]ou were not present during any conversations Kamler had with the Decedent regarding his serving as Trustee of the Trust." Req. to Admit No. 2 to Bubniak. At trial, when asked, "Did your mom tell you what was in her trust before she died?", Bubniak answered, "No. She didn't talk about her trust." Trial Tr. at p. 193, lines 9-11. At trial, when asked, "You were not there when Virtue and Jim discussed the trust, were you?", Bubniak answered, "No, I wasn't." Trial Tr. at p. 214, lines 3-5.

At trial, when asked, "You were not there when Virtue gave your brother instructions about the trust, were you?", Bubniak answered, "I was not there." Trial Tr. at p. 214, lines 12-14. Bubniak's denial of the Request for Admission was blatantly false.

Before trial, Plaintiffs complained of the quality of care that the Kamlers had provided Virtue. In the Complaint at paragraph 11, Plaintiffs alleged that Jim failed to make any distributions for the general welfare and comfort of Virtue during the time that Virtue resided with him. Both Plaintiffs denied the request for admission that "[y]ou have no evidence to support your claim, in Paragraph 11 of the Complaint, that 'Mr. Kamler failed to make any . . . distributions [for the general welfare and comfort of the Decedent] while the Decedent resided with him from August 2009 to November 2011.'" Req. to Admit No. 14 to Southward and No. 4 to Bubniak. As explained above, during the June 18, 2018 hearing that occurred less than a month before trial, Plaintiffs' counsel made many representations of fact to the Court regarding the poor quality of care that the Kamlers allegedly provided Virtue.

In stark contrast to Plaintiffs' allegations before trial, Southward admitted at trial that she was not complaining about the care that Virtue received and that Jim took care of Virtue and made sure she was comfortable. Trial Tr. at p. 58, lines 18-19, p. 150, lines 12-15. Southward admitted she was surprised that the Kamlers were able to tolerate Virtue's dementia because Southward could not have put up with that herself. Trial Tr. at p. 150, lines 21-25. Plaintiffs presented no evidence that the Kamlers put Virtue in a closet. Southward admitted that she never saw the Kamlers' home. Trial Tr. at p. 169, lines 15-17. Bubniak admitted that she regularly spoke to Virtue on the phone, and Virtue never told Bubniak that she was unhappy living with Jim and Connie or that Jim and Connie were not taking good care of her. Trial Tr. at p. 213, lines 1-6. Bubniak admitted that she never saw Virtue's living conditions in the Kamlers' home. Trial Tr. at

p. 213, lines 22-24. The photographs of Virtue's bedroom that were admitted into evidence at trial showed that Virtue did not live in a closet. Defs.' Ex. 28-32; Trial Tr. at pp. 291-294.

Surprisingly, when cross-examining Jim Kamler, Ms. Banks, counsel for Plaintiffs, finally admitted, "[n]ow, we understand that you cared for your mother, and you took excellent care for her. There's no dispute about that. There is no dispute about that." Trial Tr. at p. 415, lines 20-22. During her closing argument, Ms. Banks also stated, "as our clients have told you, they are very grateful for the fact that they took care of her, and they took good care of her. That is not what this case is about." Hearing Tr. at p. 691, lines 6-9. This is one of many examples of Plaintiffs making a false allegation or taking a position before trial that they completely abandoned at trial and that they knew or should have known they had no evidence to support. Such conduct has serious consequences because it unnecessarily forced the Kamlers to incur significant attorneys' fees to prepare to refute such allegations at trial.

Both before and during trial, Plaintiffs alleged that Jim wrongfully made a loan to himself from the Trust. For example, in support of Plaintiffs' Motion for Summary Judgment, Plaintiffs argued that, "[e]ven if one were to construe such a ridiculous loan as legitimate, it does not excuse the fact that it was in clear violation of the Trust language." 5/19/2015 Pls.' Br. in Supp. of Pls.' Mot. for Summ. Judg. at p. 27. At trial, Bubniak testified "I did read in there that in the trust that a trustee should not give himself a loan if it didn't help my mother's benefit." When asked, "Where does that appear specifically in this trust?", Bubniak testified "I don't remember." Trial Tr. at p. 202, lines 21-25.

Actually, the Trust agreement expressly permitted Jim to make the loan to himself. Section 11.09 of Trust provides that "[m]y Trustee may make secured or unsecured loans to any person (including a beneficiary) . . . for any term or payable on demand, with or without interest." Defs.'

Ex. 1. The uncontroverted evidence also showed that Jim paid the loan back in full plus interest, even though interest was not required by the Trust agreement. Defs' Ex. 101; Trial Tr. at p. 322, lines 11-15, pp. 510-512. Hence, no breach of the Trust agreement and no damages to the Trust.

As explained above, throughout this entire action, Plaintiffs alleged that the Kamlers wrongly used Trust funds to purchase real property that they titled in the names of their LLCs. Plaintiffs' counsel, Ms. Pierson, even discussed the LLCs in her opening statement. Trial Tr. at p. 21, lines 9-13. At trial, Plaintiffs introduced no evidence whatsoever that any Trust assets at all were used to purchase property for the LLCs. The Georgia real property records are public and are easily accessible on the internet. If any real property was titled in the names of the LLCs, a simple search of the Georgia real property records would have found the deeds. The insistence of Plaintiffs and their counsel to make allegations that they knew or should have known they had no evidence to prove is in extreme bad faith and is abusive.

Before trial, Plaintiffs alleged that Jim failed to properly invest the Trust assets. At trial, Plaintiffs presented no evidence at all of how Jim should had invested the Trust assets differently and the amount of damages caused by Jim's alleged failure to invest properly. The uncontroverted evidence was that Jim kept the Trust assets invested the same way Virtue had the assets invested when she was Trustee, in interest bearing bank accounts. Trial Tr. at p. 44, lines 11-13, p. 482, line 14 – p. 483, line 4. Jim's uncontested testimony was that he managed the Trust during the Great Recession, and it was very fortunate that he did not have the Trust invested in stocks, otherwise the Trust may have lost a lot of money. Trial Tr. at p. 482, line 14 – p. 483, line 4. Plaintiffs' numerous allegations that they completely abandoned at trial forced the Kamlers to spend a great deal of money on fees and expenses in order to be able to defend against such unmeritorious claims at trial.

At trial, Plaintiffs presented no evidence that Plaintiffs had made a written objection to the January 5, 2017 Trust Accounting within sixty days of receiving said Accounting, as required by Section 10.09 of the Trust regarding assent. Trial Tr. at pp. 107-109, 204-205; Defs.' Ex. 1 at § 10.09.

Plaintiffs presented no evidence whatsoever that the attorneys' fees and expenses of litigation paid by the Trust were unreasonable. At trial, Jim presented evidence of the attorneys' fees and expenses incurred, and their reasonableness, after the January 5, 2017 Trust Accounting through the Supplemental Trust Accounting and the Second Supplemental Trust Accounting. Defs.' Ex. 3 and 144; Trial Tr. at pp. 334-336, 356-361. The expenses shown in the Supplemental Trust Accounting and the Second Supplemental Trust Accounting were comprised of the attorneys' fees and expenses through July 11, 2018 that were not previously included in the January 5, 2017 Trust Accounting. Defs.' Ex. 3 and 144. The Second Supplemental Trust Accounting showed that the ending balance of the Trust as of July 11, 2018 was negative $390,119.72. Defs.' Ex. 144. Jim testified that, because the Trust had no remaining assets, Jim had to pay the $390,119.72 out of his own pocket, by taking out another mortgage of his house and by borrowing from his retirement plan. Trial Tr. at p. 360, line 7 – p. 361, line 2. Plaintiffs presented no evidence at all that the attorneys' fees and expenses of the Kamlers shown in the Supplemental Trust Accounting and the Second Supplemental Trust Accounting through July 11, 2018 were unreasonable. The fees and expenses the Kamlers claim in their Motion were simply not contested or challenged by Plaintiffs at trial.

Plaintiffs presented no evidence whatsoever of any damage to the Trust. The Court charged the jury that, under the Georgia law as to damages, a jury must be able to calculate the amount of damages from the data furnished, and it cannot be placed in a position where an allowance of loss

is based on guesswork. A jury must be able to calculate loss with a reasonable certainty. The party claiming damages carries not only the burden of proving the damages, but also furnishing the jury with sufficient data to estimate the damages with reasonable certainty. It is not necessary, however, that the party on whom the burden thus rests should submit exact figures. Trial Tr. at p. 727; *Central Auto Sales, Inc. v. Poore*, 272 Ga. App. 221, 222 (2005); *Reliance Trust Co. v. Candler*, 294 Ga. 15, 19 (2013). If the damage incurred by the plaintiff is only the imaginary or possible result of a tortious act or if other and contingent circumstances preponderate in causing the injury, such damage is too remote to be the basis of recovery against the wrongdoer. Trial Tr. at p. 727; O.C.G.A. § 51-12-8.

Plaintiffs did not present any evidence that would have allowed the jury to calculate damages with reasonable certainty. Contrary to the allegations in their pleadings, Plaintiffs presented no evidence of damages for loss or depreciation of Trust property, no evidence of a profit made by the Trustee through breach of trust, no evidence of damages for interest that would have accrued to the Trust had there been no breach, no evidence that Jim "wasted" Trust property or the value of the wasted property, no evidence that Trust property was converted or the value of the converted property. Of course, before a jury may calculate damages, the jury must first find that the Defendant committed a breach or tort. In this case, Plaintiffs presented no evidence of a breach or tort committed by the Kamlers.

As explained above, before trial, Plaintiffs made many allegations of intentional wrongdoing against Connie in the Complaint, the Amended Complaint, and the Consolidated Pre-Trial Order. Plaintiffs accused Connie of being the instigator of Jim's wrongful taking of Trust assets. Just before submitting the proposed Consolidated Pre-Trial Order to the Court, Plaintiffs filed an Amended Complaint to add many more allegations of intentional wrongdoing against

Connie and to request punitive damages from Connie. After subjecting Connie to five years of litigation, Plaintiffs presented absolutely no evidence at trial of any wrongdoing by Connie. At trial, for the first time, Plaintiffs amazingly admitted they had no evidence of Connie's alleged wrongdoing. Southward testified that she never had any communications with Connie about the Trust. Trial Tr. at p. 169, line 18 – p. 170, line 2. Bubniak testified that Connie was not able give her any information about the Trust. Trial Tr. at p. 195, line 22 – p. 196, line 1. Plaintiffs presented zero evidence that Connie had any involvement with the Trust.

During the next to last day of trial, Plaintiffs voluntarily dismissed all their claims against Connie. Immediately after Connie made a Motion for Directed Verdict, Plaintiffs voluntarily dismissed their claims against Connie. Trial Tr. at pp. 251-252. This is another example of the continued assertion by Plaintiffs and their counsel of claims in this action knowing that they did not have the evidence to support such claims.

During trial, Jim moved for directed verdict as to Plaintiffs' claims for attorneys' fees and expenses of litigation pursuant to O.C.G.A. §§ 13-6-11 and 53-12-302, which the Court granted. Trial Tr. at pp. 621-628; 7/23/2018 Order Granting Def.s' Mot. For Directed Verdict as to Pls.' Claims for Attorneys' Fees and Expenses of Litigation. Plaintiffs failed to present adequate evidence of the amount of attorneys' fees and expenses of litigation that Plaintiffs actually incurred, failed to present evidence that the fees and expenses were reasonable, and failed to present evidence of the amount of fees and expenses that should be allocated to Plaintiffs' claims against Jim versus Plaintiffs' claims against Connie that they voluntarily dismissed with prejudice.

The Court reserved ruling on the remainder of the Kamlers' Motions for Directed Verdict and stated as follows: "I'm going to let the rest of it go to the jury. I don't want this case to have to be retried by any other judge. If I am afforded the opportunity, I will reconsider all arguments

on a motion for judgment NOV." Trial Tr. at p. 628, lines 2-5. *See also* Trial Tr. at p. 234, line 25 – p. 235, line 5. Consequently, this Court's decision not to grant the Kamlers' remaining Motions for Directed Verdict at that time was not in any way a finding that Plaintiffs had presented evidence to support their claims and their alleged damages.

During closing arguments, Plaintiffs requested that the jury award them $2,515,953.78 in damages. Trial Tr. at p. 662, lines 12-14.

A very few minutes after the Court sent the jury to deliberate, the jury returned with a verdict in favor of the remaining Defendant, Jim Kamler. Trial Tr. at pp. 735-737. On July 23, 2018, the Court entered the Final Judgment in this action. Plaintiffs did not file an appeal.

The Kamlers' Motion for Attorneys' Fees and Expenses of Litigation

The Kamlers timely filed the subject Motion. After the filing of the Motion, the parties presented the Court with a consent Scheduling Order giving the parties time for a post-judgment discovery period.

The Court held a one-and-a-half-day hearing on the subject Motion, during which the Kamlers presented the testimony of their counsel, Maggie Heim and Edwin Schklar, and of Southward. Plaintiffs and Plaintiffs' counsel did not call any witnesses, tender any exhibits, or present any evidence at the hearing on the subject Motion. Plaintiffs and Plaintiffs' counsel provided no evidence to refute the reasonableness of the Kamlers' fees and expenses sought in the subject Motion. Plaintiffs and Plaintiffs' counsel did not contest the Kamlers' assertion that Plaintiffs and Plaintiffs' counsel are all jointly and severally liable to the Kamlers for all claimed fees and expenses. Of course, any denial of joint and several liability would have necessitated separate legal counsel for Plaintiffs and for their counsel. Also, Plaintiffs and Plaintiffs' counsel do not refute the fact that all claimed fees and expenses sought by the Kamlers were paid by the

Kamlers, not by the Trust, since the Trust had no remaining assets with which to reimburse the Kamlers.

The Kamlers seek their attorneys' fees and expenses of litigation from Plaintiffs and Plaintiffs' counsel, jointly and severally, pursuant to O.C.G.A. §§ 9-15-14 (a), (b), and (d) and 9-11-37(c) incurred in this action from March 13, 2017 through the date of the hearing on this Motion. March 13, 2017 is more than sixty days after Plaintiffs and their counsel received the January 5, 2017 Trust Accounting without making an objection. The 60-day period during which Plaintiffs could object to the January 5, 2017 Trust Accounting elapsed on Friday, March 10, 2017. Monday, March 13, 2017 is the first business day after Plaintiffs had assented to the January 5, 2017 Trust Accounting. The Kamlers are not seeking any fees or expenses incurred before March 13, 2017.

The Kamlers' attorneys, Maggie Heim and Edwin Schklar, testified regarding the amount and reasonableness of the attorneys' fees and expenses of litigation that the Kamlers claim from Plaintiffs and their counsel, and the Court admitted into evidence the billing statements and checks showing the fees and expenses incurred and payments. Plaintiffs' counsel cross-examined Ms. Heim and Mr. Schklar. Plaintiffs and Plaintiffs' counsel did not call any witnesses at the hearing.

During her examination, Ms. Heim, counsel for the Kamlers, presented an Accounting of the Kamlers' Attorneys' Fees and Expenses of Litigation from March 13, 2017 Through January 17, 2019, which the Court admitted into evidence as Defendants' Exhibit 174. Defs.' Ex. 174; 1/16/2019 Hr'g Tr. at p. 815, lines 10-16, p. 816, lines 20-24. Defendants' Exhibit 174 begins with a chart showing the exact fees and expenses of litigation the Kamlers claim from Plaintiffs and Plaintiffs' counsel. For each billing statement showing fees and expenses incurred by the Kamlers from March 13, 2017 through the date of the hearing, the chart identifies the date the fees

and expenses were incurred, the date of payment, the company that issued the statement, the amount, the Bates number for the statement, and the Bates number for the check showing payment of the statement. Defs.' Ex. 174; 1/16/2019 Hr'g Tr. at p. 815, line 12 – p. 816, line 19.

The total fees and expenses of litigation incurred by the Kamlers in this action from March 13, 2017 through the hearing is $553,911.19 plus the cost of the court reporter for the hearing on the Motion. Defs.' Ex. 174; 1/16/2019 Hr'g Tr. at p. 816, line 25 – p. 818, line 7. The total of $553,911.19 does not include attorneys' fees incurred after the first day of the hearing on the Motion. The Kamlers are not seeking any additional fees after the first day of the hearing. Behind the chart in Defendants' Exhibit 174 are all the billing statements and checks showing the fees and expenses incurred by the Kamlers from March 13, 2017 through the date of the hearing. Defs.' Ex. 174; 1/16/2019 Hr'g Tr. at p. 816, lines 17-19. The Kamlers incurred fees and expenses from their counsel of record in this action, expert witnesses, a technician who displayed exhibits electronically on a large screen during trial, courier services, and the court reporter for the pre-trial hearing, for trial, and for the hearing on the Motion. Defs.' Ex. 174; 1/16/2019 Hr'g Tr. at p. 816, lines 5-12.

The entire amount of the Kamlers' fees and expenses of litigation from March 13, 2017 through January 17, 2019 was or will be paid personally by the Kamlers and cannot be reimbursed by the Trust because the Trust has no remaining assets. Defs.' Ex. 3, 144, and 174; 1/16/2019 Hr'g Tr. at p. 811, line 6 – p. 813, line 17, p. 818, lines 8-10. Moreover, $354,914.19 of the fees and expenses listed in Defendants' Exhibit 174 were already included in the Supplemental Trust Accounting and the Second Supplemental Trust Accounting, which were admitted into evidence at trial as Defendants' Exhibits 3 and 144. 1/16/2019 Hr'g Tr. at p. 814, lines 10-17, p. 818, lines 11-21. The Kamlers assert that $354,914.19 of the fees and expenses they claim from Plaintiffs

and Plaintiffs' counsel in the Motion are res judicata, collateral estoppel, and cannot be contested by Plaintiffs or Plaintiffs' counsel because the reasonableness of said fees and expenses was at issue at trial, and Plaintiffs and Plaintiffs' counsel did not present any evidence at trial challenging the appropriateness or reasonableness of said fees and expenses. 1/16/2019 Hr'g Tr. at p. 768, line 9 – p. 769, line 11, p. 818, line 22 – p. 819, line 9. The remaining approximately $199,000 that was not included in the Supplemental Trust Accounting or the Second Supplemental Trust Accounting is comprised of approximately one week of pre-trial preparation, the trial, some post-trial work, such as the preparation of the Final Judgment, and work with respect to the subject Motion, including the evidentiary hearing, post-judgment discovery, and Plaintiffs' Motions in Limine. Defs.' Ex. 174; 1/16/2019 Hr'g Tr. at p. 814, line 18 – p. 815, line 8, p. 819, line 10 – p. 820, line 5, p. 836, lines 4-7. During the post-judgment discovery period, the parties served each other with written discovery requests and responses, produced documents, and Plaintiffs' counsel took the depositions of Mr. Schklar and Ms. Heim. 1/16/2019 Hr'g Tr. at p. 835, line 17 – p. 836, line 3.

The Court has carefully studied the evidence, has considered the arguments presented by both sides, and finds that that the fees and expenses the Kamlers are claiming in the Motion were all reasonable and necessary to defend against the claims asserted by Plaintiffs, to deal with all of the issues created by Plaintiffs from March 13, 2017 through the hearing, and to prosecute the subject Motion. Ms. Heim and Mr. Schklar established their personal knowledge of the fee entries in Schklar & Heim, LLC's ("S&H") Statements of Account, the legal work done on the Kamlers' behalf, and the expenses incurred by the Kamlers for experts, a trial technician, and the court reporter.

Plaintiffs and Plaintiffs' counsel did not present any evidence to challenge the reasonableness or necessity of the Kamlers' attorneys' fees and expenses of litigation. Plaintiffs and Plaintiffs' counsel did not present any evidence that any of the work done by S&H was not necessary. Plaintiffs and Plaintiffs' counsel did not present any evidence that the hourly rates charged by S&H were unreasonable. Plaintiffs and Plaintiffs' counsel did not present any evidence that the amount of time spent by S&H working for the Kamlers from March 13, 2017 through the hearing was unreasonable and did not present any evidence of how much time should have been spent. Plaintiffs and Plaintiffs' counsel did not challenge at all the reasonableness of the Kamlers' expert witness fees, trial technician fees, court reporter fees, and other expenses of litigation.

Ms. Heim and Mr. Schklar presented evidence of the hourly rates S&H charged to the Kamlers and how those rates compared to the customary rates for similar cases in the applicable market. The hourly rates charged by S&H of $395 for Edwin Schklar, $350 for Maggie Heim, and $185 for their paralegal were reasonable, especially in light of the fact that S&H's rates charged to the Kamlers were lower than the rates of the Kamlers' prior counsel in this action and significantly lower than the rates other clients typically pay S&H. Defs.' Ex. 174; 1/16/2019 Hr'g Tr. at p. 820, line 16 – p. 821, line 23, p. 875, line 20 – p. 876, line 10. Other clients of S&H typically pay hourly rates of between $475 and $575 for Mr. Schklar's time and between $375 and $455 for Ms. Heim's time. 1/16/2019 Hr'g Tr. at p. 821. S&H gave the Kamlers a large discount. 1/16/2019 Hr'g Tr. at p. 820, line 16 – p. 821, line 23, p. 876, lines 2-10.

The Court finds that the number of hours billed by S&H from March 13, 2017 through the hearing on the Motion were reasonable and necessary. At all times from March 13, 2017 through the hearing, S&H only had the same two attorneys and one paralegal working on this action. Defs.' Ex. 174; 1/16/2019 Hr'g Tr. at p. 875, lines 1-7. The Court notes that Plaintiffs have had multiple

attorneys with the same law firm throughout this action. Indeed, all three new counsel of record for Plaintiffs and Plaintiffs' counsel with respect to the Motion and all three Plaintiffs' counsel from earlier in this action were present during both days of the hearing on the Motion, while the Kamlers were represented only by their two attorneys.

S&H's billing statements provide detailed descriptions of the work performed by each timekeeper and the amount of time worked by each timekeeper each day. It does not appear that any of the work performed by S&H was unnecessarily duplicative or wasteful. It appears that S&H's work since March 13, 2017 was focused on defending against Plaintiffs' claims (which included nineteen separate counts against one or both of the Kamlers with Plaintiffs requesting an award of more than $2.5 million), dealing with the issues caused by Plaintiffs' actions or inactions (which included fourteen written Motions and two pre-trial hearings), and prosecuting the subject Motion (which included post-judgment discovery, Motions in Limine, and an evidentiary hearing).

Moreover, S&H sent the Kamlers monthly billing statements. The entire amount claimed by the Kamlers in their Motion was paid by the Kamlers personally by borrowing from a mortgage and retirement accounts. None of the claimed fees and expenses were paid by the Trust. The Kamlers had every incentive to make sure that their attorneys were not spending time performing unnecessary work.

During trial, Jim testified that the amount he had paid for attorneys, an accountant, and experts in this action was reasonable. Trial Tr. at pp. 334-336. Jim testified that the hourly rates charged by S&H were significantly less than the hourly rates of the Kamlers' prior counsel in this action. *Id.* Jim testified that the hourly rates S&H charged the Kamlers were discounted from their normal rates for clients. *Id.* Jim further testified that, before the Kamlers hired S&H, the Kamlers researched the rates of other attorneys. *Id.*

Plaintiffs and Plaintiffs' counsel presented a unified defense to the Motion. Plaintiffs and Plaintiffs' counsel filed a joint Response to the Motion. Plaintiffs and Plaintiffs' counsel hired the same three attorneys to represent them with respect to the Motion. Neither Plaintiffs nor Plaintiffs' counsel presented any evidence that any one of them is more responsible or at fault than the others. In other words, neither Plaintiffs nor Plaintiffs' counsel presented evidence that, if this Court were to award attorneys' fees and expenses to the Kamlers pursuant to O.C.G.A. §§ 9-15-14 (a) or (b) or 9-11-37(c), the award should be against one or some of them, as opposed to against all Plaintiffs and Plaintiffs' counsel, jointly and severally.

CONCLUSIONS OF LAW

The Kamlers seek their attorneys' fees and expenses of litigation from Plaintiffs and Plaintiffs' counsel, jointly and severally, pursuant to O.C.G.A. §§ 9-15-14(a), 9-15-14(b), 9-15-14(d), and 9-11-37(c) incurred in this action from March 13, 2017 through the date of the hearing on this Motion.

O.C.G.A. § 9-15-14

O.C.G.A. § 9-15-14(a) states as follows:

> In any civil action in any court of record of this state, reasonable and necessary attorney's fees and expenses of litigation shall be awarded to any party against whom another party has asserted a claim, defense, or other position with respect to which there existed 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. Attorney's fees and expenses so awarded shall be assessed against the party asserting such claim, defense, or other position, or against that party's attorney, or against both in such manner as is just.

"Further, merely pursuing a course of litigation in good faith does not automatically insulate a plaintiff from a claim for litigation costs and attorney fees pursuant to OCGA § 9-15-14(a)." *Brown v. Kinser*, 218 Ga. App. 385, 387 (1995).

Since at least March 13, 2017, Plaintiffs have asserted claims and positions with respect to which there existed 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. The findings of fact stated above and the record in this action support this conclusion. Plaintiffs had a full eleven months of discovery and received the January 5, 2017 Trust Accounting on January 9, 2017. Plaintiffs assented to the January 5, 2017 Trust Accounting on March 10, 2017, when they did not make a written objection. By March 13, 2017, after Plaintiffs had had a full sixty days to study the January 5, 2017 Trust Accounting, which they admittedly studied "in painful detail," Plaintiffs and Plaintiffs' counsel knew or should have known that Plaintiffs did not have the evidence to prove their causes of action or alleged damages. If Plaintiffs had the evidence, they would have presented it at trial, but they did not. By March 13, 2017, Plaintiffs should have dismissed all their claims in this action.

Plaintiffs were under an obligation to put forward actual evidence at trial that one or more of the transactions listed in the January 5, 2017 Trust Accounting was not authorized by the Trust agreement. Before trial, Plaintiffs and their counsel made many promises of what the evidence would show, but the trial transcript makes it apparent that the promised evidence simply did not exist. Plaintiffs did not put forward any evidence whatsoever at trial to show that the Trustee lacked authority to pay any expense from the Trust or to make any other transaction for the Trust listed in the accountings. The failure to present evidence at trial to prove any element of Plaintiffs' causes of action and to prove damages is the "complete absence of any justiciable issue of law or fact."

Plaintiffs made many unsubstantiated allegations that were plainly foreclosed by the Trust agreement and the January 5, 2017 Trust Accounting, which is conduct that warrants an award of

attorneys' fees and expenses pursuant to O.C.G.A. § 9-15-14 (a) and (b). *Bircoll v. Rosenthal*, 267 Ga. App. 431, 435 (2004). For example, Plaintiffs asserted that the loan to Jim from the Trust was wrongful. However, the Trust agreement at section 11.09 expressly permitted Jim to make the loan to himself and did not require that Jim pay interest on the loan. Defs.' Ex. 1. The uncontroverted evidence was that Jim paid the loan back in full plus interest, even though interest was not required by the Trust agreement. Defs.' Ex. 101; Trial Tr. at p. 322, lines 11-15, pp. 510-512. Another example is that Bubniak asserted that Jim wrongfully included an ambulance bill in the Trust accounting, but the ambulance bill was not in the Trust accounting. Trial Tr. at pp. 219-221. To be clear, these examples are not intended to be a comprehensive list of all sanctionable conduct of Plaintiffs and Plaintiffs' counsel.

An award of fees and expenses pursuant to O.C.G.A. § 9-15-14(a) is warranted when, although the complaint alleged facts which if believed would have afforded a basis for relief, after more than a week of presenting evidence, the plaintiff failed to present any believable facts with respect to any of his claims, made inaccurate representations regarding his claims, and totally failed to present evidence of damages. *Patterson v. Butler*, 200 Ga. App. 657, 662 (1991). Likewise, in this case, Plaintiffs failed to present evidence to support their claims and alleged damages. Before trial, Plaintiffs and Plaintiffs' counsel made inaccurate representations regarding Plaintiffs' claims and what the evidence would show.

The Kamlers were forced to disprove Plaintiffs' bogus claims through testimony and by introducing numerous Exhibits to disprove Plaintiffs' claims, including the Trust itself, which is conduct that warrants an award of attorneys' fees and expenses pursuant to O.C.G.A. § 9-15-14(a). *Cavin v. Brown*, 246 Ga. App. 40, 43 (2000).

O.C.G.A. § 9-15-14(b) states as follows:

> The court may assess reasonable and necessary attorney's fees and expenses of litigation in any civil action in any court of record if, upon the motion of any party or the court itself, it finds that an attorney or party brought or defended an action, or any part thereof, that lacked substantial justification or that the action, or any part thereof, was interposed for delay or harassment, or if it finds that an attorney or party unnecessarily expanded the proceeding by other improper conduct, including, but not limited to, abuses of discovery procedures available under Chapter 11 of this title, the "Georgia Civil Practice Act." As used in this Code section, "lacked substantial justification" means substantially frivolous, substantially groundless, or substantially vexatious.

The failure of Plaintiffs and Plaintiffs' counsel to present evidence at trial to prove the elements of the causes of action they asserted and to prove their alleged damages meets the criteria of O.C.G.A. § 9-15-14(b). Such conduct lacks substantial justification because it is substantially frivolous, substantially groundless, and substantially vexatious. Plaintiffs asserted serious allegations of intentional wrongdoing against the Kamlers with claimed damages of $2.5 million that Plaintiffs knew or should have known they had no evidence to prove, made many false representations before trial regarding what the evidence would show, and were uncooperative and unnecessarily difficult in litigating this action, which indicates that their conduct was intended to be troublesome, annoying, and expensive for the Kamlers. Such conduct is evidence that this case was interposed for harassment and that Plaintiffs were motivated by greed, jealousy, or other underlying family acrimony, not by the evidence.

Plaintiffs unnecessarily expanded the proceedings by continuing to assert claims that they had no evidence to prove and by taking unjustified positions that resulted in unnecessary motions and unnecessary work for the Kamlers' counsel. Once Plaintiffs received the January 5, 2017 Trust Accounting and realized they had no evidence to prove their case, they should have dismissed their claims.

The Court is "required to limit the fee award to those fees incurred because of sanctionable conduct." *Cohen v. Rogers*, 341 Ga. App. 146, 153 (2017). "Attorney's fees and expenses of

litigation incurred in obtaining an order of court pursuant to this Code section may also be assessed by the court and included in its order." O.C.G.A. § 9-15-14(d). The Court concludes that the entire conduct of Plaintiffs and Plaintiffs' counsel from March 13, 2017 through the date of the hearing on the Motion is sanctionable pursuant to both O.C.G.A. §§ 9-15-14(a) and 9-15-14(b). The amount of the Kamlers' reasonable fees and expenses of litigation attributable to the sanctionable conduct is $553,911.19 plus the cost of the court reporter for the hearing on the Motion. The Kamlers have presented sufficient proof of their actual costs and the reasonableness of those costs. The fees and expenses sought were reasonable and necessary and resulted from the frivolous and unjustified claims and conduct of Plaintiffs and Plaintiffs' counsel from March 13, 2017 until the date of the hearing on the Motion and in pursuing a fee award pursuant to O.C.G.A. § 9-15-14. The fees and expenses awarded to the Kamlers were amassed solely as a result of abusive conduct by Plaintiffs and Plaintiffs' counsel.

The fees and expenses of $553,911.19 plus the cost of the court reporter for the hearing on the Motion are awarded to the Kamlers from Plaintiffs and Plaintiffs' counsel, jointly and severally, because they are equally at fault. Plaintiffs themselves studied the January 5, 2017 Trust Accounting in "painful detail" and could not point to a single expense or transaction that was not authorized by the Trust. As Georgia attorneys, Plaintiffs' counsel fully understood the law and that they had a duty at trial to present real evidence to prove Plaintiffs' causes of action and alleged damages, not merely allegations, questions, or concerns. Plaintiffs and Plaintiffs' counsel chose to present a joint defense to the subject Motion. None of them presented any evidence to show that any one of them was more at fault than the others. Consequently, the award is against Plaintiffs and Plaintiffs' counsel, jointly and severally. This award is not against the new counsel for

Plaintiffs and Plaintiffs' counsel, who appear in this action solely with respect to the subject Motion.

O.C.G.A. § 9-11-37

O.C.G.A. § 9-11-37(c) states the following:

> *Expenses on failure to admit.* If a party fails to admit the genuineness of any document or the truth of any matter as requested under Code Section 9-11-36 and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that the request was held objectionable pursuant to subsection (a) of Code Section 9-11-36, or the admission sought was of no substantial importance, or the party failing to admit had reasonable ground to believe that he might prevail on the matter, or there was other good reason for the failure to admit.

The Kamlers are entitled to an award of attorneys' fees and expenses of litigation from Plaintiffs pursuant to O.C.G.A. § 9-11-37(c). Jim served Requests for Admission on both Plaintiffs and both Plaintiffs responded. The Requests for Admission served on Plaintiffs all pertained to the allegations that Plaintiffs made in their Complaint. The Requests for Admissions asked Plaintiffs to admit that they did not have the evidence to prove their allegations in the Complaint. Plaintiffs denied nearly every Request for Admission. The evidence and lack of evidence at trial proves that Plaintiffs should have admitted all the Requests for Admission. Had Plaintiffs admitted all the Requests for Admission, there would not have been a need for any further litigation or trial. Indeed, Plaintiffs would have been forced to dismiss their case. None of the Requests for Admissions were objectionable.

The admissions sought were of substantial importance because they directly quoted the allegations of the Complaint. At least by the time that Plaintiffs received the January 5, 2017 Trust Accounting, Plaintiffs did not have a reasonable ground to believe that they might prevail on the

matter. O.C.G.A. § 9-11-26(e)(2) states the following regarding a party's continuing duty to amend her answers to requests for admission:

> (2) A party is under a duty seasonably to amend a prior response if he obtains information upon the basis of which:
>
> (A) He knows that the response was incorrect when made; or
>
> (B) He knows that the response, though correct when made, is no longer true and the circumstances are such that a failure to amend the response is, in substance, a knowing concealment.

Even if Plaintiffs did not realize that they should have admitted the Requests for Admission at the time that they served their original Responses, O.C.G.A. § 9-11-26(e)(2) required Plaintiffs to supplement their Responses with admissions.

Plaintiffs provided no good reason at all for their failure to admit. During the evidentiary hearing, Plaintiffs' counsel argued that the Requests for Admission were improper because "[n]o reasonable lawyer would do that." 1/17/2019 Hr'g Tr. at p. 959, lines 11-21. The Requests for Admission meet the criteria and serve the purpose of O.C.G.A. § 9-11-36(a). The Requests for Admission were written to require Plaintiffs to determine whether they truly had the evidence to support the allegations in their Complaint. Even though Plaintiffs did not have the evidence, they wrongly chose to deny the Requests for Admission.

The Court concludes that the amount of the Kamlers' reasonable fees and expenses of litigation incurred in proving the Requests for Admission is $553,911.19 plus the cost of the court reporter for the hearing on the Motion. The fees and expenses of $553,911.19 plus the cost of the court reporter for the hearing on the Motion are awarded to the Kamlers from Plaintiffs, jointly and severally. The award pursuant to O.C.G.A. § 9-11-37(c) is not against Plaintiffs' counsel because O.C.G.A. § 9-11-37(c) does not expressly state that an award may be made against counsel for a party.

ARGUMENTS OF PLAINTIFFS AND PLAINTIFFS' COUNSEL

Plaintiffs and Plaintiffs' counsel argued that their case had merit because the Court did not grant the Kamlers' motions for partial summary judgment that they had filed many years ago. The motions for summary judgment were filed long before the January 5, 2017 Trust Accounting and before the Kamlers identified their experts. Some cases cited by Plaintiffs and their counsel, such as *Porter v. Felker*, 261 Ga. 421 (1991), address the application of O.C.G.A. § 9-15-14 when a court has previously denied a motion for summary judgment made by the same party who has requested fees pursuant to O.C.G.A. § 9-15-14. First, this Court never entered an Order denying the Kamlers' motions for partial summary judgment.

Second, the denial of a defendant's motion for summary judgment does not mean that a plaintiff will present evidence at trial to create a justiciable issue of fact or law or to support the justification of a claim. "The granting of summary judgment or directed verdict 'is a very, very grave matter. By such act, the case is taken away from the jury, and the court substitutes its own judgment for the combined judgment of the [jury].'" *Service Merchandise, Inc. v. Jackson*, 221 Ga. App. 897, 898 (1996) (citations omitted). "Trial and appellate judges should not take such matters lightly, for what is at stake is of constitutional magnitude. When a trial court or appellate court determines that summary judgment or a directed verdict is appropriate, it is in effect a determination that a party is not entitled to his or her right to a trial by jury even after a demand for jury trial has been made." *Id.* at 898-899. "A trial court should reluctantly grant such a motion, and on appeal, the trial court's decision should be scrutinized with great care by the reviewing court." *Id.* at 899. Regardless of whether a plaintiff presents some evidence at the summary judgment stage, the plaintiff must present evidence at trial to prove the elements of the causes of

action asserted. In this case, Plaintiffs presented no evidence at trial to prove their causes of action or their alleged damages.

Third, the evidentiary posture of this case was not the same at the summary judgment stage as it was at trial, namely because the January 5, 2017 Trust Accounting did not exist and the Kamlers had not yet identified any experts when the parties filed motions for summary judgment. At the summary judgment stage, the Plaintiffs could point to their "concerns," such as the "concerns" that the Trustee used Trust funds to make certain purchases. Without the January 5, 2017 Trust Accounting recording the ins and outs of the Trust with mathematical precision, showing that each of the "concerning" purchases using Trust funds was properly allocated as draws taken by the Trustee, showing that the Trustee was owed reimbursement for legitimate expenses of the Trust paid personally by the Trustee, and correctly calculating the Trustee's fee in accordance with the Trust and Georgia law, the Kamlers were not in a position to clearly show that Plaintiffs' "concerns" had no merit. Indeed, at trial Plaintiffs admitted that the purchases by the Trust that concerned them were properly allocated as draws to Jim in the January 5, 2017 Trust Accounting and admitted that Jim was entitled to be reimbursed from and compensated by the Trust.

At the summary judgment stage, Plaintiffs could point to their "concern" regarding the home care expense. Without the expert opinions of Dr. Marxer that Virtue needed 24 hour a day supervised care and of Dr. Greenwood regarding reasonable home care expenses in Cobb County, Georgia at the time that Virtue lived with the Kamlers, the Kamlers would not have been able to clearly show that the home care expense was reasonable. Without the January 5, 2017 Trust Accounting, the expert witnesses, and other evidence that did not exist during the summary judgment stage, this case is indeed one of the "unusual cases where the trial judge could not, at the

summary judgment stage, foresee facts authorizing the grant of attorney fees." *Porter v. Felker*, 261 Ga. 421, 421 (1991). At the summary judgment stage, the Court did not have the benefit of the evidence that existed in January 2017. The Kamlers are only requesting their fees and expenses beginning March 13, 2017, which is more than 60 days after the January 5, 2017 Trust Accounting.

Plaintiffs and Plaintiffs' counsel also argued that their case had merit because the Court did not grant most of the Kamlers' Motions for Directed Verdict. By the time that trial began, two Defendants remained, Jim and Connie. As soon as Connie made a Motion for Directed Verdict, Plaintiffs voluntarily dismissed all their claims against Connie with prejudice. Therefore, Connie's Motion was successful. Jim's Motion for Directed Verdict as to Plaintiffs' claim for attorneys' fees and expenses was also successful.

The denial of a party's motion for summary judgment or a motion for directed verdict does not require the denial of the same party's motion for attorneys' fees pursuant to O.C.G.A. § 9-15-14. "The function of the trial court in ruling on either requires the trial court to determine whether the movant is entitled to a judgment as a matter of law on the facts established and whether there is a genuine issue as to any material fact. In a close case, a trial court may deny summary judgment and anticipate a second opportunity to consider its ruling on a subsequent motion for directed verdict." *Ansa Mufflers Corp. v. Worthington*, 201 Ga. App. 602, 603 (1991) (punctuation omitted) (quoting *Porter*, 261 Ga. at 421-422).

The trial court may also deny directed verdict and anticipate a second opportunity to reconsider its ruling on a subsequent motion for judgment notwithstanding the verdict, if the evidence does not support the verdict. The very words of the statute support this conclusion. "Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a

later determination of the legal questions raised by the motion. Not later than 30 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict . . . . If a verdict was returned, the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed." O.C.G.A. § 9-11-50(b).

After hearing the motions for directed verdict at the close of Defendants' case, the Court stated that "I'm going to let the rest of it go to the jury. I don't want this case to have to be retried by any other judge. If I am afforded the opportunity, I will reconsider all arguments on a motion for judgment NOV." Trial Tr. at p. 628, lines 2-5. This approach is a very common and appropriate approach taken by Georgia courts to avoid appeals and retrials. After trial, Plaintiffs did not appeal. By letting the jury decide the case in favor of the remaining Defendant, Jim, it is likely that the Court saved the parties from an appeal.

In the *Ansa Mufflers* case, the trial court reserved its ruling on the motions for directed verdict until the jury returned a verdict on the claim and counterclaim. 201 Ga. App. at 603. The Court of Appeals held that the trial court's denial of motions for directed verdict did not require the reversal of the trial court's award of attorney's fees to the party whose motions for directed verdict were not granted. *Id.* The Court of Appeals explained that, "although the trial court effectively denied appellees' motion by not directing the verdict on the 'close case' presented in the main claim, the trial court, by waiting to accept the jury's award on the *Yost* counterclaim, basically accorded itself a 'second opportunity' to consider its ruling." *Id.* (citations and punctuation omitted).

The Court of Appeals has also held as follows:

> In considering an award under OCGA § 9-15-14, a trial court is not necessarily bound by the denial of a motion for directed verdict. For example, a court may properly grant a motion for judgment notwithstanding the verdict where a valid motion for directed verdict was denied erroneously. Or, a court may act expediently and deny such a motion so as to achieve a verdict and avoid a second trial in the event its grant of the motion would be reversed on appeal. A court's consideration of such a motion in the midst of trial should not automatically govern the application of OCGA § 9-15-14 relief, as the context and issue may differ. As stated in *Porter*, "[w]e cannot require trial courts to be infallible. More importantly, if additional facts authorize an [attorney fees] award and the trial court is powerless to make an award, then the purposes of the [OCGA § 9-15-14] (deterrence of litigation abuses and recompensation for legal fees and costs) are thwarted."

Atwood v. Southeast Bedding Co., Inc., 236 Ga. App. 116, 117 (1999) (citations omitted). Likewise, in this case, the Court reserved ruling on the remaining Motions for Directed Verdict so as to allow the jury to achieve a verdict and to avoid an appeal or a second trial. After hearing the evidence, the Court did not believe that Plaintiffs had justiciable issues of law or fact or that their claims were justified.

Plaintiffs and Plaintiffs' counsel also argued that they had justiciable issues of law and cited law regarding their causes of action in their Response to the Motion. The law that Plaintiffs and Plaintiffs' counsel cited is not applicable to this case. For example, Plaintiffs and Plaintiffs' counsel cited *Hasty v. Castleberry*, 293 Ga. 727 (2013) on page 18 of their Response for the proposition that "[a] Trustee is responsible for administering a trust in a manner that will preserve the trust for the remainder beneficiaries while still caring for the current beneficiary." That law did not apply to this case. First, it contradicts the Trust. The Trust states that "[m]y Trustee shall distribute to me, or to such persons or entities as I may direct, as much of the net income and principal of the trust property as I deem advisable. My Trustee may distribute trust income and principal to me or for my unrestricted use and benefit, even to the exhaustion of all trust property." Defs.' Ex. 1 at § 1.04(d). The Trust also states that "my Trustee shall give consideration first to my needs." Defs.' Ex. 1 at § 4.02(d). At trial, Southward admitted that the Trust provided that

Virtue's needs came before the needs of the contingent remainder beneficiaries of the Trust. Trial Tr. at p. 99, lines 3-9.

Second, the Trust agreement expressly stated that the laws of the state of California, not Georgia, applied with respect to the Trust. Defs.' Ex. 1 at §§ 11.01, 12.05, 12.07(d). The Court instructed the jury that the applicable laws of the State of California regarding trusts applied for the period in question. Trial Tr. at p. 719, lines 5-7. The Court charged the jury that, under California law, when the trustee of a revocable trust is someone other than the grantor, that trustee owes a fiduciary duty solely to the grantor, not to the beneficiaries, as long as the grantor is alive. During that time, the trustee needs to account to the grantor only and not also to the beneficiaries. Trial Tr. at p. 720, lines 3-8; *In re Estate of Giraldin*, 290 P. 3d 199, 201, 203-204, 207, 55 Cal. 4th 1058, 1062, 1066, 1071 (Cal. 2012); Cal. Prob. Code § 15800. The only law that applied to Plaintiffs' causes of action is the law that the Court charged the jury with at trial, not the law that Plaintiffs and their counsel cited in their Response to the Motion.

At the hearing, Plaintiffs and Plaintiffs' counsel argued that the fact that the Kamlers' counsel spent time preparing for trial and chose to put on evidence after Plaintiffs rested means that Plaintiffs' claims must not have been frivolous. The Court is not convinced by this argument. A defendant never knows with certainty what the testimony and other evidence will be at trial until the plaintiff has rested. Moreover, the Kamlers presented evidence because they had evidence to disprove Plaintiffs' claims. 1/16/2019 Hr'g Tr. at p. 904, lines 6-11. Further, Plaintiffs asserted nineteen counts against one or both of the Kamlers and claimed damages of $2.5 million. The Kamlers and their counsel were right to present the best defense possible, even if Plaintiffs' claims were frivolous. Plaintiffs' counsel correctly pointed out at the hearing on the Motion that the

Kamlers' counsel had the duty to diligently and zealously advocate on behalf of the Kamlers. 1/16/2019 Hr'g Tr. at p. 836, lines 16-21.

Plaintiffs and Plaintiffs' counsel cited *Rental Equip. Group, LLC v. MACI, LLC*, 263 Ga. App. 155, 164 (2003), which states that, "[a]s in this case, where the trial court denies summary adjudication **and where the claim had some factual merit or presented a justiciable issue of law**, the denial of an award must be affirmed on any evidence." (emphasis added). In this case, Plaintiffs' claims had no factual merit and did not present a justiciable issue of law.

Plaintiffs and Plaintiffs' counsel cited *Ellis v. Johnson*, 263 Ga. 514, 516 (1993), which states that, "[h]owever, because the appellants' contest was based on their interpretation of § 21-2-524(c), because that code section had never been interpreted by any court, and because the language of subsection (c) provided arguable support for the appellants' contention, we conclude the trial court erred in awarding attorney fees under § 9-15-14(a)." In this case, none of the applicable law provided arguable support for Plaintiffs' claims.

Plaintiffs and Plaintiffs' counsel cited *Kendall v. Delaney*, 283 Ga. 34, 36 (2008), which states that "[t]his Court will affirm a lower court ruling made under OCGA § 9-15-14(a) if there is 'any evidence' to support it. However, as discussed above, Kendall advanced a justiciable issue of law, and produced evidence to support it, and accordingly, it was error for the superior court to award attorney fees under OCGA § 9-15-14(a)." (citations omitted). In this case, Plaintiffs did not advance a justiciable issue of law and did not produce evidence to support a justiciable issue of law.

In *Lee v. Park*, 341 Ga. App. 350, which Plaintiffs and Plaintiffs' counsel cited, the Court of Appeals reversed an award of fees under O.C.G.A. § 9-15-14(b) because "the evidence

presented several genuinely disputed factual issues that had to be resolved." In this case, the evidence did not present any genuinely disputed factual issues that had to be resolved.

At the hearing, Plaintiffs and Plaintiffs' counsel argued that the Kamlers must have believed that Plaintiffs had justiciable issues of law and fact because the Kamlers identified many issues for determination in the Consolidated Pre-Trial Order. This argument does not have merit. The purpose of the Consolidated Pre-Trial Order is to frame all issues that have been raised in the pleadings and that have not been dismissed, regardless of whether the parties believe that the issues have merit. In the Consolidated Pre-Trial Order at paragraph (8), the Kamlers preceded their list of issues for determination by stating that "Defendants assert that the following correctly states the issues for determination set forth in the pleadings in this action."

Plaintiffs argued in their Response to the Motion that the Requests for Admission were objectionable because they asked for legal conclusions. First, O.C.G.A. § 9-11-36(a)(1) provides that requests for admission can "relate to statements or opinions of fact or of the application of law to fact." Second, the Requests for Admission did not ask for legal conclusions. Requesting that a Plaintiff admitted that she does not have evidence to prove a factual allegation does not call for a legal conclusion.

Plaintiffs also argued that the Requests for Admissions were objectionable. The Requests for Admission track Plaintiffs' own allegations in the Complaint. They were not objectionable.

Plaintiffs also argued that the Kamlers should have filed a Motion to Compel during discovery. To support this argument, on page 29 of their Response, Plaintiffs quoted the law that, "where a party receives an evasive or incomplete answer to a discovery request, in order to obtain an answer upon which it can rely, or sanctions for failing to produce the same, the party must file a motion to compel." *Resurgens, P.C. v. Elliott*, 301 Ga. 589 (2017). Plaintiffs did not respond to

the Requests for Admission with evasive or incomplete answers. Plaintiffs repeatedly answered with the word "denied." The word "denied" is perfectly clear. No Motion to Compel was necessary.

AWARD AND JUDGMENT

Accordingly, the Kamlers' Motion is hereby GRANTED. The Kamlers are hereby awarded $553,911.19 in fees and expenses of litigation plus the cost of the court reporter for the January 16 and 17, 2019 hearing against Judy A. Bubniak, E. Jean Southward, Broel Law, LLC (f/k/a Broel Law Group, LLC, d/b/a Georgia Probate Law Group), Erik J. Broel, Stephanie D. Banks, and Amy L. Pierson, jointly and severally, pursuant to O.C.G.A. § 9-15-14 (a), (b), and (d). The award of $553,911.19 against Judy A. Bubniak and E. Jean Southward, jointly and severally, is also made pursuant to O.C.G.A. § 9-11-37(c). Plaintiffs and Plaintiffs' counsel shall also reimburse the Kamlers $1,054.00 for the cost of the court reporter for the January 16 and 17, 2019 hearing, since the Kamlers have already paid the court reporter.

SO ORDERED, this 18th **day of** February**, 2019.**

G. GRANT BRANTLEY
Senior Superior Court Judge

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