COURT OF APPEALS
STATE OF GEORGIA

GIACOMO BELLOMO,

Appellant,

v.

TECH MAHINDRA (AMERICAS), INC.,

Appellee.

APPEAL NO. A24A1174

BRIEF OF APPELLANT GIACOMO BELLOMO

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Table of Contents

Table of Authorities

Cases

Statutes

Constitutional Provisions

A. Introduction

This is an appeal from an Order of the Honorable Rachel Krause, Superior Court of Fulton County, Georgia, awarding $1,730,731.33 in attorney's fees and costs to Appellee Tech Mahindra (Americas), Inc. ("Tech Mahindra") pursuant to O.C.G.A. §9-11-68. The award followed Appellant Giacomo Bellomo's rejection of an offer of just $10,000 to settle a civil conspiracy claim valued in excess of $304,000.

Appellant Bellomo contends that Tech Mahindra's O.C.G.A. §9-11-68 offer was not made in good faith, such that it was error to assess attorney's fees and costs against him following his rejection of the offer. Moreover, even if this Court were to conclude that the O.C.G.A. §9-11-68 offer was made in good faith, the trial court awarded an excessive amount of fees and costs to Tech Mahindra.

B. Jurisdictional Statement

This is a direct appeal from a Final Order entered by the trial court on October 4, 2023. The notice of appeal was filed within thirty days after the Final Order was entered. This Court has jurisdiction over this direct appeal pursuant to O.C.G.A. §§5-6-33(a)(1) and 5-6-34(a)(1), and because the subject matter of this appeal is not within the subject matter over which the Georgia Supreme Court has exclusive jurisdiction under Georgia Constitution Article VI, §VI, ¶II.

C. Enumeration of Errors

1. Whether the trial court erred in concluding that Tech Mahindra's settlement offer of $10,000 pursuant to O.C.G.A. §9-11-68 was made in good faith, where the offer was not reasonably related to the amount in dispute or the liability risk that Tech Mahindra knew it faced, and where the circumstances surrounding the offer suggest an absence of intent by Tech Mahindra to settle?
2. If Tech Mahindra's settlement offer of $10,000 pursuant to O.C.G.A. §9-11-68 was made in good faith, whether the trial court employed an erroneous methodology to calculate Tech Mahindra's reasonable attorney's fees and costs following Appellant Bellomo's rejection of that offer?

D. Statement of the Case

This dispute, which has been the subject of multiple prior appeals, stems from Appellant Giacomo Bellomo's attempts to satisfy a judgment entered in his favor following a jury trial in January 2015. Mr. Bellomo contends that Appellee Tech Mahindra conspired with the judgment debtor and other parties to facilitate a fraudulent transfer that prevented him from satisfying his judgment. After Mr. Bellomo resolved his fraudulent transfer claims against the other tortfeasors, the trial court dismissed his civil conspiracy claim against Tech Mahindra with prejudice and

subsequently awarded Tech Mahindra attorney's fees and costs of $1,730,731.33 under O.C.G.A. §9-11-68.

1. Material Facts

Appellant Bellomo obtained a judgment for $304,667.85 (the "Judgment") against Avion Systems, Inc. on January 12, 2015. The Judgment was affirmed on appeal. Avion Systems, Inc. v. Bellomo, 338 Ga. App. 141, 789 S.E.2d 374 (Ga. App. 2016).

While attempting to satisfy the Judgment, Mr. Bellomo learned that Avion Systems, Inc. had sold all of its assets. Appellee Tech Mahindra had provided all of the financial resources for the purchase of one of two divisions of Avion Systems, Inc., at a price that Mr. Bellomo contended was below reasonably equivalent value. V5-1137-1140, 1145, 1147; *see also* summary at Giacomo Bellomo v. Tech Mahindra (Americas), Inc., A22A0859, November 1, 2022, p. 4.

On July 12, 2017, Mr. Bellomo filed an action against multiple defendants, including judgment debtor Avion Systems, Inc. and Tech Mahindra, in an effort to satisfy his 2015 Judgment. V2-11-37 Even before Tech Mahindra answered the complaint, counsel for Appellant Bellomo and Appellee Tech Mahindra were in communication regarding a possible resolution of the claim against Tech Mahindra.

In an effort to further evaluate his claim against Tech Mahindra, Mr. Bellomo's counsel sought informal discovery from Tech Mahindra under the

protections of a proposed consent confidentiality order. V9-2349, l. 12 - V9-2350, l. 10, V9-2350, l. 19 - V9-2351, l. 8, V9-2277 Tech Mahindra refused to enter into a consent confidentiality order, and (without making any promises as to what information it might informally share) conditioned any informal discovery on Appellant Bellomo's counsel signing a nondisclosure agreement that:

- would have fallen completely outside the jurisdiction of the trial court, preventing the use of any information or documents obtained under the nondisclosure agreement in this litigation and depriving the trial court of any ability to manage the disclosure of information and documents under the umbrella of the nondisclosure agreement;
- would have required Appellant's counsel (a Georgia resident) to consent to the exclusive personal jurisdiction and venue of a New York court;
- would have potentially triggered enforcement litigation against Appellant's counsel, in her personal capacity, in a New York court that would have had no familiarity with the underlying Georgia litigation;
- would have required the application of New York law rather than Georgia law to the interpretation of the nondisclosure agreement

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despite the fact that the underlying litigation was occurring in Georgia; and

- would have barred Appellant's counsel from discussing any of Tech Mahindra's documents with Appellant Bellomo and thereby severely impaired counsel's ability to advise Mr. Bellomo regarding Tech Mahindra's role in the civil conspiracy and the merits of the claim against Tech Mahindra.

V9-2352, l. 20 – V9-2353, l. 11, V9-2278-2281

Under these non-negotiable terms set by Tech Mahindra, any informal discovery that might have been provided by Tech Mahindra would have been useless, because Tech Mahindra's constraints would have prevented Mr. Bellomo from being apprised of and evaluating Tech Mahindra's claimed defenses. V9-2353, l. 22 – 2355, l. 2, V9-2282-2284 Instead, Mr. Bellomo would have been evaluating any settlement proposal from Tech Mahindra in the dark.

After negotiations over the terms of informal discovery broke down, Tech Mahindra answered and moved to dismiss the Complaint on September 15, 2017. The Honorable Todd Markle[1], who was overseeing the case at that time, stayed

1 Judge Markle was elevated to this Court while motions for summary judgment were pending. The Honorable Rachel Krause was appointed to replace Judge Markle on the Superior Court of Fulton County in 2019, after motions for summary judgment were briefed but before oral argument.

discovery on October 19, 2017, pending determination of all parties' motions to dismiss. V2-204

On October 23, 2017, while discovery remained on hold under Judge Markle's Order, Tech Mahindra served on Mr. Bellomo a settlement offer for $10,000 pursuant to O.C.G.A. §9-11-68 (the "Offer"). V5-1261-1266 The stay of discovery, combined with Tech Mahindra's conditions precedent to informal discovery of information and documents needed to fully evaluate the Offer (described above at pages 4-5), made it impossible for Appellant Bellomo to make an informed decision regarding Tech Mahindra's claimed defenses before the Offer expired. At the same time, it was clear that the value of Appellant Bellomo's claim, if proven, would far exceed the $10,000 Offer because the Judgment that he was trying to satisfy was for $304,667.85 (more than thirty times the amount of the Offer). For these reasons, Appellant Bellomo declined the Offer on November 21, 2017. V5-1268

A few days after Tech Mahindra tendered the Offer, Judge Markle denied Tech Mahindra's first motion to dismiss and allowed the case to move forward to discovery. V2-208-214 A few months later, the parties entered into a protective order pursuant to which Tech Mahindra finally produced over 13,000 pages of documents pertaining to the asset transfer that it had funded and that Appellant Bellomo contended was fraudulent. V9-2363, l. 6 – V9-2364, l. 3

The other parties produced almost no documents in discovery. The more than 13,000 pages of Tech Mahindra documents, and the deposition of Tech Mahindra representative Guruprasad Iyengar, were the primary sources of the evidence of culpability used by Appellant Bellomo to survive defense motions for summary judgment. *See* V5-1130-1162; *see also* V9-2363, ll. 10-12, V9-2420, l. 9-2421, l. 11

Following Appellant Bellomo's settlement with the other tortfeasors, the trial court concluded that Mr. Bellomo's civil conspiracy claim against Tech Mahindra could not survive as a freestanding claim. V5-1202-1205 Although Tech Mahindra will never be found legally liable to Mr. Bellomo, the evidence examined by Judge Krause in her order denying defense motions for summary judgment makes clear that Tech Mahindra's behavior was far from blameless. V5-1146-1149 Thus, when Tech Mahindra made the Offer, its risk was far higher than its $10,000 Offer suggests. *See* V5-1146-1149

Following affirmance of Tech Mahindra's dismissal on appeal (Giacomo Bellomo v. Tech Mahindra (Americas), Inc., A22A0859, November 1, 2022; *cert. denied,* S23C0370, June 21, 2023), Judge Krause held a three-hour time-limited evidentiary hearing regarding Tech Mahindra's claim for attorney's fees under O.C.G.A. §9-11-68. V7-1736-1738 The hearing was held just two days after Tech Mahindra served and filed 554 pages of fee and cost invoices under seal. *Compare*

V7-1736-1738 *with* V7-1744-1747; *see also* V11-1-558. Prior to that last-minute filing, Tech Mahindra had resisted sharing any of its fee and cost invoices with Appellant's counsel, apparently expecting that the trial court could assess fees and costs against Appellant Bellomo based on evidence never actually disclosed to him or his counsel. V6-1411-1412, V6-1454-1455, V7-1720-1721, V7-1731-1733

Tech Mahindra's last-minute 554-page sealed filing included fee invoices that were not even in chronological order, making it difficult for Appellant's counsel to undertake a serious review of them in the short time permitted by the trial court. V11-5-558 The late, sealed filing afforded no opportunity for Appellant Bellomo to engage an expert to review and opine on the reasonableness of the invoiced legal services and costs, and no opportunity at all for Appellant Bellomo to himself review the fee invoices and expenses that Tech Mahindra was asking the trial court to order him to pay. *Compare* V7-1736-1738 *with* V7-1744-1747; *see also* V9-2316-2317; *see also* invoices at V11-1-558.

Following the Rule 68 hearing, Judge Krause granted nearly all of the fees and costs Tech Mahindra requested, entering a judgment against Appellant Bellomo for $1,730,731.33. V9-2325-2326 This has produced a Kafka-esque situation in which Appellant Bellomo is saddled with a judgment that threatens to render him and his family destitute, despite still having had no opportunity to personally review the evidence against him.

2. Procedural History

This appeal represents the fifth appearance of this dispute before this Court.[2] In its first substantive decision associated with this dispute, this Court affirmed Appellant Giacomo Bellomo's Judgment against Avion Systems for $304,667.85. Avion Systems, Inc. v. Bellomo, 338 Ga. App. 141, 789 S.E.2d 374 (Ga. App. 2016).

After being unable to satisfy his Judgment, on July 12, 2017, Mr. Bellomo filed suit against Avion Systems, Inc., Tech Mahindra, and two other tortfeasors, alleging multiple torts including fraudulent transfer and conspiracy. Following Judge Krause's denial of summary judgment to all of the defendants, Tech Mahindra petitioned the Georgia Supreme Court for interlocutory review; Tech Mahindra's Petition for Interlocutory Review was transferred to this Court; and this Court denied review. Tech Mahindra (Americas), Inc. v. Giacomo Bellomo, S20I0932, March 10, 2020; A20I0209, April 27, 2020.

Following Appellant Bellomo's settlement with the other tortfeasors, a jury trial against Tech Mahindra commenced in July 2021. But, after concluding that Appellant's civil conspiracy claim against Tech Mahindra could not survive on its own, Judge Krause dismissed the case against Tech Mahindra between jury selection and opening arguments. Dismissal was affirmed by this Court, and the Georgia

2 All four previous appearances are separately listed in a contemporaneous Information filing.

Supreme Court denied certiorari. Giacomo Bellomo v. Tech Mahindra (Americas), Inc., A22A0859, November 1, 2022; *cert denied*, S23C0370, June 21, 2023

Tech Mahindra moved for attorney's fees and costs pursuant to O.C.G.A. §9-11-68 while Mr. Bellomo's appeal was pending. V5-1228-1400, V6-1401-1402 Tech Mahindra filed a supplemental motion for attorney's fees and costs following remittitur. V7-1724-1729 Appellant Bellomo timely responded, challenging (1) the good faith nature of the Offer, (2) Tech Mahindra's failure and refusal to produce its fee and expense invoices for his review, and (3) the amount of fees and costs sought by Tech Mahindra. V6-1403-1446, V7-1730-1735

At the conclusion of the three-hour time-limited evidentiary hearing on September 8, 2023, Judge Krause announced that she viewed the Offer as having been made in good faith. V9-2422, ll. 9-12 Following supplemental briefing regarding the calculation of fees [V9-2318-2324], Judge Krause entered an Order on October 4, 2023 in which she awarded Tech Mahindra $1,730,731.33 under O.C.G.A. §9-11-68. V9-2325-2326

3. Preservation of Errors

Appellant Bellomo challenged the good faith nature of Tech Mahindra's Offer in his briefs in response to Tech Mahindra's attorney's fee motion and supplemental attorney's fee motion; in his request for an evidentiary hearing; and during the

evidentiary hearing on September 8, 2023. V6-1403-1446, V7-1730-1735, V9-2343, ll. 10-19, *see generally* V9-2345, l. 8-2385, l. 14, V9-2409, l. 24-2415, l. 13

Appellant Bellomo challenged the trial court's methodology for calculating attorney's fees and costs in his briefs in response to Tech Mahindra's attorney's fee motion and supplemental attorney's fee motion; throughout the evidentiary hearing on September 8, 2023; and in his supplemental brief following the evidentiary hearing. V6-1403-1446, V7-1730-1735, V9-2364, l. 12-2385, l. 14, V9-2392, l. 21-2393, l. 10, V9-2415, l. 14-2421, l. 22, V9-2318-2324

E. Summary of Argument

The Offer cannot have been made in good faith, and thus under §9-11-68(d)(2) it cannot form the basis for an award of fees and costs, because (1) the Offer bore no reasonable relation to the amount of the Judgment; (2) the Offer bore no reasonable relation to the liability that Tech Mahindra already knew it faced when the Offer was made; and (3) Tech Mahindra's refusal to cooperate with informal discovery to enable Mr. Bellomo to evaluate the Offer suggests that Tech Mahindra had no real intent to settle when it extended the Offer.

Assuming *arguendo* that the Offer was made in good faith, the trial court erred in calculating the amount of fees and costs to award. The award is excessive, includes fees for legal services that are not permitted by O.C.G.A. §9-11-68(b)(1), and includes fees as to which insufficient evidence was presented by Tech Mahindra.

F. Argument and Citation of Authority

1. Standards of Review

The standard of review of a trial court's determination whether an offer made pursuant to O.C.G.A. §9-11-68 was made in good faith is abuse of discretion. Great West Cas. Co. v. Bloomfield, 313 Ga. App. 180, 721 S.E.2d 173, 176 (Ga. App. 2011) (whole court)

The standard of review of a trial court's calculation of an award of reasonable attorney's fees and costs under O.C.G.A. §9-11-68 is also abuse of discretion. *See* Strategic Law, LLC v. Pain Mgmt. & Wellness Centers of Ga., LLC, 828 S.E.2d 1, 350 Ga. App. 526, 529 (Ga. App. 2019)

2. The Trial Court Abused its Discretion in Concluding That Tech Mahindra's Offer Satisfied the Good Faith Requirement of O.C.G.A. §9-11-68.

Fees and costs may not be awarded following rejection of an offer made under O.C.G.A. §9-11-68, unless the offer was made in good faith. O.C.G.A. §9-11-68(d)(2); Anglin v. Smith, 358 Ga. App. 38, 40, 853 S.E.2d 142 (Ga. App. 2020). A judgment for the defense is insufficient by itself to establish that the defense's offer was made good faith. Great West Cas. Co. v. Bloomfield, 313 Ga. App. 180, 721 S.E.2d 173, 175 (Ga. App. 2011) (whole court).

The trial court's determination of good faith is afforded deference on the presumption that the judge will typically have had the opportunity to assess "the case, the parties, the lawyers, and all of the other factors that go into such a determination, which the trial court has gathered during the progress of the case." Great West Cas. Co., 721 S.E.2d at 176.

Notwithstanding the level of deference afforded under applicable caselaw, in this case the majority of the parties' interactions with the trial court, including the entire discovery phase, occurred prior to Judge Krause being appointed as a judge. By the time she assumed the bench in 2019, motions to dismiss and for summary judgment were already pending [V2-245-247, V3-357-359]; more than a year had passed since Tech Mahindra had tendered the Offer [V5-1261-1266]; and Tech Mahindra had already incurred the bulk of the fees and costs claimed in its fee petition. *See* V11-5-151, V11-432-438 This means that Judge Krause's ability to observe the parties or lawyers or to assess the case was not much greater than this Court's ability to observe those same factors from a review of the written record.

Perhaps because of the lack of opportunity to observe parties and counsel during much of the litigation, the Order awarding fees fails to explain Judge Krause's reasoning. V9-2325-2326 It offers no clues as to her assessment of the case, the parties, the lawyers, or any other factors that, under Great West, should have influenced the determination whether the Offer was made in good faith. V9-2325-

2326 The absence of any such explanation supports a conclusion that the trial court abused its discretion. *See* Coastal Bank v. Rawlins, 347 Ga. App. 847, 848, 821 S.E.2d 89 (Ga. App. 2018)

Other factors that Judge Krause should have considered in her determination whether the Offer was made in good faith (and that her Order does not indicate she considered) include the following: (1) whether the Offer bore a reasonable relationship to the amount of damages; (2) whether the Offer was premised on a realistic assessment of liability; and (3) whether Tech Mahindra lacked intent to settle the claim. *See* Richardson v. Locklyn, 339 Ga. App. 457, 460-461, 793 S.E.2d 640 (2016); *accord* Coastal Bank v. Rawlins, 347 Ga. App. 847, 851 (1), 821 S.E.2d 89 (Ga. App. 2018); Hillman v. Bord, 347 Ga. App . 651, 655-656 (2), 820 S.E.2d 482 (Ga. App. 2018) (physical precedent only). An analysis of each of these factors confirms that Tech Mahindra's Offer was not made in good faith.

a. The $10,000 Offer Bore No Reasonable Relationship to the Amount of Damages Sought by Mr. Bellomo.

Appellant Bellomo accused Appellee Tech Mahindra of civil conspiracy in connection with a fraudulent transfer of assets that prevented him from satisfying his Judgment for $304,667.85. Because fault for civil conspiracy is legally indivisible *(see* Federal Deposit Insurance Corporation v. Loudermilk, 305

Ga. 558, 575, 826 S.E.2d 116, 129 (Ga. 2019)), Tech Mahindra faced the risk of liability for the entire sum sought by Mr. Bellomo. That sum included the $304,667.85 Judgment, several years of accrued post-judgment interest at the legal rate, a potential punitive damages award, and a potential award of associated attorney's fees and litigation expenses under O.C.G.A. §13-6-11. Based on this information, Tech Mahindra knew or should have known, on the date it issued the Offer, that its potential financial exposure equaled and likely significantly exceeded the Judgment amount of $304,667.85.

Despite its awareness of its financial exposure, Tech Mahindra's $10,000 Offer represented just 3% of the Judgment, without factoring in the other potential damages that increased Tech Mahindra's financial exposure. That should not be considered a reasonable proposal under O.C.G.A. §9-11-68, because (1) the Offer represented an effort by Tech Mahindra to eliminate financial exposure equal to more than thirty times the amount of the Offer, and (2) if the Offer had been accepted, Tech Mahindra would have eliminated that financial exposure before Mr. Bellomo had even had the opportunity to gather sufficient discovery to determine the extent of Tech Mahindra's tortious conduct. It would be unreasonable to expect Mr. Bellomo or any other similarly situated plaintiff to take such an enormous risk in exchange for such a paltry settlement offer.

In Great West, this Court affirmed the trial court's finding of an absence of good faith where the defendant had offered just $25,000 under O.C.G.A. §9-11-68 in a wrongful death case. In that case, the defendant claimed that it never believed it faced a serious risk of liability even though it subsequently offered $1 million in settlement.[3] Great West, 721 S.E.2d at 175. Both Great West and this case feature a disparity between a very small O.C.G.A. §9-11-68 offer and a significant risk of financial liability at trial. Just as the financial disparity between the offer and the offeror's financial liability established a lack of good faith in Great West, the financial disparity between the Offer and Tech Mahindra's financial exposure indicate that the Offer cannot have been made in good faith.

Finally, the disparity between the Offer and Tech Mahindra's own assessment of its financial liability is apparent from the fact that Tech Mahindra spent at least $400,000 on its unsuccessful motion for summary judgment, unsuccessful second motion to dismiss, and the associated unsuccessful appeals. V11-22-53, V11-145-151 There would be no reason for a defendant to spend $400,000 on motions practice in a case in which the defendant assessed its financial liability at just $10,000. In sum, there is no reasonable relationship

3 In contrast to Tech Mahindra's $10,000 Offer, the other defendants (whose fault was indivisible from Tech Mahindra's, and who presumably had available the same information that Tech Mahindra had) tendered $376,400.43 in their O.C.G.A. §9-11-68 offer dated September 17, 2018, and $615,000 in a second O.C.G.A. §9-11-68 offer dated May 7, 2021. V6-1416, ¶¶9, 10, V6-1436-1446

between Tech Mahindra's financial exposure and its $10,000 Offer to Mr. Bellomo, confirming a lack of good faith when Tech Mahindra extended the Offer.

b. The $10,000 Offer Cannot Have Been Premised on a Realistic Assessment of Tech Mahindra's Liability.

Tech Mahindra was in the best position of all of the parties to realistically assess its own fault before it made the low-ball $10,000 Offer to Mr. Bellomo, because as a party to the asset transfer of which Mr. Bellomo was complaining, Tech Mahindra alone was in possession of nearly all of the relevant evidence when it extended the Offer. Tech Mahindra alone possessed all of the documents pertinent to the asset transfer, and Tech Mahindra controlled key witnesses with personal knowledge of the asset transfer.

In contrast, when Tech Mahindra extended the Offer, Mr. Bellomo was in possession of almost none of the relevant evidence. He lacked any personal knowledge of the asset transfer, and he had had no opportunity to interview or depose witnesses with personal knowledge. Mr. Bellomo only knew that he was unable to satisfy his Judgment and that Tech Mahindra had been involved in the asset transfer that prevented him from satisfying the Judgment. V4-734, p. 24, ll. 4-8, V4-734, p. 27, l. 19-p. 28, l. 3

Through counsel, Mr. Bellomo had to piece together the details of the asset transfer from documents and depositions obtained primarily from Tech Mahindra in discovery. That only occurred *after* Tech Mahindra's Offer had expired. V9-2412, l. 14-2413, l. 15 Indeed, Mr. Bellomo's lack of knowledge was the reason it was so critical for him to request relevant information from Tech Mahindra early in the case through informal discovery, and the reason that Tech Mahindra's refusal to provide such information made it impossible for Mr. Bellomo to fully evaluate the Offer before it expired.

Since Tech Mahindra already had all of the information it would ever need to accurately assess its liability risk, its assessment of its own liability was not dependent on obtaining any discovery from Appellant Bellomo. Tech Mahindra already knew or should have known that it faced a serious risk of being found liable for conspiracy. Rather than use that knowledge to come up with a reasonable settlement offer that accurately reflected its risk of being found liable, Tech Mahindra extended the low-ball, unrealistic Offer. That reflects a lack of good faith on the part of Tech Mahindra.

Although Tech Mahindra will no doubt argue in its own brief that it viewed its $10,000 Offer as a realistic assessment of its risk of liability, its fee invoices tell a different story. If, after reviewing the evidence in its possession, Tech Mahindra had *truly* believed that Mr. Bellomo's claim had a value of only $10,000, Tech

Mahindra would not have engaged four law firms and incurred over $2 million in attorney's fees and litigation expenses to fight the claim because that expenditure of attorney's fees would have been out of proportion to the risk Tech Mahindra faced. *See generally*, V11-5-558

Moreover, if its $10,000 Offer had really represented its realistic assessment of its liability, Tech Mahindra would never have had any reason to extend any further settlement offers. Yet, Tech Mahindra acknowledges that it made multiple improved settlement offers after its first two motions to dismiss and its motion for summary judgment were denied and trial approached. V5-1234-1256, V6-1467, ¶16

In Great West, this Court noted the relevance of a defense settlement offer of $1 million following an initial $25,000 defense settlement offer under O.C.G.A. §9-11-68. In that case, this Court concluded that the dramatic increase in the size of the settlement offer confirmed that the initial $25,000 offer under O.C.G.A. §9-11-68 had never represented a realistic, good faith assessment of the defendant's liability and financial exposure. Great West, 721 S.E.2d at 175.

That same analysis applies to Tech Mahindra's increased offers over time. Since the evidence of *liability* that was available to Tech Mahindra never changed from the beginning of the case to the end, there would have been no reason for Tech Mahindra to have made new settlement overtures *if* the initial

Offer had been based on a *realistic* assessment of its liability. Tech Mahindra's increasingly valuable offers simply confirm Tech Mahindra's knowledge, from the beginning of the litigation, that the evidence against it presented a risk of liability worth far more than the $10,000 Offer.

Moreover, Tech Mahindra's co-defendants – whose fault was indivisible from that of Tech Mahindra - tendered $376,400.43 in their O.C.G.A. §9-11-68 offer dated September 17, 2018, and $615,000 in a second O.C.G.A. §9-11-68 offer dated May 7, 2021. V6-1416, ¶¶9, 10, V6-1436-1446 The disparity between the paltry size of Tech Mahindra's Offer and the size of its co-defendants' offers (which were based on the same evidence and same level of fault) simply confirms that Tech Mahindra's Offer was not based on a *realistic* assessment of its liability. The Offer was not made in good faith.

c. The Evidence of Tech Mahindra's Intent When Making the $10,000 Low-Ball Offer, While Equivocal, Suggests a Lack of Intent to Settle.

A final factor to consider when evaluating whether Tech Mahindra's low-ball $10,000 Offer was made in good faith is Tech Mahindra's own intent when it made the Offer. Although Tech Mahindra predictably insists that it always intended to settle this claim with the Offer, the circumstantial evidence of Tech Mahindra's intent is equivocal.

Tech Mahindra's lead attorney, Philip Robben, referred to the Offer as an effort to be "nice" to Mr. Bellomo and cover his costs if he had sued Tech Mahindra in error. V9-2399, ll. 1-9; V9-2400, ll. 9-11. Yet, as is noted above, Tech Mahindra refused to produce information or documents to demonstrate that it had been sued in error in the absence of Mr. Bellomo accepting impossible terms for a review of that information.[4] V9-2352, l. 20-2353, l. 11, V9-2277-2284 In other words, Tech Mahindra extended the Offer while simultaneously making it impossible for Mr. Bellomo to consider accepting.

Mr. Robben also characterized the likelihood of Appellant Bellomo accepting just $10,000 to settle his claim against Tech Mahindra following a review of Tech Mahindra's relevant documents as "farcical". (V9-2357, ll. 22-25) This concession simply confirms Tech Mahindra's awareness that its own documents failed to offer Mr. Bellomo any reason to walk away from his claim against Tech Mahindra in exchange for a mere $10,000.

Mr. Robben also testified that the real purpose of the Offer was simply to create risk for Mr. Bellomo associated with rejecting the Offer. V9-2399, ll.7-9. This suggests that the Offer may have been based purely on an erroneous

4 Once Tech Mahindra finally produced its information and documents in discovery, it was obvious that its reluctance to produce the information and documents while Mr. Bellomo considered the Offer was the product of awareness that its information and documents contained nothing that would have afforded any reason for Mr. Bellomo to accept a mere $10,000 to settle his claim against Tech Mahindra. Instead, Tech Mahindra's documents and its representative's deposition testimony formed the basis for Mr. Bellomo's successful effort to fend off defense motions for summary judgment. V5-1130-1162

assessment that Mr. Bellomo, the little guy facing the billion-dollar company, might be intimidated into accepting a pittance to walk away from his claim at the outset of the case, before he saw the relevant evidence. The disparity between Tech Mahindra's liability and financial exposure on the one hand, and the $10,000 Offer on the other hand, suggests that Tech Mahindra either underestimated Appellant Bellomo's resolve to seek fair compensation for tortious conduct, or never had any serious expectation that the Offer would settle the case.

Regardless of how Mr. Robben's testimony is interpreted, had Tech Mahindra truly intended to settle Mr. Bellomo's claims at the outset of the litigation, it could have extended an offer in a sum high enough to give Mr. Bellomo incentive to take it seriously. Tech Mahindra failed to do so, confirming that it never seriously intended to settle Mr. Bellomo's claim with its $10,000 Offer.

In sum, the three factors discussed in this Section (pages 14-23) establish that Tech Mahindra's low-ball Offer of $10,000 was not made in good faith. The Offer bore no *reasonable* relationship to the amount that could have been awarded to Mr. Bellomo had his conspiracy claim against Tech Mahindra been successful. The Offer bore no *reasonable* relationship to a *realistic* assessment of Tech Mahindra's potential liability *based on the information and documents that were in Tech Mahindra's sole possession when it extended the Offer*. And,

the evidence of Tech Mahindra's intent (while equivocal) suggests at best a half-hearted effort to settle that Tech Mahindra never expected Mr. Bellomo to accept.

If the evidence analyzed in this Section (pages 14-23) were to be deemed to establish good faith, then it would be difficult to identify any case featuring an absence of good faith. The effect will be to render the "good faith" requirement of O.C.G.A. §9-11-68(d)(2) meaningless. That cannot have been the intent of the Georgia Legislature, which must be assumed to have intended to impose a meaningful good faith requirement when it enacted O.C.G.A. §9-11-68. "We will presume that the legislature says what it means and means what it says." Stock Bldg. Supply, Inc. v. Platte River Ins. Co., 336 Ga. App. 113, 783 S.E.2d 708, 714 (Ga. App. 2016)

Because the Offer was not made in good faith, under O.C.G.A. §9-11-68(d)(2) it cannot form the basis for an award of attorney's fees and costs, and reversal is required. *See* Anglin v. Smith, 358 Ga. App. 38, 40, 853 S.E.2d 142 (Ga. App. 2020).

3. The Trial Court Abused its Discretion by Applying Faulty Methodology to Calculate Tech Mahindra's Reasonable Attorney's Fees and Costs.

If this Court reverses the award of fees and costs on the basis of an absence of good faith on Tech Mahindra's part, this second issue will be rendered moot. Even if this Court concludes that the Offer was made in good faith, the award of fees and costs should be reversed and the case remanded, because the amount awarded Tech Mahindra was based on faulty methodology.

As is explained below, any award of fees and costs must be supported by evidence. Under O.C.G.A. §9-11-68(b)(1), Tech Mahindra may only be awarded its *reasonable* fees and costs, and only those incurred between the date Appellant Bellomo rejected the Offer and the date judgment was entered. The trial court must scrutinize the claimed fees and costs to identify those that satisfy these criteria. Here, the trial court abused its discretion by failing to apply these basic rules to its determination of the amount to award Tech Mahindra.

a. The Trial Court Erred by Pulling a Number Out of the Air.

Prior to issuing her order, Judge Krause signaled that she intended to simply pick a number rather than engage in the requisite thoughtful analysis:

> [referring to a different case for comparison] So it was a little easier to just pick a number out of the air that felt right. And this seems like a case where I'm comfortable doing that, but I feel like maybe I want to know if that's the appropriate approach within the clearly wide discretion that the Court has in determining what are reasonable attorney's fees.

V9-2430, l. 22-102, l. 3 The absence of any analysis of Tech Mahindra's fees and costs in her order confirms that Judge Krause did just that: she picked a number out of thin air and awarded it after the most cursory of reviews of 554 pages of invoices. That was an abuse of discretion necessitating reversal and remand, because Judge Krause abdicated her responsibility to engage in the complex process necessary to determine the *exact* amount appropriate to award. *See* Modi v. India-American Cultural Ass'n., A23A1569, January 10, 2024, pp. 16-17 (reversing and remanding case to trial court with instructions for further factfinding regarding appropriate amount of fees to award)

b. The Trial Court Erroneously Awarded Fees and Costs Incurred Outside the Dates Between Rejection of the Offer and Entry of the Dismissal With Prejudice.

An award of attorney's fees or litigation expenses is not available in Georgia except where specifically authorized by statute. Brooks v. Hayden, 355 Ga. App. 171, 172, 843 S.E.2d 594 (Ga. App. 2020) Under O.C.G.A. §9-11-68(b)(1):

> If a defendant makes an offer of settlement which is rejected by the plaintiff, the defendant shall be entitled to recover reasonable attorney's fees and expenses of litigation incurred by the defendant or on the defendant's behalf **from the date of the rejection of the offer of settlement through the entry of judgment** if the final judgment is one of no liability ….
>
> [emphasis supplied]

Appellant Bellomo declined Tech Mahindra's $10,000 Offer on November 21, 2017. V5-1268 The trial court dismissed Mr. Bellomo's claim against Tech Mahindra with prejudice on September 27, 2021. V5-1202-1205 A dismissal with prejudice operates as a final judgment. *See, e.g.*, Flott v. Southeast Permanente Medical Group, 655 S.E.2d 242, 288 Ga. App. 730 (Ga. App. 2007) (referring to "judgment of dismissal"); *see also* O.C.G.A. §5-6-34(a)(1) (defining "final judgment" as "where the case is no longer pending in the court below"). Therefore, under the plain language of O.C.G.A. §9-11-68(b)(1), Tech Mahindra is not entitled to an award of costs or fees incurred after the September 27, 2021 dismissal with prejudice.

Tech Mahindra sought fees and costs encompassing an additional 21 months following the dismissal, through June 27, 2023. Those additional fees and costs totaled to approximately $570,000 and included fees associated with both the post-dismissal appeals and Tech Mahindra's fee petition. V11-370-432, V11-463-529, V11-535-541

Although the Order awarding fees and costs is silent as to whether this additional approximately $570,000 was included in the award, simple math establishes that it was. First, the difference between the amount Tech Mahindra sought and the amount awarded is less than the $570,000 Tech Mahindra invoiced after the dismissal. Second, the trial court only identified one deduction from the

sum requested by Tech Mahindra, representing an unspecified amount for fees and costs that Tech Mahindra would have incurred as a non-party responding to discovery had Mr. Bellomo accepted the Offer and dismissed Tech Mahindra from the lawsuit. V9-2325-2326 The difference between the fees and costs Tech Mahindra sought and the fees and costs the trial court awarded is $432,683.02. V9-2325-2326 That allows an inference that the trial court deemed $432,683.02 to be reasonable for responding to non-party discovery, and that the trial court took no deductions for fees and costs incurred outside of the permitted time period. The award must be reversed and the case remanded to the trial court for a corresponding reduction of the award.

c. The Trial Court Erroneously Awarded Fees Associated with Tech Mahindra's Fee Petition.

The fees and costs claimed by Tech Mahindra included approximately $74,000 incurred in 2023[5] for preparation of Tech Mahindra's petition for fees and costs under O.C.G.A. §9-11-68(b)(1). V11-419, V11-425, V11-474, V11-478, V11-482, V11-486 In Day v. Mason, 357 Ga. App. 836, 847, 851 S.E.2d 825 (Ga. App. 2020), this Court noted that no fee award is permitted unless it is specifically authorized by a statute. Since O.C.G.A. §9-11-68(b)(1) contains no language suggesting that fees and costs associated with preparing a fee petition are

5 This $74,000 claim for fees and costs is also addressed in Part 3.b. above.

recoverable, it was error to award those fees to Tech Mahindra. The award must be reversed and the case remanded to the trial court for a corresponding reduction.

d. The Trial Court Erroneously Awarded Fees Associated with Appeals.

Tech Mahindra sought and was awarded fees associated with two appeals. In Day v. Mason, 357 Ga. App. 836, 847, 851 S.E.2d 825 (Ga. App. 2020), this Court noted:

> Generally, an award of attorney fees is not available in Georgia unless authorized by statute or contract. Thus, whether a statute that authorizes an award of attorney fees also includes an award of appellate fees depends on the language of the statute.

Under O.C.G.A. §§9-15-14 and 13-6-11, awards of fees and expenses must be confined to those incurred during proceedings in the trial court, because those statutes contain no authorization for recovery of appellate fees. *See, e.g.*, David G. Brown, P.E., Inc. v. Kent, 274 Ga. 849, 850, 561 S.E.2d 89 (Ga. 2002) (appellate fees not available under O.C.G.A. §13-6-11); Kautter v. Kautter, 286 Ga. 16, 19, 685 S.E.2d 266 (Ga. 2009) (appellate fees not available under O.C.G.A. §9-15-14); Springside Condominium v Harpagon Co., 679 SE2d 85, 86, 298 Ga. App 39 (Ga. App. 2009) (generally analyzing availability of attorney's fees for appeal under multiple Georgia statutes). For the same reason - because O.C.G.A. §9-11-68(b)(1)

contains no language affirmatively authorizing fees and costs associated with appeals - appeal fees should not have been awarded to Tech Mahindra.

Tech Mahindra sought approximately $68,000 for its unsuccessful petition for interlocutory appeal in 2020 and approximately $500,000 for post-dismissal appeals.[6] *See* V11-213-227, V11-370-432, V11-447-452, V11-462-529, V11-535-541 The award must be reversed and the case remanded to the trial court for a corresponding reduction.

e. The Trial Court Erred by Awarding an Unreasonable Amount.

The trial court awarded $1,730,731.33 in attorney's fees and costs. V9-2325-2326 This sum is facially excessive and unreasonable, because as noted above at page 26 this sum exceeds the total amount[7] reflected on Tech Mahindra's invoices for the permitted date range of November 21, 2017 to September 27, 2021. V11-5-369, V11-433-462, V11-530-534, V11-542-558

The award is unreasonable for the following additional reasons explained below.

i. Tech Mahindra Did Not Meet Its Burden of Proving Reasonableness and Value.

6 The fees associated with the post-dismissal appeals are also addressed in Part 3.b. above.
7 Exact calculation of the fees reflected on Tech Mahindra's invoices is difficult if not impossible, because although some time entries have been redacted, a "spot check" suggests that the dollar values for the redacted entries may not have been deducted from the total amount indicated on each invoice.

To recover fees and costs incurred during the permitted date range of November 21, 2017 to September 27, 2021, Tech Mahindra bears the burden of proving both the amount earned and the reasonableness of that amount. *See* O.C.G.A. §9-11-68(b)(1). Tech Mahindra was required to present evidence of the actual fees and costs incurred, and the reasonable value thereof; and the trial court was only allowed to award a reasonable sum based on that evidence. *See* Cajun Contractors, Inc. v. Peachtree Prop. Sub, LLC, 360 Ga. App. 390, 405, 861 S.E.2d 222 (Ga. App. 2021); *see also* Jackson v. Sanders, 333 Ga. App. 544, 561, 773 S.E.2d 835 (Ga. App. 2015).

A reasonable fee "will not necessarily match the amount of fees the litigant would owe under the contract of legal representation..." Taylor v. Devereux, 316 Ga. 44, 116, 885 S.E.2d 671, 723 (Ga. 2023), Ellington, J. dissenting. Thus, Tech Mahindra was required to prove not just the amounts invoiced by its four law firms for the permitted time frame, but the actual *value* of the services for which it sought an award. *See* City of College Park v. Pichon, 456 S.E.2d 686, 690, 217 Ga. App. 53 (Ga. App. 1995); *see also* Hagan v. Keyes, 329 Ga. App. 178, 764 S.E.2d 423 (Ga. App. 2014).

Both Taylor and Georgia Department of Corrections v. Couch, 295 Ga. 469, 759 S.E.2d 804 (2014), contemplate the submission of evidence of hours worked; hourly billing rates; the types of services provided and the need for same; the

education, training, and experience of the attorneys whose fees are sought; and the reasonable market rates for the types of work performed.

Tech Mahindra only partially satisfied these requirements. It failed to offer evidence of (1) the nature of many of the services and costs claimed; (2) the need for many of the services and costs claimed; (3) the value thereof; or (4) the education, training, experience, and even identities of many legal professionals referenced on its invoices.

ii. Tech Mahindra Failed to Meet its Burden of Proof as to the Nature of and Need for Many of the Services and Costs For Which it Received an Award.

Tech Mahindra failed to provide itemized fee invoices for some of the work for which it sought and obtained an award. Instead, that work was invoiced merely as a series of lump sums devoid of detail as to the work performed or the hourly rate charged. *See, e.g.,* V11-31 ($82,899.12), V11-81 ($15,351.96), V11-112 ($4092), V11-143 ($13,073.66), V11-160 ($3600), V11-167 ($1039.62), V11-173 ($11,211.38), V11-186 ($1020), V11-210 ($6725), V11-232 ($6370), V11-267 ($2,497.50) These unexplained lump sum payments total to $147,880.24. By failing to offer evidence to explain these fees, Tech Mahindra failed to meet its burden of proof that these fees were reasonable.

The fees as to which itemization was provided are themselves facially unreasonable in multiple instances, including the following:

Four attorneys for Tech Mahindra (and two law firms) billed to prepare its portion of a four-page initial status report to the trial court. That was a report that merely identified the attorneys and basic procedural information. Then three Tech Mahindra attorneys (and two law firms) billed to attend a half-hour teleconference with Judge Markle's staff attorney to discuss the status report. The fees for these mostly-administrative tasks totaled to at least $12,000. V9-2365, l. 13 – 39, l. 11; V11-8-11 While there is no dispute that the report and teleconference attendance were both required by Judge Markle, Tech Mahindra failed to explain the reason those tasks required four attorneys, two law firms, and fees exceeding $12,000. V9-2365, l. 13 – 39, l. 11

Tech Mahindra spent at least $400,000 in fees and costs on its *unsuccessful* motion for summary judgment, *unsuccessful* second motion to dismiss, and *unsuccessful* petition for interlocutory appeal from the denial of those motions. V11-22-53, V11-145-151, V11-156-178, V11-192-196, V11-212-231 Tech Mahindra offered no evidence to explain the need to spend more than the amount of Mr. Bellomo's $304,667.85 Judgment on *unsuccessful* tactics.

iii. Tech Mahindra Offered no Evidence as to the Value of the Services Other Than Invoices.

A reasonable fee "will not necessarily match the amount of fees the litigant would owe under the contract of legal representation..." Taylor, 316 Ga. at 116, Ellington, J. dissenting. Here, rather than offer any evidence of the *value* provided by the services of its four law firms, Tech Mahindra simply asked the trial court to *assume* that the amounts invoiced for fees and costs corresponded equally to the value of those services.

Given the mixed results obtained by Tech Mahindra at various stages (including its unsuccessful motion for summary judgment, two unsuccessful motions to dismiss, and unsuccessful attempted interlocutory appeal, for which it arguably received zero value), Tech Mahindra should have been required to offer evidence of the value provided by the tactics for which it sought fees and costs. Because Tech Mahindra failed to produce any such evidence, the trial court should have excluded the fees and costs for those activities of Tech Mahindra's attorneys that facially provided no actual value.

The absence of evidence of the value of Tech Mahindra's fees and costs is particularly significant when the size of the fee award is compared to the size of the Judgment Mr. Bellomo sought to satisfy. The trial court awarded Tech Mahindra nearly *six times the $304,667.85 Judgment Mr. Bellomo brought this action to collect and more than 173 times the amount of Tech Mahindra's O.C.G.A. §9-11-68*

Offer. Just the *costs* awarded to Tech Mahindra ($399,312.23) exceed the Judgment Mr. Bellomo sought to collect.

The trial court had – and disregarded - an obligation to include in its order findings to support both the factual basis for the award and the reasonableness of the costs and fees awarded. *See* Brooks, 355 Ga. App. at 175; *see also* Spirnak v. Meadows, 355 Ga. App. 857, 844 S.E.2d 482, 495 (Ga. App. 2020) and cases cited therein. Awarding fees and costs equal to six times the amount of Mr. Bellomo's Judgment in the absence of evidence supporting such a value was an abuse of discretion. *See* Strategic Law, LLC v. Pain Mgmt. & Wellness Centers of Ga., LLC, 828 S.E.2d 1, 350 Ga. App. 526, 529 (Ga. App. 2019) (finding no abuse of discretion where trial court *denied* award under O.C.G.A. §9-11-68 for fees of $90,000 incurred to satisfy a $3700 claim, characterizing the size of the fee request as unreasonable and punitive.)

iv. Tech Mahindra Failed to Offer Evidence as to Education, Training, Experience, and Even Identities of Many of the People Whose Fees it Was Awarded.

1. No Evidence Offered at all With Respect to Invoices From Two of Tech Mahindra's Four Law Firms.

Tech Mahindra submitted a 554-page compilation exhibit of invoices from four different law firms. V11-5-558 No one appeared to testify as a representative

of two of those law firms: Strickland Brockington Lewis LLP and Taylor English Duma LLP. Nor were any affidavits offered to explain the invoices from those two law firms. The invoices from these two law firms (totaling to $60,793) merely identify people by initials, with no evidence offered as to the names, education, levels of experience, qualifications, or even licensure of most of the people whose initials appear on the invoices. V11-432-460 None of these fees or costs should have been allowed.

2. Insufficient Evidence of Education, Levels of Experience, Qualifications, and Licensure of Employees of Tech Mahindra's Primary Law Firm.

The itemized invoices from Tech Mahindra's primary law firm, Kelley Drye and Warren, do not disclose hourly billing rates for the many people whose names appear on its invoices. *See, e.g.*, V11-75) With the exception of testimony regarding the qualifications of the three Kelley, Drye attorneys who entered appearances in this case, Tech Mahindra offered no evidence as to whether the people whose names or initials appear on invoices are licensed attorneys, their levels of education, their levels and types of experience, or any other qualifications to provide the services reflected on the invoices.

In contrast, in Taylor, 316 Ga. at 92-93, the Georgia Supreme Court affirmed a fee award in part because the attorneys for the prevailing party had submitted the

sort of evidence sorely lacking in this case: affidavits from counsel describing their skills and experience and explaining and justifying their hourly rates. Tech Mahindra should not be permitted to escape the requirement that it provide the sort of evidence expected in Taylor. Because Tech Mahindra failed to provide such evidence as to many of the legal professionals who invoiced for their services, those portions of the invoices should have been disregarded. The award should be reversed and the case remanded for the award to be reduced accordingly.

G. Conclusion

For the reasons set forth above, Appellant Giacomo Bellomo prays that the Court will conclude that Tech Mahindra's Offer of $10,000 under O.C.G.A. §9-11-68 was not made in good faith. He prays that this Court will reverse the award of attorney's fees and costs to Tech Mahindra under O.C.G.A. §9-11-68.

Alternatively, in the event that the Court concludes that the Offer was made in good faith, Appellant Bellomo prays that the Court will nevertheless conclude that the trial court abused its discretion in calculating Tech Mahindra's award. In that event, Appellant Bellomo prays that this Court will reverse and remand to the trial court with appropriate instructions for correctly determining the award.

H. Certification

This submission does not exceed the word count limit imposed by Appellate Rule 24.

Respectfully submitted,

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COURT OF APPEALS
STATE OF GEORGIA

GIACOMO BELLOMO Appellant, v. TECH MAHINDRA (AMERICAS), INC., Appellee. _____/	§ § § § § § § § § §	APPEAL NO. A24A1174

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing "Brief of Appellant" upon all counsel of record by service of a PDF copy of this document via email to the following, based on a prior agreement with Appellee's counsel that such service shall be deemed sufficient service:

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I certify that there is a prior agreement with William C. Buhay, Esq. to allow documents in a PDF format sent *via* email to suffice for service on all of Appellee's counsel.

This 9th day of April, 2024.

Respectfully submitted,
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