COURT OF APPEALS
STATE OF GEORGIA

GIACOMO BELLOMO,

Appellant,

v.

TECH MAHINDRA (AMERICAS), INC.,

Appellee.

APPEAL NO. A24A1174

REPLY BRIEF OF APPELLANT GIACOMO BELLOMO

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Introduction

This is an appeal from an award of fees and costs under O.C.G.A. §9-11-68 that was entered after Appellant Giacomo Bellomo declined Appellee Tech Mahindra (Americas), Inc.'s $10,000 settlement offer associated with his efforts to satisfy a judgment for $304,667.85. Appellant Bellomo contends that Tech Mahindra participated in a conspiracy with other actors to prevent him from satisfying his judgment, and that as a consequence Tech Mahindra should have been held liable for the full judgment, accrued post-judgment interest, attorney's fees, and potentially punitive damages – making an offer of just $10,000 unreasonable and not in good faith. Assuming *arguendo* that the offer was made in good faith, the trial court's award of fees and costs was excessive and not supported by the record.

A. Reply Regarding Relevant Facts

1. Reply to Tech Mahindra's Summary of the Underlying Facts of the Case

Tech Mahindra's Brief ignores (and thereby concedes) the fact that Tech Mahindra was denied summary judgment on Mr. Bellomo's conspiracy claim because Tech Mahindra provided all of the financial resources for the asset transfer that prevented him from satisfying his judgment. Mr. Bellomo's expert opined that the asset transfer was for less than reasonably equivalent value, which would have permitted a jury to conclude that the transfer was fraudulent. V5-1137-1140, 1145,

1147; *see also* summary at Giacomo Bellomo v. Tech Mahindra (Americas), Inc., A22A0859, November 1, 2022, p. 4.

Tech Mahindra's "facts" at pages 2-6 of its Brief also ignore and thereby concede Mr. Bellomo's summary, at pages 3-5 of his initial Brief, of the roadblocks Tech Mahindra imposed when he attempted to gather information to properly evaluate the Rule 68 offer before it expired. Since the purpose of Rule 68 is to promote settlement (*see* Carr v. Yim, A23A0687 (Ga. App. October 12, 2023), p. 15), Tech Mahindra's refusal to provide sufficient information to enable Mr. Bellomo to evaluate its Rule 68 offer undermines its contention that the offer was extended in good faith.

Tech Mahindra's "factual" summary instead simply presents a *theory* of why it should not have been found liable on Mr. Bellomo's conspiracy claim: that the transferred assets were allegedly fully pledged to a superior creditor before Mr. Bellomo obtained his judgment.[1] That is a *theory* that Tech Mahindra pursued unsuccessfully in its second of three motions to dismiss and in its motion for summary judgment. The trial court rejected that *theory* because it rested on disputed material facts. V3-335-352; V5-1145 A dispute of material fact over asset valuation needed to be resolved by a jury because, as is noted above, Mr. Bellomo's expert

1 Tech Mahindra's "record" citations in support of this *theory* do not appear to comport with the record. At pages 3, 6, and 19 of its Brief, Tech Mahindra cites to pages in Record Volume 7 that are not found in Volume 7.

opined that the transferred assets had more than sufficient value to satisfy both the superior creditor and Mr. Bellomo's judgment. V5-1145

Tech Mahindra's *theory* of why it should not have been found liable to Mr. Bellomo has never been accepted by any court and it was not the basis for the trial court's dismissal of Mr. Bellomo's conspiracy claim against Tech Mahindra. Instead, Mr. Bellomo's conspiracy claim against Tech Mahindra was only dismissed once the underlying fraudulent transfer claim against the other defendants was settled and dismissed. *See* Giacomo Bellomo v. Tech Mahindra (Americas), Inc., A22A0859, November 1, 2022.

Against this backdrop, Tech Mahindra offers no facts in its Brief to support the proposition that, *at the time it extended the Rule 68 offer to Mr. Bellomo*, it had a reasonable certainty that its *theory* of why it should not be found liable would carry the day. Given the uncertainty for Tech Mahindra presented later in the case by the trial court's refusal to grant it summary judgment, the absence of facts to support Tech Mahindra's reasonable certainty of a successful outcome *at the time it extended the Rule 68 offer* is notable. And the absence of any such contemporaneous supporting facts means that Tech Mahindra cannot have been acting in good faith when it offered just $10,000 to settle Mr. Bellomo's claim.

Tech Mahindra also ignores inconvenient facts when it asserts, at page 6 of its Brief, that it was unaware of Mr. Bellomo's judgment when it participated in the

transaction that Mr. Bellomo contends was a fraudulent transfer. Circumstantial evidence, including that cited by the trial court when it denied summary judgment to Tech Mahindra, supports a conclusion that Tech Mahindra – a sophisticated business with an entire department devoted to business acquisitions - indeed had that knowledge when it participated in the transfer. V5-1147-1149

2. Reply Regarding Procedural History

Tech Mahindra asserts as "fact", at page 7 of its Brief, that its right to recover attorney's fees under Rule 68 was triggered by the entry of Remittitur on the trial court's docket on July 11, 2023. This is a disputed statutory interpretation of Rule 68. Appellant Bellomo contends that, if Rule 68 permits Tech Mahindra to recover any attorney's fees or costs, the award cannot include fees or costs incurred after September 27, 2021, when the trial court dismissed Mr. Bellomo's claim with prejudice. This dispute is addressed below in Part B.3.b.

At page 8 of its Brief, Tech Mahindra misstates that Appellant first asked to review its attorney's fee invoices on August 23, 2024, two weeks before the trial court scheduled and held the Rule 68 evidentiary hearing. To the contrary, Appellant's initial response to Tech Mahindra's Rule 68 motion (filed May 30, 2023) noted that Tech Mahindra had failed to support its motion with any detailed fee or cost invoices, and Appellant objected to the consideration of any award absent detailed evidence. V6-1411-1412 Tech Mahindra simply refused to produce those

554 pages of detailed invoices until the trial court ordered it to do so. It *finally* produced the detailed fee and cost invoices on September 5, 2023, just three days before the evidentiary hearing.

At page 9 of its Brief, Tech Mahindra misstates Appellant Bellomo's position regarding the admissibility of the 554 pages of fee and cost invoices. Tech Mahindra chose to offer invoices from four different law firms as a single compilation exhibit. Only two of those four law firms were represented by witnesses during the evidentiary hearing. Appellant objected to the authenticity and admissibility of those portions of the compilation exhibit that purported to evidence legal services provided and expenses incurred through the two law firms that were not represented at the hearing. V9-2392, l. 21-2393, l. 10; V11-432-462 The trial court overruled the objection. V9-2395, ll.12-13

B. Argument and Citation of Authority

1. Reply Regarding Standard of Review

The parties are in agreement that the abuse of discretion standard of review applies to both the trial court's determination of good faith and the trial court's determination of the amount to fees and costs to award, so long as the award falls within parameters set by Rule 68.

Tech Mahindra mistakenly relies at page 13 of its Brief on the standard of review regarding findings of fact. The trial court made no findings of fact. V9-2325-2326

The absence of findings of fact or legal analysis by the trial court makes it difficult to determine whether it satisfied the parameters set by Rule 68, including the time frame for which fees and costs may be awarded. The parameters set by Rule 68 are matters of statutory interpretation to be considered *de novo* by this Court. *See* Carr v. Yim, A23A0687, p. 4 (interpreting a different part of Rule 68).

2. The Trial Court Abused its Discretion in Concluding That Tech Mahindra's Offer Was in Good Faith.

Fees and costs may not be awarded following rejection of a Rule 68 offer, 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). Because awards under Rule 68 are in derogation of the common law, courts must strictly construe Rule 68 against awards. Carr v. Yim, A23A0687, p. 7, *quoting* Harris v. Mahone, 340 Ga. App. 415, 421-422 (Ga. App. 2017)

a. Tech Mahindra Has Not Challenged Appellant's Analysis of the Three Criteria Used to Evaluate Good Faith.

Appellant's initial Brief addressed the three criteria that Georgia's courts consider to determine whether a Rule 68 offer was made in good faith. Beyond questioning whether the Court *must* consider those three criteria, Tech Mahindra's Brief has generally ignored them. Tech Mahindra's silence suggests it has no basis to challenge Appellant's analysis of those criteria if this Court agrees they should be considered.

b. Tech Mahindra's Theory of Good Faith is Unsupported by Facts or Law.

Tech Mahindra relies on the proposition that good faith exists where the offeror had a reasonable foundation on which to base its offer. Tech Mahindra contends that its conclusion that insufficient assets existed to satisfy Mr. Bellomo's judgment - because those assets were (according to Tech Mahindra) fully pledged to a superior creditor – means that it cannot have engaged in wrongdoing when it joined with other actors to participate in the asset transfer that Mr. Bellomo contends was fraudulent. Thus, according to Tech Mahindra's analysis, its Rule 68 offer of just 3% of the value of the judgment that Mr. Bellomo was trying to satisfy was subjectively reasonable when the offer was made.

There are several problems with Tech Mahindra's argument.

First, Tech Mahindra has provided no factual support whatsoever for the idea that this "insufficient assets" analysis actually formed the basis for its determination

of the amount to tender in its Rule 68 offer. Tech Mahindra did not, for example, offer evidence or caselaw to support this analysis when Mr. Bellomo sought additional information as he considered how to respond to the Rule 68 offer. Since it would have been logical for Tech Mahindra to have offered such evidence and caselaw for Mr. Bellomo's consideration had that formed the basis for the offer, the failure to offer such evidence or caselaw for Mr. Bellomo's consideration is notable.

Nor did Tech Mahindra produce evidence *during the Rule 68 evidentiary hearing* to show that, before it tendered the Rule 68 offer, it had even performed the "insufficient assets" analysis on which it now seeks to rely.

Assuming *arguendo* that Tech Mahindra had actually developed this "insufficient assets" *theory* before it tendered the Rule 68 offer, it had experienced counsel who likely would have advised that the *theory* was far from a sure winner when the offer was made. That level of uncertainty is not reflected in the size of the Rule 68 offer.

In other words, Tech Mahindra's "insufficient assets" *theory* (which has never been accepted by a court) represents nothing more than an effort to create an after-the-fact justification for its nominal Rule 68 offer years after it extended the offer. This belated effort to justify its Rule 68 offer underscores Tech Mahindra's lack of good faith *when it made the offer*.

Tech Mahindra's other "reasonableness" arguments are equally unavailing.

At page 17 of its Brief, Tech Mahindra argues that its Rule 68 offer was reasonable because (1) it had engaged in an arms-length transaction with the other defendants, and (2) it never knew about Mr. Bellomo's judgment before he filed suit. Tech Mahindra goes on to argue that it therefore could not have engaged in conspiracy to prevent Mr. Bellomo from satisfying his judgment. Being a sophisticated litigant with experienced and sophisticated counsel, Tech Mahindra surely understood, when it extended the Rule 68 offer at the beginning of the case, that these would be disputed issues of fact with an uncertain outcome before a jury. Yet, its Rule 68 offer fails to reflect that level of uncertainty.

At page 21 of its Brief, Tech Mahindra relies on Richardson v. Locklyn, 339 Ga. App. 457, 460, 793 S.E. 2d 640, 643 (Ga. App. 2016) for the proposition that a nominal Rule 68 offer can be made in good faith where the offeror reasonably believes its exposure is minimal – and then Tech Mahindra argues that it viewed its exposure as minimal when it offered Mr. Bellomo just $10,000. Tech Mahindra argues at page 18 that its belief that "its exposure was minimal was strengthened as the case progressed." These arguments find no support in the court record and are indeed contradicted by the record.

First, Tech Mahindra continued to make multiple *improved* settlement overtures following the trial court's denial of its motion for summary judgment. V5-1234-1256, V6-1467, ¶16 If Tech Mahindra truly viewed its case as becoming

stronger as the case progressed, then its decision to improve its settlement offers over time merely confirms that its Rule 68 offer did not reflect its initial assessment of its liability or financial exposure, and thus cannot have been made in good faith.

Second, at the same time as Tech Mahindra was increasing its settlement offers, its co-defendants – whose fault was indivisible from that of Tech Mahindra[2] - were also increasing their settlement offers, to $376,400.43 on September 17, 2018 (V6-1416, ¶9, V6-1436-1440) and to $615,000 on May 7, 2021. V6-1416, ¶10, V6-1441-1446 This behavior offers no support for Tech Mahindra's newly-asserted claim that it viewed its prospects as improving as the case approached trial.

Third, Tech Mahindra's own expenditure of over $2 million on attorney's fees and costs underscores just how seriously it took Mr. Bellomo's claims and just how concerned it was that it faced exposure far in excess of its $10,000 offer. *See* V11-5-558 Even the most aggressive litigant would not spend $2 million to defend against a $10,000 case.

At page 19 of its Brief, Tech Mahindra presents as "fact" its apparent belief as to what Appellant Bellomo knew about the judgment debtor's financial

2 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)

arrangements with its lender when he filed suit against Tech Mahindra and its co-defendants. Mr. Bellomo's pre-suit knowledge is not established in the record.[3] Nor is it relevant to the analysis of *Tech Mahindra's* good faith.

Finally, Tech Mahindra relies in its Brief on a handful of cases that offer no real guidance. Cohen v. The Alfred and Adele Davis Academy, 310 Ga. App. 761 (Ga. App. 2011), offers so little analysis as to provide no guidance regarding how to determine when a Rule 68 offer has been made in good faith. To the extent that Tech Mahindra has relied on decisions by judges of the Northern District of Georgia regarding matters of Georgia state law, this Court has no obligation to accord those decisions any particular weight.

In sum, Tech Mahindra's Brief fails to rebut Appellant Bellomo's arguments that the trial court abused its discretion in concluding that the $10,000 Rule 68 offer was made in good faith. Tech Mahindra offers no factual or legal support for a conclusion that it extended its Rule 68 offer to Mr. Bellomo in a good faith effort to resolve his claim, where the claim was valued at no less than $304,667.85 and potentially significantly more than that sum after addition of 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

3 Tech Mahindra also makes an assertion regarding Mr. Bellomo's knowledge at page 6 of its Brief, without citation to the record, and an assertion of opinion regarding Mr. Bellomo's knowledge and motivations at page 24 without citing to any testimony by Mr. Bellomo. Mr. Bellomo categorically denies those unsupported assertions.

under O.C.G.A. §13-6-11. The trial court's finding of good faith was an abuse of discretion that should be reversed.

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

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. Any award of fees and costs must be supported by evidence. The trial court was required 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) To the extent that Tech Mahindra's Brief relies on caselaw from the Northern District of Georgia or other courts to suggest any other process for determining the amount of fees and costs to award, that caselaw is inapplicable.

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

Although the trial court had discretion in calculating the award of fees and costs within the parameters set by Rule 68, the determination of the time frame

encompassed by the award is a matter of statutory construction and thus a matter of law to be reviewed by this Court *de novo*. Carr v. Yim, A23A0687, p. 4 (analyzing a different part of Rule 68). Tech Mahindra's Brief highlights a dispute that was not clear in the trial court: that the parties do not agree on the statutory interpretation that determines the correct time frame that can be encompassed by an award.[4]

Rule 68 permits an award of fees and costs from the date a good faith offer is made through the entry of judgment. Tech Mahindra has attempted to extend that time frame through Remittitur on June 27, 2023, encompassing an additional twenty-one months and approximately $570,000 in additional fees and costs for the appeals and the fee petition. *See* V11-370-432, V11-463-529, V11-535-541 The plain language of O.C.G.A. §9-11-68(b)(1), which refers to "entry of judgment" rather than "remittitur", does not support Tech Mahindra's interpretation.

The entry of judgment occurred when the trial court dismissed Mr. Bellomo's claim against Tech Mahindra with prejudice on September 27, 2021. V5-1202-1205 This must be the outside date as to which fees and costs can be awarded under Rule 68, because Rule 68 only permits recovery of fees through entry of judgment and 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)

4 The trial court solicited research on this issue following the evidentiary hearing. [V9-2432, ll. 3-8] Appellant submitted research [V9-2318-2321], but Tech Mahindra did not. Appellant interpreted Tech Mahindra's lack of response to the trial court on this issue as agreement with Appellant's statutory interpretation of the correct time frame.

(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").

This interpretation is confirmed by a comparison of O.C.G.A. §9-11-68(**b**)(1) and O.C.G.A. §9-11-68(**d**)(1). Although O.C.G.A. §9-11-68(**b**)(1) cuts off an award of fees and expenses following "entry of judgment", O.C.G.A. §9-11-68(**d**)(1) contemplates the possibility of "an appeal … taken from such judgment" and permits the filing of a motion under O.C.G.A. §9-11-68 "upon remittitur affirming such judgment". Under Tech Mahindra's interpretation, the appeal taken from judgment that is referenced in O.C.G.A. §9-11-68(**d**)(1) would be a nullity, because the judgment would not yet have been entered until after the appeal. This Court "refrain[s], whenever possible, from construing the statute in a way that renders any part of it meaningless." Carr v. Yim, A23A0687, p. 7, *quoting* Catoosa County v. Rome News Media, 349 Ga. App. 123, 129-130 (Ga. App. 2019)

Moreover, if the entry of judgment referenced in O.C.G.A. §9-11-68(**b**)(1) and remittitur affirming judgment referenced in O.C.G.A. §9-11-68(**d**)(1) were to occur simultaneously, there would be no need to distinguish between the two in different parts of Rule 68. The Georgia Legislature clearly chose to distinguish entry of judgment and remittitur affirming judgment. The statute says what it means and means what it says. Any award of fees and costs to Tech Mahindra can only

encompass the dates between Mr. Bellomo's rejection of the Rule 68 offer and entry of the final dismissal with prejudice on September 27, 2021.

The conclusion that the operative date to cut off fees and costs is the date of the trial court's dismissal is also consistent with O.C.G.A. §§9-15-14 and 13-6-11, both of which limit awards to fees and costs incurred in the trial court. In contrast, O.C.G.A. §50-14-5(b) contemplates an award of fees and costs "reasonably incurred" during the entire "proceeding", which this Court has interpreted to include reasonably incurred fees and costs associated with an appeal. *See* Evans County Bd. of Commissioners v. Claxton Enterprise, 255 Ga. App. 656, 659(3), 566 S.E.2d 399 (Ga. App. 2002) The existence of this statute confirms that the Georgia Legislature is aware of the means to expand a fee award to appellate litigation when it chooses to do so. The Legislature did not choose to do so when it enacted Rule 68.

Finally, the cases cited by Tech Mahindra are distinguishable. Security Life Ins. Co. v. St. Paul Fire & Marine Ins. Co., 278 Ga. 800, 803 (Ga. 2004) addresses matters specific to surety law that are not pertinent to this case. Lexington Developments, Inc. v. O'Neal Construction Co., 143 Ga. App. 440, 441 (Ga. App. 1977) has been superseded by O'Neal Const. Co., Inc. v. Lexington Developers, Inc., 240 Ga. 376 (Ga. 1977), which does not address the cited proposition. Chlupacek v. Chlupacek, 226 Ga. 520, 521 (Ga. 1970) appears to address matters that were unique to the divorce laws in effect when it was decided fifty-four years ago.

In sum, the trial court was not permitted to award any fees or costs incurred by Tech Mahindra after entry of dismissal on September 27, 2021. The trial court never explained what time frame it used to calculate Tech Mahindra's award. But, as is discussed at pages 26-27 of Appellant's initial Brief, the size of the award confirms that at least some portion must be attributable to fees and costs incurred during dates outside the permitted time frame. The award must be reversed and remanded for recalculation in accordance with the correct time frame.

b. The Trial Court Erred by Awarding an Unreasonable Amount Unsupported by Evidence.

Tech Mahindra failed to respond to many challenges to the reasonableness of its fees and costs, thereby conceding the merits of the challenges. In particular, Tech Mahindra failed to point to any record 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 the invoices issued by three of its four law firms. Tech Mahindra also failed to point to record evidence itemizing invoices totaling to $147,880.24.

It was an abuse of discretion to award Tech Mahindra fees and costs for which basic information justifying those claimed fees and costs does not appear in the record. This is particularly important in light of the enormous amount of fees and

costs awarded. The award should be reversed and remanded for recalculation after rejection of fees and costs as to which insufficient evidence exists in the record.

C. Conclusion

For the reasons set forth above and in his initial Brief, Appellant Giacomo Bellomo prays that the Court will conclude that the trial court abused its discretion when it determined that Tech Mahindra's Rule 68 offer of $10,000 was made in good faith. He prays that this Court will reverse the award.

Alternatively, in the event that the Court concludes that the offer was made in good faith, Appellant prays that the Court will conclude that the award was calculated erroneously and that the Court will reverse and remand to the trial court with appropriate instructions for correctly determining the award.

D. Certification

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing "Reply 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 10th day of June, 2024.

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