IN THE STATE COURT OF GWINNETT COUNTY
STATE OF GEORGIA

ALICE REESE, Plaintiff, v. WILLOW PLACE II, ET AL., Defendant.	CIVIL ACTION FILE NO. 13-A-123456-S9

PLAINTIFF'S MOTION AND BRIEF TO STRIKE DEFENDANT'S ANSWER AND TO RECOVER ATTORNEY'S FEES PURSUANT TO O.C.G.A. § 9-15-14

COMES NOW, Alice Reese, ("Plaintiff"), and files this Motion to Strike Defendants' DBL & Associates ("DBL") Answer and to Recover Attorney's Fees Pursuant to O.C.G.A. § 9-15-14, and moves this Court to strike Defendant's Answer from the record and to omit it from evidence. In support thereof, Plaintiff respectfully shows the Court the following:

I. INTRODUCTION

Throughout this case, Defendant DBL & Associates has provided false information that has foreclosed Plaintiff from joining an essential party to this lawsuit, prevented her counsel from pursuing a claim against the proper tortfeasor, and wasted numerous hours of attorney time. As will be discussed at length, *infra*, Defendant erroneously identified AMCR II and III (hereinafter collectively referred to as "AMCR") as the party responsible for creating and filling the hole into which Plaintiff fell when the responsible party was actually Alternative Protections ("AP"). Despite having access to the contracts, invoices, proposals, sales notices, and bank statements that irrefutably establish AP as the responsible party, DBL erroneously maintained AMCR's culpability for *years*. This omission has foreclosed Plaintiff from adding an essential

party to this case because of the tolling of the statute of limitations – damage for which there is no remedy. Plaintiff's attorney has also wasted large swaths of time investigating and developing a case against an improper tortfeasor. Accordingly, Plaintiff files this Motion, pursuant to O.C.G.A. §§ 9-11-37(d) and 9-15-14 seeking (a) the striking of Defendant's Answer; and (b) the recovery of attorney's fees incurred as a result of the false information provided by Defendant.

Plaintiff is mindful of the severity of the sanctions that she seeks, but she asks that this court also consider the severe way in which Defendant DBL's discovery abuse has affected her ability to recover from a tortfeasor.

II. SUMMARY OF RELEVANT FACTS

This is a negligence case arising from Defendant's breach of its non-delegable duty to keep its premises safe. Specifically, in 2014, Defendant directed AMCR to cut down a group of Holly trees on a strip of land at their commercial property. (Deposition of Sam Moore, hereinafter "Moore Depo." at 61:3-14). In accordance with their agreement, AMCR cut down the trees, leaving around three to four inches of exposed tree stump. (Moore Depo. at 61:9-13). Defendant then contracted AP to remove the remaining tree stumps. (Moore Depo. at 62:20-63:3). Recognizing that the holes left by the removed tree stumps would create a dangerous condition on the land, DBL also contracted AP to fill the resulting holes with mulch. (Moore Depo. at 62:20-63:3). Unfortunately, these holes were never filled and became camouflaged by tall grass over the next three years.

On June 6, 2017, Plaintiff was running some errands at the Landing at Willow Place Mall when she fell into one of the aforementioned holes while walking to her parking space. Because she couldn't anticipate the change in terrain, Plaintiff fell violently and suffered a tear to her right

shoulder rotator cuff as well as injuries to her back, neck, hip, and right shoulder. These injuries led to a right shoulder rotator cuff repair and a left hip replacement surgery.

Plaintiff filed this action on April 1, 2019. Her complaint was followed by interrogatories and requests for documents that petitioned the names of all parties responsible for creating the dangerous situation that caused her injury. Defendant identified ARMC as the entity responsible for creating and filling the holes and maintained ARMC's liability for *four years.* (Deposition of ARMC's Corporate Representative Michael Bond Corey, hereinafter "Corey Depo." at 141:13-142:20). However, as a result of AMCR's Non-Party Request for Production of Documents to AP, it was discovered that AP was in fact the company responsible for removing the stumps in question, creating the resulting holes, and failing to fill those holes properly. (Corey Depo. 158:4-10). Defendants never disclosed any of this information in discovery. It was only when confronted with these NPRPDs from AP that AMCR's operations manager, Sam Moore, admitted that he was responsible for directing AP to both remove the stumps in question and fill them in 2014. (Moore Depo. at 62:20-22). Mr. Moore also admitted that tall grass would have grown over the holes over time, making them harder to see. (Moore Depo. at 74:11-22; 87:11-14).[1]

In striking Defendant's Answer, the Court may soundly rely on the false and misleading statements outlined below:

(1) Defendant provided false information regarding the entity responsible for removing the stumps.

Defendant's responses to AMCR's Interrogatories clearly identified AMCR as the party responsible for removing the tree stumps from the strip of land where Plaintiff fell.

> **Interrogatory 6**. As to the action in which these interrogatories are served, please give a detailed factual description and basis for Defendant's claim that the cutting

[1] Plaintiff takes the position that these holes were particularly dangerous because they were camouflaged by the grass that had grown over them. Moreover, Defendants failed to provide any warning signs that such holes existed.

> down of trees, removal of trees, and/or removal of tree stumps was AMCR III's duty or responsibility to perform.
>
> **Answer.** Sam Moore asked AMCR III to work on the trees in the subject area.

Defendant DBL & Associates Management's Response to AMCR III Property Management Company's Interrogatories, hereinafter "DBL Response" ¶6. Defendant later doubled down on this false response.

> **Interrogatory 20.** Please set forth in detail each and every act and/or omission which you contend was an act of negligence on the part of AMCR III and/or AMCR II and describe how each act and/or omission contributed to the incident […].
>
> **Response.** Defendant is not in possession of any invoices or other documents reflecting removal of the tree/stump by any other contractor. Therefore, it is Defendant's contention that AMCR III removed trees in the area at issue. As further response, after the removal of the trees at issue, the area where the purported fall occurred was maintained by AMCR III, and AMCR III failed to properly maintain or notify the property owner about any potential issues.

DBL Response ¶20. However, Sam Moore, the operations manager of Willow Place Mall and The Landing at Willow Place, directly contradicted these interrogatory responses when he confirmed during his deposition that AMCR was only responsible for cutting down the trees in the landing and that Alternative Protections was responsible for removing the stumps.

> Q. You're saying that AMCR removed some amount of the trees in that island, and then Alternative Protections was responsible for removing the stumps from those trees and filling up the stumps with mulch and other stuff?
>
> A. Yes.

(Moore Depo. at 92:22-93:2). Plaintiff's counsel then questioned Mr. Moore directly about the discrepancy between Mr. Moore's testimony and DBL & Associate's responses to the interrogatories sent by AMCR.

> **Q.** So the answer to [interrogatory no. 6] is 'Sam Moore asked AMCR III to work on the trees in the subject area." Did I read that right?
>
> **A.** Yes.

> **Q.** But you would agree that that's not completely accurate with regard to this incident because the removal of the tree stumps […] was done by Alternative Protections with regard to the area that we're talking about; right?
>
> **A.** Yes.
>
> **Q.** So this answer on some level doesn't have all the important information because it doesn't include the fact that you would have asked Alternative Protections to remove those tree stumps and to fill them; is that right?
>
> **A.** Yes.

(Moore Depo. at 96:22-97:10).

Counsel for AMCR also confirmed that there was no mix-up regarding whether AP had been contracted to perform the specific work at issue in this case.

> **Q**. Do you remember ever instructing Alternative Protections to grind stumps on other occasions besides the one at issue?
>
> **A**. No.

(Moore Depo. at 61:18-20).

(2) Defendant provided false information regarding the entity responsible for initially covering up the holes.

In its Responses to AMCR's interrogatories, DBL stated that AMCR was contractually responsible for covering up the holes in the landing.

> **Interrogatory 8.** Identify the specific section, clause, paragraph, sentence, phrase and/or reference contained in the April 1, 2009 agreement and/or Master Service Agreement that evidences or demonstrates that AMCR III had a duty or responsibility to perform the tasks of cutting down trees, removal of trees, removal of tree stumps, and/or filling in holes created by the removal of tree stumps along the landscaping and/or grass bed where Plaintiff's alleged fall occurred.
>
> **Response.** Defendant refers to the excerpt of the Master Services agreement between CBS and Associates Management, Inc., and AMCR III Property Management, LLC and AMCR Management Services produced with its Response to Co-Defendant's Request for Production of Documents.

DBL Response ¶8. During his deposition on January 21, 2021, Defendants' Corporate Representative, Michael Corey, also testified that AMCR was solely responsible for removing the trees, removing the stumps, and filling the resulting holes on the strip of land where Plaintiff fell. (Corey Depo. at 98: 21-99:12; 109:7-11).

However, Sam Moore, DBL's operations manager and the person responsible for the day-to-day management of the area, admitted that Alternative Protections Landscape Management was actually contracted to remove the stumps and fill the resulting holes with mulch after AMCR cut down the trees. (Moore Depo. at 62:20-22).

III. ARGUMENT AND CITATION OF AUTHORITY

A. The Court Should Strike Defendant's Answer as a Sanction for Intentionally False Discovery.

"[A]n intentionally false response to a [discovery] request (particularly concerning a pivotal issue in the litigation) authorizes a trial court to impose the sanctions permitted by O.C.G.A. § 9-11-37(d) for a total failure to respond." *MARTA v. Doe*, 292 Ga. App. 532, 537 (2008). Under such circumstances, Rule 37(d) sanctions become available immediately, including striking an answer. *Exum v. Norfolk Southern Railway*, 305 Ga. App. 781, 783 (2010). Georgia courts have authorized such harsh sanctions by reasoning that *false* information "'is *worse* than no response.'" *MARTA*, 292 Ga. App. at 536 (quoting *Sandoval v. Martinez*, 780 P.2d 1152, 1155-56 (N.M. 1989)) (emphasis in original). Where the information provided is false, "the party serving the interrogatory may never learn that it has not really received the answer to the interrogatory." *Id.* Thus, "[t]he obstruction to the discovery process is *much graver* when a party denies having had a prior accident than when the party refuses to respond to an interrogatory asking if there have been any prior accidents." *Id.* (emphasis added). The policy implication of allowing such behavior is serious:

> To condone [a litigant's intentionally false discovery responses] would force parties to assume the falsity of every sworn interrogatory and file endless motions preserving their right to relief. Such a rule would allow the unscrupulous to conceal documents from opposing parties by the simple expedient of denying their existence, without fear of penalty if the deception were by some chance discovered. *It would discourage diligence in seeking out relevant documents even on the part of those not actively dishonest. Lack of diligence or negligence would not only be unpunished, it would be rewarded.*

Id. at 537. (emphasis added).

In determining whether a party intentionally or willfully provided false information, "the Civil Practice Act does not require that a party displays, and the trial court finds, *actual willfulness* [sic]; instead, it requires at least a conscious or intentional failure to act, as distinguished from an accidental or involuntary non-compliance." *Howard v. Alegria,* 321 Ga. App. 178, 178 (2013); *see also Rivers v. Almand*, 241 Ga. App. 565, 566 (1999) (quoting *Washington v. South Ga. Med. Center*, 221 Ga. Ap. 640, 641 (1996)). Willfulness may be inferred from a party's conduct. *Id.*

1. Defendant's failure to investigate fulfills the willfulness element required to strike its answer.

As discussed at length, *supra*, Defendant has erroneously identified AMCR as the sole party responsible for cutting down the trees, removing the tree stumps, and filling the resulting holes on the strip of land where Plaintiff suffered her injurious fall since the beginning of this litigation. In its response to AMCR's interrogatories, DBL stated that it identified AMCR as the party responsible for removing the tree stumps and filling the resulting holes because it was "not in possession of any invoices or other documents reflecting tree/stump removal by any other contractor." DBL Response ¶20. But, as AMCR would uncover, DBL *did have invoices* – they also had faxes, purchase orders, proposals and presumably the corresponding bank statements which evidence AP's responsibility for creating the dangerous conditions on Defendant's property.

The trees at issue were cut down in 2014. (Moore Depo. at 61:3-14). Had DBL reviewed its records before responding to discovery requests, it would have found a June 17, 2014 fax from their Operations Manager, Sam Moore, to AP with the subject line "Stumps – The Landing" and the comment "PLS schedule work ASAP!". (Facsimile Transmission from Willow place to AP, attached hereto as Plaintiff's Exhibit A). This fax was attached to a purchase order of $2,120.00 *for the removal and grinding of stumps and the installment of mulch*. (Purchase Order from Sam Moore, attached hereto as Plaintiff's Exhibit B). Had DBL then reviewed its incoming invoices, it would have found a July 22, 2014 **invoice** from Alternative Protections to DBL for "Labor and Equipment to Remove and Grind Stumps and Remove Debris and Mulch from Area" totaling $2,120. (Invoice from AP to DBL & Associates, attached hereto as Plaintiff's Exhibit C). Had DBL followed this trail of breadcrumbs to its logical conclusion – its bank statements – it would have found an August 21, 2014 payment of $2,120 to Alternative Protections. DBL could have then confirmed this information with a short chat with Sam Moore, their employee in charge of managing the landscaping in this area, who was responsible for ordering the work. (Moore Depo. at 62:19-22). This series of logical, sequential investigative steps is not only obvious to Plaintiff's Counsel (and likely this Court), it was also obvious to AMCR, who – after doing exactly what has been outlined above – discovered the correct information responsive to the interrogatories that DBL erroneously answered.

Also, and very importantly, DBL had a long-standing relationship with Alternative Protections. Sam Moore stated that DBL often contracted AP to handle heavy duty landscaping – like stump removal – for which AMCR did not have proper equipment. (Moore Depo. at 79:20-25). From early 2014 to the present, AMCR has contracted with AP over a dozen times, and at least once a year. (*See* Invoices between DBL and AP, attached collectively as Plaintiff's Exhibit

D). Because DBL had *repeatedly* contracted with AP to perform landscaping work on the property, it is simply illogical that it would not immediately investigate to determine which of the two commercial landscapers with which it often worked was responsible for creating this dangerous situation. Instead, DBL performed a cursory review of whatever information was readily available before summarily shifting the blame onto AMCR.

DBL's failure to perform even minimal, basic research illustrates the kind of willfulness required by the Civil Practice Act. DBL had invoices, faxes, proposals, purchase orders, and bank statements evidencing DBL's contractual relationship with AP for grinding the stumps on the landing and filling the resulting holes with mulch. All of this work was done at the behest of DBL employee and Landing's Operational Manager, Sam Moore. Had DBL reviewed its work orders, it would have found this information. Had DBL reviewed its bank statements, it would have found this information. Had DBL simply spoken with its employee, Sam Moore, the person in charge of landscaping, they would have discovered this information. Had DBL done any of the investigation required of them by law, they would have found this information. Investigation in this context is not voluntary; it's *compulsory.* Georgia's Civil Practice Act doesn't simply allow party litigants to provide whatever information is most convenient for the purpose of responding to discovery requests – it *demands* correct and complete answers. This lazy legal work demonstrates a blatant and unapologetic lack of diligence that has caused disastrous and irreparable harm to Plaintiff's case.

> A litigant will not be heard to contend that its own conduct has removed it beyond the reach of sanctions when it has frustrated the orderly process described in OCGA § 9-11-37 by false or erroneous responses to interrogatories. […]. Such a rule […] would discourage diligence in seeking out relevant documents even on the part of those not actively dishonest. Lack of diligence or negligence would not only be punished it would be rewarded.

MARTA, 292 Ga. App. at 897-98 (internal citation and punctuation excluded). Plaintiff fails to conjure a situation more illustrative of a lack of diligence in seeking out relevant documents and information than the one at hand. DBL *repeatedly* erroneously identified AMCR as the party responsible for removing the stumps and filling the holes instead of doing one of the many investigative tasks that Plaintiff outlined, *supra*: reviewing company bank statements, reviewing company work orders, interviewing employees, and surely a host of other easily executable actions. DBL's response shows not only a lack of diligence, but *a complete dearth of any effort at all*. A finding of *a conscious or intentional failure to act* is sufficient to impose sanctions. See *Dryer v. Spectrum Eng'g, Inc.*, 245 Ga.App. 30, 32 (2000); *Bells Ferry Landing, Ltd. v. Wirtz*, 188 Ga.App. 244, 345 (1988) (emphasis added). Defendant DBL had every piece of information that would show the true party responsible for creating the dangerous situation on their land but simply failed to review it. DBL's responses illustrate either a grossly inadequate and poorly executed investigation or an intentional falsehood provided to mislead and pervert this litigation – both or either is sufficient cause to strike its answer.

2. DBL's discovery abuse has caused irreparable damage to Plaintiff's case.

Plaintiff suffered her injurious fall on DBL's property on June 6, 2017. Plaintiff filed her action for recovery on April 1, 2019. Per O.C.G.A. § 9-3-33, the statute of limitations for Plaintiff's action tolled on June 6, 2019. Plaintiff did not discover that AP was responsible for creating the conditions that led to her injury until *two years* after the statute of limitations had tolled. Because AP was not joined to this lawsuit before the tolling of the statute of limitations, Plaintiff has no way to join it as an indispensable party now. There is no legal remedy to rectify this problem. DBL's failure to properly investigate this case has forever foreclosed Plaintiff from adding an indispensable party to this lawsuit.

DBL's incorrect answers to interrogatories have also prevented Plaintiff from thoroughly investigating this claim within the discovery period. Plaintiff has not been able to depose AP's management or employees, nor has she been able to retrieve and review records relating to its work with DBL. There is a host of information relating to this claim that Plaintiff will never have the opportunity to learn due entirely to the DBL's discovery abuse.

B. The Court Should Award Plaintiff Attorney's Fees under O.C.G.A. § 9-15-14 as a Sanction for the Conduct of Defendant and Defense Counsel.

"The damages authorized by O.C.G.A. § 9–15–14(a) 'are intended not merely to punish or deter litigation abuses but also *to recompense litigants who are forced to expend their resources in contending with [abusive litigation]*.'" *LabMD, Inc. v. Savera*, 331 Ga. App. 463, 465 (2015) (emphasis added). Similar to an award under subsection (a), an award under subsection (b) is also intended to both "punish or deter litigation abuses" and "to recompense litigants who are forced to expend their resources." *Moon v. Moon*, 277 Ga. 375, 389 (2003); *see also Savera*, 331 Ga. App. at 465. To the extent an award is based on O.C.G.A. § 9-15-14(b), "it must be sustained unless the trial court abused its discretion." *Mitcham v. Blalock*, 268 Ga. 644, 647 (1997).

An award of attorney's fees is justified under either subsection (a) or (b) where a party's own evidence flatly contradicts that party's asserted position. *Cavin v. Brown*, 246 Ga. App. 40, 43 (2000) (awarding attorney's fees where the plaintiff was forced to incur attorney time disproving a "bogus" position, despite evidence contradicting defendant's position); *see also* Order, *Habif v. Meredith*, Case No. 17A65993-2, State Court of DeKalb County (May 9, 2018), attached hereto as Exhibit "8." Recovery of fees is justified because a litigant should not be forced to incur attorney's fees to discover a falsehood. *Sandoval v. Martinez*, 780 P.2d 1152 (N.M. 1989).

In *Sandoval v. Martinez*, the New Mexico Court of Appeals addressed a similar situation and provided as follows:

> For example, if an interrogatory answer falsely denied the existence of discoverable information, the other party probably will have suffered expenses *substantially beyond the cost of moving for sanctions after discovery of the falsehood*. *The injured party likely would have incurred expenses not only to discover the falsehood, but also to pursue, in preparation for trial, factual and legal avenues that it would not have pursued if truthful responses had been provided. A court order requiring reimbursement of such expenses may be appropriate*.

Id. at 1156 (emphasis added).[2] The situation that the *Sandoval* court describes perfectly parallels the case at hand. Plaintiff's counsel dedicated numerous hours to investigating a claim against AMCR when the proper party was AP. The hours that Plaintiff's counsel has spent drafting pleadings, taking depositions, reviewing documents, and conducting legal research to develop a case against AMCR are wasted and unrecoverable. In the face of the time bar by the statute of limitations, Plaintiff can't even redirect whatever small amount of work could have been transferable to a case against AP. DBL's erroneous discovery responses have *undeniably* wasted hours of Plaintiff's counsel's time and is the kind of conduct properly sanctionable under O.C.G.A. § 9–15–14.

IV. CONCLUSION

Given the degree of the falsehoods uncovered in this case, this is more than an issue of credibility to be decided by the jury. Plaintiff has incurred several hours of attorney time on acts necessitated by the false statements told by Defendant and defense counsel. Plaintiff requests the Court strike Defendant's Answer as a sanction for the flagrant discovery abuse that has occurred in this case. Plaintiff further requests an award of attorney's fees and expenses be jointly and

[2] The logic in *Sandoval* has been adopted by the Georgia Court of Appeals. *See MARTA*, 292 Ga. App. at 536 (2008).

severally entered against Defendant's Counsel. If Plaintiff's request for attorney's fees is granted, Plaintiff requests leave of this Court to supplement the Motion with the exact hours and fees requested.