

2014 WL 2718625 (Ala.) (Appellate Brief)  
Supreme Court of Alabama.

Steven Mark HAYDEN and Angela Rae Hayden, Defendants/Appellants/Cross-Appellees,

v.

William B. CASHION and Western Steel, Inc., Plaintiffs/Appellees/Cross-Appellants.

Nos. 1130159, 1130199.

May 8, 2014.

On Appeal from the Circuit Court for Jefferson County, Alabama CV2012-209

**Reply Brief of Appellees and Cross-Appellants**

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**\*1 SUMMARY OF THE ARGUMENT**

A fiduciary relationship,

is one in which one person occupies toward another such a position...as reasonably to inspire confidence that he will act in good faith for the other's interests...and it appears when the circumstances make it certain the parties do not deal on equal terms, but, on the one side, there is an overmastering influence, or, on the other...trust, justifiably reposed.

It arises...in all the variety of relations in which dominion may be exercised by one person over another.

*Line v. Ventura*, 38 So.3d 1, 13 (Ala. 2009) (affirming a \$200,000 compensatory and \$550,000 punitive damages award against defendant who “consciously disregarded” the fiduciary duty he owed to a **financially** vulnerable minor).

This matter constitutes an exceptionally egregious case of breach of fiduciary duty. Here, the Haydens went far beyond “consciously disregarding” their fiduciary duties; rather, in bad faith they wielded their positions of influence to willfully, maliciously, and secretly attempt to strip Cashion of all possession and control of his own property, “a sacred right, which should not be taken away without urgent reason,” so that they could take for themselves everything Cashion spent his lifetime earning. \*2 *Belcher v. Queen*, 39 So.3d 1023, 1028 (Ala. 2009). Moreover, throughout these proceedings, the Haydens repeatedly asserted frivolous defenses, filed frivolous actions in other jurisdictions, and harassed Plaintiffs and their attorneys purely for purposes of delaying the inevitable judgment against them and increasing Plaintiffs' litigation costs.

Equity has long recognized that forms of relief other than compensatory and punitive damages, such as surcharging a fiduciary, are necessary to restore individuals on the vulnerable side of a fiduciary relationship to the position they occupied before a breach occurred. *George Gleason Bogert & George Taylor Bogert, The Law of Trusts and Trustees* § 701 (2d ed. 1993); *First Ala. Bank of Montgomery, NA v. Martin*, 425 So.2d 415, 419 (Ala. 1982)(equity allows a court to place the parties in the position they would have occupied except for a breach). As part of this principle, courts can order fiduciaries to pay attorneys' fees personally if they are subject to a surcharge. Austin Wakeman Scott & Williams Franklin Fratcher, *The Law of Trusts* § 188.4 (4th ed. 1988).

This Court has consistently affirmed that in cases such \*3 as this one where fiduciaries commit “fraud, willful negligence or malice,” equity provides that fiduciaries should be responsible for the attorneys' fees incurred by their beneficiary to restore the status quo. *Reynolds v. First Ala. Bank of Montgomery*, 471 So. 2d 1238, 1243 (Ala. 1985); *Lawyers Sur. Corp. v. Whitehead*, 719 So. 2d 824, 831-32 (Ala. Civ. App. 1997)(absent trustee's breach of trust, there would have been no need whatsoever for litigation to compel him to make restitution for the beneficiaries' losses), *aff'd in part and rev'd in part on other grounds Ex parte Lawyers Sur. Corp.*, 719 So. 2d 833, 837 (Ala. 1998.) Additionally, the Alabama Litigation Accountability Act (“ALAA”), Ala. Code § 12-19-270, *et seq.*, provides that attorneys' fees *shall be awarded*, where, as here, parties seek to delay proceedings and increase costs through frivolous filings and harassing litigation tactics.

Although the Trial Court made the requisite legal and factual findings under both equitable principles and the ALAA to support an award of the entirety of attorneys' fees incurred by Plaintiffs to remedy the Haydens' atrocious actions and respond to their numerous frivolous filings, \*4 the Trial Court committed reversible error by failing to award Plaintiffs' attorneys' fees under either theory. Importantly, Plaintiffs would not have incurred any attorneys' fees if the Haydens had not culpably breached their fiduciary duties by trying to steal Cashion's assets. Moreover, Plaintiffs' incurred attorneys' fees would have been *much lower* if the Haydens had not used frivolous filings and harassment to purposefully delay the proceedings and increase costs. Therefore, under equitable principles and the ALAA, this Court should assess the entirety of attorneys' fees Plaintiffs incurred as damages against the Haydens.

## ARGUMENT

### **I. ALTHOUGH IT CORRECTLY DETERMINED THAT IT SHOULD AWARD PLAINTIFFS' ATTORNEYS' FEES UNDER EQUITABLE PRINCIPLES AND THE ALAA, THE TRIAL COURT ERRED IN EXCLUDING OVER NINTEY-FIVE PERCENT OF PLAINTIFFS' INCURRED ATTORNEYS FEES FROM ITS AWARD WITHOUT JUSTIFICATION OR EXPLANATION.**

When deciding whether a trial court misapplied the law to the undisputed facts, the standard of review for this Court is de novo. *Ex parte State Farm Mut. Auto. Ins. Co.*, 118 So. 3d 699, 704 (Ala. 2012) (applying de novo standard to determine whether common-fund doctrine applied to award \*5 of attorneys' fees). Additionally, while “the determination of whether an attorney fee is reasonable is within the sound discretion of the trial court and will not be disturbed on appeal absent an **abuse** of that discretion,... the trial court's order regarding an attorney fee must allow for meaningful review by articulating the decisions made, the reasons supporting those decisions, and the performance of the attorney-fee calculation.” *Beal Bank, SSB v. Schilleci*, 896 So. 2d 395, 400, 404 (Ala.2004)(remanded where trial court reduced attorneys' fees award without explanation)(emphasis added).

The Haydens cite to four separate cases for the proposition that under the **abuse** of discretion standard this Court should not reverse the Trial Court's decision to unjustifiably and inexplicably exclude more than ninety-five percent of Plaintiffs' incurred attorneys' fees from its award. (Haydens' Response at 33-34.) However, in every case cited by the Haydens for this proposition, this Court, in fact, reversed each trial court's attorneys' fee calculation. See *Ex parte Edwards*, 601 So. 2d 82, 85 (Ala. 1992)(reversing trial court's unexplained reduction in Plaintiff's requested attorneys' fees and on second \*6 appeal, reversing the trial court's same reduction in attorneys' fees for its failure to apply the lodestar method to its fee calculation); *Varner v. Century Finance Co.*, 738 F.2d 1143, 1150 (11th Cir. 1984) (reversing trial court's "artificially low" computation of attorneys' fees, and remanding for reevaluation); *State Bd. Of Educ. v. Waldrop*, 840 So.2d 893, 896 (Ala. 2002) (applying a de novo standard of review where trial court did not receive ore tenus evidence regarding the request for attorneys' fees, and reversing the trial court's fee determination); *Pharmacia Corp. v. McGowan*, 915 So.2d 549, 554-557 (Ala. 2004)(remanding where trial court did not explain its attorneys' fees award decision or the reasons for its decision, and reversing trial court's explained fee decision on second appeal).

Similarly, the trial court's fee determination here warrants reversal. Although the Trial Court correctly determined that Plaintiffs were due to be awarded attorneys' fees under both equitable principles and the ALAA, and evaluated the reasonableness of Plaintiffs' fees under the *Peebles v. Miley*, 439 So.2d 137, 140-43 (Ala. 1983), factors; it unjustifiably excluded over ninety-five \*7 percent of Plaintiffs' incurred attorneys' fees from its award and did not explain its reasoning for doing so.

#### **A. THE TRIAL COURT CORRECTLY DETERMINED THAT IT SHOULD AWARD PLAINTIFFS' ATTORNEYS' FEES UNDER BOTH EQUITABLE AND STATUTORY PRINCIPLES.**

After the conclusion of the bench trial, the Trial Court issued an order requiring Plaintiffs to submit additional evidence in support of their attorneys' fees by July 26, 2013. <sup>1</sup> (C. 5805.) Pursuant to that Order, Plaintiffs submitted a request for attorneys' fees totaling \$1,522,277.47, which represented all fees incurred from inception through the conclusion of the trial of the case. <sup>2</sup> (C. 5806-6192.) Plaintiffs' evidentiary submission included:

- 1) affidavits from three of their attorneys attesting to the reasonableness of their fees (C. 5887-5889, 5893-5897, 6163-6164); \*8
- 2) detailed billing records from each firm representing Plaintiffs (C. 5890-5891, 5912-6104, 6165-6192);
- 3) summaries of the Haydens' numerous bad faith attempts to seize control of Cashion's assets (C. 6130-6135), the Haydens' frequent attempts to improperly delay litigation and increase Plaintiffs' attorneys' fees and expenses (C. 6137-6140), and the Haydens' multiple attempts to harass and threaten Plaintiffs' attorneys and experts (C. 6142-6143); and
- 4) an affidavit from Plaintiffs' attorneys' fees expert, Alfred F. Smith. (C. 6121-6156).

The Trial Court ordered the Haydens to respond to Plaintiffs' submission by August 7, 2013. (C. 5805.) However, the Haydens *did not offer any evidence*, expert or otherwise, to counter Plaintiffs' undisputed evidence supporting their attorneys' fees submission.

In its Final Judgment, the Trial Court evaluated Plaintiffs' evidentiary submissions and the applicable law, and correctly determined that Plaintiffs' should be awarded \*9 attorneys' fees under both equity principles and the ALAA. (See C. 6372-6373.)

#### **1. The Trial Court correctly determined that it should award Plaintiffs' attorneys' fees under equity principles.**

Alabama recognizes equity principles that allow for the recovery of attorneys' fees for fraud, willful negligence, or malice. See *Reynolds v. First Alabama Bank*, 471 So. 2d 1238, 1243 (Ala. 1985)(holding trustee liable for beneficiaries' attorneys' fees where there was evidence trustee breached its fiduciary duties by concealing its actions from the beneficiary); see also Ala. Code § 26-1A-117,<sup>3</sup> comm. cmts. (noting that Alabama courts have recognized exceptions to the usual “American Rule” of \*10 attorneys' fees in equity cases, and recognizing that an agent who breaches his duty under a Power of Attorney is *required* to restore the value of his principal's property to what it would have been had the breach not occurred).

Additionally, equity requires that damages imposed for an agent's breach of fiduciary duty to his principal should “put the parties in the position they would have occupied except for the breach.” *First Ala. Bank of Montgomery, N.A. v. Martin*, 425 So. 2d 415, 429 (Ala. 1982)(upholding trial court's ruling that surcharge damages against trustees to reimburse beneficiaries' lost principal plus interest was appropriate to restore beneficiaries to the status quo); see also *Restatement 3d of Trusts § 95* comm. cmts. (2003) (noting that surcharge damages are a tool of the courts to craft remedies for beneficiaries where traditional damages to restore lost value do not adequately compensate the trusts or their beneficiaries or where the trustee commits acts of self-dealing). Other jurisdictions have also adopted the principle that trial courts should award attorneys' fees in situations of egregious fiduciary misconduct. See, e.g., *Allard v. Pacific Nat'l Bank*, 768 P.2d 998, 1002 (Wash. 1989) (affirming attorneys' fees award \*11 of approximately \$1 million expended by Plaintiffs at trial and on appeal where litigation was necessitated by fiduciary's “inexcusable conduct”); *Parker v. Rogerson*, 49 A.D.2d 689, 689 (N.Y. App. 1975) (“[A]n errant fiduciary may be surcharged for the legal expenses incurred in establishing his wrongdoing and obtaining recoupment.”).

The decision of whether to award fees under the equitable exception to the American Rule is within the sound discretion of the Trial Court, and should not be reversed absent an **abuse** of that discretion. See *James v. Jamos*, 768 So.2d 356, 361 (Ala. 2000). In its Final Judgment, the Trial Court correctly concluded that the Haydens were liable for attorneys' fees under equitable principles because they had committed “numerous actions' constituting “intentional, fraudulent, and bad faith conduct...in their efforts to steal away Cashion's assets.” (C. 6373.) The undisputed evidence presented to the Trial Court supports its finding that the Haydens should be fully liable for Plaintiffs' attorneys' fees under equitable principles.

The evidence before the Trial Court showed that the Haydens intentionally and undisputedly executed multiple \*12 fraudulent documents, in the guise of acting under their authority as Cashion's agents under the POA, but without Cashion's knowledge or consent. These surreptitious, bad faith acts purported to remove Cashion's assets (including Western Steel) from his possession, control, and authority; place those assets squarely under the Haydens' control; and punish Cashion should he challenge the Haydens' scheme. (See C. 6130-5135, 6352-6355.) These acts were the antithesis of the duties of a fiduciary.

The evidence also showed that the Haydens committed additional breaches of their fiduciary duties by:

- 1) attempting to enter into a sham “Compromise Settlement” in Clark County, Nevada in order to legally bind Cashion to the fraudulent transfers of his assets (C. 91-98);
- 2) stealing corporate documents from Cashion and Western Steel (R. 89-93);
- 3) sending out numerous e-mails to Cashion's family and employees in attempt to discredit Cashion (C. 140-142, 147, 150-151); and
- 4) aiding Frankie Cashion with executing a “Post Nuptial Agreement” that removed Cashion's rights \*13 under a previously validly executed prenuptial agreement. (C. 107-111).

Based on the evidence showing that the Haydens engaged in multiple intentional, fraudulent, and bad faith actions, the Trial Court correctly concluded that the Haydens' should be liable for Plaintiffs' attorneys' fees under equitable principles. (See C. 6372-6373.)

## 2. The Trial Court correctly determined that it should award Plaintiffs' attorneys' fees under the ALAA.

Under the ALAA trial courts “shall” award attorneys' fees against parties who raise frivolous actions or defenses “without substantial justification,” interpose any actions or defenses for the purposes of “delay or harassment,” or “expand the proceedings by other improper conduct.” Ala. Code § 12-19-272 (emphasis added). An action or defense is “without substantial justification” if it is “frivolous, groundless in fact or law, or vexatious, or interposed for any improper purpose, including without limitation, to cause unnecessary delay or needless increase in the cost of litigation....” Ala. Code § 12-19-271.

If a trial court determines that a party's action, claim, or defense is “without substantial justification,” \*14 based on it being frivolous, groundless in fact, vexatious, or interposed for improper purposes, that determination will not be disturbed on appeal “unless it is clearly erroneous, without supporting evidence, manifestly unjust, or against the great weight of the evidence.” *Pac. Enters. Oil Co. v. Howell Petroleum Corp.*, 614 So. 2d 409, 418 (Ala. 1993) (citing *Cove Creek Development Corp. v. APAC-Alabama, Inc.*, 588 So. 2d 458, 461 (Ala. 1991)).

In its Final Judgment, the Trial Court correctly concluded that the Haydens were liable for attorneys' fees under the ALAA because they had raised “numerous unmeritorious defenses” and filed “numerous unmeritorious...motions purely for purposes of causing unnecessary delay and increasing litigation costs.” (C. 6373.) The great weight of the evidence supports the Trial Court's finding that the Haydens are liable under the ALAA.

As set forth more completely in Plaintiffs summaries and in the Record on Appeal, the Haydens perpetually sought to delay the proceedings and harass Plaintiffs and their counsel. (C. 6137-6143). The Haydens' tactics included:

- 1) threatening to report Plaintiffs' attorneys to the Alabama and Nevada Bar associations and to sue \*15 Plaintiffs' counsel and their firms, (C. 149, PTX126);
- 2) assisting Frankie Cashion in fabricating a 911 emergency call falsely claiming that Cashion was holding Western Steel employees hostage at gunpoint (R. 358-373; C. 181-182);
- 3) wrongfully withholding Cashion's medical records during discovery (PTX024);
- 4) improperly delaying depositions and requiring that they be conducted in the Trial Court's chambers (PTX079); and
- 5) sending Cashion, his expert witness, and his attorneys insulting, harassing, and threatening text messages and e-mails in the weeks leading up to the trial of this case. (R. 440-442, C. Supp. 21-24; 27-40).

The Haydens also repeatedly filed pleadings and motions that were groundless in fact, frivolous, and vexatious. These included:

- \*16 1) multiple unwarranted motions for recusal<sup>4</sup> (C. 1599-1912, 5052-5374, 5731-5767);
- 2) multiple untimely motions for change of venue (C. 562-566, 746-755, 1002-1140, 1210-1235, 6205-6207);
- 3) motions improperly claiming Mark Hayden was the president of Western Steel (C. 3527-3726); and
- 4) improper notices of appearance by the Haydens' counsel on behalf of Western Steel in both the Trial Court and other forums. (C. 1924-1933, PTX004 at 593-648).

Finally, the Haydens sought to “expand the proceedings” into other forums by improper conduct, including:

- 1) filing a sham lawsuit on Cashion's “behalf,” but without Cashion's knowledge, in the District Court of Clark County, Nevada (C. 87-89);

- \*17 2) attempting to remove this action to federal court without any legal basis (C. 265-274);
- 3) improperly attempting to reopen a settled case in the Circuit Court of Elmore County, Case No. CV-11-80, for the purpose of litigating in Elmore County the claims pending before the Jefferson County Circuit Court (PTX004);
- 4) repeatedly filing baseless Petitions for Writs of Mandamus and a Petition for Rehearing in this Court (C. 1002-1140, 1210-1235, 5768-5805, 5731-5767); and
- 5) suing the Jefferson County Circuit Court Judge in Federal Court and using that meritless suit as an attempted basis for recusal of the Trial Court Judge. (C. 2790-2809, 6308-6342).

The great weight of the evidence shows that the Haydens repeatedly violated the ALAA under almost every applicable metric, and the Trial Court correctly found them to be liable for Plaintiffs' attorneys' fees under that Act.<sup>5</sup>

**\*18 B. THE TRIAL COURT ERRED IN FAILING TO AWARD OVER NINTEY-FIVE PERCENT OF THE ATTORNEYS' FEES INCURRED BY PLAINTIFFS WITHOUT JUSTIFICATION OR EXPLANATION.**

The Haydens fraudulently and in bad faith sought to take control of Cashion's assets without his knowledge, egregiously breaching their fiduciary duties. They also filed numerous frivolous defenses and actions in the Trial Court and in other forums without substantial justification, and have repeatedly harassed Plaintiffs and their counsel. The Haydens' actions undeniably warrant an award of all attorneys' fees incurred by Plaintiffs to rectify the Haydens' wrongdoings.

However, after correctly finding that Plaintiffs were due to be awarded attorneys' fees under both equitable principles and the ALAA, the Trial Court unjustifiably and inexplicably stated that, despite those findings, it would “nevertheless” only hold the Haydens' liable for the attorneys' fees Plaintiffs incurred in bringing two separate successful contempt motions against the Haydens \*19 for violations of the Preliminary Injunction Order and for threatening one of Plaintiff's expert witnesses. (C. 6373.) Out of the \$1,522,277.47 Plaintiffs' incurred in attorneys' fees, therefore, the Trial Court only awarded \$72,163.01, less than five percent of the amount Plaintiffs expended to rectify the Haydens' actions.

A trial court's order regarding an attorney fee must allow for meaningful review by articulating the decisions made, the reasons supporting those decisions, and the performance of the attorney-fee calculation.” *Beal Bank, SSB v. Schilleci*, 896 So. 2d 395, 404 (Ala.2004). Additionally, where the record before a trial court supports the granting of an award under the ALAA, its failure to assess reasonable attorneys' fees and costs constitutes reversible error, *Brashear v. Spinks*, 623 So. 2d 321, 323 (Ala. Civ. App. 1993) (reversing trial court's failure to award attorneys' fees under the ALAA where the record indisputably supported “the granting of an appropriate award under the statute”); see also *Asam v. Capps Trailer Sales*, 631 So. 2d 251 (Ala. Civ. App. 1993)(where litigation expenses were undisputed, entire \*20 amount of attorneys' fees sought were awarded under the ALAA).

The Trial Court's decision not to award fees under equitable principles and the ALAA once it made the correct determination that fees should be awarded under those doctrines was unsupported and inexplicable. See, e.g. *Regions Bank v. Lowery*, No. 1120612, 2014 WL 1407237 at \*21 (Ala. Apr. 11, 2014)(trial court's severe reduction in Defendants' requested attorneys' fees was reversible error, as it was unsupported by either side's evidence and was “not in keeping with the norms of litigation preparation and practice”). The Trial Court's decision was certainly not given “proper consideration” and was not within its “due discretion,” as claimed by the Haydens. (Haydens' Response at 34.)

The Trial Court had already made unchallenged findings that it would assess attorneys' fees against the Haydens as part of its sanctions under its two contempt orders (C. 3149-3166, 3777-3778); therefore, the Trial Court's analysis of whether attorneys' fees were due under equitable principles or the ALAA was only necessary for a determination of whether attorneys' fees should

be awarded \*21 separate and apart from those sanctions. The Trial Court **abused** its discretion by not awarding Plaintiffs' attorneys' fees under equitable principles or the ALAA once it determined that awards under both doctrines were appropriate, and prejudiced Plaintiffs by withholding over ninety-five percent of the attorneys' fees incurred by Plaintiffs from its award without justification or explanation.

### C. PLAINTIFFS' ATTORNEYS' FEES ARE REASONABLE.

In addition to proving that attorneys' fees were proper under the ALAA and equitable principles, Plaintiffs proved their requested fees were reasonable under the Peebles factors. Under *Peebles v. Miley*, 439 So.2d 137, 140-43 (Ala, 1983), in determining the reasonableness of attorneys' fees, courts should consider:

- (1) the nature and value of the subject matter of the employment;
- (2) the learning, skill, and labor requisite to its proper discharge;
- (3) the time consumed;
- (4) the professional experience and reputation of the attorney;
- (5) the weight of the attorney's responsibilities;
- (6) the measure of success achieved;
- (7) the reasonable expenses incurred by the attorney;
- \*22 (8) whether the fee is fixed or contingent;
- (9) the nature and length of a professional relationship;
- (10) the fee customarily charged in the locality for similar legal services;
- (11) the likelihood that a particular employment may preclude other employment; and
- (12) the time limitations imposed by the client or by the circumstances.

*Edelman & Combs v. Law*, 663 So.2d 957, 959-60 (Ala. 1995)(citing *Peebles*, 439 So.2d at 140-141). Additionally, when an applicant for attorney fees “has carried his burden of showing that the claimed rate and number of hours are reasonable, the resulting product is presumed to be the reasonable fee to which counsel is entitled.” *Blum v. Stenson*, 465 U.S. 886, 897 (1984).

The affidavit of Plaintiffs' expert witness, Alfred F. Smith, analyzed Plaintiffs' claims for attorneys' fees under each of the *Peebles* factors. (C. 6121-6156). Plaintiffs' attorneys also presented testimony and affidavits evidencing the reasonableness of their fees based on the *Peebles* factors, including, *inter alia*, the time expended, hourly rates, skill and experience, and results obtained. (R. 294, C. 5806-6192). The Haydens did not offer any evidence to counter Plaintiffs' submissions.

\*23 In its Final Judgment, the Trial Court considered Plaintiffs' expert's ‘evaluation of Plaintiffs' attorneys' fees and the affidavits and invoices submitted by Plaintiffs' attorneys, and undertook an analysis of the *Peebles* factors for purposes of evaluating the fees claimed for the contempt sanctions. (C. 6372-6374.) The Trial Court found that Plaintiffs' fees were “reasonable based on the time Plaintiffs spent to pursue their clients' interests and to remedy [the Haydens'] actions” (C. 6373.) It also found that Plaintiffs' attorneys set hourly rates “in line with the fees customarily charged in their localities for similar



services,” and that Plaintiffs' attorneys “achieved favorable results for their clients in a timely fashion, despite [the Haydens'] repeated attempts to prevent them from doing so.” (C. 6373-6374.) Moreover, the Trial Court did not make findings that any of the fees incurred by Plaintiffs were redundant, excessive, or otherwise unwarranted; yet still it erroneously declined to award Plaintiffs all attorneys' fees incurred.

Because the fees and expenses incurred by Plaintiffs are due to be awarded to Plaintiffs under equitable principles and the ALAA, and because Plaintiffs have \*24 conclusively demonstrated that their fees are reasonable, this Court should order the Trial Court to award Plaintiffs the entirety of attorneys' fees incurred. See *Beal Bank*, 896 So. 2d at 404 (noting that this Court has the right to look to the whole record on the value of attorneys' services and may render a decree awarding attorneys' fees as it “deems right and proper under the circumstances”); *Ex parte Edwards*, 601 So.2d 82, 86 (Ala. 1992) (where trial court's explanation for its reduction of attorneys' fees was unsupported by the evidence, this Court undertook its own analysis to determine the appropriate amount of fees to award). In the alternative, this Court should order the Trial Court to explain its reason for excluding over ninety-five percent of the fees incurred by Plaintiffs from its award,<sup>6</sup>

#### **D. GUYTON V. HUNT, 61 SO.3D 1085 (ALA. CIV. APP. 2010), IS INAPPLICABLE TO PLAINTIFFS' APPEAL.**

\*25 The Haydens rely on *Guyton* for the proposition that a litigant may not claim standing to assert the rights of a third party, and argue that Western Steel is a third party and not a proper plaintiff to this suit. (Haydens' Response at 34.) The Haydens, therefore, claim that Cashion is not due to be awarded any attorneys' fees because all of the fees have been paid by Western Steel.

As an initial matter, Western Steel did not pay all of Plaintiffs' attorneys' fees. Rather, Western Steel only paid the fees that Cashion did not pay, individually. (R. 275, 380-383.) Both Plaintiffs seek attorneys' fees to place them in the position they occupied before the Haydens breached their fiduciary duties, and it is immaterial which Plaintiff paid which fees. Also, Cashion is the sole shareholder and sole director of Western Steel. (R. 259-260.)

Moreover, no litigant here is asserting the rights of a third party. The Haydens' continued insistence on appeal that their efforts to seize control of Western Steel were valid and effective, including their preposterous argument that Mark Hayden is Western Steel's president, constitutes \*26 a continued violation of the ALAA and the Permanent Injunction implemented by the Trial Court. (See C. 6376.) The Trial Court even sanctioned the Haydens and their counsel for filing fraudulent documents with the Alabama Secretary of State that fictitiously listed Mark Haden as Western Steel's president<sup>7</sup> and improperly entering appearances in various courts on behalf of Western Steel. (C. 3165.) The Haydens' breach of fiduciary duty rendered all actions taken under the POA, including their attempted takeover of Western Steel, “void and of no effect.” (C. 6368.)

The Haydens continue to argue in bad faith that their egregious actions should go unpunished. However, as Mark \*27 Hayden admitted at trial, were it not for the Haydens' wrongful acts, Plaintiffs would not have incurred any attorneys' fees to undo them. (R. 560-561.) This Court should send a message to the Haydens that individuals who commit egregious breaches of fiduciary duty, and engage in vexatious, bad faith, and harassing litigation tactics should be held accountable for the attorneys' fees incurred by a wronged party seeking to restore the status quo.

Unfortunately, the exploitation of **elders** by individuals like the Haydens is only increasing in Alabama. John C. Craft, *Preventing Power of Attorney Abuse - A Lawyer's Role*, The Ala. Lawyer, Vol. 75, No. 2 at 116-122 (Mar. 2014) (“[S]eniors [often] live silently with the injustice of **financial** exploitation or never recover any of the money stolen from them.”); *see also Disciplinary Notices*, The Ala. Lawyer, Vol. 75, No. 2 at 134 (Mar. 2014)(attorney disbarred for appointing himself as beneficiary of trust he drafted for his **elderly** uncle without approval, filing lawsuit on his uncle's behalf without uncle's knowledge, and forging his uncle's signature to effectuate settlement of that lawsuit). Holding the Haydens responsible for all the attorneys' fees \*28 Plaintiffs incurred would proactively serve as a deterrence mechanism for other fiduciaries in Alabama who consider acting in bad faith or engaging in self-dealing. *See* Austin Wakeman Scott & Williams Franklin Fratcher, *The Law of Trusts* § 205.1 (4th ed. 1988).

## \*29 CONCLUSION

The Trial Court correctly concluded that Plaintiffs should be awarded attorneys' fees under equitable principles and the ALAA separate and apart from the fees Plaintiffs incurred in bringing two successful contempt motions against the Haydens' Despite this finding, the Trial Court committed reversible error by refusing to award any attorneys' fees to Plaintiffs under those doctrines without justification or explanation. Based on the foregoing, this Court should reverse the Trial Court and award the entirety of attorneys' fees Plaintiffs incurred to right the Haydens' wrongs.

### Footnotes

- 1 At trial, Elizabeth Brickfield testified regarding the fees incurred by the Nevada firm of Lionel, Sawyer & Collins to invalidate the Haydens' sham lawsuit filed in Clark County, Nevada. (R. 293-294.)
- 2 That fee total is merely six percent (6%) of the \$25 million value the Haydens ascribed to the assets they unlawfully and in bad faith attempted to take from Cashion, including Western Steel. (See C. 5068.)
- 3 This code section is part of the Alabama Uniform Power of Attorney Act ("AUPAA"), which is applicable to powers of attorney executed after January 1, 2012. The AUPAA, therefore, does not specifically apply to the 2007 Power of Attorney in this case ("POA"). However, the Alabama legislature has "acknowledged and preserved" the Alabama common-law and equitable doctrine that fiduciaries who act in bad faith should be responsible for attorneys' fees, while noting that a remedy under this section is "not exclusive" of other available remedies. See [Ala. Code § 26-1A-121](#) ("[T]he principles of law and equity supplement this chapter."); [Ala Code § 26-1A-123](#) ("The remedies under this chapter are not exclusive and do not abrogate any right or remedy under the law of this state other than this chapter.").
- 4 The Haydens' Motions for Recusal even included patently false accusations that the Trial Court had conducted the Preliminary Injunction Hearing ex parte. (See C. 3914-3915) (Contempt Order finding that the Haydens continued to perpetuate the lie that the Preliminary Injunction hearing had been conducted ex parte in the Trial Court and in other forums "as a continuing effort to knowingly misrepresent what happened," as the Haydens' counsel's undisputed testimony confirmed he was present at that hearing).
- 5 Section 12-19-276 of the ALAA notes that damages awarded pursuant to the ALAA are "cumulative and in addition to the damages which may be awarded for a frivolous appeal pursuant to [Rule 38, Alabama Rules of Appellate Procedure](#)." Because it largely repeats the same groundless arguments raised before the Trial Court, the Haydens' appeal is frivolous. Therefore, this Court may ex *mero motu* award "just damages and single or double costs" to Plaintiffs See [Ala. R. App. P. 38](#). Plaintiffs respectfully request this relief.
- 6 If remanded for an explanation, the Trial Court cannot receive additional evidence, See [Madison County Dep't of Human Res. V. T.S., 53 So, 3d 38, 46 \(Ala. 2010\)](#) (trial court exceeded its jurisdiction on remand by taking additional evidence regarding attorneys' fees, necessitating subsequent remand for trial court to explain fee award based only on the evidence it had received prior to the first remand).
- 7 The Haydens attached the Secretary of State's records evidencing their fraudulent filings and other documents as part of an Appendix to their Response. The Alabama Rules of Appellate Procedure do not permit parties to attach appendices to briefs submitted to this Court. See [Ala R. App. P. 28\(g\)](#) (requiring that references to the Record on Appeal be made by citing to the appropriate page numbers of either the clerk's record or the reporter's transcript); see also [Ala. R. App. P. 32](#) comm. cmts. ("The amendment to [Rule 32](#) omitted all references to the appendix system, because the use of the appendix system has been discontinued."). Plaintiffs, therefore, move this Court to strike and disregard the appendices submitted with both the Haydens' initial and responsive briefs.