

IN THE STATE COURT OF CLAYTON COUNTY
STATE OF GEORGIA

BEECHER and EVELYN DYKE,)
as parents of Barbara Nester, deceased, and)
JACK DYKE, as Administrator of the)
Estate of Barbara Nester,)
)
Plaintiffs,)
) CIVIL ACTION
Vs.)
) FILE NUMBER: 2004-CV-01211-B
RUSSELL T. BUNDY ASSOCIATES, INC.,)
a foreign for profit corporation, d/b/a)
PAN-GLO ATLANTA, and)
KENNETH WALTER PELECH,)
)
Defendants.)

**DEFENDANTS' BRIEF IN SUPPORT OF THEIR
MOTION FOR PARTIAL SUMMARY JUDGMENT**

COME NOW Defendants RUSSELL T. BUNDY ASSOCIATES, INC. d/b/a PAN-GLO ATLANTA and KENNETH WALTER PELECH, and submit the following Brief in Support of Their Motion for Partial Summary Judgment. **For purposes of this Motion only**, the facts are set forth in a light most favorable to the Plaintiffs.

STATEMENT OF FACTS

Plaintiffs have sued Defendants Bundy and Pelech for the wrongful death of their decedent, Barbara Nester, in a motor vehicle accident on May 12, 2003. Barbara Nester died as a result of injuries she sustained in that motor vehicle accident.

The motor vehicle accident was caused when the truck driven by Pelech crossed the median from northbound I-75 into the southbound lanes of travel and was struck by the car driven by Barbara Nester. Pelech was driving the tractor trailer in the course and scope of his

employment with Russell T. Bundy Associates, Inc. at the time of the subject motor vehicle accident.

There is insufficient evidence to support an award of punitive damages or attorney's fees or expenses of litigation against these Defendants as a matter of law.

STANDARD OF REVIEW

To prevail on a Motion for Summary Judgment pursuant to O.C.G.A. § 9-11-56(c), the moving party must demonstrate there are no genuine issues of material fact, and the disputed facts, viewed in the light most favorable to the non-moving party, warrant judgment as a matter of law. If the record reveals there is no evidence sufficient to create a genuine issue as to any essential element of the plaintiff's claims, his claim "tumbles like a house of cards." *Lau's Corp. v. Haskins*, 261 Ga. 491 (1991). Defendants have no burden on summary judgment beyond demonstrating a lack of genuine issue of fact on any essential element of plaintiffs' claims. *Id.* It is the duty of each party at summary judgment to present their case in full, or risk judgment going against them. *Sharfuddin v. Drug Emporium*, 230 Ga. App. 679, 681 (1998), *cert. denied*.

The record before the Court on Defendants' Motion for Partial Summary Judgment is completely void of any evidence demonstrating a genuine issue of material fact as to the Defendants' liability for punitive damages, attorney's fees or expenses of litigation. Defendants are entitled to summary judgment as a matter of law under O.C.G.A. § 9-11-56 as to Plaintiffs' claims for punitive damages, attorney's fees and expenses of litigation.

ARGUMENT AND CITATION OF AUTHORITY

Even when the evidence is viewed in a light most favorable to the Plaintiffs, it is clear that Defendants are entitled to judgment as a matter of law due to the absence of evidence to

support the Plaintiffs' claims for punitive damages, attorney's fees and expenses of litigation.

A. There is Insufficient Evidence To Support An Award Of Punitive Damages Against These Defendants As A Matter Of Law.

Clear and convincing evidence of a defendant's "willful misconduct, malice, fraud, wantonness, oppression, or that entire want of care which would raise the presumption of conscious indifference to consequences" is required to warrant the imposition of punitive damages. OCGA § 51-12-5.1(b). Negligence, even gross negligence, is insufficient to support such an award. *Colonial Pipeline Co. v. Brown*, 258 Ga. 115, 118, 365 S.E.2d 827 (1988).

Bartja v. National Union Fire Ins. Co. of Pittsburgh, Pa., 218 Ga.App. 815, 818, 463 S.E.2d 358, 361 (1995), cert. denied. There is no evidence in the record (let alone "clear and convincing evidence") that driver Pelech "was speeding, traveling too fast for conditions, driving under the influence of alcohol [or drugs], had an opportunity to avoid the collision, or acted with such a willful and wanton lack of care as to entitle a jury to presume he was consciously indifferent to the consequences of his actions." See Bartja v. National Union Fire Ins. Co. of Pittsburgh, Pa., 218 Ga.App. 815, 818-819, 463 S.E.2d 358, 362 (1995), cert. denied. The evidence simply indicates Mr. Pelech suddenly passed out at the wheel, causing the truck to cross the median and enter the southbound lanes of travel. This evidence is insufficient evidence as a matter of law to support an award of punitive damages. See, e.g., Brooks v. Gray, 262 Ga.App. 232, 585 S.E.2d 188, 189 (2003); ("crossing the centerline 'would not, in the absence of aggravating circumstances, authorize appellants to recover punitive damages.'"); Currie v. Haney, 183 Ga.App. 506, 359 S.E.2d 350 (1987); Bradford v. Xerox Corp., 216 Ga.App. 83-84, 453 S.E.2d 98 (1994), cert. denied (crossing median while speeding on wet pavement not sufficient to support punitive damages). Thus, "the record raises no disputed issues of fact sufficient to preclude summary judgment as to punitive damages. Bartja v. National Union Fire Ins. Co. of Pittsburgh, Pa., 218 Ga.App. 815, 818-819, 463 S.E.2d 358, 362 (1995), cert. denied."

Plaintiffs will claim that Pelech lied about how much rest he had the night before the accident. Nevertheless, even if true, such evidence is insufficient evidence as a matter of law to support an award of punitive damages as this alleged untruth occurred long after the accident and played no role in causing the accident. O.C.G.A. § 51-12-5.1.

As to claims against the employer, Bundy, for punitive damages, “[n]othing in the record indicates that [Bundy] knew or should have known that [Pelech] had a tendency to fall asleep at the wheel [or pass out at the wheel]. Assuming that [Bundy] knew of [Pelech]’s entire driving history, the record raises no disputed issues of fact sufficient to preclude summary judgment as to punitive damages.” Bartja v. National Union Fire Ins. Co. of Pittsburgh, Pa., 218 Ga.App. 815, 818-819, 463 S.E.2d 358, 362 (1995), cert. denied. Nothing in Pelech’s driving history was sufficient to put anyone on notice that he was at risk for passing out or falling asleep at the wheel. Anything else is irrelevant and will not support an award of punitive damages. See, e.g., Doctoroff v. Perez, 273 Ga.App. 560, 615 S.E.2d 623, 625 (2005), cert. denied (where Perez’s actions in driving without a valid license was not the proximate cause of the accident, but rather, the collision occurred because Perez failed to yield, and a review of the record revealed no evidence that Perez caused the collision through a pattern or policy of dangerous driving, the Court of Appeals found that the trial court did not err in granting summary judgment on the plaintiff’s claim for punitive damages); Brooks v. Gray, 262 Ga.App. 232, 585 S.E.2d 188, 189 (2003)(affirming the grant of summary judgment on a claim of punitive damages arising out of a collision involving a teenage driver who was driving at a time not allowed by his restricted license. Court noted that the teenager’s driving during the restricted period was not the proximate cause of the accident and further that “his action did not constitute a pattern or policy of dangerous driving.”)

B. Defendants Are Entitled To Summary Judgment On Plaintiffs' Punitive Damage Claims Because The Georgia Statutory Scheme For Punitive Damages Is Unconstitutional On Its Face.

The Georgia statute on punitive damages provides that such damages "may be awarded only in tort actions where it is proven by clear and convincing evidence that the defendant's actions showed willful misconduct, malice, fraud, wantonness, oppression, or that entire want of care which would raise the presumption of conscious indifference to consequences." O.C.G.A. § 51-12-5.1(b). The statute further provides that punitive damages may not be awarded as compensation to a plaintiff, but solely to punish, penalize, or deter a defendant. O.C.G.A. § 51-12-5.1(c). In tort cases where the cause of action does not arise from product liability and it is found the defendant acted with the specific intent to cause harm, there is no limit regarding the amount awarded as punitive damages against the tortfeasor. The only limit imposed provides that no other defendant other than the active tortfeasor be held liable for these damages. O.C.G.A. § 51-12-5.1(f).

While awarding compensation for human pain and suffering and the economic losses associated with such injuries is a matter firmly rooted in our judicial system, legislation providing compensation must not be unreasonable and arbitrary. See McBride v. General Motors Corporation, 737 F. Supp. 1563, 1579 (M.D. Ga. 1990). The Georgia scheme for awarding punitive damages is an unreasonable and arbitrary statute in that it is unconstitutionally vague. The statute fails to provide defendants with sufficient procedural protections, affords defendants inadequate notice as to the type of conduct that may be punished and the potential severity of that punishment, and fails to satisfy the requirement of mere rational relationship to a legitimate state purpose as required to satisfy substantive due process. Finally, the fact that courts have traditionally left punitive damages to the discretion of the jury is an insufficient basis for upholding an otherwise unconstitutional punitive damages scheme, particularly in light of the historically unprecedented explosion in the frequency and size of punitive damage awards seen today.

C. **The Georgia Punitive Damages Scheme Is A Violation Of Procedural Due Process Of The Federal Constitution.**

The Fourteenth Amendment of United States Constitution provides that no state shall "deprive any person of life, liberty, or property without due process of law..." U.S. Const., Amend. XIV. Due Process has two requirements: (1) laws must provide fair notice to persons of ordinary intelligence of precise conduct proscribed, and (2) laws must provide standards and guidance to law enforcement officers, judges, and juries, to prevent arbitrary and discriminatory enforcement. High Ol' Times, Inc. v. Busbee, 515 F. Supp. 176 (N.D. Ga. 1980), rev'd on other grounds, 673 F.2d 1225 (11th Cir. 1982). Identification of the specific dictates of due process generally requires consideration of three distinct factors: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. Tucker v. Caldwell, 608 F.2d 140 (5th Cir. 1979); Crocker v. Hakes, 616 F.2d 237 (5th Cir. 1980). In short, whether due process requires a particular procedure in a given situation must be determined by balancing the individual's interest in avoiding loss which lack of procedure inflicts upon him against interests which the government seeks to advance by denying it. Anderson v. Banks, 520 F. Supp. 472 (S.D. Ga. 1981). Finally, to successfully challenge a statute as violative of due process, the presence of state action and the deprivation of a property or liberty interest are needed. These requirements are clearly met in the present case.

The Georgia punitive damage scheme, as provided in O.C.G.A. § 15-12-5.1, violates the due process clause of the Fourteenth Amendment to the Federal Constitution. First, the statute fails to provide a defendant fair notice of the conduct that will subject him to punishment as well as the severity of the penalty the state may impose. See B.M.W. v. Gore, 517 U.S. 599, 116 S. Ct. 1589, 134 L. Ed.2d 809 (1996). Second, the Georgia scheme lacks sufficient procedural safeguards as required to survive a procedural due process attack. See Pacific Mutual Life

Insurance Co. v. Haslip, 499 U.S. 1, 111 S.Ct. 1032, 113 L. Ed.2d 1 (1991). Finally, the traditional practice of American courts to leave punitive damages to the discretion of the jury is an insufficient basis for upholding the statute in light of the current explosion in the frequency and size of punitive damage awards handed down by juries. Pacific Mutual Life Insurance Co. v. Haslip, 499 U.S. 1, 111 S.Ct. 1032 (1991) (O’Conner, J., dissenting).

- (1) O.C.G.A. § 51-12-5.1 fails to provide fair notice of the conduct that will subject a defendant to punishment and of the severity of that potential punishment.

Elementary notions of fairness enshrined in constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a state may impose. B.M.W. v. Gore, 517 U.S. 559, 116 S.Ct. 1589, 134 L. Ed.2d 809, 826 (1996). In Georgia, a potential defendant has inadequate notice of the conduct that will subject him to punitive damages under O.C.G.A. § 51-12-5.1. The statute’s only requirement is that the plaintiff prove the defendant’s actions showed "willful misconduct, malice, fraud, wantonness, oppression, or that entire want of care which would raise the presumption of conscious indifference to consequences." O.C.G.A. § 51-12-5.1(b). Further, if it is found that the defendant acted with specific intent to cause harm, the defendant has no idea regarding the severity of the penalty which may be imposed. In such instances, the sky is the limit for the potential liability of a defendant. See O.C.G.A. § 51-12-5.1(f).

In B.M.W. v. Gore, supra, the U.S. Supreme Court delineated three guideposts in determining whether defendant BMW received adequate notice regarding the magnitude of the sanction the state may impose as punitive damages: (1) the degree of reprehensibility of the defendant’s action; (2) the disparity between the harm or potential harm suffered by the plaintiff and the punitive damage award; and (3) the difference between this remedy and the civil penalties authorized or imposed in comparable cases. Johansen v. Combustion Engineering, Inc., 170 F.3d 1320 (11th Cir. 1999) (citing B.M.W. v. Gore, 517 U.S. at 575). The Georgia statute provides no method whatever for a defendant to balance these factors in order to be put

on notice of his potential liability for punitive damages.¹ This type of open-ended liability under O.C.G.A. § 51-12-5.1, which vests the jury with complete authority to determine the initial amount of liability, clearly provides a defendant no notice regarding the potential severity of the sanction. As a result, the statute violates Defendants' constitutional right to receive fair notice. See B.M.W. v. Gore, *supra*.

(2) The Georgia punitive damage scheme contains insufficient procedural safeguards.

The constitutional guarantee of procedural due process applies to governmental deprivation of legitimate "property" or "liberty" interests within the meaning of the fifth and fourteenth amendments and requires that any such deprivation be accompanied by minimum procedural safeguards. Elley v. Morris, 390 F. Supp. 913 (N.D. Ga. 1975). However, in cases involving the due process clause of the fourteenth amendment, what "process" is due must be tailored to fit the facts and circumstances involved. Davis v. Weir, 359 F. Supp. 1023 (N.D. Ga. 1973), *aff'd in part and modified in part*, 497 F.2d 139 (5th Cir. 1974). Whether due process requires a particular procedure in a given situation must be determined by balancing the individual's interest in avoiding the loss which lack of the procedure inflicts upon him against the interests which the government seeks to advance by denying it. Tyler v. Vickery, 517 F.2d 1089 (5th Cir. 1975), *cert. denied*, 426 U.S. 940, 96 S. Ct. 2660, 49 L. Ed.2d 393 (1976).

The Georgia regime for punitive damages provides inadequate procedural safeguards to satisfy the requirements of the due process clause of the federal constitution's fourteenth amendment. In Pacific Mutual Life Ins. Co. v. Haslip, 499 U.S. 1, 113 L. Ed.2d 1, 111 S.Ct. 1032 (1991), the U.S. Supreme Court considered whether the Alabama system for awarding

¹ While both the Gore and Johansen decisions involved whether punitive damages awarded by the jury may be so excessive as to be unconstitutional, this difference should not preclude use of the three fair notice factors in the case at hand. In fact, the present case provides a stronger argument for application of these factors since notice regarding potential liability is most important to a defendant before the defendant engages in the action, not after a damage award is handed down by the jury.

punitive damages maintained the proper procedural protections. The Court focused on: (1) jury instructions; (2) post-trial review of the award; and (3) procedures for Alabama Supreme Court review of the award. American Employers Ins. v. Southern Seeding Serv., 931 F.2d 1453, 1456 (1991) (citing Haslip, 111 S.Ct. at 1043). The U.S. Supreme Court ultimately found the procedural protections afforded by the Alabama punitive damage system sufficient to satisfy due process. See Haslip, supra. (upholding the Alabama punitive damages system). However, the Alabama system provides much greater procedural protection than does the Georgia system.²

First, Alabama provides greater procedural protection in the form of jury instructions. In determining that jury instructions provided under the Alabama system were sufficient, the Supreme Court noted that jurors were: (1) instructed regarding the purpose of punitive damages; (2) informed by the trial court that the jury was not compelled to award punitive damages; and (3) instructed that the character and degree of the wrong should be taken into consideration in any award. Haslip, 499 U.S. at 19. Georgia fails to provide these procedural safeguards. In contrast to the Alabama system, Georgia juries are not required to be instructed to consider the character and degree of the wrong before returning with a punitive damage award. See O.C.G.A. §51-12-5.1; Suggested Pattern Jury Instruction, Council of Superior Court Judges of Georgia, Civil Cases, Vol. 1 (3rd ed; revised Nov. 1998). In fact, Georgia juries are not required to receive much instruction whatsoever regarding punitive damages. In this way, Georgia jury instructions fail to reasonably accommodate the interest of the defendant in rational decision making and are insufficient under the due process clause of the federal constitution. See Haslip, 111 S.Ct. at 1044.

² In fact, the court in Hospital Auth. of Gwinnett Co. v. Jones (Jones II) acknowledged that, "while the Georgia jury instructions may be said to be quite similar to those given in Alabama, it is clear that the Alabama post-trial review by both the trial and appellate court is more structured [than the Georgia system]." 261 Ga. 613, 615 (emphasis added) (citing Hammond v. City of Gadsden, 493 So.2d 1374 (Ala. 1986), and Green Oil Co. v. Hornsby, 539 So.2d 218 (Ala. 1989)).

Second, in contrast to the Georgia system, Alabama has established procedures for the trial court's review of punitive damage awards. American Employers Ins. v. Southern Seeding Serv., 931 F.2d 1453, 1457 (1991) (discussing Haslip, *supra*). The trial court is required to "reflect in the record the reasons for interfering with a jury verdict, or refusing to do so, on grounds of excessiveness of the damages." *Id.* (citing Hammond v. City of Gadsden, 493 So.2d 1374 (Ala. 1986)). In Hammond, the Alabama Supreme Court suggested factors such as the "culpability of the defendant's conduct," "the desirability of discouraging others from similar conduct," "the impact on the parties," and "impact on innocent third parties" were all appropriate for the trial court's consideration. Hammond, 493 So.2d 1374 (Ala. 1986). The Hammond factors were expanded in Green Oil Co. v. Hornsby, 539 So.2d 218, 223-24 (Ala. 1989). Hornsby added that courts should include inquiries such as: (1) whether the punitive damages bear a reasonable relationship to the harm that has occurred or is likely to occur; (2) the reprehensibility of the defendant's conduct, the duration of the conduct, the defendant's awareness, any concealment, and the frequency of similar past conduct; (3) the profitability of the wrongful conduct to the defendant; (4) the financial position of the defendant; (5) the costs of litigation; (6) imposition of criminal sanctions against the defendant; and (7) other civil awards against the defendant for the same conduct. *Id.* In contrast to the constitutional Alabama system, Georgia lacks this type of thorough examination and established procedures for the trial court's review of punitive damage awards.³

Finally, the Georgia regime for awarding punitive damages lacks appropriate procedures for the Georgia Supreme Court's review of the punitive damage award. In Alabama, the

³Although the 11th Circuit recently decided in Johansen v. Combustion Engineering, Inc., 170 F.3d 1320 (11th Cir. 1999) that the District Court has the authority to make a determination as to the constitutional limit of a particular award and enter judgment for that amount as a matter of law, Johansen is limited to reducing the award only when the absolute constitutional limit has been exceeded. In determining what the proper constitutional limit may be, the Johansen court relied on the analysis used by the U.S. Supreme Court in B.M.W. v. Gore rather than procedural protections delineated by the Georgia courts. Unlike the Alabama decisions in Hornsby and Hammond, the Georgia courts have provided no guidelines for trial courts to consider when reviewing punitive damage awards.

Alabama Supreme Court provides an additional check on the jury's discretion by employing a comparative analysis and then applying the detailed substantive standards enunciated in Green Oil. In Haslip, the United States Supreme Court concluded that the application of these standards imposed a "sufficiently definite and meaningful constraint on the discretion of Alabama fact finders in awarding punitive damages." Haslip, 111 S. Ct. at 1045. A further purpose of the final review by the Alabama Supreme Court is to insure the award does not exceed an amount that accomplishes society's goals of punishment and deterrence. Id. In contrast, the Georgia punitive damage regime fails to provide for the application of any substantive standards by the Georgia Supreme Court to the jury's decision regarding damages. As a result, the Georgia Supreme Court can exercise no meaningful constraint on the discretion of Georgia juries and, thus, there is no assurance that the punitive damage award has not greatly exceeded the amount needed to accomplish the Georgia statute's stated goals of punishment and deterrence.

While Georgia does employ certain procedural protections for cases involving punitive damages, present protections are insufficient. For instance, Georgia mandates a bifurcated trial to determine the applicability and amount of punitive damages:

In any case in which punitive damages are claimed, the trier of fact shall first resolve from the evidence produced at trial whether an award of punitive damages shall be made...If it is found that punitive damages are to be awarded, the trial shall immediately be recommenced in order to receive such evidence as is relevant to a decision regarding what amount of damages will be sufficient to deter, penalize, or punish the defendant in light of the circumstances of the case. It shall then be the duty of the trier of fact to set the amount to be awarded according to subsection (e), (f), or (g) of this Code section, as applicable.

O.C.G.A. § 51-12-5.1(d)(1)-(2). Even so, Courts have recognized that in certain circumstances, a bifurcated procedure may be inadequate to avoid confusing the jury in its determination of the issues of compensatory damages and punitive damages. See General Motors Corp. v. Moseley, 213 Ga. App. 875, 447 S.E.2d 302 (1994). Further, it is difficult to see how a bifurcated trial

could be considered a meaningful constraint on the discretion of Georgia juries in awarding punitive damages since bifurcation in no way substantively affects either the jury's initial determination of whether the punitive damage award is appropriate or the jury's later consideration of the amount of an award.

Finally, a balancing of interests⁴ indicates present protections under the Georgia statute are insufficient to satisfy procedural due process requirements. Under the Georgia system, the loss inflicted on a defendant as a result of the lack of procedural protections is great. With few procedures in place to provide for adequate jury instructions or post-trial review of the punitive damage award, section (f) of the statute imposes on a defendant potentially unlimited punitive damages. O.C.G.A. § 51-12-5.1(f). Additionally, the government's substantial interest in punishing and deterring reprehensible conduct is not advanced by denying additional procedural protections. In fact, additional procedural protections would likely produce the beneficial result of an increased public confidence in the legal system and also serve as a deterrent of "runaway" verdicts. For these reasons, the Georgia regime for imposing punitive damages should be held an unconstitutional violation of the procedural due process clause of the Federal Constitution.

D. O.C.G.A. § 51-12-5.1 Is A Violation Of Substantive Due Process Of The Federal Constitution.

The test in satisfying substantive due process where no fundamental right is involved⁵ requires the legislation to have a reasonable relation to proper legislative purpose and be neither arbitrary nor discriminatory. Nebbia v. New York, 291 U.S. 502, 537, 54 S.Ct. 505, 516, 78 L.

⁴Taylor v. Vickery, 517 F.2d 1089 (5th Cir. 1975), cert. denied, 426 U.S. 940, 96 S.Ct. 2660, 49 L. ED.2d 393 (1976), provides that whether due process requires a particular procedure in a given situation must be determined by balancing the individual's interest in avoiding the loss which lack of the procedure inflicts upon him against the interests which the government seeks to advance by denying it.

⁵There is no fundamental right involved in the present case since, for substantive due process purposes, the United States Supreme Court has generally limited the designation as "fundamental" to rights such as procreation and marriage.

Ed. 940 (1934); Silver v. Baggiano, 804 F.2d 1211, 1218 (11th Cir. 1986). Any reasonable means of achieving a legitimate governmental goal will satisfy the mere rational relationship test. In Pacific Mutual Life Insurance Co. v. Haslip, 499 U.S. 1, 111 S.Ct. 1032, 113 L. ED.2d 1 (1991), the U.S. Supreme Court found that it is unnecessary to draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable punitive damage award that would fit every case. Instead, the Court found that a general concern of reasonableness should properly enter into the constitutional calculus. Haslip, 111 S.Ct. at 1032. The current Georgia punitive damages statute originated from the 1987 Georgia Tort Reform Act. Encyclopedia of Georgia Law, vol. 8, §42, p. 109, 110 (Harrison, 1992). The goal in establishing the statute was to provide a deterrence and penalty to defendants for their misconduct rather than compensation to an injured plaintiff. O.C.G.A. § 51-12-5.1(a)-(c); Mack Trucks, Inc. v. Conkle, 263 Ga. 539, 436 S.E.2d 635, 638 (1993). While the goal of penalizing a defendant who acts, or fails to act, with specific intent to cause harm is certainly a legitimate governmental goal, O.C.G.A. § 51-12-5.1 does not accomplish this goal in a reasonable, non-arbitrary manner. For instance, the Georgia statute provides unlimited jury discretion in determining whether to impose punitive damages. See Haslip, 499 U.S. 1, 18 (1991); Ga. Const. Art. I, § 1, ¶ 1. Additionally, there is absolutely no limit to the amount of punitive damages that may be awarded against an active tortfeasor falling under part (f) of the statute. O.C.G.A. § 51-12-5.1(f). As a result, the statute fails to take into consideration the appropriate level of punitive damages that would accomplish the purposes of the statute in serving as a deterrent to the defendant. Instead, the statute affords a plaintiff the possibility of a windfall award of a purely arbitrary sum, regardless of whether a lesser amount would have sufficiently deterred the defendant from future misconduct. For these reasons, the Georgia statute is a violation of substantive due process of the federal constitution.

E. O.C.G.A. § 51-12-5.1 Is A Violation Of Due Process Of The Georgia Constitution.

The Georgia Constitution provides that "no person shall be deprived of life, liberty, or property except by due process of law." Ga. Const. Art. I, §1, ¶ 1. Due process of law means the administration of general laws according to established rules, not violative of the fundamental principles of private right, by a competent tribunal having jurisdiction of the subject matter, and proceeding upon notice and hearing. Shoemake v. Whitlock, 226 Ga. 771, 177 S.E.2d 677 (1970); Norman v. State, 171 Ga. 527, 156 S.E. 203 (1930). The due process clause of the Georgia Constitution, while mirroring the language of the due process clause of the Fourteenth Amendment to the U.S. Constitution, affords greater protection than does federal due process. Suber v. Bulloch County Bd. of Educ., 722 F. Supp. 736 (S.D. Ga. 1989) (emphasis added).

The Georgia Supreme Court has addressed the constitutionality of the Georgia statutory scheme for providing punitive damages. Hospital Authority of Gwinnett Co. v. Jones, 259 Ga. 759, 386 S.E.2d 120 (1989) (Jones I), affirmed and reinstated on remand, 261 Ga. 613, 409 S.E.2d 501 (1991) (Jones II) . In Jones I, the Court found that the statutory scheme was not per se unconstitutional in failing to protect against a jury's unbridled exercise of discretion. On remand, in light of the U.S. Supreme Court decision in Pacific Mutual Life Ins. Co. v. Haslip, supra, the Georgia Supreme Court upheld the prior \$1.3 million punitive damages award as appropriate. Jones II, 261 Ga. at 615-616, 409 S.E.2d at 503. Interestingly, the Court looked to the "conclusiveness of history" in reaching its decision, stating that because the punitive damage process was "clothed in common-law history and tradition," the process was "able to withstand a due process challenge which less inveterate procedures could not." Id. at 616, 409 S.E.2d. at 504.

An apparent change in views among Justices of the U.S. Supreme Court indicates that the traditional, historically-based reasoning used by the Georgia Supreme Court in Jones II cannot currently be relied upon to save the Georgia statute from being declared an unconstitutional violation of due process under the Georgia constitution. As noted above, the Georgia Supreme Court looked to the common-law history and tradition of punitive damages in upholding the

constitutionality of the Georgia statute. Jones II, 261 Ga. at 616. In this decision, the Court appeared to be following the view expressed by Justice Scalia in his concurrence in Haslip, 499 U.S. at 24. In Haslip, Justice Scalia reasoned that the Alabama system for awarding punitive damages should be upheld because "no procedure firmly rooted in the practices of our people can be so fundamentally unfair as to deny due process of law." Id. at 38. Today, however, it is evident that the position of Justice Scalia on punitive damages is losing prominence. While Scalia concurred in the judgment in Haslip, his views on punitive damages were relegated to that of the dissent in B.M.W. v. Gore, 517 U.S. 559 (1996).

Currently, the views expressed by Justice O’Conner regarding the constitutionality of punitive damages are gaining acceptance by the Supreme Court. In Haslip, O’Conner was the lone dissenter, noting that "due process is not a fixed notion; procedural rules, ‘even ancient ones, must satisfy contemporary notions of due process.’" Haslip, 499 U.S. at 60 (O’Conner, J., dissenting) (citing Burnham v. Superior Court of Cal., County of Marin, 495 U.S. 604, 630, 109 L. ED.2d 631, 110 S.Ct. 2105 (1990) (Brennan, J., concurring)). According to Justice O’Conner, "the court has the authority under the Fourteenth Amendment to examine even traditionally accepted procedures and declare them invalid." Haslip, 499 U.S. at 60. As the basis for her rejection of Scalia’s historical argument, O’Conner cited the fact that recent years have witnessed an explosion in the frequency and size of punitive damage awards. Id. (citing RAND Institute for Civil Justice, M. Peterson, S. Sarma, & M. Shanley, Punitive Damages - Empirical Findings iii (1987)). Specifically, O’Conner noted that in California, punitive damages were assessed against one of every ten defendants who were liable for compensatory damages. Id. More recently, in B.M.W. v. Gore, supra, Justice O’Conner joined in both the majority and the concurring opinions while Justice Scalia’s position became that of the dissent. See B.M.W. v. Gore, (holding an Alabama punitive damages award of \$2 million grossly excessive and hence, violative of due process). This change of position provides evidence of the gaining acceptance by the U.S. Supreme Court of Justice O’Conner’s views on punitive damages and the resulting rejection of the purely historical basis for upholding these type of damages. Thus, the reasoning

of the Georgia Supreme Court in Jones II must be found insufficient to uphold the constitutionality of the Georgia punitive damages statute under the Georgia Constitution.

Finally, while cases often mention the constitutionality of certain applications of the Georgia punitive damages statute, the instant challenge to the statute's constitutionality is a specific, focused attack that has not been considered in the past. See Bibb Distrib. Co. v. Stewart, 238 Ga.App. 650, 519 S.E.2d 455 (1999). This attack on the constitutionality of O.C.G.A. 51-12-5.1 takes into account the guidelines provided by the United States Supreme Court regarding both the constitutionality of specific punitive damage awards and the state statutes authorizing those awards. See B.M.W. v. Gore, 517 U.S. 559, 116 S.Ct. 1589 (1996). Thus, for the reasons indicated above, Defendant is entitled to summary judgment on punitive damages because the Georgia punitive damages statute is unconstitutional.

F. Defendants Are Entitled To Summary Judgment On Plaintiffs' Punitive Damage Claims Because The Georgia Statutory Scheme For Punitive Damages Is Unconstitutional As Applied To This Case.

1. The Georgia Punitive Damage Scheme Violates The Defendants' Right To Procedural Due Process Under The Federal Constitution.

The Due Process guarantee under the Federal Constitution provides that no state shall "deprive any person of life, liberty or property without due process of law." U.S. Const., Amend. XIV. To satisfy this guarantee, the law must provide fair notice to persons of ordinary intelligence of precise conduct proscribed and must provide standards and guidance to law enforcement officers, judges, and juries to prevent arbitrary and discriminatory enforcement. High Ol' Times, Inc. v. Busbee, 515 F. Supp. 176 (N.D. Ga. 1980), rev'd on other grounds, 673 F.2d 1225 (11th Cir. 1982).

The Eleventh Circuit recently addressed when a defendant has received constitutionally adequate notice that his conduct might result in a particular damage award.⁶ Johansen v.

⁶Regarding punitive damages, the Court in Johansen agreed with the district court's decision that the "initial disparities in the relevant ratios were genuinely 'shocking,' and that \$15

Combustion Engineering, Inc., 170 F.3d 1320 (11th Cir. 1999). The Johansen Court used the guidelines specified by the U.S. Supreme Court in Gore for determining whether the defendant had adequate notice regarding the amount of punitive damages potentially imposed. First, the most important indicator of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct. Johansen. (citing Gore, 517 U.S. at 575, 116 S.Ct. 1589). The Court specifically noted the lack of evidence of the high degree of culpability warranting a substantial punitive damage award. Id. (citing Gore, 517 U.S. at 580, 116 S.Ct. 1589). Second, punitive damages must bear a "reasonable relationship" to actual damages. Id. This requirement is to insure the defendant has received fair notice of the severity of the penalty the State may impose. Id. Finally, there may be a lack of adequate notice if the difference between the civil or criminal penalties that were or could have been imposed and the punitive damage award is too great. Id.

A review of the Gore factors indicates Defendant did not receive adequate notice that his conduct toward Plaintiff at the Run-n-Shoot could subject Defendant to punitive damages. First, an award of punitive damages would be unreasonable in the present case because Defendant Stackhouse's actions were not reprehensible. Since Defendant acted out of a mere attempt to defend his nephew, Defendant was not provided constitutionally adequate notice of potential liability for punitive damages. See Johansen, supra. Additionally, the difference in gravity between potential criminal penalties for Defendant's conduct and the imposition of punitive damages is too great to have provided Defendant adequate notice as required under the fifth and fourteenth amendments to the U.S. Constitution. For example, if Defendant had been charged with either a battery under O.C.G.A. § 16-5-23.1, simple battery under O.C.G.A. § 16-5-23, or

million in punitive damages was grossly excessive." Johansen, 170 F.3d 1320 (11th Cir. 1999). Although the Court went further to state that even the reduction to \$4.35 million "produced ratios which were gross enough to 'raise a suspicious judicial eyebrow,'" the court ultimately found this "100:1 ratio of the punitive to the actual damages justified by the need to deter this and other large organizations from a 'pollute and pay' environmental policy." Id. (quoting TXO Production Corp. v. Alliance Resources Corp., 509 U.S. 443, 482, 113 S.Ct. 2711, 125 L. ED.2d 366 (1993)).

simple assault under O.C.G.A. § 16-5-20, Defendant would have been charged with a misdemeanor, subject to a maximum fine of \$1,000.00. Further, Georgia law provides that for simple assault or simple battery, opprobrious or abusive language may be used as justification. O.C.G.A. § 16-5-25. Under criminal law, the trier of fact would have been left to make the determination as to whether the Plaintiff's actions and words constituted sufficient justification for Defendant's conduct. O.C.G.A. § 16-5-25. Finally, Georgia law even allows a person to strike another person if they reasonably believe it is necessary to defend a third person. O.C.G.A. § 16-3-21.

Thus, since (1) Defendant's alleged conduct could only subject him to prosecution for a misdemeanor; (2) Plaintiff's actions or opprobrious language could have justified Defendant's act; and (3) Georgia law allows a person to strike another if the person believes it is reasonably necessary to defend a third person, criminal law provided very little notice to the Defendant regarding the possibility of being subject to the extreme and potentially unlimited penalty of punitive damages. In short, considering that the imposition of punitive damages is tantamount to a severe criminal penalty,⁷ the misdemeanor sanction provided under criminal law for Defendant's alleged conduct provided constitutionally insufficient notice regarding the possibility of potential liability for punitive damages. See B.M.W. v. Gore, 517 U.S. 559, 116 S.Ct. 1589, 134 L. ED. 2d 809 (1996).

2. The Georgia Punitive Damage Scheme Violates Defendants' Rights To Substantive Due Process Under The Federal Constitution.

In order to satisfy substantive due process where no fundamental right is involved, legislation must have a reasonable relation to a proper legislative purpose and be neither arbitrary nor discriminatory. Nebbia v. New York, 291 U.S. 502, 537, 54 S.Ct. 505, 516, 78 L. ED. 940 (1934); Silver v. Baggiano, 804 F.2d 1211, 1218 (11th Cir. 1986). Under Georgia law, in determining reasonableness of award of punitive damages, the court should consider: (1)

⁷See B.M.W. v. Gore, supra at 46.

whether the misconduct caused personal injury or merely damage to property; (2) whether the actor's misconduct was active or passive; and (3) the existence of a rational relationship between the misconduct and amount of award. Lightning v. Roadway Exp., Inc., 60 F.3d 1551 (11th Cir. 1995). Any reasonable means of achieving a legitimate governmental goal will satisfy the mere rational relationship test and accomplish the purpose of the due process clause, to prevent arbitrary deprivation of liberty and property. In the instant case, however, the imposition of O.C.G.A. §51-12-5.1 is unreasonable.

Imposing punitive damages is unreasonable in the case at hand because a rational relationship is lacking between the Defendants' alleged misconduct and the award of any amount of punitive damages. Under Georgia law, the purpose of punitive damages is not to compensate, but rather to punish and deter. Turpeau v. Fidelity Financial Services, Inc., 936 F. Supp. 975 (N.D. Ga. 1996), affirmed 112 F.3d 276 (citing O.C.G.A. § 51-12-5.1). In the present case, an award of punitive damages is not a reasonable way to accomplish the statute's goal of deterrence. As a result, the imposition of punitive damages in this case violates the substantive due process requirement that there be a rational relationship between the misconduct and the punitive damage award. Lightning v. Roadway Exp., Inc., supra.

3. The Georgia Punitive Damage Scheme Violates The Defendants' Rights To Due Process Under The Georgia Constitution.

The Georgia Constitution provides that "no person shall be deprived of life, liberty or property except by due process of law." Ga. Const. Art. 1, § 1, ¶ 1. Courts have found that even though the due process clause of the Georgia Constitution mirrors the due process clause of the fourteenth amendment to the U.S. Constitution, Georgia due process provides greater protection than does federal due process. Suber v. Bulloch County Bd. of Educ., 722 F. Supp. 736 (S.D. Ga. 1989). As a result, the Georgia scheme for punitive damages is a violation of these Defendants' right to due process under the Georgia Constitution.

Similar to the federal constitution, the procedural due process component of the Georgia constitution requires that there be adequate notice to a defendant that his conduct is proscribed. Hospital Authority of Gwinnett Co. v. Jones, 259 Ga. 759, 386 S.E.2d 120, 124 (Ga. 1989). Although there is no precise test for when the notice requirement of the Georgia constitution has been complied with, since (1) it has been shown, above, that notice requirements of the federal constitution were not satisfied in the present case as required in B.M.W. v. Gore and (2) the Georgia constitution provides greater due process protection than the U.S. constitution,⁸ it follows that the Defendants have been deprived of their rights to due process under the Georgia Constitution. Accordingly, summary judgment is appropriate on Plaintiffs' claims for punitive damages.

G. There is Insufficient Evidence To Support An Award Of Attorney's Fees And Expenses Of Litigation Against These Defendants As A Matter Of Law.

Plaintiffs can similarly not recover on their claim to recover attorney's fees and expenses of litigation based upon O.C.G.A. § 13-6-11. "When bad faith is not an issue and the only asserted basis for a recovery of attorney fees is either stubborn litigiousness or the causing of unnecessary trouble and expense, there is not any evidence to support an award of fees pursuant to statute governing such awards if a bona fide controversy clearly exists between the parties." Scully v. 1st Magnolia Homes, Inc., 274 Ga. App. 890, 619 S.E.2d 392 (2005). "But[,] where a bona fide controversy exists, a recovery under [O.C.G.A. § 13-6-11] is impermissible unless there is evidence that the defendant has acted in bad faith in the underlying transaction. While issues of stubborn litigiousness are normally for the jury, if there is a bona fide controversy, there can be no stubborn litigiousness as a matter of law." Nextel South Corp. v. R.A. Clark Consulting, Ltd., 266 Ga.App. 85, 88, 596 S.E.2d 416, 420 (2004).

In the present case, there has been a bona fide controversy as to liability prior to the date

⁸Suber v. Bulloch County Board of Educ., 722 F. Supp. 736 (S.D. Ga. 1989).

when the Defendants, for legal and tactical reasons, admitted liability on January 19, 2005. Prior to that time, Defendants' position was that the motor vehicle accident was caused when Pelech choked as a result of a sudden medical emergency. As the court well knows, if Defendants had been able to persuade a jury of that fact, then they would have been entitled to prevail on liability in the case. See, e.g., Lewis v. Smith, 238 Ga. App. 6, 7, 517 S.E.2d 538, 540 (1999), cert. denied. See also Waits v. Makowski, 191 Ga. App. 794, 795, 383 S.E.2d 175, 177 (1989); Freeman v. Martin, 116 Ga. App. 237, 239, 156 S.E.2d 511, 512 (1967), cert. denied.

The bad faith referred to in O.C.G.A. § 13-6-11, in actions sounding in tort, means bad faith in the transaction out of which the cause of action arose. Atlanta Journal Co. v. Doyal, 82 Ga. App. 321, 335 (1950). The mere failure to pay a claim without suit does not constitute bad faith. Beacon Indus. v. Vanderbunt Concrete, Ltd., 172 Ga. App. 573 (1984); Allen v. Brackett, 165 Ga.App. 415 (1983). Thus, bad faith refers to a time prior to the institution of suit, not defendant's conduct in defending the case. Gwinnett County Bd of Tax Assessors v. Network Publications, 208 Ga. App. 15, 18 (1993); Candler v. Wickes Lumber Co., 195 Ga. App. 239, 242 (1990). There are no facts in this case to support a finding of bad faith against these Defendants because there is no evidence of bad faith in the underlying transaction.

Since admitting liability, the Defendants have had a bona fide controversy as to damages in that Plaintiffs are seeking a sum in excess of \$35 million, a sum which far exceeds any reasonable value for this case.

In light of the above, Defendants are entitled to summary judgment as to Plaintiffs' claims for attorney's fees and expenses of litigation, as well.

CONCLUSION

WHEREFORE, Defendants respectfully request the Court grant their Motion for Partial Summary Judgment as to Plaintiffs' claims for punitive damages, attorney's fees and expenses of litigation.

This ___ day of January, 2006.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the within and foregoing **Defendants' Brief in Support of Their Motion for Partial Summary Judgment** upon all parties to this matter by hand delivery to counsel of record as follows:

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This ___ day of January, 2006.

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