

## **DRI PUNITIVE DAMAGES COMPENDIUM: GEORGIA**

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## GEORGIA

### 1. Background and Basics

#### (a) Leading Cases and the Applicable Statute

- O.C.G.A. § 51-12-5.1.
- Hosp. Auth. of Gwinnett County v. Jones, 261 Ga. 613, 409 S.E.2d 501 (1991).
- Ford v. Uniroyal Goodrich Tire Co., 267 Ga. 226, 476 S.E.2d 565 (1996).
- Colonial Pipeline Co. v. Brown, 258 Ga. 115, 365 S.E.2d 827 (1988).

#### (b) Purpose of Punitive Damages

Prior to the enactment of O.C.G.A. § 51-12-5.1, punitive damages were awarded to “deter the wrongdoer from repeating the trespass or as compensation for the wounded feelings of the plaintiff.” O.C.G.A. § 51-12-5. However, after the enactment of O.C.G.A. § 51-12-5.1, punitive damages are no longer awarded as a form of compensation to a plaintiff, but instead are awarded “solely to punish, penalize, or deter a defendant.” O.C.G.A. § 51-12-5.1(c).

#### (c) Level of Conduct Required for Punitive Damages Award

Punitive damages may be awarded only in tort-related actions in which 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 the consequences.” O.C.G.A. § 51-12-5.1(b); Davis v. S. Exposition Mgmt. Co., 232 Ga. App. 773, 776, 503 S.E.2d 649, 652 (1998) (holding that “punitive damages cannot be awarded absent evidence of willful misconduct, malice, fraud, wantonness, or oppression, or that entire want of care which would raise the presumption of a conscious indifference to consequences”); Wisembaker v. Warren, 196 Ga. App. 551, 554, 396 S.E.2d 528, 533 (1990) (same). As a matter of law, gross negligence is insufficient to sustain an award of punitive damages. Mableton Parkway CVS, Inc. v. Salter, 273 Ga. App. 477, 482, 615 S.E.2d

558, 564 (2005) (reversing denial of summary judgment motion on punitive damages where evidence showed at most gross negligence on behalf of defendant); Durben v. Am. Material, Inc., 232 Ga. App. 750, 751, 503 S.E.2d 618, 619 (1998) (same); Cnty. Fed. Sav. & Loan Ass'n v. Foster Developers, Inc., 179 Ga. App. 861, 865, 348 S.E.2d 326, 330 (1986) (evidence showing indifference or lack of sympathy not sufficient to overcome defendant's motion for directed verdict on punitive damages); but see Zeigler v. Clowhite Co., 234 Ga. App. 627, 627, 507 S.E.2d 182, 183 (1998) (reversing grant of summary judgment to maker of bleach who added lemon scent when addition of that scent could have masked noxious odor of bleach fumes).

**(d) Product Liability Causes of Action for which Punitive Damages are Recoverable**

Punitive damages may be recovered for any product liability cause of action sounding in negligence. O.C.G.A. § 51-12-5.1(b). In addition to negligence actions, a product liability claim brought under a strict liability theory will also support an award of punitive damages. E.g., Banks v. ICI Ams., Inc., 266 Ga. 607, 610-11, 469 S.E.2d 171, 174-75 (1996); see also O.C.G.A. § 51-12-5.1(e).

**(e) Special Rules Applicable in Actions Seeking Punitive Damages**

In product liability actions, there is no cap on the amount of punitive damages that may be awarded. O.C.G.A. § 51-12-5.1(e)(1). The statute does not define what constitutes a product liability action. However, Georgia courts have applied this rule to a variety of different design defect cases and failure to warn cases. See, e.g., Zeigler v. CloWhite Co., 234 Ga. App. 627, 629, 507 S.E.2d 182, 184 (1998) (failure to warn case); Banks v. ICI Ams., Inc., 266 Ga. 607, 610, 469 S.E.2d 171, 175 (1996) (design defect case).

Only one punitive damages award may be recovered from a defendant where the cause of action is based on product liability. Id. After withdrawing a proportionate part of the costs of litigation, including reasonable attorney's fees as determined by the trial judge, seventy-five percent (75%) of any punitive damages award arising from a product liability cause of action shall be paid into the treasury of the state through the Office of Treasury and Fiscal Services. O.C.G.A. § 51-12-5.1(e)(2).

There is also no cap on the amount of punitive damages that may be awarded in cases where the defendant acted with specific intent or caused the harm while under the influence of alcohol or non-prescription drugs. O.C.G.A. § 51-12-5.1(f). Where punitive damages are imposed in these situations, damages shall only be the liability of an active tortfeasor, not the liability of any defendant other than an active tortfeasor. Id. In analyzing the specific intent to cause harm provision in this statute, Georgia courts have held that the plaintiff must request a charge on specific intent to cause harm and the trier of fact must make separate finding of specific intent to cause harm. McDaniel v. Elliott, 269 Ga. 262, 265, 497 S.E.2d 786, 788 (1998); see also J.B. Hunt Transport, Inc. v. Bentley, 207 Ga. App. 250, 255-56, 427 S.E.2d 499, 504 (1993) (while evidence was sufficient to support finding of conscious indifference to consequences such that punitive damages were appropriate, evidence did not support a finding of specific intent to harm allowing Plaintiff to recover more than \$250,000); Aldworth Co. v. England, 286 Ga. App. 1, 5, 648 S.E.2d 198, 202 (2007) (same); Viau v. Fred Dean, Inc., 203 Ga. App. 801, 418 S.E.2d 604 (1992) ("the mere knowledge and appreciation of a risk, short of a substantial certainty," does not establish specific intent).

O.C.G.A. § 51-12-5.1 provides that in all other cases punitive damages are capped at a maximum of \$250,000. O.C.G.A. § 51-12-5.1(g). In Bagley v. Shortt, the Georgia Supreme

Court held that the \$250,000 punitive damages cap did not violate due process, equal protection, or the right of access to the courts, and is therefore constitutional. 261 Ga. 762, 762, 410 S.E.2d 738, 739 (1991).

## **2. Pleading**

### **(a) Specific Prayer**

An award of punitive damages must be specifically prayed for in the complaint. O.C.G.A. § 51-12-5.1(d)(1). Georgia courts have interpreted this requirement to mean that a request for punitive damages must be included in a complaint's prayer for relief. Drug Emporium, Inc. v. Peaks, 227 Ga. App. 121, 134, 488 S.E.2d 500, 510-11 (1997). The specific prayer requirement has not been interpreted to constitute an independent cause of action. See Massey v. Kelly, Inc., 742 F. Supp. 1156, 1158 (N.D. Ga. 1990). However, the complaint must set forth a claim for punitive damages as well as the aggravating circumstances which authorize such damages. Lawrence v. Direct Mortg. Lenders Corp., 254 Ga. App. 672, 683, 563 S.E.2d 533, 541 (2002).

### **(b) Statutory Requirements**

The party seeking punitive damages is not required to plead the specific amount of punitive damages sought. O.C.G.A. § 51-12-5.1. Beyond those limitations enumerated in O.C.G.A. § 51-12-5.1, there are no further statutory restrictions on pleading a request for punitive damages. See, e.g., Drug Emporium, Inc., 227 Ga. App. at 133, 488 S.E.2d at 510 (reversing an award of punitive damages by default judgment where the plaintiff did not follow the specific pleading requirements set forth in O.C.G.A. § 51-12-5.1).

### **(c) Pleading Fraud or Mistake**

Like its federal counterpart, O.C.G.A. § 9-11-9(b) requires allegations of fraud or mistake to be pled with particularity: "In all averments of fraud or mistake, the circumstance constituting

fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.” O.C.G.A. § 9-11-9(b).

**(d) Ad Damnum Clause**

“[P]unitive damages must be specifically prayed for in the complaint, which must be more than a mere prayer for punitive damages in the ad damnum.” Lawrence, 254 Ga. App. at 683, 563 S.E.2d at 541 (citing O.C.G.A. § 51-12-5.1(d)(1) (internal quotations omitted)). In other words, a mere request for punitive damages in the ad damnum clause is insufficient unless the circumstances which would authorize an award of punitive damages are set forth within the complaint itself, at least generally. Id.

**3. Discovery**

**(a) Procedure**

Georgia does not have any specific statutory scheme setting forth a different discovery procedure (such as bifurcation or phasing) in cases involving punitive damages that are any different from Georgia’s Civil Practice Act. O.C.G.A § 9-11-26, et al.

**(b) Relevant Discovery**

**(i) Financial Condition of the Defendant**

When punitive damages are sought, evidence of the financial condition of the defendant may be discoverable when plaintiff establishes an evidentiary showing (by affidavit, discovery responses, or otherwise) that a factual basis exists for the punitive damage claim. See, e.g., Holman v. Burgess, 199 Ga. App. 61, 63, 404 S.E.2d 144, 147 (1991).

**(ii) Evidence of Past Similar Conduct**

Evidence of a defendant’s past similar conduct may be discoverable in cases involving punitive damages. Apple Inv. Props., Inc. v. Watts, 220 Ga. App. 226, 227, 469 S.E.2d 356, 358 (1996) (“[e]vidence concerning the extent of similar conduct would be highly relevant

concerning the true scope of the problem and the extent to which punitive damages might be required to punish or deter.”). For example, in Gunthorpe v. Daniels, the Georgia Court of Appeals allowed a plaintiff accusing her orthodontist of malpractice to introduce evidence of similar treatment the doctor gave other patients. 150 Ga. App. 113, 115, 257 S.E.2d 199, 201 (1979). This type of evidence may show that a defendant “knew that such carelessness on [its] part in the past had resulted in similar injuries to others but continued in this course of conduct in utter indifference to the consequences . . . .” Apple Inv. Props., Inc., 220 Ga. App. at 226, 469 S.E.2d at 358.

**(c) Limitations on Discovery**

While discovery of a defendant’s worldly circumstances and business relationships is authorized, discovery of the defendant’s financial affairs is not unlimited. Ledee v. Devoe, 225 Ga. App. 620, 625, 484 S.E.2d 344, 348 (1997). Because of the great potential for abuse created by such a discovery right—such as using the threat of discovery of financial information as an attempt to extort an unwanted settlement—the Georgia Court of Appeals has held that a trial court may refuse to enforce such a discovery request where it appears “more calculated to burden the [defendants] than . . . to lead to admissible evidence.” Holman, 199 Ga. App. at 63, 404 S.E.2d at 147; see also Floyd v. First Union Nat. Bank of Ga., 203 Ga. App. 788, 791, 417 S.E.2d 725, 728 (1992); Mitzner v. Hyman, 175 Ga. App. 311, 313, 333 S.E.2d 182, 184 (1985).

Like financial records, evidence of past similar conduct is subject to the trial court’s discretion in balancing the plaintiff’s right to discover the information against defendant’s right to privacy. See Apple Inv. Props., 220 Ga. App. at 227, 469 S.E.2d at 358; Holman, 199 Ga. App. at 63, 404 S.E.2d at 147.

#### **4. Proof**

##### **(a) Standard of Proof**

The standard of proof for awarding punitive damages in Georgia is as follows:

Punitive damages may be awarded only in such tort actions in which 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 “clear and convincing evidence” standard is an intermediate standard requiring proof greater than a civil “preponderance of the evidence” standard but less than the “reasonable doubt” standard in criminal cases. See, e.g., Compris Techs., Inc., v. Techwerks, Inc., 274 Ga. App. 673, 681, 618 S.E.2d 664, 671 (2005). A party seeking to prove that a party acted with specific intent to cause harm must show this by a preponderance of the evidence, not by the clear and convincing standard that applies to entitlement to punitive damages generally. See Kothari v. Patel, 262 Ga. App. 168, 585 S.E.2d 97 (2003); Time Warner Entm’t Co. v. Six Flags Over Georgia, LLC, 245 Ga. App. 334, 537 S.E.2d 397 (2000) (vacated on other grounds).

##### **(b) Form of Trial**

Georgia law mandates a bifurcated punitive damages trial. O.C.G.A. § 51-12-5.1(d)(1) provides:

An award of punitive damages must be specifically prayed for in a complaint. 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. This finding shall be made specially through an appropriate form of verdict, along with the other required findings.

O.C.G.A. § 51-12-5.1(d)(1). O.C.G.A § 51-12-5.1(d)(2) then provides:

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)(2). Trial courts must either bifurcate or trifurcate a trial when punitive damages are at issue. Webster v. Boyett, 269 Ga. 191, 192-93, 496 S.E.2d 459, 461 (1998); see also Bolden v. Ruppenthal, 286 Ga. App. 800, 804, 650 S.E.2d 331, 335 (2007) (discussing Webster).

**(c) Admissible Evidence**

When the appropriateness and amount of punitive damages are issues before the finder of fact, Georgia law permits the admission of several forms of evidence that would otherwise be excluded in trials where no punitive damages are sought. Some of the more relevant evidentiary exceptions to the scope of this paper are discussed below.

**(i) Similar Acts or Omissions**

Georgia law typically excludes evidence of similar acts or omissions in negligence actions. However, a showing that the other acts were “substantially similar” can lead to the admission of the evidence in the liability portion of trial involving punitive damages to establish motive, intent, or malice, or to establish a course or pattern of conduct that would raise the presumption of conscious indifference to consequences. West v. Nodvin, 196 Ga. App. 825, 828-29, 397 S.E.2d 567, 571 (1990) (overruled on other grounds); Apple Inv. Props., 220 Ga. App. at 227, 469 S.E.2d at 358; see also Cooper Tire & Rubber Co. v. Crosby, 273 Ga. 454, 460, 543 S.E.2d 21, 27 (2001) (regarding product liability actions); Rose v. Figgie Intern., Inc., 229 Ga. App. 848, 854, 495 S.E.2d 77, 84 (1997) (same). “Evidence of other transactions or occurrences is admissible if it is relevant to the particular instance and does not place too great a

danger of undue consumption of time, confusion of issues, undue prejudice or unfair surprise.”

Id. Evidence of substantially similar acts or omissions may also be admissible in the damages portion of the proceeding. Apple Inv. Props., 220 Ga. App. at 227, 469 S.E.2d at 358.

**(ii) Subsequent Remedial Measures**

Although evidence of subsequent remedial measures is inadmissible on the issue of negligence, such evidence can be admissible when “the subsequent repair, change, or modification tends to prove some fact of the case on trial (other than belated awareness of negligence, of course), to show contemporary knowledge of the defect, causation, a rebuttal of a contention that it was impossible for the accident to happen in the manner claimed.” Gen. Motors Corp. v. Moseley, 213 Ga. App. 875, 882, 447 S.E.2d 302, 310 (1994) (overruled on other grounds); see also Middlebrooks v. Hillcrest Foods, Inc., 256 F.3d 1241, 1248 (11th Cir. 2001); Rose v. Figgie Intern., Inc., 229 Ga. App. 848, 855, 495 S.E.2d 77, 84 (1997). Evidence of subsequent remedial measures may also become admissible “to show the appropriate degree of deterrence or punishment.” Moseley, 213 Ga. App. at 888, 447 S.E.2d at 314.

**(iii) Defendant’s Wealth**

Information concerning a defendant’s financial worth is admissible in the punitive damages portion of a bifurcated trial. J.B. Hunt Transport, Inc. v. Bentley, 207 Ga. App. 250, 258, 427 S.E.2d 499, 506 (1992). The rationale for allowing such evidence is that “the allowance of a given sum would be a greater punishment to a man of small means than to one possessing larger wealth.” Wilson v. McLendon, 225 Ga. 119, 121, 166 S.E.2d 345, 346 (1969). Hence, this information permits the finder of fact to determine an appropriate amount of punitive damages specific to defendants of different means.

**(iv) Defenses and Mitigation of Damages**

A defendant may introduce evidence to defeat or lessen a claim for damages based on the plaintiff's conduct that gave rise to the defendant's alleged breach of duty. As one court has put it, "where the plaintiff seeks to recover punitive damages, as well as actual damages [] the rule has been stated as follows: 'Where there has been a breach of a duty giving rise to a cause of action, and the injured party claims punitive damages, all the surrounding circumstances accompanying the breach of duty may be given in evidence to the jury.'" Smith v. Davis, 76 Ga. App. 154, 156, 45 S.E.2d 237, 239 (1947) (citation omitted).

**(v) Guilty Pleas**

Guilty pleas on criminal charges for the same type of conduct that gives rise to punitive damages liability may be admissible in the punitive damages portion of a bifurcated trial. Thompson v. Moore, 177 Ga. App. 675, 675, 342 S.E.2d 27 (1986). The trial court has discretion on whether to allow evidence of prior or subsequent guilty pleas in the bifurcated punitive damages portion of the proceeding. Webster v. Boyett, 269 Ga. 191, 194, 496 S.E.2d 459, 462 (1998).

**(vi) Convictions**

Evidence of a conviction of a criminal offense may be admitted during the punitive damages portion of a bifurcated trial where criminal conduct is of the same type as that which gave rise to the imposition of punitive damages. See Webster, 269 Ga. at 195, 496 S.E.2d at 462. The trial court has discretion whether to admit this type of evidence in the liability portion of a bifurcated trial for the purpose of determining whether punitive damages are appropriate. Id.

**(d) Instructions**

Jury charges are discussed in detail in section 6.

## 5. Defenses

### (a) Georgia-Specific Defenses

In Georgia, a defendant can typically introduce evidence on all the circumstances involving the alleged breach of duty giving rise to punitive damage liability to lessen the damages. See, e.g., Smith v. Davis, 76 Ga. App. 154, 156, 45 S.E.2d 237, 239 (1947). Evidence of good faith will negate the propriety of awarding punitive damages where the evidence demonstrates the defendant acted or failed to act without the necessary state of mind to warrant punitive damages. See, e.g., Tomberlin Assoc., Architects, Inc. v. Free, 174 Ga. App. 167, 169, 329 S.E.2d 296, 299 (1985) (“punitive damages may not be inflicted where a person acts in ‘good faith.’”). Georgia also permits a civil defendant to introduce evidence of actual or potential criminal punishment to mitigate an award of punitive damages. White v. Taylor, 157 Ga. App. 328, 329, 277 S.E.2d 321, 322 (1981). As discussed in White v. Taylor, however, the criminal punishment must arise from the same conduct that gives rise to punitive damages liability. Id.

Compliance with applicable safety regulations can also serve as a defense to a claim for punitive damages in product liability actions, provided there is not other evidence showing that a defendant acted with conscious indifference. In Stone Man, Inc. v. Green, 263 Ga. 470, 435 S.E.2d 205 (1995), the Georgia Supreme Court addressed the propriety of punitive damages in a nuisance case, where the evidence showed that defendant operated its business in accordance with county, state and federal regulations, stating as follows:

While compliance with the law will not preclude a finding that business activity constitutes a nuisance, such compliance does tend to show that there is no clear and convincing evidence of ‘willful misconduct, malice, fraud, wantonness, oppression or the entire want of care that would raise a presumption of a conscious indifference to the rights of others’. This is especially true in the case of a commercial enterprise the operation of which is

accompanied by a certain amount of unpleasant but unavoidable effects... [Defendant's] compliance with county, state and federal regulations is not the type of behavior which supports an award of punitive damages...

Id. at 471-472 [internal citations omitted]; see also Welch v. Gen. Motors Corp., 949 F. Supp. 843, 846 (N.D. Ga. 1996) (granting summary judgment on punitive damages claim when evidence showed compliance with Federal Motor Vehicle Safety Regulations, and there was no evidence that defendant knew braking system was otherwise defective); but see Gen. Motors Corp. v. Moseley, 213 Ga. App. 875, 882, 447 S.E.2d 302, 310 (1994) (overruled on other grounds) (“[n]othing in Stone Man precludes an award of punitive damages where, notwithstanding the compliance with applicable safety regulations, there is other evidence showing culpable behavior.”).

**(b) Product-Specific Defenses**

There do not appear to be any product-specific defenses to a prayer for punitive damages in Georgia.

**(c) Liability for the Acts of Others**

**(i) Vicarious Liability**

In general, an employer's respondeat superior liability includes liability for punitive damages if the employee's wrongful conduct was sufficient to permit punitive damages. Johnson v. Allen, 272 Ga. App. 861, 869, 613 S.E.2d 657, 663 (2005). Further, an employer may even be exposed to punitive damages absent express ratification if the employee's wrongful acts or omissions were committed during and within the course of the employee's employment. Am. Fid. & Cas. Co. v. Farmer, 77 Ga. App. 166, 178, 48 S.E. 2d 122, 132 (1948). Provided the agent's conduct rises to the level necessary to warrant the imposition of punitive damages, the employer or master is liable for those damages even if the employee or servant has an individual

defense. Id.; see also Sightler v. Transus, Inc., 208 Ga. App. 173, 173, 430 S.E.2d 81, 82 (1993); Eric James Hertz & Mark D. Link, Punitive Damages in Georgia, § 4-8 (2d ed. 2006). An employer may also be liable for punitive damages if its own independent conduct is sufficient to support a finding of conscious disregard for the rights of others. See Durben v. Am. Materials, Inc., 232 Ga. App. 750, 751, 503 S.E.2d 618, 619 (1998).

**(ii) Joint Tortfeasors**

The state of Georgia’s law of punitive damages as applicable to joint tortfeasors is currently unclear. There is authority suggesting that where parties are sued jointly, punitive damages cannot be recovered against any party unless all parties are liable for punitive damages. See Chupp v. Henderson, 134 Ga. App. 808, 812, 216 S.E.2d 366, 368-69 (1975); Willis v. Hill, 116 Ga. App. 848, 868, 159 S.E.2d 145, 160 (1967) (rev’d on other grounds). While no court has directly refuted this authority, at least one as distinguished its applicability. See Crow v. Evans, 183 Ga. App. 581, 582, 359 S.E.2d 446, 446-47 (1987). Another more recent decision refused to address the validity of these cases finding that the issue had been waived. See Surles v. Cornell Corrections of California, Inc., 290 Ga.App. 260, 268, 659 S.E.2d 683, 690 (2008).

As part of the 2005 “tort reform” package known as Senate Bill 3, the Georgia General Assembly attempted to abolish joint and several liability all together. See O.C.G.A. §51-12-33. The Tort Reform statute created new provisions for the allocation of fault among parties and non-parties. See generally O.C.G.A. § 51-12-33. O.C.G.A. § 51-12-33(b) and (c) authorizes the trier of fact to apportion any award of damages among joint tortfeasors—whether or not they are a party—based on percentage of fault for each person. Although punitive damages are not explicitly referenced in O.C.G.A. § 51-12-33, the provision does reference the apportionment of the “total amount of damages,” which could include punitive damages, if awarded. Id.

The effect of these statutory changes on the liability for punitive damages is not clear. It appears possible that the abolition of joint and several liability (if ultimately upheld as constitutional) would negate the issues discussed in Willis and Chupp. If there is not joint and several liability, a jury would necessarily have to assess punitive damages against each defendant individually. It is also unclear how the apportionment of damages under O.C.G.A. § 51-12-33 would affect a court's determination of reasonableness under both the Georgia and U.S. Constitutions. Whether a Georgia court would look to the amount awarded against an individual defendant, or to the total amount of damages assessed against all of them, when determining the relationship between the harm and the reasonableness of the punitive damages award has not yet been determined. There are undoubtedly other issues that could arise in this context that are beyond the scope of this paper. Anyone defending a Georgia case involving more than one at fault party is encouraged to review recent Georgia cases interpreting and challenging this provision, if any, before trying such a case.

**(d) Limitations on Liability**

**(i) Governmental Entities**

In Georgia, governmental entities may not be liable for punitive damages as a matter of law because “such awards would seriously damage the public interest.” See, e.g., Metrop. Rapid Transit Auth. v. Boswell, 261 Ga. 427, 427-28, 405 S.E.2d 869, 869 (1991) (citing City of Newport v. Fact Concerts, 453 U.S. 247, 263 (1981)). What falls within the “governmental entities” category gives rise to further considerations, which is beyond the scope of this paper. See Boswell, 261 Ga. 427, 405 S.E.2d 869.

**(ii) Municipalities**

In City of Columbus v. Myszka, the Georgia Supreme Court held that without statutory authority, a municipality cannot be liable for punitive damages. 246 Ga. 571, 573, 272 S.E.2d 302, 305 (1980).

**(iii) Estates**

Punitive damages may not be recovered from the estate of a deceased tortfeasor, but instead may only be recovered against an individual tortfeasor while that individual is still alive. See, e.g., Cleveland v. Alford, 188 Ga. App. 690, 690, 373 S.E.2d 853, 854 (1988).

**(iv) Servers of Alcohol Not Deemed an Active Tortfeasor**

Punitive damages may not be awarded against establishments that serve alcohol where the server is not considered an “active tortfeasor.” O.C.G.A. § 51-12-5.1(f); see, e.g., Capp v. Carlito’s Mexican Bar & Grill No. 1, Inc., 288 Ga. App. 779, 784, 655 S.E.2d 232, 237 (2007).

**(e) Effect of a Finding that the Defendant Engaged in Conduct Warranting Punitive Damages**

There is no special effect of a specific finding that a defendant has engaged in conduct warranting punitive damages in Georgia (e.g., loss of contribution rights, loss of certain defenses).

**(f) Post-Trial Defenses**

O.C.G.A. § 51-12-12 authorizes the court to interfere with a jury award of punitive and compensatory damages under certain circumstances:

The question of damages is ordinarily one for the jury; and the court should not interfere with the jury’s verdict unless the damages awarded by the jury are clearly so inadequate or so excessive as to be inconsistent with the preponderance of the evidence in the case.

O.C.G.A. § 51-12-12. This provision applies to trial court and appellate review of both punitive and compensatory damage awards. Mercer w. Woodard, 166 Ga. App. 119, 127, 303 S.E.2d 475, 484 (1983). In Georgia, the trial court may order a new trial on damages or grant a new trial conditioned on “any party’s refusal” to accept an increased or reduced amount of damages. O.C.G.A. § 51-12-12(b). “Any party’s refusal” refers to the party adversely affected by either the grant of a new trial or modified damages. Lisle v. Willis, 265 Ga. 861, 862, 463 S.E.2d 108, 109 (1995). For a discussion of the law concerning excessive punitive damage awards see sections 1(e) and 7(c).

**(g) Set-Offs**

Georgia does not appear to have any specific law with regard to set-offs of punitive damages, other than the fact that a trial court is permitted to interfere with a jury award of punitive damages when the award is sufficiently inadequate or excessive. See O.C.G.A. § 51-12-12.

**(h) Law of Multiple Awards**

Multiple awards of punitive damages arising from the same act or omission are prohibited in products liability cases. See, e.g., Ford v. Uniroyal Goodrich Tire Co., 267 Ga. 226, 230, 476 S.E.2d 565, 569-70 (1996).

**6. Jury Instructions**

The Council of Superior Court Judges of Georgia has adopted a pattern set of jury charges that it recommends using in Georgia trial courts. The pattern jury charges contains an entire section on punitive damages. See Georgia Suggested Jury Instructions Volume I, Civil Cases (5th ed.) §§ 66.700 et. seq. For example, the pattern jury charges contain specific charges for: (1) punitive liability (§66.700); (2) clear and convincing evidence (§66.701); (3) specific intent to harm (§66.711); (4) acting while under the influence of drugs or alcohol (§66.720); (5)

burden of proof (§66.630); and (6) guidelines as to the proper amount of punitive damages (§66.750).

The essential punitive damages charges from Georgia's Suggested Pattern Jury Instructions concerning punitive damages read as follows:

66.700 Punitive Liability

In tort actions, there may be aggravating circumstances that may warrant the awarding or imposing of additional damages called punitive damages.

Before you may award (impose) punitive damages, the plaintiff must prove that the defendant's actions showed willful misconduct, malice, fraud, wantonness, oppression, or that entire want of care that would raise the presumption of conscious indifference to consequences. The plaintiff must prove that the defendant is liable for punitive damages by a higher standard than that for proof of other damages; that is, by clear and convincing evidence.

...

66.702 Punitive Liability, continued

If the plaintiff fails to prove, by clear and convincing evidence, that the defendant was guilty of willful misconduct, malice, fraud, wantonness, oppression, or entire want of care that would raise the presumption of conscious indifference to consequences, then you would not be authorized to award (impose) punitive damages.

Mere negligence, although amounting to gross negligence, will not alone authorize an award (imposition) of punitive damages.

Punitive damages, when authorized, are awarded (imposed) not as compensation to a plaintiff but solely to punish, penalize, or deter a defendant. In your verdict, you should specify whether you do or do not decide (that the plaintiff should receive) (to impose) punitive damages.

Georgia Suggested Jury Instructions Volume I, Civil Cases (5th ed.) §§ 66.700, 66.702.

Importantly, these charges have been approved by the Council of Superior Court Judges and the practitioner can safely assume that using these charges will withstand an attack on appeal.

In addition to the pattern jury charges, the Georgia Supreme Court in Hospital Authority of Gwinnett County v. Jones offered some guidelines and factors to be considered in charging a jury on punitive damages. 259 Ga. 759, 386 S.E.2d 120 (1989) (overruled on other grounds). In particular, the court suggested considering and charging on the following factors: (1) the nature and egregiousness of the defendant's conduct; (2) the extent and duration of the defendant's wrongdoing and the possibility of its recurrence; (3) the intent of the defendant in committing the wrong; (4) the profitability of the defendant's wrongdoing; (5) the amount of actual damages awarded; (6) previous awards of punitive damages against the defendant; (7) potential or prior criminal sanctions against the defendant based upon the same wrongful acts; (8) the financial circumstances of the defendant; and (9) any other pertinent circumstances. Id. at 764, 386 S.E.2d at 125.

Although the pattern jury charges and the Hospital Authority of Gwinnett County decision offer excellent guidance on punitive damages jury charges, there are other cases that warrant discussion. First, in Clarke v. Cox, the court held that in cases involving multiple defendants, the jury should be charged to separately determine punitive damages for each defendant. 197 Ga. App. 83, 84, 397 S.E.2d 598, 600 (1990). Second, in McDaniel v. Elliot, the court held that in order to avoid the cap on punitive damages in a non-product liability case, a party must charge on specific intent to cause harm and the jury must make a separate finding of specific intent to cause harm. 269 Ga. 262, 265, 497 S.E.2d 786, 788 (1998). Finally, in Ford v. Uniroyal Goodrich Tire Co., the court held that in product liability actions, it is reversible error to charge the jury on O.C.G.A. § 51-12-5.1(e)(2), which mandates that in a products liability case, seventy-five percent of a punitive damages award shall go to the state. 267 Ga. 226, 231, 476 S.E.2d 565, 570 (1996).

## **7. Amounts**

### **(a) Statutory Limits**

In product liability actions, there are no caps on punitive damages. See O.C.G.A. § 51-12-5.1(e)(1); section (1)(e), supra. In most other causes of action, however, O.C.G.A. § 51-12-5.1(g) caps punitive damages at a maximum of \$250,000. See O.C.G.A. § 51-12-5.1(g). In pertinent part, O.C.G.A. § 51-12-5.1(g) provides that “[f]or any tort action not provided for by subsections (e) [product liability exception] and (f) [specific intent exception] of this Code section in which the trier of fact has determined that punitive damages are to be awarded, the amount which may be awarded in the case shall be limited to a maximum of \$250,000.00.” O.C.G.A. § 51-12-5.1(g). In interpreting this statute, the Georgia Supreme Court held that the phrase “the amount which may be awarded in the case shall be limited to a maximum of \$250,000” means that \$250,000 is the maximum amount of money that the finder of fact may award to any one plaintiff as punitive damages regardless of the number of defendants and regardless of the number of theories of recovery arising out of the same transaction, occurrence, or series of transactions or occurrences. Bagley v. Shortt, 261 Ga. 762, 763, 410 S.E.2d 738, 739 (1991). For a more detailed discussion of these statutory limitations, see Section 1(e) above.

### **(b) Common Law Limitations**

In addition to the statutory caps on punitive damages, the Georgia Supreme Court has indicated, at least in property damage cases, that punitive damages awards can run afoul of the excessive fines clause of the Georgia Constitution (Ga. Const. art. I, § I, para. XVII). Colonial Pipeline Co. v. Brown, 258 Ga. 115, 117, 365 S.E.2d 827, 829 (1988). In Colonial Pipeline Co., a plurality of the Georgia Supreme Court considered a challenge to a punitive damages award based on the excessive fines clause of the Georgia Constitution. 258 Ga. at 118, 365 S.E.2d at 829. Colonial Pipeline argued that a \$5,000,000 punitive damage award in a property damage

case, where the actual value of the damaged property was only \$52,728.46, was excessive. Id. at 115, 365 S.E.2d at 118. In analyzing Colonial Pipeline’s argument, the court held that the excessive fines clause applies to the imposition of punitive damages in civil cases and reversed the punitive damages award on this ground. Id. at 120, 365 S.E.2d at 830. In reversing the punitive damages award, the court found that it was excessive “because (1) any negligence present was passive; (2) there was no bodily injury to this plaintiff, and the award does not bear a rational relationship to the actual damages award; (3) there is no rational relationship between the offense and the punishment in that the punitive damage award was 100 times the property damage award.” Id. at 123, 365 S.E.2d at 833.

One reading of the Colonial Pipeline case limits its holding and application of the excessive fines clause to punitive damages awards in property damages cases. The Georgia Supreme Court, however, in at least one case, has analyzed a punitive damages award in a non-property damage case under the excessive fines clause. See, e.g., Hosp. Auth. of Gwinnett County v. Jones, 259 Ga. 759, 386 S.E.2d 120, 123 (1989) (vacated on other grounds). In this case, the Georgia Supreme Court failed to expressly consider the factors utilized by the court in Colonial Pipeline and simply held that the punitive damages award at issue did not violate the excessive fines clause. Id. at 762, 386 S.E.2d at 123. Because the court considered the excessive fines clause in a non-property damage case, it is likely that the excessive fine clause applies to non-property damages cases. Id.

**(c) State Test for Reasonableness**

Although the United States Supreme Court has held that the United States Constitution’s Due Process Clause requires that punitive damages bear a reasonable relationship to the compensatory damages award (e.g. Pacific Mutual Ins. Co. v. Haslip, 449 U.S. 1, 18 (1991)), the Georgia Supreme Court has declined to hold that the Georgia Constitution’s Due Process Clause

requires a similar reasonable relationship. Hosp. Auth. of Gwinnett County, 261 Ga. at 614, 409 S.E.2d at 502. “The purpose of punitive damages is to deter the repetition of reprehensible conduct by the defendant or others.” Id. “Because deterrence is based on factors other than the actual harm caused,” the Georgia Supreme Court rejected the notion that punitive damages must necessarily bear some reasonable relationship to the actual damages awarded by the jury. Id. at 614, 409 S.E.2d at 502-03; see also Bickerstaff Automotive, Inc. v. Tsepas, 258 Ga. App. 327, 330, 574 S.E.2d 322, 325 (2002) (noting that “because deterrence is based on factors other than the actual harm caused, the Supreme Court of Georgia rejected the notion that punitive damages must necessarily bear some relationship to the actual damages awarded by the jury”); Lawrence v. Direct Mortgage Lenders Corporation, 254 Ga. App. 672, 563 S.E.2d 533 (2002) (\$50,000 punitive damage award was not excessive even though actual damages were approximately \$1,500, when defendant did not raise federal due process challenge below). As discussed below, however, the relationship between the punitive damage award and the actual damage award can be considered when determining whether the verdict is the result of undue passion. See subsection (d).

Although Georgia Courts have held that the Georgia Constitution does not require a punitive damages award to bear a reasonable relationship to the actual damages awarded by the jury, Georgia Courts do recognize that the United States Constitution imposes such requirements and therefore apply the standards set forth in BMW of North America v. Gore. 517 U.S. 559, 574-75 (1996); see also Sumitomo Corp. of Am. v. Deal, 256 Ga. App. 703, 709, 569 S.E.2d 608, 614-15 (2002). The distinction between the Georgia and United States Constitutions makes it critical for any practitioner to expressly preserve and raise challenges to a punitive damages award under the United States Constitution. See Lawrence v. Direct Mortgage Lenders Corp.,

254 Ga. App. 672, 676 n.2, 563 S.E.2d 533, 536 (2002) (\$50,000 punitive damage award was not excessive under Georgia Constitution even though actual damages were approximately \$1,500 and defendant waived any federal constitutional challenges by not bringing them below).

**(d) Excessiveness Analysis Under State Law**

Under O.C.G.A. §§ 5-5-20 and 51-12-12, a punitive damages award may be challenged as excessive. O.C.G.A. § 5-5-20 provides that “[i]n any case when the verdict of a jury is found contrary to evidence and the principles of justice and equity, the presiding judge may grant a new trial before another jury.” O.C.G.A. § 5-5-20. Similarly, O.C.G.A. § 51-12-12 provides that “[t]he question of damages is ordinarily one for the jury; and the court should not interfere with the jury’s verdict unless the damages awarded by the jury are clearly so inadequate or so *excessive* as to be inconsistent with the preponderance of the evidence in the case.” O.C.G.A. § 51-12-12(a).

A punitive damages award can be set aside under these statutes if it “shocks the judicial conscience” or is “blatantly egregious.” Bickerstaff Automotive, Inc., 258 Ga. App. at 330, 574 S.E.2d at 325 (“shocks the judicial conscience”); Mercer v. Woodard, 166 Ga. App. 119, 127, 303 S.E.2d 475, 484 (1983) (“blatantly egregious”). In other words, the verdict must be so unreasonable as to show that it was the result of passion, prejudice, partiality, or undue bias on the part of the jury. Calloway v. Rossman, 150 Ga. App. 381, 385, 257 S.E.2d 913, 917 (1979). The court *may* consider the relationship between punitive damages and compensatory damages to determine whether the punitive damages award is excessive due to undue passion and prejudice. Bickerstaff Automotive, Inc., 258 Ga. App. at 330, 574 S.E.2d at 325.

(e) **State Court Appellate Decision Reversing Punitive Damages Awards as Excessive or Unreasonable**

Georgia courts are unlikely to strike down punitive damages awards as excessive or unreasonable under state law. In fact, “a review of in excess of 110 appellate decisions challenging punitive damages awards as excessive yielded only three instances where the appellate courts held a punitive damages award excessive where the trial court had not so ruled.”

Hertz & Link, *supra*, at § 7-5. These three cases are as follows:

- Colonial Pipeline Co. v. Brown, 258 Ga. 115, 365 S.E.2d 827 (1998)
- Investment Securities Corp. v. Cole, 57 Ga. App. 97, 194 S.E. 411 (1937)
- Jones v. Spindel, 122 Ga. App. 390, 177 S.E.2d 187 (1970)

Id. Furthermore, an analysis of these same cases shows that trial courts rarely characterized punitive damage awards as excessive. Id. However, the cases in which the trial court did in fact rule punitive damages awards excessive are as follows:

- Lisle v. Willis, 265 Ga. 861, 463 S.E. 2d 108 (1995)
- Northern Telecom, Inc. v. Wilkerson, 219 Ga. App. 710, 466 S.E.2d 221 (1995)
- Schechter v. Strickland, 189 Ga. App. 82, 375 S.E.2d 93 (1988)

Id. Because Georgia courts are unlikely to strike down a punitive damages award under state law, the practitioner should focus his or her efforts on challenging a punitive damages award under the United States Constitution’s Due Process Clause.

**8. Who Recovers**

As a general rule, the plaintiff is entitled to keep the entire amount of a punitive damages award. However, in product liability cases, the punitive damages award is split with the State of Georgia. O.C.G.A. § 51-12-5.1(e)(2). Specifically, after withdrawing a proportionate part of the costs of litigation, including reasonable attorney’s fees as determined by the trial judge, seventy-

five percent (75%) of any punitive damages award arising from a cause of action based on product liability shall be paid into the treasury of the state through the Office of Treasury and Fiscal Services. O.C.G.A. § 51-12-5.1(e)(2). This statute was examined by the Georgia Supreme Court in Ford v. Uniroyal Goodrich Tire Co., 267 Ga. 226, 476 S.E.2d 565 (1996). In Ford, the Georgia Supreme Court held that the legislature passed the seventy-five percent provision to punish defendants who have damaged society at large. Id. at 231, 476 S.E.2d at 570. The court noted that the statute furthered this purpose by not allowing the first plaintiff to reach the courthouse with a product liability lawsuit to reap a windfall from the punitive damages, but instead requiring that three-quarters of the punitive damages awarded be paid into the state treasury. Id.

The constitutionality of this statute was challenged in Mack Trucks v. Conkle, 263 Ga. 539, 436 S.E.2d 635 (1993). In that case, the Georgia Supreme Court found this provision to be constitutional and specifically held that it does not violate the right to a jury trial or the “right of choice” provisions under article I, section I, paragraphs XI & XII of the Georgia Constitution. Mack Trucks, 263 Ga. at 545, 436 S.E.2d at 640.

## **9. Insurance Coverage**

In Georgia, O.C.G.A. § 33-7-3 governs casualty liability insurance coverage. Under this statute, an insurance company is allowed to provide insurance coverage “against legal liability for the death, injury, or disability of any human being, or for damage to property . . . .” O.C.G.A. § 33-7-3(1). In Greenwood Cemetery, Inc. v. Travelers Indem. Co., the Georgia Supreme Court held that insurance contracts which insure against punitive damages do not violate public policy. 238 Ga. 313, 316, 232 S.E.2d 910, 913-14 (1977). The court held that punitive damages are a type of “legal liability” which O.C.G.A. § 33-7-3(1) expressly authorizes. Id. Georgia courts, however, have reached a different result as it relates to uninsured motorist

(“UM”) insurance coverage. State Farm Mutual Automobile Ins. Co. v. Weathers, 260 Ga. 123, 123, 392 S.E.2d 1, 1 (1990). In State Farm, the Georgia Supreme Court held that UM insurance carriers are not liable to their own insured for punitive damages awarded against a defendant in an uninsured motorist case. Id. The rationale for this rule lies in the deterrence aspect of a punitive damages award. Shelter Mut. Ins. Co. v. Bryant, 220 Ga. App. 526, 528, 469 S.E.2d 792, 794 (1996). In Shelter Mut. Ins. Co., the Court held that “allowing punitive damages to be awarded against an insurance company can serve no deterrent function because the wrongdoer is not the person paying the damages.” Id.

## **10. Appeals**

In Georgia, there are no special rules or procedures for appealing an award of punitive damages.