STATE OF GEORGIA COMPENDIUM OF LAW

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PRE-SUIT AND INITIAL CONSIDERATIONS

Pre-suit Notice Requirements/Prerequisites to Suit

By statute in Georgia, no demand is necessary prior to the initiation of a civil action except where the law or a contract provides for such a condition precedent. O.C.G.A. § 9-2-6 (2017).

Georgia law specifically requires for such precedent demands in actions involving abatement of nuisance by alienee, O.C.G.A. § 41-1-5(b) (2017), damages after public official who collected money refused to pay over same, O.C.G.A. § 15-13-3(a) (2017), demand by holder of note for attorney fees, O.C.G.A. § 13-1-11(a)(3) (2017), interest from demand on pending action, O.C.G.A. §§ 7-4-14, 7-4-15, 15-13-3(a) (2017), *Rivergate Corp. v. Atlanta Indoor Adver. Concepts*, 210 Ga. App. 501, 503 (1993), presentment of demand in negotiable instrument, O.C.G.A. § 11-3-501 (2017), suits against municipal corporations, O.C.G.A. § 36-33-5(a) (2017), and notice of an injury required by the Workers' Compensation Act, O.C.G.A. 34-9-80 (2017).

Relationship to Federal Rules of Civil Procedure

In some areas, such as discovery, class actions, and joinder rules, Georgia has adopted the Federal Rules of Civil Procedure or substantially their equivalent. However, in areas such as venue, service of process, and subject matter jurisdiction, the federal and state rules differ quite significantly. Most of these distinctions are discussed more fully below. Other notable differences include Georgia's 30-day period in which to file a responsive pleading to a complaint, the effect of a 12(b) motion on the timing of a responsive pleading, the state's six-month renewal statute, availability of fifty interrogatory questions, and no limitation on the number of depositions.

Description of the Organization of the State Court System

Georgia's Constitution vests judicial power in two appellate courts, the Supreme Court and the Court of Appeals, and five classes of trial courts: superior court, state court, magistrate court, probate court, and juvenile court. GA. CONST. art. VI, § 1, para. 1. These courts provide a unified judicial system. GA. CONST. art. VI, § 1, para. 2.

A) **Judicial selection.** All Justices of the Supreme Court and the judges of the Court of Appeals are elected on a nonpartisan basis for a term of six years. GA. CONST. art. VI, § 7, para. 1. All judges of the superior, state, and probate courts are elected to four year terms by the electors of the judicial circuit or county in which the judges are to serve. O.C.G.A. §§ 15-6-4.1, 15-7-20(b), 15-9-1 (2014).

1) **Vacancies.** In the case of vacancies in a Supreme Court, Court of Appeals, superior court or state court judgeship, the governor shall appoint an attorney to fill the vacancy until a regularly scheduled election can be held to elect a successor. GA. CONST. art. VI, § 7, para. 3.; O.C.G.A. § 45-12-50 (2017). The governor shall appoint all officers and fill all vacancies unless otherwise prescribed by the Constitution and laws of this state. O.C.G.A. § 45-12-50 (2017).

2) **Probate.** Until a probate court judgeship vacancy is filled by a special election, O.C.G.A. § 15-9-11(a) (2017), the chief judge of the city or state court serves as the

judge and is vested with all the powers of the judge. O.C.G.A. § 15-9-10(a) (2017). If there is no such chief judge or if for some reason the chief judge cannot serve as judge, the clerk of the superior court of the county shall serve as judge and shall be vested with all the powers of the judge. *Id*. In the event that the clerk of the superior court, for some reason, cannot serve as judge, the chief judge of the superior court of the county appoints a person to serve as judge; such person is vested with all the powers of the judge. *Id*.

3) **Magistrate.** A chief magistrate shall be elected by voters of the county in which the judge will preside to a four-year term. O.C.G.A. § 15-10-20(d) (2017). Other magistrates shall be appointed by the chief magistrate with the consent of the judges of superior court at the end of each four-year term, or when a vacancy is created during a four-year term. *Id.*

4) **Juvenile.** Unless a local legislative act provides for the election of a juvenile court judge, the judge or a majority of the judges of the superior court in each circuit in the state may appoint one or more qualified persons as judge of the juvenile courts of the circuit to a four-year term. O.C.G.A. §§ 15-11-50, 15-11-52 (2017).

B) **Structure.**

1) **Supreme Court.** The Supreme Court of Georgia, a seven-justice tribunal, has exclusive appellate jurisdiction over cases involving the construction of a treaty or the Constitution of the State of Georgia, and election contests. GA. CONST. art. VI, § 6, para. 2. The Supreme Court has general appellate jurisdiction over cases involving title to land, equity, wills, habeas corpus, extraordinary remedies, divorce and alimony, capital offenses, and cases certified by the Court of Appeals. GA. CONST. art. VI § 6, para. 3. Extraordinary remedies include mandamus, prohibition, quo warranto, and certain other remedies. *Spence v. Miller*, 176 Ga. 96, 99 (1932). Additionally, the Supreme Court may review by certiorari cases in the Court of Appeals, and it may answer questions of state law at the request of another state appellate or federal district or appellate court. GA. CONST. art. VI, § 6, para. 5; GA. CONST. art. VI, § 6, para. 4.

2) **Courts of Appeals.** The Court of Appeals is a court of review and exercises appellate and certiorari jurisdiction in all cases not reserved to the Supreme Court or conferred on other courts of law (e.g., appeals from certain inferior courts to the superior court for de novo review). GA. CONST. art. VI, § 5, para. 3. In the case of some Supreme Court cases, permission of the appropriate appellate court to bring an appeal must be obtained through a timely application. O.C.G.A. § 5-6-35(d) (2017).

3) **Superior Courts.** Each of Georgia's 159 counties has a superior court, which serves as the trial court of general jurisdiction in this state. Many of these counties are organized together to form one of Georgia's forty-nine judicial circuits. O.C.G.A. § 15-6-1 (2017). The superior courts have original jurisdiction in all cases, except in cases where the constitution provides otherwise. GA. CONST. art. VI, § 4, para. 1. The superior courts have exclusive subject matter jurisdiction by

the Georgia Constitution in four types of cases: (1) trials in felony cases, except in case of juvenile offenders; (2) cases respecting title to land; (3) divorce cases; and (4) equity cases. *Id.*

4) **State Courts.** State courts of counties are courts of limited jurisdiction. GA. CONST. art. VI, § 3, para. 1. They have concurrent jurisdiction with the superior courts over the following types of cases only:

> (1) The trial of criminal cases below the grade of felony;
> (2) The trial of civil actions without regard to the amount in controversy, except those actions in which exclusive jurisdiction is vested in the superior courts;
> (3) The hearing of applications for and the issuance of arrest and search warrants;
> (4) The holding of courts of inquiry;
> (5) The punishment of contempts by fines not exceeding $1,000.00, by imprisonment not exceeding 20 days, or both; and
> (6) Review of decisions of other courts as may be provided by law.

O.C.G.A. § 15-7-4(a) (2017). Not all counties have state courts; state courts exist only where the General Assembly has specifically created such a court by express local act. O.C.G.A. § 15-7-2 (2017).

5) **Probate Court.** Probate courts are given "original, exclusive, and general jurisdiction" over matters including, but not limited to, the probate of wills and all other matters and things as appertain or relate to the estates of deceased persons. O.C.G.A. § 15-9-30 (2017).

6) **Magistrate Court.** Each of Georgia's counties has a magistrate court; a court with limited subject matter jurisdiction over matters including, but not limited to:

> (1) The hearing of applications for and the issuance of arrest and search warrants . . .
> (5) The trial of civil claims including garnishment and attachment in which exclusive jurisdiction is not vested in the superior court and the amount demanded or the value of the property claimed does not exceed $15,000, provided that no prejudgment attachment may be granted;
> (6) The issuance of summons, trial of issues, and issuance of writs and judgments in dispossessory proceedings and distress warrant proceedings as provided in Articles 3 and 4 of Chapter 7 of Title 44;
> (7) The punishment of contempts by fine not exceeding $200.00 or by imprisonment not exceeding ten days or both.

O.C.G.A. § 15-10-2 (2017).

7) **Juvenile Court.** The juvenile court has exclusive original jurisdiction over juvenile matters, except in cases involving criminal acts committed by a minor child. O.C.G.A. § 15-11-10 (2017); O.C.G.A. § 15-11-560 (2017). Juvenile courts share concurrent jurisdiction with the Superior Courts where the child is charged with a criminal act punishable by life imprisonment or death. *Id.* However, Superior Courts maintain exclusive jurisdiction over children thirteen to seventeen charged with serious criminal offenses, including murder, rape, and manslaughter. *Id.*

C) **Alternative dispute resolution.**

1) **Arbitration.** The Georgia Arbitration Code, O.C.G.A. § 9-9-1, *et seq.*, generally applies to disputes in which the parties agreed in writing to arbitrate. Arbitration is mandatory where disputes arise over the annexation of land by municipalities. O.C.G.A. § 36-36-114(a) (2017). Binding arbitration is also authorized, but not mandatory, for medical malpractice cases, O.C.G.A. § 9-9-61 (2017), child custody disputes, O.C.G.A. § 19-9-1.1 (2017), lemon law disputes, O.C.G.A. § 10-1-786(a) (2017), sexual discrimination in employment cases, O.C.G.A. § 34-5-6 (2017), and where a municipality or county development impact fee ordinance provides for the resolution of disputes over the development impact fee. O.C.G.A. § 36-71-10(c) (2017).

2) **Mediation.** Generally, any contested civil or domestic matter case may be referred to mediation. Ga. Model Court Mediation Rule 1 (2015). Georgia requires mediation for unresolved disputes regarding wages, hours, and working conditions of firefighters, O.C.G.A. § 25-5-7 (2017), and requires the establishment of a mediation board to resolve disputes between public utilities and the department of transportation. O.C.G.A. § 32-6-171(d) (2017). Georgia's statutory framework also specifically provides for, but does not necessarily require, mediation where a petition for grandparents' visitation has been filed, O.C.G.A. § 19-7-3(e) (2017), and where a claimant has made a claim under Georgia's Worker's Compensation Act. O.C.G.A. § 34-9-100(b) (2017).

Service of Summons

A) **Person.** Process may be served by the sheriff or deputy for the county where the action is brought or where the defendant is found, or by a civilian who is an American citizen and who is specially appointed by the court. O.C.G.A. § 9-11-4(c) (2017). Service of process can be effected on an individual by delivering: (i) personal service; (ii) service at home or usual place of abode; or (iii) service upon an authorized agent. O.C.G.A. § 9-11-4(e)(7) (2017). In 2009, Georgia amended its code to allow for delivery of pleadings subsequent to the complaint by electronic copy via e-mail. O.C.G.A. § 9-11-5(f) (2017).

B) **Public and private corporations.** Georgia law provides for two distinct ways to serve process on corporations. Under the Civil Practice Act, a corporation incorporated or domesticated under the laws of Georgia or a foreign corporation authorized to transact business in Georgia, may be served by personally serving the president or other officer of the corporation, secretary, cashier, managing agent, or other agent. O.C.G.A. § 9-11-4(e)(1) (2017). However, when for any reason service cannot be effected on such an officer or agent, the Georgia Secretary of State is considered an agent of such corporation upon whom any process, notice, or demand may be served. *Id.* Under the Civil Practice Act, the plaintiff or the plaintiff's attorney shall certify in writing to the Secretary of State that he or she has forwarded by registered mail or statutory overnight delivery such process, service, or demand to the last registered office or agent listed on the records of the Secretary of State, that service cannot be effected at such office, and the plaintiff has mailed a copy

of the summons and a copy of the complaint to the last known address of an officer outside the state. *Id.*

C) **Corporations' registered agents.** In the corporation code, service of process can be effected on a corporation's registered agent. O.C.G.A. § 14-2-504(a) (2017). However, if a corporation has no registered agent or the agent cannot with reasonable diligence be served, the corporation may be served by registered or certified mail or statutory overnight delivery, return receipt requested, addressed to the secretary of the corporation at its principal office. O.C.G.A. § 14-2-504(b) (2017).

D) **Waiver.** A plaintiff may notify the defendant of the commencement of an action by sending a first class mail copy of the complaint and waiver of service of summons. Thereafter, the defendant has thirty days to return the request for waiver, or the defendant is liable for reasonable costs subsequently incurred in effecting service of process. If a defendant does waive service of process, she has sixty days to file her responsive pleading, as compared to the standard thirty days under Georgia law. O.C.G.A. § 9-11-4(d) (2017).

E) **Other.** Personal service outside Georgia is permitted (i) upon persons who are residents of Georgia, and (ii) in any action affecting specific realty or status, or other in rem or quasi in rem proceedings. O.C.G.A. § 9-11-4(f)(2) (2017). Service by publication in Georgia is only available where a court has entered an order allowing service by publication in rem or quasi in rem proceedings or where the defendant could not be found. O.C.G.A. § 9-11-4(f)(1) (2017).

Statutes of Limitations

A) **Construction.** For causes of action based upon damage to real property, written contract, or implied contract, the statutes of limitations are four, O.C.G.A. § 9-3-30(a) (2017), six, O.C.G.A. § 9-3-24 (2017), and four years, O.C.G.A. § 9-3-25 (2017), respectively.

Furthermore, O.C.G.A. § 9-3-51 (2017) provides an eight (8) year statute of ultimate repose for construction defect claims. This does not alter the applicable statute of limitations, but establishes the outermost time in which any action for construction defect can be asserted. O.C.G.A. §§ 9-3-30, 9-3-53. The Georgia Court of Appeals ruled that the statute of repose does not apply to claims for contractual indemnification where the indemnification provision does not require a showing of negligence. *Nat'l Serv. Indus. v. Ga. Power Co.*, 294 Ga. App. 810, 813 (2008). However, a party also "should not be allowed to skirt the statute of repose in O.C.G.A § 9-3-51 by bringing indemnification or defense claims that are essentially claims for deficient construction." *Facility Constr. Mgmt. v. Ahrens Concrete Floors, Inc.*, NO. 1:08-cv-01600-JOF, 2010 U.S. Dist. LEXIS 29242, at *23 (N.D. Ga. Mar. 24, 2010).

In addition, where an injury occurs during the seventh or eighth year after substantial completion, an action in tort to recover damages for an injury or wrongful death may be brought within two years after the date on which such injury occurred, but in no event may such an action be brought more than ten years after the substantial completion of construction of such an improvement. O.C.G.A. § 9-3-51(b) (2017).

B) **Oral contracts.** The statute of limitations for oral contracts is four years in Georgia. O.C.G.A. § 9-3-25 (2014); *Piedmont Life Ins. Co. v. Bell*, 103 Ga. App. 225, 233 (1961).

C) **Written contracts.** The statute of limitations for written contracts is generally six years in Georgia. O.C.G.A. § 9-3-24 (2017). However, if the contract is under seal, the statute of limitation is 20 years. O.C.G.A. § 9-3-23 (2017).

D) **Contribution.** The statute of limitations for a party's right of contribution is generally 20 years in Georgia. O.C.G.A. § 9-3-22 (2014); *Krasaeath v. Parker*, 212 Ga. App. 525, 526 (1994). However, ultimate statutes of repose may limit a parties' right of contribution prior to the expiration of the full twenty years. *Id.*

E) **Employment.** All actions for the recovery of wages, overtime, or damages and penalties accruing under Georgia's laws respecting the payment of wages and overtime shall be brought within two years after the right of action has accrued. O.C.G.A. § 9-3-22 (2017).

F) **Fraud.** The Statute of limitations in Georgia for actions based on fraud is four years. O.C.G.A. § 9-3-31 (2017); *O'Callaghan v. Bank of Eastman*, 180 Ga. 812, 818 (1935).

G) **Governmental entities.** In derogation of the common law, the State of Georgia and its municipalities are generally barred from bringing an action if, under the same circumstances, a private person would be barred. O.C.G.A. §§ 9-3-1 and 9-3-2 (2017). Also, the government is exempt from having its property taken by adverse possession. O.C.G.A. § 44-5-163 (2017).

H) **Improvements to realty.** Georgia law limits the period of recovery to eight years after substantial completion of improvements on real property accruing due to deficiencies in planning, supervising, or constructing improvements to realty. O.C.G.A. § 9-3-51(a) (2017). However, where the injury occurs

> during the seventh or eighth year after such substantial completion, an action in tort to recover damages for an injury or wrongful death may be brought within two years after the date on which such injury occurred, but in no event may such an action be brought more than ten years after the substantial completion of construction of such an improvement.

O.C.G.A. § 9-3-51(b) (2017).

I) **Indemnity.** Actions for indemnity are governed by a twenty-year statute of limitations. O.C.G.A. § 9-3-22 (2017); *Union Carbide Corp. v. Thiokol Corp.*, 890 F. Supp. 1035, 1051 (S.D. GA. 1994).

J) **Personal injury.** O.C.G.A. § 9-3-33 (2017):

> Actions for injuries to the person shall be brought within two years after the right of action accrues, except for injuries to the reputation, which must be brought within one year after the right of action accrues, and except for actions for injuries to the person involving loss of consortium, which must be brought within four years after the right of action accrues.

However, this statute of limitations does not apply to medical malpractice cases. O.C.G.A. § 9-3-34 (2017).

K) **Professional liability.** In Georgia, generally, an action for medical malpractice must be brought within two years "after the date on which an injury or death arising from a negligent or wrongful act or omission occurred," but the ultimate statute of repose prevents any action for medical malpractice to be brought more than five years after the date on which the negligent or wrongful act or omission occurred. O.C.G.A. § 9-3-71 (2017); *but see Amu v. Barnes*, 283 Ga. 549, 553 (2008) ("when a misdiagnosis results in a subsequent injury that is difficult or impossible to date precisely, the statute of limitation[s] runs from the date symptoms attributable to the new injury are manifest[ed] to the plaintiff").

A cause of action for legal malpractice, alleging negligence or unskillfulness, sounds in contract and is subject to a four-year statute of limitations for an oral agreement, or six-year statute of limitation if based on a written agreement. *Morris v. Atlanta Legal Aid Soc'y*, 222 Ga. App. 62, 65 (1996).

L) **Property damage.** Actions for injuries to personal and real property must be brought within four years after the right of action accrues. O.C.G.A. §§ 9-3-31, 9-3-32 (2017).

M) **Survival.** Actions brought or completed under Georgia's survival statute, O.C.G.A. § 9-2-41 (2017), are governed by the corresponding statute of limitations for the underlying tort. *Cf. Eubank v. Barber-Colman Co.*, 115 Ga. App. 217, 218 (1967). Notably, the time between the death of a person and the commencement of representation upon his estate is not counted against his estate in calculating any limitation applicable to the bringing of an action, provided that such time shall not exceed five years. O.C.G.A. § 9-3-92 (2017).

N) **Tolling.** A statute of limitations is tolled for minors and persons who are legally incompetent because of mental retardation or mental illness until their disability is removed. O.C.G.A. § 9-3-90 (2017); *see Grimsby v. Hudnell*, 76 Ga. 378, 383 (1886).

O) **Wrongful death.** Under O.C.G.A. § 9-3-33 (2017), a defendant's liability on a wrongful death claim extends two years from the date of death. *Stafford-Fox v. Jenkins*, 282 Ga. App. 667, 675 (2006) (quoting *Miles v. Ashland Chem. Co.*, 261 Ga. 726 (1991)).

Statute of Repose

A) **Medical malpractice.** Georgia's statute of ultimate repose in medical malpractice case provides that in no event shall an "action for medical malpractice be brought more than five years after the date on which the negligent or wrongful act or omission occurred." O.C.G.A. § 9-3-71(b) (2017).

B) **Real Property**. Similarly, an action concerning the improvements on real property may not be brought more than ten years after the substantial completion of construction of such an improvement. O.C.G.A. § 9-3-51(b) (2017).

C) **Products Liability.** Strict products liability is limited to ten years from the date the product is first sold for use or consumption. O.C.G.A. § 51-1-11(b)(2) (2017).

Venue Rules

Pursuant to the Georgia Constitution, generally, venue must be laid in the county where the defendant resides when the case is filed. GA. CONST. art. VI, § 2, para. 6. However, cases respecting title to land must be placed in the county where the land (or any part thereof) lies. GA. CONST. art. VI, § 2, para. 2. Additionally, where multiple defendants exist, all from Georgia, in cases of joint obligors and joint tortfeasors, venue may be placed in the county in which any of them resides. GA. CONST. art. VI, § 2, para. 4. The Georgia Constitution also provides for special venue rules in cases involving divorce and alimony, equitable relief, and the making and endorsing of notes. GA. CONST. art. VI, § 2, paras. 1, 3, 5. Venue against a corporation is always proper in the county of its registered office. O.C.G.A. § 14-2-510(b)(1) (2017). In some cases, depending in part on whether the underlying action sounds in tort or contract, the action may also lay in a county where the corporate defendant transacts business and has an office, or a county where the cause of action originated. O.C.G.A. § 14-2-510(b)(2), (3), (4) (2017).

NEGLIGENCE

Comparative Negligence

In Georgia, if the plaintiff, in the exercise of ordinary care, could have avoided an accident, he is denied recovery under the doctrine of contributory negligence because the plaintiff's negligence is considered the sole proximate cause of injury. *Laseter v. Clark*, 54 Ga. App. 669, 672 (1936); O.C.G.A. § 51-11-7 (2017). However, in all other cases, Georgia law's comparative negligence rule is that "if the plaintiff's negligence was less than the defendant's, the plaintiff is not denied recovery although his damages shall be diminished by the jury in proportion to the degree of fault attributable to him." *Daniel v. Smith*, 266 Ga. App. 637, 641 (2004) (quoting *Union Camp Corp. v. Helmy*, 258 Ga. 263, 267 (1988)).

Exclusive Remedy—Worker's Compensation protections

The exclusive remedy provision of the Worker's Compensation Act ("WCA") is set forth in O.C.G.A. § 34-9-11(a) and provides that an employee's rights and remedies under the WCA exclude all other rights and remedies of the employee against the employer on account of such injury, loss of service, or death:

> The policy advanced by this provision is to provide the employee, who suffers a work-related injury compensable under the WCA, with statutory benefits from the employer without regard to issues of negligence, contributory negligence, or assumption of risk, while the employer receives immunity from common law tort liability as the quid pro quo for providing the benefits.

Crisp Reg'l Hosp., Inc. v. Oliver, 275 Ga. App. 578, 580 (2005). Accordingly, where the WCA is applicable, it provides the exclusive remedy for an injured employee against the employer. O.C.G.A. § 34-9-11(a) (2017).

Indemnification

In addition to any contractual obligation that might give rise to an indemnification obligation, under Georgia law, "if the negligence of the tortfeasor is passive as opposed to active, a tortfeasor can seek indemnity against a party whose conduct is alleged to be the proximate cause of the injury." *Colt Indus. Operating Corp. v. Coleman*, 246 Ga. 559, 560 (1980). Any right of indemnity from another is not lost by compromise or settlement. O.C.G.A. § 51-12-32(a) (2017).

Joint and Several Liability

A) **History.** Historically, under Georgia law, if a judgment is entered jointly against several tortfeasors and was paid off by one of them, the others shall be liable to him for contribution. Contribution among joint tortfeasors was "enforceable where one has paid more than his share of the common burden which all are equally bound to bear." *Campbell, Odom & Griffith, P.C. v. Doctors Co.*, 281 Ga. App. 684, 685 (2006) (quoting *Tenneco Oil Co. v. Templin*, 201 Ga. App. 30, 35 (1991)).

B) **Tort reform.** Generally, joint tortfeasors are jointly and severally liable for a plaintiff's injuries. *Brewer v. Insight Tech. Inc.*, 301 Ga. App. 694, 700 (2009). In February 2005, the Georgia General Assembly's enactment of "tort reform" placed the legal doctrine of "joint and several liability" in flux. Jason Crawford, J. Clay Fuller, Dustin T. Brown, Kate S. Cook, & E. Wycliffe Orr, *Trial Practice and Procedure*, MERCER L. REV. 381, 384 (2005).

> [The Tort Reform Act] Section 10 replaced Code section 51-12-31, providing that in a case brought against several joint tortfeasors, a plaintiff may only recover damages against a defendant who was actually liable for the injury. The bill also replaced Code section 51-12-33 with a new section requiring the fact-finder to determine the percentage of negligence of the plaintiff and to reduce the amount of damages in proportion to that negligence. Additionally, the fact-finder will apportion the damages among the defendants who are actually liable according to the degree of fault for each party, thus eliminating joint and several liability and any right of contribution. Further, if the plaintiff is 50% or more liable, the bill eliminates the plaintiff's ability to recover any damages.

Hannah Y. Cockett, Rebecca McArthur, Matthew Walker, *Torts and Civil Practice,* 22 GA. ST. U. L. REV. 221, 228 (2005).

Strict Liability

A) **Standard.** Georgia applies strict liability in cases involving blasting or explosives that damage the property of another, *Berger v. Plantation Pipeline Co.*, 121 Ga. App. 362, 363 (1970); *Brooks v. Ready Mix Concrete Co.*, 94 Ga. App. 791, 795 (1956), the ownership of a dog that kills or injures any livestock while not on the premises of its owner or the person having charge of it, O.C.G.A. § 51-2-6 (2017), an innkeeper's duty to prevent theft, O.C.G.A. § 43-21-8 (2017), and damage to property entrusted to common carriers caused by something other than an act of God or public enemies of the state. *Cent. R.R. & Banking Co. v. Hasselkus & Stewart*, 91 Ga. 382, 387 (1892). Additionally, the manufacturer of a new product that is defective at the time of dispatch from the manufacturer and which proximately causes injury to a plaintiff is strictly liable for the defect. O.C.G.A. § 51-1-11(b) (2017).

B) **Learned intermediaries.** Georgia has applied the learned intermediary doctrine, its courts holding that a manufacturer of a prescription drug or medical device

> does not have a duty to warn the patient of the dangers involved with the product, but instead has a duty to warn the patient's doctor, who acts as a learned intermediary between the patient and the manufacturer . . . Under the learned intermediary doctrine, the manufacturer's warnings to the physician must be adequate or reasonable under the circumstances of the case.

McCombs v. Synthes, 277 Ga. 252, 253 (2003).

Willful and Wanton Conduct

In Georgia, "[w]illful conduct is based on an actual intention to do harm or inflict injury; wanton conduct is that which is so reckless or so charged with indifference to the consequences . . . [as to be the] equivalent in spirit to actual intent." *Chrysler Corp. v. Batten*, 264 Ga. 723, 726 (1994) (quoting *Hendon v. Dekalb Cnty.*, 203 Ga. App. 750, 758 (1992)). Conscious indifference to consequences is all that is required to characterize a defendant's negligence as willful and wanton conduct. *McKinsey v. Wade*, 136 Ga. App. 109, 111 (1975). An owner-occupier of land's only duty to a trespasser or licensee is to not willfully or wantonly injure such an individual. *Francis v. Haygood Contracting, Inc.*, 199 Ga. App. 74, 75 (1991); O.C.G.A. § 51-3-2 (2017); O.C.G.A. § 51-3-3 (2017). Additionally, the pleading and proving of willful and wanton conduct will remove the shield of sovereign immunity, *Martin v. Gaither*, 219 Ga. App. 646, 652 (1995), and is required to recover exemplary and punitive damages. O.C.G.A. § 51-12-5.1(b) (2017).

DISCOVERY

Electronic Discovery Rules

Georgia has not adopted the provisions of the Fed. R. Civ. P. 34 or its equivalent to govern the inspection of electronically stored information. *See* O.C.G.A. § 9-11-34(a) (2017); *Agio Corp. v. Coosawattee River Resort Ass'n, Inc.*, 328 Ga. App. 642, 760 S.E.2d 691 (2014).

Expert Witnesses

A) **Forms of disclosure – reports required.** Discovery of facts known and opinions held by experts may be obtained through interrogatories that require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. O.C.G.A. § 9-11-26(b)(4)(A)(i) (2017). A party may also obtain discovery from any expert, but the party obtaining discovery of an expert must pay a reasonable fee for the time spent in responding to discovery by that expert. In limited other situations, another party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial. O.C.G.A. § 9-11-26(b)(4)(A)(ii) (2017). Georgia does not require mandatory disclosure of experts as is required by the Federal Rules of Civil Procedure. O.C.G.A. § 9-11-26 (2017).

B) **Rebuttal witnesses.** The only limitation placed on the calling of rebuttal witnesses in Georgia is the State may only offer expert mental health testimony in the sentencing phase, not the criminal liability stage, and strictly in rebuttal of the expert mental health evidence offered in mitigation by the defense. *Abernathy v. State*, 265 Ga. 754, 756 (1995).

C) **Discovery of expert work product.** In *McKinnon v. Smock*, the Court of Appeals explained the work product doctrine in Georgia:

> When a document is prepared in anticipation of litigation by a party's counsel and then disclosed to that party's testifying expert, the disclosure does not waive the work product protection that should be accorded the document and the document may only be discovered upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means.

209 Ga. App. 647, 648 (1993); O.C.G.A. § 9-11-26(b)(3) (2017).

Non-Party Discovery

A) **Subpoenas.** Unlike under the federal rules, a subpoena is not required to compel non-parties to produce requested documents in Georgia. *See* O.C.G.A. § 9-11-34(c) (2017). However, the non-party may object to the Request for Production of Documents on any grounds available to a party. *Id.* For depositions of a non-party, "the clerk of the superior court of the county in which the action is pending or the clerk of any court of record in the county where the deposition is to be taken may issue subpoenas for the persons sought to be deposed." O.C.G.A. § 9-11-45(a)(1)(A) (2017). Additionally, upon agreement of the parties, "an attorney, as an officer of the court, may issue and sign a subpoena for the person sought to be deposed on behalf of a court in which the attorney is authorized to practice." O.C.G.A. § 9-11-45(a)(1)(B) (2017).

B) **Time frames for responses.** Non-parties have thirty days to respond to requests for production of documents. O.C.G.A. § 9-11-34(b)(2) (2017). However, where the request for production is made to a non-party engaged in the healing arts, the patient can file, within twenty days, an objection to the disclosure of the requested information. O.C.G.A. § 9-11-34(c)(2) (2017). If no objection has been filed within twenty days, the non-party healing artist must comply with the request for production to a non-party. O.C.G.A. § 9-11-34(c)(2) (2017); but see O.C.G.A. § 9-11-34(d).

Privileges

A) **Attorney-client privilege.**

In January 2013, the four different statutes addressing the attorney-client privilege in Georgia—O.C.G.A. §§ 24-9-21, 24-9-27(c), 24-9-24, and 24-9-25—were repealed and replaced by one new statute, O.C.G.A. § 24-5-501, which applies to "certain admissions and communications excluded from evidence on grounds of public policy, including … [c]ommunications between attorney and client…." O.C.G.A. § 24-5-501(a)(2). "The new

Code greatly simplified the statutory language constituting the privilege and eliminated certain 'awkward language' in the prior statutes …. Notwithstanding these changes, the rules governing the privilege in Georgia generally remain the same." *St. Simons Waterfront, LLC v. Hunter, Maclean, Exley & Dunn, P.C.*, 293 Ga. 419, 746 S.E.2d 98, 103 n.1 (2013)

Georgia law provides that

> communications to any attorney or to his employee to be transmitted to the attorney pending his employment or in anticipation thereof shall never be heard by the court. The attorney shall not disclose the advice or counsel he may give to his client, nor produce or deliver up title deeds or other papers, except evidences of debt left in his possession by his client.

Id.

B) **Statements.** Statements made in good faith in the performance of a public, legal, or moral private duty; to protect a speaker's interest in a matter in which it is concerned; and to further the right of free speech or the right to petition government for a redress of grievances under the Constitution of the United States or the Constitution of the State of Georgia in connection with an issue of public interest or concern, among others, are all statutorily-defined privileged communications. O.C.G.A. § 51-5-7 (2017).

C) **Work product.** *Dep't of Transp. v. Hardaway Co*., 216 Ga. App. 262, 263 (1995) (overruled on other grounds by *Johnson & Johnson v. Kaufman,* 226 Ga. App. 77, 82 (1997)) (internal quotations omitted):

> Material obtained or collected by a party is protected from discovery as work product even before claim is instituted if reasonable grounds exist to believe that litigation is probable. The material need not contain the mental impressions, conclusions, opinions, or legal theories of the preparer to be protected, but need only have been prepared in anticipation of litigation.

Georgia's work product doctrine is codified at O.C.G.A. § 9-11-26(b)(3) (2017). Unlike the attorney-client privilege which places the burden of proof on the party claiming the privilege, the "burden of proving a waiver of work-product protection lies on the party asserting the waiver." *McKesson Corp. v. Green*, 279 Ga. 95, 96 (2005). Further, Georgia follows the prevailing view that disclosure to an "adversary, real or potential, forfeits work-product protection." *Id.* (internal quotations omitted). "Of importance to trial practitioners, the supreme court applies a 'clear abuse of discretion' standard of review to a trial court's decision that a party has met the exception to the work product doctrine under O.C.G.A. § 9-11-26(b)(3)." Kate S. Cook, Alan J. Hamilton, John C. Morrison III, *Trial Practice and Procedure,* 60 MERCER L. REV. 397, 414 (2008).

D) **Self-critical analysis.** O.C.G.A. § 31-7-143 (2017):

> The proceedings and records of medical review committees are not subject to discovery or introduction into evidence in any civil action against a provider of professional health services arising out of the matters which are the subject of evaluation and review by such committee and no person who was in attendance at a meeting of a medical review

> committee shall be permitted or required to testify in any such civil action as to any evidence or other matters produced or presented during the proceedings of such committee or as to any findings, recommendations, evaluations, opinions, or other actions of such committee or any members thereof.

Similarly, the proceedings and records of a review organization shall be held in confidence and shall not be subject to discovery or introduction into evidence in any civil action. O.C.G.A. § 31-7-133(a) (2017).

E) **Others for consideration.** Georgia's privileged communications are codified in O.C.G.A. § 24-5-501 (2017). Among other privileged communications, Georgia provides for the following privileges: communications between husband and wife, attorney and client, psychiatrist and patient, licensed psychologist and patient, and a licensed clinical social worker, clinical nurse specialist in psychiatric/mental health, licensed marriage and family therapist, or licensed professional counselor during the psychotherapeutic relationship, accountant and client, among grand jurors, and secrets of state. O.C.G.A. § 24-5-501 (2017).

Requests to Admit O.C.G.A. § 9-11-36 (2017):

> A party may serve upon any other party a written request for the admission . . . of any matters that . . . relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request . . . The matter is admitted unless, within 30 days after service of the request or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by his attorney . . . Any matter admitted . . . is conclusively established unless the court, on motion, permits withdrawal or amendment of the admission.

Unique State Issues

Unlike the Federal Rules of Civil Procedure, the Georgia Civil Practice Act does not place a limit on the number of depositions that may be taken in a given case. *See* O.C.G.A. § 9-11-30 (2017).

EVIDENCE, PROOFS, & TRIAL ISSUES

Accident Reconstruction

An expert witness in accident reconstruction may testify at trial if his or her "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue [and the] witness [is] qualified as an expert by knowledge, skill, experience, training, or education." O.C.G.A. § 24-7-702 (2017); *see also Smith v. Liberty Chrysler-Plymouth-Dodge, Inc.*, 647 S.E.2d 315, 318 (Ga. Ct. App. 2007). "[A] police officer with investigative training and experience on automobile collisions is an expert [in accident reconstruction] . . . even if he is not trained to reconstruct traffic accidents." *Fortner v. Town of Register*, 657 S.E.2d 620, 622-23 (Ga. Ct. App. 2008).

Appeal

A) **When permitted.** Georgia appellate law mainly distinguishes between judgments that are deemed directly appealable and cases requiring an application for appeal. O.C.G.A. §§ 5-6-34 (2016) through 5-6-35 (2011).

1) **Final judgments.** Almost all "final" judgments are directly appealable. O.C.G.A. § 5-6-34(a)(1). However, O.C.G.A. § 5-6-35 provides a list of final judgments that require an application for discretionary appeal, including, but not limited to, superior courts' review of administrative hearings, divorce decrees, and orders denying temporary restraining orders. O.C.G.A. § 5-6-35(a)(1)-(12).

2) **Interlocutory orders.** Generally, non-final or interlocutory orders or rulings, by statute, are directly appealable. O.C.G.A. § 5-6-34(a)(2)-(13).

3) **Non-final orders.** Finally, some non-final orders and rulings are appealable only with permission of both the trial and appellate courts. O.C.G.A. § 5-6-34(b). To appeal most evidentiary or discovery rulings prior to trial requires the permission of the trial court within ten days of the adverse ruling, an application for a discretionary appeal to an appellate court, and the granting of same. *Id*.

B) **Timing.** Notice of appeal must be filed within thirty days after entry of the appealable decision or judgment. O.C.G.A. § 5-6-38(a) (2014). "[W]hen a motion for new trial, a motion in arrest of judgment, or a motion for judgment notwithstanding the verdict has been filed, the notice shall be filed within [thirty] days after the entry of the order granting, overruling, or otherwise finally disposing of the motion. In civil cases, the appellee may institute cross appeal by filing notice thereof within fifteen days from service of the notice of appeal by the appellant." *Id*.

C) **Direct appeals**. O.C.G.A. § 5-6-34(b):

> Where the trial judge in rendering an order, decision, or judgment, not otherwise subject to direct appeal . . . certifies within ten days of entry thereof that the order, decision, or judgment is of such importance to the case that immediate review should be had, the Supreme Court or the Court

> of Appeals may thereupon, in their respective discretions, permit an appeal to be taken from the order, decision, or judgment if application is made thereto within ten days after such certificate is granted. The application shall be in the nature of a petition and shall set forth the need for such an appeal and the issue or issues involved . . . The application shall be filed with the clerk of the Supreme Court or the Court of Appeals and a copy of the application, together with a list of those parts of the record included with the application, shall be served upon the opposing party or parties in the case [at or before the filing of the application] . . . The opposing party or parties shall have ten days from the date on which the application is filed in which to file a response . . . The Supreme Court or the Court of Appeals shall issue an order granting or denying such an appeal within [forty-five] days of the date on which the application was filed. Within ten days after an order is issued granting the appeal, the applicant, to secure a review of the issues, may file a notice of appeal as O.C.G.A. 5-6-37.

D) **Discretionary appeals.** In the case of discretionary appeals filed pursuant to O.C.G.A. § 5-6-35(d), the application must be filed "with the clerk of the Supreme Court or the Court of Appeals within [thirty] days of the entry of the order, decision, or judgment complained of and a copy of the application, together with a list of those parts of the record included with the application, shall be served upon the opposing party or parties as provided by law, except that the service shall be perfected at or before the filing of the application." Under O.C.G.A. § 5-6-35(d), "[w]hen a motion for new trial, a motion in arrest of judgment, or a motion for judgment notwithstanding the verdict has been filed, the application must be filed within [thirty] days after the entry of the order granting, overruling, or otherwise finally disposing of the motion." *Id.*

Biomechanical Testimony

In Georgia appellate courts' limited discussion of biomechanical devices, the courts have found that a person cannot be qualified as an expert in surgery of biomechanics "where he or she would not be lawfully qualified (by holding a valid state license) to perform the treatment which is the subject of the expert opinion." *Riggins v. Wyatt*, 452 S.E.2d 577, 578 (Ga. Ct. App. 1994) (superseded by statute on other grounds). Additionally, the appellate courts have expressed some skepticism about whether "the field of biomechanics includes a technique of determining if specific injuries result from specific accidents," and, if they exist, whether such techniques have "reached a scientific stage of verifiable certainty." *Cromer v. Mulkey Enters., Inc.*, 562 S.E.2d 783, 787 (Ga. Ct. App. 2002).

Collateral Source Rule

In Georgia, the collateral source rule bars a defendant from "presenting any evidence as to payments of expenses of a tortious injury paid for by a third party and taking any credit toward the defendant's liability and damages for such payments." *Hoeflick v. Bradley*, 637 S.E.2d 832, 833 (Ga. Ct. App. 2006). "The collateral source rule applies to payments made by various sources, including insurance companies, beneficent bosses, or helpful relatives." *Id*. Moreover, "Georgia does not permit a tortfeasor to derive any benefit from a reduction in damages for medical expenses

paid by other." *Olariu v. Marrero,* 248 Ga. App. 824, 826 (2001) (quoting *Bennett v. Haley*, 208 S.E.2d 302 (Ga. Ct. App. 1974)).

Convictions

A) **Criminal.** Generally, character of the parties and especially their conduct in other transactions are irrelevant. O.C.G.A. § 24-6-608(b) (2013). But, prior convictions are considered during criminal sentencing. O.C.G.A. § 17-10-2(a)(1) (2009). Under the recidivist statute, persons with three prior felony convictions must serve the maximum sentence for a subsequent felony conviction. O.C.G.A.§ 17-10-7(c) (2015); *Aldridge v. State*, 282 S.E.2d 189, 191-92 (Ga. Ct. App. 1981). A prior conviction may be used both in the guilt-innocence phase of a criminal trial as evidence of a similar transaction, and to enhance punishment under the recidivist statute, as well. *Morgan v. State*, 627 S.E.2d 413, 415 (Ga. Ct. App. 2006). Prior convictions may also be used as impeachment evidence during the guilt-innocence phase, *Carswell v. State*, 589 S.E.2d 605, 607 (Ga. Ct. App. 2003).

In balancing admission as a similar transaction, the Court must determine whether there is a sufficient connection between the prior conviction and the crime charged, because, if not, the prejudicial nature of the prior act evidence will outweigh its probative value. *Martin v. State*, 662 S.E.2d 185, 190 (Ga. Ct. App. 2008). Prior convictions evidence are admissible as a similar transaction if "(1) it is introduced for a proper purpose, (2) sufficient evidence shows that the accused committed the independent offense, and (3) a sufficient connection or similarity exists between the independent offense and the crime charged so that proof of the former tends to prove the latter." *Id*.

Compliance with Uniform Superior Court Rules 31.1 and 31.3, which require the party attempting to use prior acts to give notice to the other party for all prior acts,

> ensures that, at a hearing outside of the presence of the jury, either prior to trial or prior to any mention of such evidence before the jury, the party offering the prior act evidence must show and the court must affirmatively find: (a) that there is sufficient evidence that such an act occurred; (b) that the party offering the evidence has an appropriate purpose for seeking its introduction into evidence and is not seeking to try and show that, because of an unconnected act in the accused's past, the accused should be convicted of the present charge; and (c) that there is a sufficient probative connection between the crime charged and the prior act to justify admission of the prior act into evidence.

Barrett v. State, 436 S.E.2d 480, 482 (Ga. 1993) (overruled). However, the Supreme Court of Georgia overruled prior case law in *Wall v. State*, and held that Uniform Superior Court Rules 31.1 and 31.3 "should not be applied to instances of prior difficulties between the defendant and the victim." 500 S.E.2d 904, 907 (Ga. 1998). Accordingly, the Court held that the trial court must conduct a pre-trial hearing and make certain findings before evidence of prior difficulties between the defendant and the victim can be admitted at trial. *Id.* However, the admission of such evidence should be accompanied by an instruction from the trial judge explaining the limited use to which the jury may put such evidence. *Id.*

B) **Civil cases.** "[A] judgment of conviction or acquittal rendered in a criminal prosecution cannot be given in evidence in a purely civil action, to establish the truth of the facts on which it was rendered. *Continental Cas. Co. v. Parker*, 288 S.E.2d 776, 779 (Ga. Ct. App. 1982). However, "a witness in a civil case may always be impeached by proof of a conviction for a felony or other crime involving moral turpitude." *Giles v. Jones*, 315 S.E.2d 440, 441 (Ga. Ct. App. 1984). Pursuant to O.C.G.A. § 24-6-609, "[e]vidence that any witness has been convicted of a crime shall be admitted regardless of the punishment, if it readily can be determined that establishing the elements of such crime required proof or admission of an act of dishonesty or making a false statement." O.C.G.A. § 24-6-609(a)(2) (2013). Evidence of a conviction under O.C.G.A. § 24-6-609 "shall not be admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for such conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect." O.C.G.A. § 24-6-609(b). "However, evidence of a conviction more than ten years old, as calculated in this subsection, shall not be admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence." *Id.* A party may not use a plea of nolo contendre to impeach a witness. *Pitmon v. State*, 595 S.E.2d 360, 363 (Ga. Ct. App. 2004). Moral turpitude has been defined as "an act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow man, or to society in general, contrary to the accepted and customary rule of right and duty between man and man." *Carruth v. Brown*, 415 S.E.2d 470, 471 (Ga. Ct. App. 1992) (quoting *Huff v. Anderson*, 90 S.E.2d 329 (Ga. 1955)).

C) **Traffic.** "[A] guilty plea to a traffic violation is admissible as an admission against interest, but does not conclusively establish negligence; it is 'only a circumstance to be considered along with the other evidence in the civil action for damages.'" *Gaddis v. Skelton*, 486 S.E.2d 630, 631 (Ga. Ct. App. 1997) (decided under former O.C.G.A. § 24-9-20) (quoting *Roesler v. Etheridge*, 187 S.E.2d 572 (Ga. Ct. App. 1972)). It has also been held that a trial court does not err by allowing the State to rebut a Defendant's good character evidence with evidence of his past traffic convictions. *Campbell v. State*, 470 S.E.2d 503, 505 (Ga. Ct. App. 1996)(decided under former O.C.G.A. § 24-9-20).

D) **Agency.** At least in the context of drivers licensing privileges, proceedings to suspend driving privileges are "strictly civil or administrative in nature since no criminal consequences result from a finding adverse to the [licensee]. Thus, [the administrative] outcome does not control the admissibility in a criminal trial." *Sheffield v. State*, 361 S.E.2d 28, 29 (Ga. Ct. App. 1987) (internal quotations omitted). There is a dearth of case law on other types of administrative law conclusions.

Day in the Life Videos

The admission of day in the life evidence is "generally committed to the sound discretion of the trial court whose determination shall not be disturbed on appeal unless it amounts to an abuse of discretion." *White v. Regions Bank*, 561 S.E.2d 806, 809 (Ga. 2002) (internal quotations omitted). Where such videos are used and there is testimony as to immaterial variations between the picture and the victim's life, "the judge's decision to admit the pictorial representation will not ordinarily be reversed." *Eiland v. State*, 203 S.E.2d 619, 621 (Ga. Ct. App. 1973). However,

> movies which are posed, which are substantially different from the facts of the case, and which because of the differences might well be prejudicial and misleading to the jury, should not be used, and this is especially true where the situation or event sought to be depicted is simple, the testimony adequate, and the picture adds nothing except the visual image to the mental image already produced.

Id. A cumulative objection normally will not stand against "day in the life" evidence because the party should be allowed to present the evidence in its most probative and persuasive form. *See Kirkland v. State*, 424 S.E.2d 638, 642-43 (Ga. Ct. App. 1992); *Department of Transp. v. Petkas*, 377 S.E.2d 166, 171-72 (Ga. Ct. App. 1988).

Dead Man's Statute

Georgia repealed its Dead Man's statute in 1979. *Murray v. Stone*, 655 S.E.2d 821, 822-23 (Ga. 2008); *see also* O.C.G.A. § 24-6-601 (2013).

Medical Bills

O.C.G.A. § 24-9-921(2013):

> Upon the trial of any civil case involving injury or disease, the patient or the member of his family or other person responsible for the care of the patient shall be a competent witness to identify bills for expenses incurred in the treatment of the patient upon a showing by such witness that the expenses were incurred in connection with the treatment of the injury, disease, or disability involved in the subject of litigation at trial and that the bills were received from: (1) A hospital; (2) An ambulance service; (3) A pharmacy, drugstore, or supplier of therapeutic or orthopedic devices; or (4) A licensed practicing physician, dentist, orthodontist, podiatrist, physical or occupational therapist, doctor of chiropractic, psychologist, advanced practice registered nurse, social worker, professional counselor, or marriage and family therapist. Such items of evidence need not be identified by the one who submits the bill, and it is not necessary for an expert witness to testify that the charges were reasonable and necessary. However, nothing in this Code section shall be construed to limit the right of a thorough and sifting cross-examination as to such items of evidence.

Offers of Proof

Hendrix v. Byers Bldg. Supply, Inc., 307 S.E.2d 759, 761 (Ga. Ct. App. 1983):

> [I]t is a well settled rule [in Georgia] that in order to preserve a ground of objection relating to the exclusion of oral testimony it is necessary for the complaining party to show what he expects to prove and that the evidence is material, relevant and beneficial . . . [and] that where an offer of proof is necessary it is error for the trial

judge to deny counsel an opportunity to state what he proposes to prove by the evidence offered.

However, where counsel fails to make testimony available either through counsel's "own affidavit or through the procedures for subpoenaing out-of-state witnesses, the trial judge [does] not abuse his discretion in disallowing the proffer of proof of the hearsay testimony, both as to what counsel thought [the witness] would testify and as to what [the witness] had allegedly told counsel." *Castell v. State*, 314 S.E.2d 210, 212 (Ga. 1984).

Offers of Judgment

In Georgia,

(a) At any time more than thirty days after the service of a summons and complaint on a party but not less than thirty days (or twenty days if it is a counteroffer) before trial, either party may serve upon the other party, but shall not file with the court, a written offer, denominated as an offer under this Code section, to settle a tort claim for the money specified in the offer and to enter into an agreement dismissing the claim or to allow judgment to be entered accordingly. Any offer under this Code section must:
(1) Be in writing and state that it is being made pursuant to this Code section;
(2) Identify the party or parties making the proposal and the party or parties to whom the proposal is being made;
(3) Identify generally the claim or claims the proposal is attempting to resolve;
(4) State with particularity any relevant conditions;
(5) State the total amount of the proposal;
(6) State with particularity the amount proposed to settle a claim for punitive damages, if any;
(7) State whether the proposal includes attorney's fees or other expenses and whether attorney's fees or other expenses are part of the legal claim; and
(8) Include a certificate of service and be served by certified mail or statutory overnight delivery in the form required by Code Section 9-11-5.

(b) (1) If a defendant makes an offer of settlement which is rejected by the plaintiff, the defendant shall be entitled to recover reasonable attorney's fees and expenses of litigation incurred by the defendant or on the defendant's behalf from the date of the rejection of the offer of settlement through the entry of judgment if the final judgment is one of no liability or the final judgment obtained by the plaintiff is less than 75% of such offer of settlement.
(2) If a plaintiff makes an offer of settlement which is rejected by the defendant and the plaintiff recovers a final judgment in an amount greater than 125% of such offer of settlement, the plaintiff shall be entitled to recover reasonable attorney's fees and expenses of litigation incurred by the plaintiff or on the plaintiff's behalf from the date of the rejection of the offer of settlement through the entry of judgment.

(c) Any offer made under this Code section shall remain open for 30 days unless sooner withdrawn by a writing served on the offeree prior to acceptance by the offeree, but an offeror shall not be entitled to attorney's fees and costs under subsection (b) of this Code section to the extent an offer is not open for at least thirty days (unless it is rejected during that 30 day period).A counteroffer shall be deemed a rejection but may serve as an offer under this Code section if it is specifically denominated as an offer under this Code section. Acceptance or rejection of the offer by the offeree must be in writing and served upon the offeror. An offer that is neither withdrawn nor accepted within 30 days shall be deemed rejected. The fact that an offer is made but not accepted does not preclude a subsequent offer. Evidence of an offer is not admissible except in proceedings to enforce a settlement or to determine reasonable attorney's fees and costs under this Code section.

O.C.G.A. § 9-11-68 (2006). Although § 9-11-68(b)(1) was found unconstitutional in its retroactive application of substantive law, the most recent cases uphold the general constitutionality of the subsection despite a challenge alleging the subsection impedes a constitutional right of access to the courts. *Compare Fowler Props., Inc., v. Dowland*, 646 S.E.2d 197 (Ga. 007), *with Smith v. Baptiste*, 694 S.E.2d 83 (Ga. 2010); *see also Georgia Dep't of Corrections v. Couch*, 759 S.E.2d 804 (Ga. 2014).

Prior Accidents

Stovall v. DaimlerChrysler Motors Corp., 608 S.E.2d 245, 247 (Ga. Ct. App. 2004) (internal quotations omitted):

> Similar acts or omissions on other and different occasions are not generally admissible to prove like acts or omissions at a different time or place. However, in product liability cases, an exception to the general rule has developed, and in some cases evidence of other substantially similar incidents involving the product is admissible and relevant to the issues of notice of a defect and punitive damages.

Additionally, "such evidence may under certain limited circumstances be admissible to establish, among other things, a course of conduct or bad faith . . . [or] when the question of malice or wanton misconduct [arises]." *D.G. Jenkins Homes, Inc. v. Wood*, 582 S.E.2d 478, 481 (Ga. ct. App. 2003).

Relationship to the Federal Rules of Evidence

On January 1, 2013, Georgia adopted new Rules of Evidence, which are more closely aligned with the Federal Rules of Evidence. These new rules are found in Title 24 of the Georia Civil Practice Act. According to a leading Georgia evidence commentator, the new Georgia rules are based on the Federal Rules of Evidence, "with a few changes to address known problems with the current Federal Rules or to retain desirable Georgia policies." Paul S. Milich, *Georgia's New Evidence Code -- An Overview*, 28 GA. ST. U. L. REV. 379, 382 (2011).

Seat Belt and Helmet Use Admissibility

A) **Seat belts.** O.C.G.A. § 40-8-76.1(d) generally prohibits the introduction of evidence that a party sitting in the front seats of a vehicle was not wearing his seat belt at the time of his injury, while allowing evidence of seat belt use regarding a passenger in the rear seat. *See Purvis v. Virgil Barber Contractor*, 421 S.E.2d 303, 305 (Ga. Ct. App. 1992) (holding that the statute applies to front seat passengers, not rear seat passengers). However, even where such seat-belt evidence is admissible, Georgia's appellate courts have consistently held that "seat belt evidence is relevant only to the issue of damages." *Id.* at 16.

B) **Helmets.** Despite this rule for seat belts, Georgia courts have relied on evidence that a party attempted to rent a helmet to support an assumption of the risk defense. *Fowler v. Alpharetta Family Skate Ctr., LLC*, 601 S.E.2d 818, 820 (Ga. Ct. App. 2004) ("The fact that [Plaintiff] attempted to rent a helmet to protect his head from injury shows that he understood and appreciated the risk of injury he would face if he did fall and strike the ice.").

Spoliation

A) **Effect of spoliation.** Georgia does not recognize spoliation of evidence, destruction or failure to preserve evidence that is necessary to contemplated or pending litigation, as a separate tort. *Bouvé & Mohr, LLC v. Banks*, 618 S.E.2d 650, 654 (Ga. Ct. App. 2005); *cf. Owens v. American Refuse Sys., Inc.*, 536 S.E.2d 782, 784 (Ga. Ct. App. 2000). Rather, in the way of sanction, a trial court may: (1) charge the jury that spoliation of evidence creates a rebuttable presumption that the evidence would have been harmful to the spoliator; (2) dismiss the entire case; or (3) exclude testimony about the evidence. *Brito v. Gomez Law Group, LLC*, 658 S.E.2d 178, 184-85 (Ga. Ct. App. 2008); *see R.A. Siegel Co. v. Bowen*, 539 S.E.2d 873, 877 (Ga. Ct. App. 2000); *Chapman v. Auto Owners Ins. Co.*, 469 S.E.2d 783, 785-86 (Ga. Ct. App. 1996). However, the Supreme Court of Georgia long ago determined that a jury charge regarding spoliation "can be given . . . only in exceptional cases, and the greatest caution must be exercised in its application." *Cotton States Fertilizer Co. v. Childs*, 174 S.E.2d 708, 711 (Ga. 1934); *accord AT Sys. S.E., Inc. v. Carnes*, 613 S.E.2d 150, 153 (Ga. Ct. App. 2005).

B) **Factors.** Georgia courts have routinely considered five factors in determining whether a party has spoliated evidence:

> (1) whether the [complaining party] was prejudiced as a result of the destruction of evidence; (2) whether such prejudice could be cured; (3) the practical importance of the evidence; (4) whether the [party who destroyed the evidence] acted in good or bad faith; and (5) the potential for abuse if expert testimony about the evidence is not excluded.

Bridgestone/Firestone N. Am. Tire, LLC v. Campbell Nissan N. Am., 574 S.E.2d 923, 926 (Ga. Ct. App. 2002); *Bowen*, 539 S.E.2d at 877; *Chapman*, 469 S.E.2d 783 at 785. If spoliation is found to exist under these factors, it gives rise to a rebuttable presumption under O.C.G.A. § 24-14-22 such that:

> [i]f a party has evidence in such party's power and within such party's reach by which he or she may repel a claim or charge against him or her but omits to produce it or if such party has more certain and satisfactory evidence in his or her power but relies on that which is of a weaker and inferior nature, a presumption arises that the charge or claim against such party is well founded; but this presumption may be rebutted.

O.C.G.A. § 24-14-22 (2013). However, this code section does not apply to criminal cases, because such a presumption would violate the accused's right to be convicted only upon proof beyond a reasonable doubt. *Radford v. State*, 302 S.E.2d 555, 559 (Ga. 1983) (decided under former O.C.G.A. § 24-4-22). In enacting former § 24-4-22, which is nearly identical to the current code, the Georgia Legislature intended that "a party should be penalized by the presumption for withholding evidence within their power to produce, and relying on evidence of an inferior nature." *Jones v. Krystal Co.*, 498 S.E.2d 565, 569 (Ga. Ct. App. 1998) (decided under former O.C.G.A. § 24-4-22).

Subsequent Remedial Measures

In Georgia, "[e]vidence of subsequent remedial measures generally is inadmissible in negligence actions, because the admission of such evidence basically conflicts with the public policy of encouraging safety through remedial action." *McCorkle v. Department of Trans.*, 571 S.E.2d 160, 163 (Ga. Ct. App. 2002). Courts generally presume that evidence of subsequent remedial measures is offered for the purpose of proving negligence. *Id*. But, when the remedial action tends to prove some fact of the case on trial, other than awareness of negligence, such evidence may be admissible. *Thomas v. Department of Trans.*, 502 S.E.2d 748, 750 (Ga. Ct. App. 1998). Subsequent remedial acts may be admitted where the feasibility of repair or modification is an issue at trial, to show contemporary knowledge of the defect, causation, or to rebut a contention that it was impossible for the accident to happen in the manner claimed. *Id*.

Use of Photographs

A still photograph may be admitted where there has been a foundational showing that it is a fair and accurate representation of the scene sought to be depicted. *Rower v. State*, 466 S.E.2d 897, 901 (Ga. Ct. App. 1995); *see also* O.C.G.A. § 24-9-923 (2013). Testimony of the photographer or individuals in the chain of custody is not required. *Department of Trans. v. Millen*, 474 S.E.2d 687, 688-89 (Ga. Ct. App. 1996). "The admission or exclusion of photographs, even when there is admittedly some difference in the situation portrayed and that which existed, is a matter within the discretion of the trial judge and will not be controlled unless abused." *Skipper v. Department of Trans.*, 399 S.E.2d 538, 543 (Ga. Ct. App. 1990) (quoting *Rush v. State*, 1373 S.E.2d 377 (Ga. Ct. App. 1988)).

DAMAGES

Caps on Damages

In 2005, the Georgia Tort Claims Act added Chapter 13 to the Georgia code, providing for a $350,000.00 cap on damages in certain medical malpractice situations. O.C.G.A. § 51-13-1. However, the caps on noneconomic damages were held unconstitutional in *Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt* because the caps infringed on a party's constitutional right to have a jury determine noneconomic damages. 286 Ga. 731, 735-36 (2010); *see* Ga. Const. Art. I, § I, Para. XI(a).

> By requiring the court to reduce a noneconomic damages award determined by a jury that exceeds the statutory limit, O.C.G.A. § 51-13-1 clearly nullifies the jury's findings of fact regarding damages and thereby undermines the jury's basic function.

Nestlehutt, 286 Ga. at 736. The Georgia Supreme Court held O.C.G.A. § 51-13-1 to be wholly void and of no force and effect from the day it was enacted. *Nestlehutt*, 286 Ga. at 738. However, the Court in Nestlehutt upheld caps on punitive damages because, unlike the measure of actual damages suffered, punitive damages are not a fact tried by the jury; therefore, there is no constitutional right to have a jury determine punitive damages. *Id*. at 736. Punitive damages are generally limited to $250,000. O.C.G.A. § 51-12-5.1(g) (2017). The 2005 Georgia Tort Claims Act also placed caps on damages awarded in tort claims against the State, O.C.G.A. § 50-21-29(b)(1), but the constitutionality of this section is questionable in light of Nestlehutt because under § 50-21-29(b)(1), "any caps specified under Code Section 51-13-1 . . . shall serve as a total cap of all damages, regardless of the type of damages claimed." There is no case law addressing the constitutionality of O.C.G.A § 50-21-29 post Nestlehutt. [no signal].

Calculation of Damages

Not unlike other jurisdictions, in Georgia, "[t]he awarding of damages is to compensate the plaintiff for damages sustained, and not to unreasonably burden the defendants beyond the point of compensating the plaintiff." *Atlanta Recycled Fiber Co. v. Tri-Cities Steel Co.*, 152 Ga. App. 259, 265 (1979). "General damages are those which the law presumes to flow from any tortious act; they may be recovered without proof of any amount." O.C.G.A. § 51-12-2(a) (2017). "Special damages are those which actually flow from a tortious act; they must be proved in order to be recovered." O.C.G.A. § 51-12-2(b) (2017). "The burden is on the plaintiff to show both the breach and the damage, and this must be done by evidence which will furnish the jury data sufficient to enable them to estimate with reasonable certainty the amount of damages. The damage award cannot be left to speculation, conjecture and guesswork." *Hosp. Auth. of Charlton Cnty. v. Bryant*, 157 Ga. App. 330, 331 (1981) (internal quotations omitted).

Available Items of Personal Injury Damages

A) **Past medical bills.** Opinion testimony of an attending physician as to "the reasonable value of other medical, hospital, and nursing services, based on some direct knowledge of the nature and extent of such services and hypothetical information" is generally admissible. *Callaway v. Miller*, 118 Ga. App. 309, 312-13 (1968). Also, testimony by the plaintiff is admissible to identify bills received for medical and hospital expense incurred

and for which he was responsible. *Id.* at 313. "The best evidence rule does not apply to fact of payment of medical charges"; a plaintiff may testify without the introduction of medical bills and invoices. *Bush v. Wyche*, 147 Ga. App. 807, 808 (1978). However, to recover, a plaintiff must show the medical charges were necessary expenses incurred on account of the plaintiff's injuries. *Colvard v. Mosley*, 270 Ga. App. 106, 109 (2004).

B) **Future medical bills. "**To warrant future medical expenses, there must be evidence that the injury will require future medical attention." *Massie v. Ross*, 211 Ga. App. 354, 354 (1993) (quoting *Gusky v. Candler Gen. Hosp.*, 192 Ga. App. 521, 524 (1989)). "An award of future medical costs must be supported by competent evidence to guide the jury in arriving at a reasonable value for such expenses" and cannot be based on mere conjecture and speculation that the plaintiff would have future expenses. *Bridges Farm v. Blue*, 221 Ga. App. 773, 775 (1996) (affirmed in part, reversed in part by *Bridges Farms v. Blue*, 267 Ga. 505, 506 (1997)) (internal quotations omitted). A court should instruct the jury that any award for future medical expenses should be reduced to its present cash value. *Hughes v. Brown*, 109 Ga. App. 578, 579 (1964); O.C.G.A. § 51-12-13 (2017).

C) **Hedonic damages.** Hedonic damages, which are meant to compensate for loss of enjoyment of life's activities, are available in Georgia as part of pain and suffering awards. *Dowling v. Lopez*, 211 Ga. App. 578, 580 (1993); *Food Lion v. Williams*, 219 Ga. App. 352, 355 (1995). Also, plaintiffs in wrongful death actions in Georgia may be entitled to damages for the "full value of the life of the decedent," which consists of two elements, the economic value of the deceased's normal life expectancy and the intangible element incapable of exact proof. *Miller v. Jenkins*, 201 Ga. App. 825, 826 (1991). This second intangible element is determined by the value of the life as established by the "enlightened conscience of an impartial jury" as applied to the evidence in the case, including testimony regarding age, life expectancy, precocity, health, mental and physical development, family circumstances, and from the experience and knowledge of human affairs on the part of the jury. *Ga. Dep't of Human Res. v. Johnson*, 264 Ga. App. 730, 738 (2003).

D) **Disfigurement.** Disfigurement is an element of damages awarded under the larger category of pain and suffering and is measured by the "enlightened conscience of impartial jurors." *Langran v. Hodges*, 60 Ga. App. 567, 569 (1939).

E) **Loss of normal life.** This area of damages largely mirrors the discussion of hedonic damages above.

F) **Disability.** Where the injury to a plaintiff is permanent and affects his ability to labor and earn money, the following scheme applies: where there is no evidence from which to determine the amount of earned money which may be lost over the remaining lifetime, the amount is determined by the enlightened conscience of the jury and may be classified with pain and suffering. *Michaels v. Kroger Co.*, 172 Ga. App. 280, 283 (1984). Conversely, where there is evidence that the plaintiff is earning and will continue to earn money and that his earning capacity has been diminished, an award may be based on percentage of diminution of earning capacity. *Id.* In the latter case, wherever there is evidence of the pecuniary value of the plaintiff's earning capacity at the time of the injury coupled with evidence of the nature and extent of the diminution of that capacity, the jury may arrive at a reasonable and just compensation for impairment of earning capacity. *Id*. at 284.

G) **Past pain and suffering.** *Ga. Power Co. v. Braswell*, 48 Ga. App. 654, 660 (1934):

> Physical pain and suffering in consequence of a tort occasioning an injury to the plaintiff is a proper element of damages. There is no standard by which physical pain and suffering may be measured in money. It can only be said that an award of damages therefore should be estimated in a fair and reasonable manner, and not by any sentimental or fanciful standard, and should constitute a reasonable compensation to the plaintiff upon the facts disclosed by the evidence. The jury is entitled to consider the length of the plaintiff's suffering, the nature of his injury, his age, health, habits, and pursuits. It is not necessary that there should be direct evidence that the plaintiff will suffer pain in the future, but the jury is entitled to draw all such inferences from the evidence as are justified by the common experience and observations of mankind. The only measure of such damages is the enlightened conscience of an impartial jury.

Pain and suffering damages can be proven by the injured, someone familiar with the injured party, or an expert witness who can describe the severity of the injured's pain and suffering. *Richardson v. Downer*, 232 Ga. App. 721, 723 (1998); GA. LAW ON DAMAGES (2007-2008 Ed.) § 4.3. Largely following the "impact rule," Georgia courts have held in the past that in cases "where mere negligence is relied on, before damages for mental pain and suffering are allowed, there must also be an actual physical injury to the person, or a pecuniary loss resulting from an injury to the person which is not physical." *Nationwide Mut. Fire Ins. Co. v. Lam*, 248 Ga. App. 134, 137 (2001). However, in the case of *Oliver v. McDade* the court found that a plaintiff may recover damages for mental pain and suffering under the pecuniary loss rule, absent a showing of physical injury, due to pecuniary loss being shown due to nonphysical injuries such as depression or anxiety. 328 Ga. App., 368, 270 (2014).

H) **Future pain and suffering.** When damages are sought for future pain and suffering, three elements are involved: "(a) physical pain and suffering; (b) mental suffering and anxiety; (c) loss of ability to labor." *Baxter v. Bryan*, 122 Ga. App. 817, 821 (1970). The permanent or partial loss of the ability to work will be addressed below. Testimony by the plaintiff and others that the plaintiff has become irritable, overly excitable, moody, depressed, or anxious since a permanent injury will warrant a charge of future mental suffering. *Rosenfeld v. Young*, 117 Ga. App. 35, 37 (1967). Long ago, the Supreme Court determined that future pain and suffering may form an element in estimating damages, provided the evidence renders it reasonably certain that they will necessarily result from the injury. *Atlanta & W.P. R.R. v. Johnson*, 66 Ga. 259 (1881).

> [A] jury [is] authorized to infer that the effect of the injuries would be permanent, from the character of the suffering and the length of time it had continued. This is true although a physician has testified that the injuries were temporary. The question is for the jury, who can, if they see fit, attach as much probative value to the testimony of the person injured as to the opinion of the physician.

White v. Knapp, 31 Ga. App. 344, 346 (1923).

I) **Loss of society.** Georgia recognizes a cause of action for loss of spousal consortium. *W.J. Bremer Co. v. Graham*, 169 Ga. App. 115, 116 (1983). Each spouse is entitled to the

> comfort, companionship, and affection of the other. The rights of the one and the obligations of the other spring from the marriage contract, are mutual in character, and

> attach to the husband as husband and to the wife as wife. Any interference with these rights, whether of the husband or of the wife, is a violation, not only of a natural right, but also of a legal right arising out of the marriage relation.

Id. However, the mental anguish of a relative or friend due solely to grief over injury to another is not compensable. *Elsberry v. Lewis*, 140 Ga. App. 324, 327 (1976).

J) **Lost income, wages, earnings.** The loss of wages, salary, commission, or other earnings between the date of the injury and trial is certainly recoverable. *See, Porter v. Bland*, 105 Ga. App. 703, 709 (1962).

> Where there is evidence of the percentage of permanent disability, and evidence of the degree to which this disability may reasonably affect future income, a charge for future damages related to earning capacity [must be given] . . . The amount awarded and representing loss of earnings must be reduced to present cash value. However, where lost future earnings as such are sought, the loss is pecuniary and must be proved with reasonable certainty. Damages recoverable for the loss of probable future earnings must be pleaded, and proved by introducing in evidence sufficient data upon which the jury may base their finding.

Long v. Serritt, 102 Ga. App. 550, 554-55 (1960) (internal quotations omitted). A diminution in one's capacity to labor is an element of pain and suffering. *Wall Realty Co. v. Leslie*, 54 Ga. App. 560, 563 (1936). The rule for determining such damages is the enlightened consciences of fair and impartial jurors. *City Council of Augusta v. Drawdy*, 75 Ga. App. 543, 547 (1947).

Lost Opportunity Doctrine

Discussed above in the context of the "increased risk of harm", the loss of an opportunity of survival doctrine is not well-developed in Georgia case law. It is clear, however, that the doctrine is not available under the wrongful death statute. *Dowling* , 211 Ga. App. At 580. Other claims associated with loss of chance of survival, such as pain and suffering, loss of consortium, loss of enjoyment of life, may be available outside the wrongful death statute. *Id.* In a failure to diagnose an incurable illness case, there can be no lost opportunity damages because, as a matter of law, the proximate cause of death is the incurable condition, and not the misdiagnosis. *Pruette v. Phoebe Putney Mem'l. Hosp.*, 295 Ga. App. 335, 340 (2008).

Mitigation

"When a person is injured by the negligence of another, he must mitigate his damages as far as is practicable by the use of ordinary care and diligence." O.C.G.A. § 51-12-11 (2014). But, "this duty to mitigate does not apply in cases of positive and continuous torts." *Id*. Georgia courts have defined three types of "positive and continuous torts": (1) fraud; (2) "ongoing violations of property rights;" and (3) "intentional torts such as assault and battery." *Wachovia Bank of Ga., N.A. v. Namik*, 275 Ga. App. 229, 232 (2005). For example, where the deceased refuses to go to a hospital when he was injured and thus fails to exercise the proper care to obtain treatment, as it was his duty to do, a jury is authorized to lessen his damages for pain and suffering. *Rosenthal v. O'Neal*, 108 Ga. App. 54, 54-55 (1963).

Punitive Damages

A) **When may be brought.** "Punitive damages shall be awarded not as compensation to a plaintiff but solely to punish, penalize, or deter a defendant." O.C.G.A. § 51-12-5.1(c) (2017). Furthermore,

> [a]n 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 must first resolve from the evidence produced at trial whether an award of punitive damages shall be made. This finding is to be made specially through an appropriate form of verdict, along with the other required findings. If it is found that punitive damages are to be awarded, the trial is 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) (2017).

B) **Standard.** "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) (2017).

C) **Insurability.** In Georgia, the actual language of the insurance policy is the decisive factor in determining whether punitive damages are covered by the insurer. *Grain Dealers Mut. Ins. Co. v. Pat's Rentals*, 269 Ga. 691, 692 (1998).

D) **Caps.** For any tort action where punitive damages are awarded, not involving products liability or a specific intent to cause harm, the amount which may be awarded in the case shall be limited to a maximum of two hundred and fifty thousand dollars ($250,000.00). O.C.G.A. § 51-12-5.1(e)-(g) (2017). In products liability cases, 75% of all punitive damages must be paid to the state. *Id.* at § 51-12-5.1(e)(2); *State v. Mosely*, 263 Ga. 680 (1993). Additionally, where the defendant acted or failed to act while "under the influence of alcohol, drugs other than lawfully prescribed drugs administered in accordance with prescription, or any intentionally consumed glue, aerosol, or other toxic vapor to that degree that his or her judgment is substantially impaired," there shall be no limitation regarding the amount which may be awarded as punitive damages. O.C.G.A. § 51-12-5.1(f) (2017). In. Nestlehutt, the Supreme Court of Georgia held punitive damages to be constitutional. 286 Ga. 731, 735 (2010).

Recovery and Pre- and Post-Judgment Interest

A) **Prejudgment interest.** According to O.C.G.A. § 51-12-14(a), if the judgment entered in favor of the plaintiff is "not less than" the amount demanded, then pre-trial interest will apply. This is important language because it is distinct from the verdict that may be awarded by the jury. A judgment may be variable for many reasons. (2017).

As for a judgment that is equal to the amount demanded, it would stand to reason, based on the language of the statue, that pre-judgment interest will be applicable. *Id*. The rate described in the statute is the prime rate, at the thirteenth day after the mailing of the demand letter, plus 3%. O.C.G.A. § 51-12-14(c) (2017). The date of the start of the calculation is also the 30th day following the mailing of the demand letter to the date of the entry of the judgment. *Id*.

B) **Post-judgment interest.** After the entry of the judgment, a different statute, O.C.G.A. § 7-4-12(a) (2017), takes over to apply post-judgment interest at the same rate, i.e. prime rate at the time of the entry of the judgment plus 3%. This could be a different rate from the pre-judgment rate depending on what the prime rate is at the two relevant times.

There are many variations on the calculations, specifically, what is included and what is not included in the calculation, that makes up the basis for whether it is greater than or equal to the demand. For instance, the pre-judgment interest statute is read in pari materia with the post-judgment statute. That means that the interest that is paid post-judgment is added to the judgment amount to be considered when determining whether it is greater than or equal to the demand. In addition, any awards of attorney's fees are added to the amount as well.

Recovery of Attorneys' Fees

As a general rule, Georgia law does not provide for the award of attorney fees even to a prevailing party, unless an award is authorized by statute or by contract.

A) **Statute.** "When awarded by statute, such fees may be obtained only pursuant to the statute under which the action was brought and decided." *Suarez v. Halbert*, 246 Ga. App. 822, 824 (2000). One specific example of such a statute is O.C.G.A. § 13-6-11, which provides: "where the plaintiff has specially pleaded and has made prayer therefore and where the defendant has acted in bad faith, has been stubbornly litigious, or has caused the plaintiff unnecessary trouble and expense, the jury may allow [attorney fees]." O.C.G.A. § 13-6-11 (2017). Also relevant to personal injury cases, attorneys' fees and expenses of litigation in an underlying action may be recoverable in a subsequent action as real damages incurred as the result of defendants' malfeasance or misfeasance. The effect of such a claim is to attempt to place the plaintiff in the same position he would have occupied had the plaintiff not been forced to litigate with a third party. *Atlanta Woman's Club v. Washburne*, 215 Ga. App. 201, 202 (1994). Additionally, attorney fees may be, in limited circumstances, available under the Civil Practice Act for motions to compel and offers of settlement. O.C.G.A. §§ 9-11-26, -58 (2017).

If a party fails to prove that "the attorney's services were of any value whatsoever, or what a reasonable fee for the services would be," the party is not entitled to recover for this element of his lawsuit. *Willis-Wade Co. v. Lowry*, 144 Ga. App. 606, 606-07 (1978) (quoting *Talley-Corbett Box Co. v. Royals*, 134 Ga. App. 769, 771 (1975)). Nonetheless, after hearing testimony regarding hours spent in preparation for trial, as experienced and able lawyers, trial judges are "quite capable" of placing a value on the legal services rendered by an attorney. *Webster v. Webster*, 250 Ga. 57, 58 (1982). Pro se litigants who are not attorneys cannot recover attorney fees because of the lack of any meaningful standard for calculating the amount of the award. *Jarallah v. Am. Culinary Fed'n*, 242 Ga. App. 595, 596 (2000).

Settlement Involving Minors

O.C.G.A. § 29-3-3 (2017):

> If the minor has a conservator, the only person who can compromise a minor's claim is the conservator. Whether or not legal action has been initiated, if the proposed gross settlement of a minor's claim is fifteen thousand dollars ($15,000.00) or less, the natural guardian of the minor may compromise the claim without becoming the conservator of the minor and without court approval. The natural guardian must qualify as the conservator of the minor in order to receive payment of the settlement if necessary to comply with the affidavit requirements of O.C.G.A. § 29-3-1. If no legal action has been initiated and the proposed gross settlement of a minor's claim is more than fifteen thousand dollars ($15,000.00), the settlement must be submitted for approval to the court. If legal action has been initiated and the proposed gross settlement of a minor's claim is more than fifteen thousand dollars ($15,000.00), the settlement must be submitted for approval to the court in which the action is pending. The natural guardian or conservator shall not be permitted to dismiss the action and present the settlement to the court for approval without the approval of the court in which the action is pending. If the proposed gross settlement of a minor's claim is more than fifteen thousand dollars ($15,000.00), but such gross settlement reduced by: (1) Attorney's fees, expenses of litigation, and medical expenses which shall be paid from the settlement proceeds; and (2) The present value of amounts to be received by the minor after reaching the age of majority is more than fifteen thousand dollars ($15,000.00), the natural guardian may not seek approval of the proposed settlement from the appropriate court without becoming the conservator of the minor. If an order of approval is obtained from the court, or a court in which the action is pending, based upon the best interest of the minor, the natural guardian or conservator shall be authorized to compromise any contested or doubtful claim in favor of the minor without receiving consideration for such compromise as a lump sum. Without limiting the foregoing, the compromise may be in exchange for an arrangement that defers receipt of part, not to exceed a total distribution of fifteen thousand dollars ($15,000.00) prior to a minor reaching the age of majority, or all of the consideration for the compromise until after the minor reaches the age of majority and may involve a structured settlement or creation of a trust on terms which the court approves. Any settlement entered consistent with the above described statutory scheme is final and binding upon all parties, including the minor.

Where there is a surviving spouse, a child has no right of action for wrongful death at all (whether a minor or not). *Morris v. Clark*, 189 Ga. App. 228, 230 (1988). But, the children of a decedent have a right to share in the proceeds of such an action. O.C.G.A. § 51-4-2(d)(1) (2017). The wrongful death statute creates a cause of action in the children for breach of the spouse's duty as their representative. *See Morris v. Clark*, 189 Ga. App. at 231. "[T]he surviving spouse acts as the children's representative and owes them the duty to act prudently in asserting, prosecuting and settling the claim and to act in the utmost good faith." *See Home Ins. Co. v. Wynn*, 229 Ga. App. 220, 222 (1997). And, the agent, i.e. spouse, is not permitted to acquire rights in a settlement antagonistic to the principal's interests, i.e. the child's interests. *Id.*; *see also*. O.C.G.A. § 23-2-59

(2017). Unlike a situation in which a minor child has a right of action, a settlement brokered by a surviving spouse is not approved by the probate court. *Morris*, 189 Ga. App. at 230. It is approved by the superior or state court presiding over the wrongful death action. *Id.* at 231.

Taxation of Costs

As noted above, where the defendant has acted in bad faith, has been stubbornly litigious, or has caused the plaintiff unnecessary trouble and expense, the defendant may be liable for the costs of filing the action. O.C.G.A. § 13-6-11 (2017). "In all civil cases in any of the courts of this state, except as otherwise provided, the party who dismisses, loses, or is cast in the action shall be liable for the costs of the action." O.C.G.A. § 9-15-1 (2017). Costs of Appeals are generally taxed against the Appellant or Applicant; however, on remitter, the victorious party may seek the costs of appeal. *See, Bryant v. Randall*, 245 Ga. 200 (1980).

This Compendium outline contains a brief overview of certain laws concerning various litigation and legal topics. The compendium provides a simple synopsis of current law and is not intended to explore lengthy analysis of legal issues. This compendium is provided for general information and educational purposes only. It does not solicit, establish, or continue an attorney-client relationship with any attorney or law firm identified as an author, editor or contributor. The contents should not be construed as legal advice or opinion. While every effort has been made to be accurate, the contents should not be relied upon in any specific factual situation. These materials are not intended to provide legal advice or to cover all laws or regulations that may be applicable to a specific factual situation. If you have matters or questions to be resolved for which legal advice may be indicated, you are encouraged to contact a lawyer authorized to practice law in the state for which you are investigating and/or seeking legal advice.