STATE OF GEORGIA TRANSPORTATION AND LOGISTICS COMPENDIUM OF LAW

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A. ELEMENTS OF PROOF FOR DERIVATIVE NEGLIGENCE CLAIMS

1. *RESPONDEAT SUPERIOR* (Let the Master Answer)

If an employee is on company business at the time of the accident, his employer is vicariously responsible for any negligence committed on his part. O.C.G.A. § 51-2-2; Allen Kane's Major Dodge, Inc. v. Barnes, 243 Ga. 776, 777, 257 S.E.2d 186, 188 (1979); Wright v. Pine Hills Country Club, Inc., 261 Ga. App. 748, 751, 583 S.E.2d 569, 572-73 (2003). In order for a business to be held vicariously liable for an employee's torts, two elements must be present: 1) the employee must be furthering the company's business, and 2) the employee must be acting within the scope of his employment. Drury v. Harris Ventures, Inc., 302 Ga. App. 545, 546-47, 691 S.E.2d 356, 358 (2010).

In the motor carrier context, scope of employment has been broadly defined. For example, where a driver is waiting at a truck stop for the next dispatched load, he can be considered in the scope of the master's business. Wright v. Transus, Inc., 209 Ga. App. 771, 434 S.E.2d. 786 (1993).

a. Lease Liability

Georgia recognizes the concept of "lease liability." Where equipment and drivers are covered by lease agreements, the traditional rule of *respondeat superior* does not apply. 49 C.F.R. § 376.12(c)(1).[1] In any case where the accident occurs during the term of the lease, liability will be imposed on the motor carrier irrespective of whether the driver was technically in the scope of employment for the motor carrier. Hot Shot Express, Inc. v. Assicurazioni Generali, S.P.A., 252 Ga. App. 372, 374, 556 S.E.2d 475, 477 (2001); Nationwide Mut. Ins. Co. v. Holbrooks, 187 Ga. App. 706, 712, 371 S.E.2d 252, 256-57 (1988).

2. NEGLIGENT ENTRUSTMENT

Under the theory of negligent entrustment, liability is not determined with an analysis of whether the employee was acting within the "scope of employment." Instead, the negligent act is the owner lending the vehicle to a driver when the owner has *actual knowledge* that the driver is incompetent or habitually reckless. The owner's actual knowledge of the driver's incompetence or recklessness must concur with the negligent conduct of the driver on account of his incompetence and recklessness. See Cherry v. Kelly Servs, Inc., 171 Ga. App. 235, 319 S.E.2d 463 (1984); Spencer v. Gary Howard Enters., Inc., 256 Ga. App. 599, 568 S.E.2d 763 (2002), *overruled on other grounds*, TGM Ashley Lakes, Inc. v. Jennings, 264 Ga. App. 456 (2003); Western Industries, Inc. v. Poole, 280 Ga. App. 378, 634 S.E.2d 118 (2006).

Generally, the owner does not have the duty to investigate the driver and ascertain the driver's competency. Smith v. Tommy Roberts Trucking Co., 209 Ga. App. 826, 828-29, 435 S.E.2d 54, 57 (1993). In motor carrier cases, however, the motor carrier has a legal duty to check the driver's qualifications, and the Federal Motor Carrier Safety Regulations may establish

[1] 49 C.F.R. § 376.12 was enacted by the Interstate Commerce Commission and was formerly codified 49 C.F.R. § 1057.12.

constructive knowledge of driver incompetency that would have been revealed by a proper driver qualification. 49 C.F.R. § 391 et seq.; see Smith, 209 Ga. App. 826, 435 S.E.2d 54.

3. NEGLIGENT HIRING, RETENTION AND SUPERVISION

The Georgia Code provides that an employer is bound to exercise ordinary care in the selection of employees and not to retain them after knowledge of any incompetence. O.C.G.A. § 34-7-20.

The negligent selection and retention of incompetent servants allows a plaintiff who is injured as a result of this negligence to bring a cause of action against the employer. To sustain a claim for negligent hiring or retention, a plaintiff must show that *the employer knew or should have known of the employee's propensity to engage in the conduct which caused the plaintiff's injury*. Piney Grove Baptist Church v. Goss, 255 Ga. App. 380, 383, 565 S.E.2d 569, 572 (2002). In 2004, the Supreme Court of Georgia added that the employer-defendant "has a duty of exercising ordinary care not to hire or retain an employee the employer knows, or should have known, poses a risk of harm to others, *where it is reasonably foreseeable from the employee's tendencies or propensities that the employee could cause the type of harm sustained by the plaintiff*." Munroe v. Universal Health Servs, Inc., 277 Ga. 861, 863, 596 S.E.2d 604, 606 (2004). The same standard is applied with respect to negligent supervision claims. See Alexander v. A. Atlanta Autosave, Inc., 272 Ga. App. 73, 611 S.E.2d 754 (2005).

Specifically, a plaintiff can only establish liability "by showing that an employer had actual knowledge of numerous and serious violations on its driver's record, or, at the very least, when the employer has flouted a legal duty to check a record showing such violations." Poole, 280 Ga. App. at 380, 634 S.E.2d at 121. The key is whether there is any evidence to suggest that the employee was incompetent in the first place. For example, if his driving record does not contain any violations that would alert an employer that he was incompetent to drive, then the employer may avoid liability. If the employer conducted all of the necessary steps in order to properly evaluate the employee's driving capabilities, conducted an extensive review of his driver's record before he was hired, which included requesting records from the driver's previous employer, and continued to monitor his driving while he was employed, then the employer can avoid liability.

In addition, under the new standard, without some evidence to suggest that the specific harm suffered by the plaintiff was reasonably foreseeable based on the specific tendencies or propensities of the employee, the employer may avoid liability. Smith, 209 Ga. App. at 829, 435 S.E.2d at 57. However, if the court finds a violation of the federal motor carrier safety regulations (which would have been revealed by a properly conducted driver qualification file), summary judgment on negligent hiring can be authorized against the motor carrier, and a jury issue can also be created on punitive damages. See Smith, 209 Ga. App. 826, 435 S.E.2d 54; Meyer v. Trux Transp., Inc., 2006 U.S. Dist. LEXIS 81869, 2006 WL 3246685, *8 (N.D. Ga. 2006).

It remains a requirement for a negligent hiring, retention, and supervision claim that the employee actually be acting under the color of employment at the time of the accident or the tortious conduct occur during the employee's working hours. Lear Siegler v. Stegall, 184 Ga. App. 27, 28, 360 S.E.2d 619, 620 (1987).

4. NEGLIGENT TRAINING

There are no cases that find tort liability based solely on negligent training. This theory of recovery is usually coupled with negligent supervision, and then discussed using the same analysis as negligent hiring and retention. See Remediation Resources, Inc. v. Balding, 281 Ga. App. 31, 34, 635 S.E.2d 332, 335 (2006). Some cases have discussed the facts particularly supporting liability under negligent training but without providing specific legal analysis regarding what is required for a *prima facia* case. See Ledbetter v. Delight Wholesale Co.,191 Ga. App. 64, 380 S.E.2d 736 (1989).

5. NEGLIGENT MAINTENANCE

In Georgia, a duty exists for an owner to maintain the vehicle in proper working order. For example, O.C.G.A. § 40-8-50 requires every motor vehicle "to be equipped with brakes adequate to control the movement of and to stop and hold such vehicle...." See Lewis v. Harry White Ford, 129 Ga. App. 318, 319, 199 S.E.2d 599, 601 (1973). Thus, an owner who permits another to operate the vehicle when the owner knows or should know that the vehicle is in disrepair is liable for injuries proximately caused by the defect. See Cantrell v. U-Haul Co. of Georgia, Inc., 224 Ga. App. 671, 482 S.E.2d 413 (1997). A defendant can defeat such a claim by establishing regular maintenance and servicing of the vehicle occurred prior to the accident and this regular maintenance did not reveal any problems that would alert the owner of a defect. Id. at 627.

B. ADMISSION OF AGENCY, PUNITIVE DAMAGES AND WRONGFUL DEATH

1. ADMISSION OF AGENCY IN DIRECT NEGLIGENCE CLAIMS

Prior to November 2020, once it was conceded that the employer was in fact vicariously liable for negligence of the employee under a theory of *respondeat superior*, direct negligence claims (negligent hiring, retention, entrustment, etc.) were deemed moot, and evidence supporting them was rendered irrelevant and inadmissible. See Bartja v. Nat'l Union Fire Ins. Co. of Pittsburgh, 218 Ga. App. 815, 817, 463 S.E.2d 358, 361 (1995); see also Durben v. Am. Materials, Inc., 232 Ga. App. 750, 503 S.E.2d 618 (1998). The admission by the employer became known as the "Repondeat Superior Rule."

An exception to this rule existed when a punitive damages claim was brought against the motor carrier. In these cases, the plaintiff claimed the employer's conduct justified a separate award of punitive damages. Thus, it was the conduct of the employer that was considered in awarding punitive damages and not the actions of the employee. Clarke v. Cotton, 263 Ga. 861, 862, 440 S.E.2d 165 (1994). For cases considering punitive damages for trucking direct negligence actions, see Smith, 209 Ga. App. 826, 435 S.E.2d 54; Hutcherson v. Progressive Corp., 984 F.2d 1152 (11th Cir. 1993); Bartja, 218 Ga. App. 815; Meyer, 2006 U.S. Dist. LEXIS 81869, 2006 WL 3246685; MasTec N. Am., Inc. v. Wilson, 325 Ga. App. 863, 755 S.E.2d 257 (2014); and Little v. McClure, No. 5:12-CV-147, 2014 U.S. Dist. LEXIS 120681, 2014 WL 4276118 (M.D. Ga. 2014).

In November 2020, the Georgia Supreme Court entered a landmark decision which concluded that Georgia's apportionment statute found in O.C.G.A. § 51-12-33, abrogated

decisional case law and the "Respondeat Superior Rule," which had been relied upon by the Court of Appeals and defense practitioners since 1967. Quynn v. Hulsey, 310 Ga. 473, 850 S.E.2d 735 (2020). As reflected in the case law above, for over 50 years, when an employer, including a motor carrier, admitted vicarious liability for the actions of its employee, direct negligence claims against the employer for negligent hiring, retention, etc. were deemed moot and partial summary judgment would be entered in favor of the employer for those claims, unless punitive damages were at issue. Now, however, plaintiffs can pursue direct negligence claims and vicarious liability claims against motor carriers regardless of whether the motor carrier has admitted vicarious liability for the actions of its employee.

2. PUNITIVE DAMAGES AND THE TRUCKING CASE

If the employee's conduct warrants imposition of punitive damages, the employer may also be liable for these damages. Sightler v. Transus, Inc., 208 Ga. App. 173, 173, 430 S.E.2d 81, 81-82 (1993). Where a plaintiff has a valid claim for punitive damages against the employer based on its independent wrongdoing in hiring, retaining or supervising the employee or entrusting a vehicle to that employee (which must be a higher standard of culpability than negligence), these direct claims are placed before the jury. Durben, 232 Ga. App. at 751, 503 S.E.2d at 619; Pace v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA, 2014 WL 4976773, *18 (N.D. Ga. 2014). Previously, in situations where punitive damages were at issue and direct negligence claims against the employer were pled and pursued, courts bifurcated the direct liability claims to avoid any prejudice to the employer on the vicarious liability claim. Durben, 232 Ga. App. 750, 503 S.E.2d 618. Although there are no reported cases since Quynn on the issue of bifurcation, given the holding of Quynn, defense attorneys should be prepared to address the issue as to whether bifurcation is still appropriate.

Unfortunately, Georgia has a highly complex punitive damage statute, which is found at O.C.G.A. § 51-12-5.1. This statute was amended in the late 1980s in response to a tort reform movement and has been amended several times since. Under the terms of the current statute, punitive damages are to be awarded only in tort actions where it is "proven by clear and convincing evidence" that the defendants' actions showed "willful misconduct, malice, fraud, wantonness, oppression, or that entire want of care which would raise the presumption of conscious indifference to consequences." O.C.G.A. § 51-12-5.1(b). The statute also provides that punitive damages are to 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(d)(2).

By the terms of the statute, punitive damages in Georgia are capped at $250,000. O.C.G.A. § 51-12-5.1(g). There are three exceptions to capping: cases involving product liability, cases involving intentional acts ("specific intent to cause harm"), and lastly, cases where the defendant was operating a motor vehicle while under the influence of drugs or alcohol. If none of those three circumstances are present, then the $250,000 cap applies. The punitive damage cap applies to each plaintiff separately, regardless of the number of defendants or theories of recovery. Bagley v. Shortt, 261 Ga. 762, 763, 410 S.E.2d 738, 739 (1991).

Subsection (d) of the punitive damage statue provides that the punitive damage case shall be bifurcated. O.C.G.A. § 51-12-5.1(d). The trier of fact must first resolve whether an award of

punitive damages should be imposed. The second phase of the case determines the amount of punitive damages to be awarded. Originally, the case law in Georgia allowed at trial judge the discretion to bifurcate the liability and punitive damage portions of the case to avoid prejudice to the defendants in the liability phase. Moore v. Thompson, 255 Ga. 236, 238, 336 S.E.2d 749, 751 (1985); see also O.C.G.A. § 9-11-42. However, the passage of the revised punitive damage statute as part of the Tort Reform Act in 1987 changed the standard. The statutory bifurcation scheme does not require bifurcation of the punitive damage aspects of the case from the liability aspects. This in turn adds potential prejudice in the liability phase of the case. The trial court is still vested with discretion to divide the case so as to avoid prejudice. Hanie v. Barnett, 213 Ga. App. 158, 160, 444 S.E.2d 336, 338 (1994). However, the trial court can no longer simply bifurcate the liability and punitive phases of the trial (as in the pre-tort reform days). Webster v. Boyett, 269 Ga. 191, 192-93, 496 S.E.2d 459, 461 (1998). Instead, the trial court is authorized to actually trifurcate the case (i.e., cut it into three parts). Id.

Under the *statutory* scheme of bifurcation, the issue of *whethe*r to award punitive damages (thus allowing the jury to hear all of the harmful conduct), would actually arise during the compensatory damage phase of the case. The Supreme Court and Court of Appeals of Georgia have recognized that this punitive evidence might also inflame the jury as to liability and compensatory damages, thereby creating an unfair result for defendants. For that reason, the courts have allowed, at the discretion of the trial judge, for trifurcation. Hanie, 213 Ga. App. at 160, 444 S.E.2d at 338; Webster, 269 Ga. at 193-94, 496 S.E.2d at 461-62; Moresi v. Evans, 257 Ga. App. 670, 672-73, 572 S.E.2d 327, 330-331 (2002).

In trifurcation, phase one of the trial would simply resolve fault, causation, and compensatory damages. Phase two would then consider whether or not the defendants' actions were willful, wanton, or showed conscious in difference to consequences. In the event the jury decides that the defendant's conduct did constitute one of the grounds for punitive damages, then the amount to punitive damages would be awarded in the third and last phase. The decision about whether to trifurcate a punitive damage case is entirely at the discretion of the trial judge. For cases discussing these issues, see Smith, 209 Ga. App. 826, 435 S.E.2d 54; Bartja, 218 Ga. App. 815; and especially Webster, 269 Ga. 191, 496 S.E.2d 459 and its citing references, including Bolden v. Ruppenthal, 286 Ga. App. 800, 650 S.E.2d 331 (2007).

Evidence of financial circumstances is relevant in a punitive damage case. J.B. Hunt Transp. v. Bentley, 207 Ga. App. 250, 427 S.E.2d 499 (1993). However, a mere demand for punitive damages does not entitle the plaintiff to discovery on the defendant's financial circumstances. Instead, an evidentiary showing must be made. Holman v. Burgess, 199 Ga. App. 61, 404 S.E.2d 144 (1991); Ledee v. Devoe, 225 Ga. App. 620, 484 S.E.2d 344 (1997). Prior similar incidents are admissible on punitive damages. Mack Trucks v. Conkle, 263 Ga. 539, 436 S.E.2d 635 (1993); Gunthorpe v. Daniels, 150 Ga. App. 113, 257 S.E.2d 199 (1979); Holt v. Grinnell, 212 Ga. App. 520, 441 S.E.2d 874 (1994). In addition, even after discovery, a court can conclude that the evidence fails to meet the standard of clear and convincing as a matter of law. Durben, 232 Ga. App. 750, 503 S.E.2d 618; Frey v. Gainey Transp. Servs., 2006 U.S. Dist. LEXIS 90639 (N.D. Ga. 2006).

As noted above, in direct negligence cases, it is the conduct of the employer that is considered in awarding punitive damages and not the actions of the employee. Clarke, 263 Ga. 861, 440 S.E.2d 165. For cases considering punitive damages in trucking-direct negligence cases, see Smith, 209 Ga. App. 826; Meyer, 2006 U.S. Dist. LEXIS 81869 (N.D. Ga. 2006); Flutcherson v. Progressive Corp., 984 F.2d 1152 (11th Cir. 1993); and Bartja, 218 Ga. App. 815.

3. WRONGFUL DEATH AND PUNITIVE DAMAGES

In Georgia, a wrongful death claim is brought in two parts: one is brought by the "statutory wrongful death claimant, "and the other by the estate. Under the wrongful death statute, certain individuals are empowered to bring claims for wrongful death on behalf of a decedent. See O.C.G.A. §§ 51-4-2, 51-4-5.

In the case of married adults, this right to bring suit belongs to the surviving spouse. Unmarried adults are represented by their children or parents. See O.C.G.A. § 51-4-2(a). If no living relatives can be found, the estate will have a statutory death claim. See O.C.G.A. § 51-4-5(a).

The measure of damages in the statutory wrongful death claim is the "full value of the life of the decedent without deducting for any of the necessary or personal expenses of the decedent had he lived." O.C.G.A. §§ 51-4-1, 51-4-2(a). The "full value of the life" damages includes the economic component testified to by the plaintiff's economists, and another amount equal to the "intangible" or "non-economic" aspects of life, which the jury is free to award in any amount according to their "enlightened conscience." See Pollard v. Kent, 59 Ga. App. 118, 200 S.E. 542 (1938). Punitive damages are not allowed in statutory wrongful death claims. Ford Motor Co. v. Stubblefield, 171 Ga. App. 331, 340, 319 S.E.2d 470, 480 (1984).

The second portion of a wrongful death claim concerns the estate. The estate has a claim for medical and funeral expenses. O.C.G.A. § 51-4-5(b). In addition, in the event there is any sort of "survivor's claim," this would be the right of the estate to pursue. See O.C.G.A. § 51-4-5(a).

A survivor's claim simply means that if a decedent dies with an existing personal injury claim, the claim can survive his or her death and be pursued by the estate. For example, if a claimant is injured and survives for some period of time before dying, then the injury claim and the claim for any pain and suffering incurred before death would be part of the survivor's claim owned by the estate. This is separate and apart from the statutory wrongful death claim. O.C.G.A. § 9-2-41.

Georgia also allows recovery for what are known as "pre-impact fright damages." Pre-impact fright damages are awarded to a claimant to compensate the claimant for his fright in realizing that he is about to have a possibly fatal accident. See generally Pullman Co. v. Strang, 35 Ga. App. 59, 132 S.E. 399 (1926). If there is clear evidence that the decedent was aware of the impending accident and would no doubt have been frightened to some degree, then the claim exists. This fright claim will survive death and is part of the estate's claim. Claims for punitive damages may also brought by the estate, pursuant to a survival action.

In summary, most plaintiffs seek:

(1) The full value of the life unreduced by the expenses of living (no punitive damages in statutory wrongful death claim);
(2) Damages for funeral, burial and medical expenses (estate);
(3) Pre-impact fright or survivorship of personal injury damages (estate); and
(4) Punitive damages, capped at $250,000 (estate only).

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.