Punitive Damages in Assault & Battery/Intentional Torts

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Introduction

Punitive damages law in Georgia is primarily governed by O.C.G.A. § 51–12–5.1 which was adopted by the legislature as part of the Georgia Tort Reform Act of 1987. Punitive damages are also known as vindictive damages, exemplary damages, deterrent damages, additional damages, punitory damages, penal damages, and smart money. Punitive damages in Georgia are defined by O.C.G.A. § 51–12–5.1 (a) as follows:

> As used in this Code section, the term "punitive damages" is synonymous with the terms "vindictive damages," "exemplary damages," and other descriptions of additional damages awarded because of aggravating circumstances in order to penalize, punish, or deter a defendant. O.C.G.A. § 51–12–5.1 (a)

According to the statute "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). Prior to the enactment of O.C.G.A. § 51–12–5.1, punitive damages in Georgia were awarded "to deter the wrongdoer from repeating the trespass or as compensation for the wounded feelings of the plaintiff." The Tort Reform Act of 1987 eliminated the compensatory nature of punitive damages in Georgia. O.C.G.A. § 51–12–5.1(c) and authorized punishment as a legitimate goal.

Requisite Standard of Conduct

O.C.G.A. § 51–12–5.1 (b) provides that 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. Georgia Appellate decisions have long held that negligence, even gross negligence, cannot support a punitive damages award. Colonial Pipeline Co. v. Brown, 258 Ga. 115, 118, 365 S. E. 2d 827 (1988); Morales v. Webb, 200 Ga. App. 788, 790, 409 S. E. 2d 572 (1991).

Clear and convincing evidence is an intermediate standard of proof "which is greater than the preponderance of the evidence standard ordinarily employed in civil proceedings, but less than the reasonable doubt standard applicable in criminal proceedings." Clarke v. Cotton, 207 Ga. App. 883, 884, 429 S. E. 2d 291 (1993), affirmed, 263 Ga. 861, 440 S. E. 2d 165 (1994). Whether a tort rises to the level to impose punitive damages is generally a jury question. A jury is entitled to impose punitive damages even where the *clear and convincing* evidence only creates an **inference** of the defendant's conscious indifference to the consequences of his or her acts. Tookes v. Murray, 297 Ga. App. 765, 678 S.E.2d 209 (2009); Weller v. Blake, 315 Ga. App. 214, 726 S.E.2d 698 (2012). Although questions of wilful or wanton conduct supporting an award of punitive damages are generally matters for a jury's consideration, Hughes v. First Acceptance Insurance Company of Georgia, Inc., 343 Ga. App. 693, 808 S.E.2d 103 (2017); Weller v. Blake, 315 Ga. App. 214, 220 (3), 726 S.E.2d 698 (2012);

Keith v. Beard, 219 Ga. App. 190, 464 S.E.2d 633 (1995) the trial court may grant summary judgment where there is no evidence to support such claims. Layer v. Clipper Petroleum, 319 Ga. App. 410, 735 S.E.2d 65 (2012); Howard v. Alamo Corp., 216 Ga. App. 525, 455 S.E.2d 308 (1995).

The jury should always be charged as to the complete definition of *clear and convincing* evidence. A party must object to the Court's failure to give the *clear and convincing* definition, otherwise the failure to object may result in waiver of the error. Waller v. Rymer, 293 Ga. App.833, 668 S.E. 2d 470 (2008).

Assault and Battery

Any unlawful touching is a violation of the right to inviolability of one's person is actionable even in the absence of actual physical hurt or pecuniary loss. Interstate Life & Accident Co. v. Brewer, 56 Ga. App. 599, 607, 193 S.E. 458 (1937); Stover v. Atchley, 189 Ga. App. 56, 57, 374 S.E.2d 775 (1988). Georgia courts have upheld punitive damages awards in cases of unjustifiable and unwarranted assaults described variously as "malicious, wanton and aggravated," Rattaree v. Chapman, 79 Ga. 574, 580, 4 S.E. 684 (1887). "violent [and] malicious," Swinney v. Wright, 35 Ga. App. 45, 48, 132 S.E. 228 (1925); "wilful, wanton, and intentional," Head v. John Deere Plow Co., 71 Ga. App. 276, 279, 30 S.E.2d 622 (1944). or "wilful and malicious." Nissen v. Goodyear Tire & Rubber Co., Inc., 90 Ga. App. 175, 177, 82 S.E.2d 253 (1954). The fact that an assault is publicly committed has been considered an aggravating circumstance. Bignault v.

Hendry, 58 Ga. App. 644, 646, 199 S.E. 659 (1938). Similarly, sufficient aggravation has been found where the assault was committed in a degrading and humiliating manner. Cherry v. McCall, 23 Ga. 193, 196 (1857). The courts often refer to the unprovoked nature of the assault in authorizing punitive damages. Rattaree v. Chapman, 79 Ga. 574, 580, 4 S.E. 684 (1887); Swinney v. Wright, 35 Ga. App. 45, 45, 132 S.E. 228 (1925); Johnson v. Morris, 158 Ga. 403, 404, 123 S.E. 707, 708 (1924).

O.C.G.A. § 51-1-13 expressly allows the jury to take the defendant's intention into account when awarding damages. In Stover v. Atchley, 189 Ga. App. 56, 374 S.E.2d 775 (1988). the court of appeals upheld the award of $25,000 in compensatory damages and $50,000 in punitive damages where the defendant grandson choked the plaintiff grandfather, spit on him, and threw him against the wall "while exclaiming 'die old man, damn it, die.'" Id. Despite the absence of medical treatment or injuries other than scratches and bruises, the court held that the punitive award was not an impermissible double recovery. Id.

Evidence of defendant's prior or subsequent violent acts may be admitted in the punitive damages portion of a bifurcated trial. Dimarco's, Inc. v. Neidlinger, 207 Ga. App. 526, 526, 428 S.E.2d 431 (1993). In Dimarco's, Inc. the court of appeals held that a certified copy of defendant's conviction for manslaughter 14 years earlier was also admissible in the liability portion of the trial on the issue of defendant's "bent of mind, habit, and course of conduct."Id.

Intentional Torts

As amended in 1997, O.C.G.A. § 51–12–5.1 (f) states: In a tort case in which the cause of action does not arise from product liability, if it is found that the defendant acted, or failed to act, with the specific intent to cause harm... there shall be no limitation regarding the amount which may be awarded as punitive damages against an active tort-feasor but such damages shall not be the liability of any defendant other than an active tort-feasor. However, knowledge and appreciation of a risk is not sufficient to constitute specific intent. J. B. Hunt Transport, Inc. v. Bentley, 207 Ga. App. 250, 255, 427 S. E. 2d 499 (1992). An appreciation of a risk, short of substantial certainty, is not the equivalent of intent. Aldworth Company, Inc. v. England, 286 Ga. App. 1, 648 S.E. 2d 198 (2007).

In addition the *clear and convincing* standard of proof is inapplicable to intentional torts, instead the standard of proof required to prove a defendant acted or failed to act with specific intent to cause harm is the *pre-ponderance of the evidence* standard. Since O.C.G.A. subsection 51–12–5.1(f) is silent about the standard of proof required for "specific intent" cases the court must use the common law *preponderance of evidence* standard generally applicable in civil cases. Kothari v. Patel, 262 Ga.App. 168, 585 S.E.2d 97 (2003).

Uncapped Awards for Intentional Torts

O.C.G.A. § 51-12-5.1(f) states that in any tort case in which the cause of action does not arise from product liability, if it is found that the defendant acted, or failed to

act, with the specific intent to cause harm there shall be no limitation regarding the amount which may be awarded as punitive damages against an active tort-feasor but such damages shall not be the liability of any defendant other than an active tort-feasor.

The courts have looked to the Restatement (Second) of Torts5 for a definition of "intent" in determining whether a defendant has acted with a specific intent to cause harm. See, e.g., Viau v. Fred Dean, Inc., 203 Ga. App. 801, 805, 418 S.E.2d 604 (1992); J.B. Hunt Transport, Inc. v. Bentley, 207 Ga. App. 250, 255, 427 S.E.2d 499 (1992). Accordingly, "intent" is defined "to denote that the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it." Eubanks v. Nationwide Mutual Fire Ins. Co., 195 Ga. App. 359, 364, 393 S.E.2d 452 (1990), quoting Restatement (Second) of Torts § 8A (1965). Mere knowledge and appreciation of a risk is not sufficient to constitute specific intent. J.B. Hunt Transport, Inc. v. Bentley, 207 Ga. App. 250, 255, 427 S.E.2d 499 (1992); Aldworth Co., Inc. v. England, 286 Ga. App. 1, 648 S.E.2d 198 (2007) (an appreciation of a risk, short of substantial certainty, is not the equivalent of intent). Furthermore the standard of proof required to prove a defendant acted or failed to act with specific intent to cause harm is the "pre-ponderance of the evidence" standard. O.C.G.A. § 51-12-5.1(f) does not incorporate the "clear and convincing" evidentiary standard as set forth in O.C.G.A. subsection § 51-12-5.1(b). Since the statute is a derogation of common law it must be strictly construed and because O.C.G.A. subsection 51-12-5.1(f) is silent about the

standard of proof required for "specific intent" cases the court must use the common law "preponderance of evidence" standard generally applicable in civil cases. Kothari v. Patel, 262 Ga. App. 168, 585 S.E.2d 97 (2003).

The jury must make an actual finding that defendant acted, or failed to act, with a specific intent to cause harm before subsection (f) may be applied and the cap removed. Sims v. Heath, 258 Ga. App. 681, 577 S.E.2d 789 (2002). In the interest of judicial economy, and to provide certainty and predictability to verdicts rendered, the Supreme Court adopted a bright line rule for cases tried after May 7, 1998, requiring a party to request both a charge on specific intent to cause harm and a separate finding of specific intent to cause harm by the trier of fact in order to avoid the cap on punitive damages. McDaniel v. Elliott, 269 Ga. 262, 265, 497 S.E.2d 786 (1998); Scott v. Battle, 249 Ga. App. 618, 548 S.E.2d 124 (2001) (party may object to court's failure to comply with separate finding requirement before entry of judgment or in any timely post-judgment motion, including motion for new trial, even when party failed to object at time verdict was returned); Quay v. Heritage Financial, Inc., 274 Ga. App. 358, 617 S.E.2d 618 (2005).

Suing the Estate of the Defendant

Punitive damages may not be recovered from the estate of a deceased tortfeasor. Morris v. Duncan, 126 Ga. 467, 54 S.E. 1045 (1906). Punitive damages may only be recovered against an individual while he is still alive. Cleaveland v. Alford, 188 Ga.

App. 690, 373 S.E.2d 853 (1988) since the purpose of punitive damages, namely punishment and deterrence, cannot be accomplished once the tortfeasor is deceased.

The practitioner should note that the statute providing for nonabatement of tort actions provides in part:

> In case of the death of the defendant, the cause of action shall survive against said defendant's personal representative. However, in the event of the death of the wrongdoer before an action has been brought against him, the personal representative of the wrongdoer in such capacity shall be subject to the action just as the wrongdoer himself would have been during his life, provided that there shall be no punitive damages against the personal representative. O.C.G.A. § 9-2-41.

While the statute expressly prohibits the recovery of punitive damages against the representative of the deceased tortfeasor if the tortfeasor dies before an action has been brought, it does not specifically address the availability of punitive damages in the event the action is commenced prior to the tortfeasor's death. This omission is all the more conspicuous in light of the fact that the legislature amended language preceding the above-quoted passage to include the words "cause of action" in stating, " … nor shall any action or cause of action for the recovery of damages for homicide, injury to the person, or injury to property abate by the death of either party." O.C.G.A. § 9-2-41. See, Posner v. Koplin, 94 Ga. App. 306, 310, 94 S.E.2d 434 (1956).

One might argue that the legislature intended for punitive damages to be authorized against the representative of a deceased defendant in a continued action that was commenced before the defendant's death. However, the expressly intended purpose of punitive damages under O.C.G.A. § 51-12-5.1(a) would clearly not be served under such circumstances.

Driving Under the Influence

If a defendant was under the influence of alcohol or drugs at the time of the collision this fact is admissible to show "wilful misconduct, wantonness, and that entire want of care which raises the presumption of conscious indifference to the consequences." Moore v. Thompson, 255 Ga. 236, 237, 336 S. E. 2d 749 (1985). In a DUI case the defendant's prior acts of driving under the influence are admissible, since the egregiousness of the conduct cannot be adequately gauged by focusing only on the incident in issue. Holt v. Grinnell, 212 Ga. App. 520, 521–522, 441 S. E. 2d 874 (1994), *relying* on Thompson v. Moore, 174 Ga. App. 331, 332, 329 S. E. 2d 914 (1985), affirmed in part and rev'd in part on other grounds, Moore v. Thompson, 255 Ga. 236, 336 S. E. 2d 749 (1985). Trial Courts continually struggle with how and when the prior DUI's come in during the trial. The Court's should allow the prior misconduct in the first phase of a bifurcated trial since the relevance of prior or subsequent misconduct of the same nature as that in issue outweighs any prejudice to the defendant so long as the jury is fully charged that this evidence goes only to liability for punitive damages. In Webster v.

Boyett 269 Ga. 191, 496 S.E.2d 459 (1998) the Georgia Supreme Court stated that the trial court has discretion as to when the prior misconduct comes in during the trial and there is no bright-line rule as to the timing regarding the admissibility of similar bad acts. The Webster Court stated that the "the best way to guarantee a fair trial and ensure judicial economy is to continue to give the trial judge discretion on when to admit the evidence of prior and subsequent acts.... The trial judge should consider the potential prejudice to the parties, the complexity of issues and the potential for jury confusion, and the relative convenience, economy, or delay that may result. Webster v. Boyett, 269 Ga. 191, 496 S.E.2d 459 (1998).

Where the plaintiff is seeking punitive damages against a drunk driver, the plaintiff need not prove that the defendant was arrested for DUI in order to lay a foundation that the defendant was under the influence of alcohol at the time of the collision. Seitz v. McCullough, 138 Ga. App. 147, 225 S.E.2d 917 (1976). A trial court has discretion to admit even minimal evidence of alcohol consumption. In Seitz the only evidence of intoxication was that the defendant driver's breath smelled of alcohol after the accident. The court held that while "[t]he mere odor of alcohol by itself is weak evidence of intoxication[,] ... it does have a logical connection to that issue, and should be considered by the jury[ ] ... in deciding whether a person is intoxicated" Id. at 150. See also, Butts v. Davis, 126 Ga. App. 311, 190 S.E.2d 595 (1972). If a defendant refuses to submit to blood-alcohol testing this may also be admissible against the defendant. Stacey v.

Caldwell, 186 Ga. App. 293, 367 S. E. 2d 73 (1988)

While automobile liability insurance will normally cover liability for punitive damages (unless the policy excludes such coverage) incurred as a result of drunken driving, an uninsured motorist carrier cannot be held liable to its policyholder for punitive damages against a known or unknown drunken driver. Roman v. Terrell, 195 Ga. App. 219, 393 S. E. 2d 83 (1990); Coker v. State Farm Mut. Auto. Ins. Co., 193 Ga. App. 423, 388 S. E. 2d 34 (1989); State Farm Mut. Ins. Co. v. Kuharik, 179 Ga. App. 568, 347 S. E. 2d 281 (1986).

Punitive Damages and Bad Faith Award of Attorneys Fees

If a plaintiff has presented sufficient facts that will support a claim for punitive damages, then the same facts may also be sufficient to satisfy the "bad faith" prong of O.C.G.A. Section § 13-6-11 so as to entitle the plaintiff to attorneys fees against the defendant. Ford Motor Co. v. Stubblefield, 171 Ga. App. 331, 342 (1984). See also, Knobeloch v. Mustascio, 640 F. Supp. 124 (N.D.Ga. 1986).

Punitive Damages in Relation to Real Property

Upon evidence of aggravated circumstances, a plaintiff may recover punitive damages for nuisance actions. The aggravated conduct that gives rise to punitive damages can be found in either the defendant's action or inaction. Even where the defendant did not act with conscious indifference in creating the problem that led to the damage, punitive damages may be justified if the defendant acted with such conscious indifference

in failing to correct that problem. Raymar, Inc. v. Peachtree Golf Club, 161 Ga. App. 336, 287 S.E.2d 768 (1982). If a defendant violated no codes or ordinances in creating the nuisance a jury could still consider the issue of punitive damages for the continuing nuisance and failing to adequately abate the nuisance. Weller v. Blake, 315 Ga. App. 214, 726 S.E.2d 698 (2012).

If a person commits a trespass punitive damages may be awarded. Ready–Mix Concrete Co. v. Rape, 98 Ga. App. 503, 509, 106 S. E. 2d 429 (1948); Little v. Chesser, 256 Ga.App. 228, 568 S.E.2d 54 (2002). Compare the case of Wright v. VIF/Valentine Farms Bldg. One, LLC, 308 Ga.App. 436, 708 S.E.2d 41(2011) [Reliance on a survey can eliminate a claim for wilful trespass and subsequent punitive damages.] Interference with burial easement may give rise to a claim for punitive damages. Davis v. Overall, 301 Ga.App. 4, 686 S.E.2d 839 (2009).

Jury Verdict Form

If the jury finds that the defendant acted, or failed to act, with the specific intent to cause harm, there shall be no limitation regarding the amount which may be awarded as punitive damages. O.C.G.A. § 51–12–5.1 (f). In the interest of judicial economy, and to provide certainty and predictability to verdicts rendered, the Supreme Court adopted a bright line rule for cases tried after May 7, 1998, requiring a party to request both a charge on specific intent to cause harm and a separate finding of specific intent to cause harm by the trier of fact in order to avoid the cap on punitive damages. McDaniel v.

Elliott, 269 Ga. 262, 265, 497 S.E.2d 786 (1998); Quay v. Heritage Financial, Inc., 274 Ga.App. 358, 617 S.E.2d 618 (2005).

If the jury awards punitive damages thru a general verdict form the entire judgment may be overturned if one or more of the underlying causes of action fails appellate scrutiny. Where a plaintiff pursues separate causes of action, the trial court should submit a specific verdict form under which the jury can indicate which cause of action the punitive award is based, otherwise the entire judgment may be overturned if the appellate court finds that at least one cause of action was not supported by the evidence. Lyman v. Cellchem International, 342 Ga. App. 446, 803 S.E.2d 375 (2017).