PUNITIVE DAMAGES

September 6, 2019

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Who are we?

SOLACE is a program of the State Bar of Georgia designed to assist those in the legal community who have experienced some significant, potentially life-changing event in their lives. SOLACE is voluntary, simple and straightforward. SOLACE does not solicit monetary contributions but accepts assistance or donations in kind.

How does SOLACE work?

If you or someone in the legal community is in need of help, simply email SOLACE@gabar.org. Those emails are then reviewed by the SOLACE Committee. If the need fits within the parameters of the program, an email with the pertinent information is sent to members of the State Bar.

What needs are addressed?

Needs addressed by the SOLACE program can range from unique medical conditions requiring specialized referrals to a fire loss requiring help with clothing, food or housing. Some other examples of assistance include gift cards, food, meals, a rare blood type donation, assistance with transportation in a medical crisis or building a wheelchair ramp at a residence.

Contact SOLACE@gabar.org for help.
A solo practitioner’s quadriplegic wife needed rehabilitation, and members of the Bar helped navigate discussions with their insurance company to obtain the rehabilitation she required.

A Louisiana lawyer was in need of a CPAP machine, but didn’t have insurance or the means to purchase one. Multiple members offered to help.

A Bar member was dealing with a serious illness and in the midst of brain surgery, her mortgage company scheduled a foreclosure on her home. Several members of the Bar were able to negotiate with the mortgage company and avoided the pending foreclosure.

Working with the South Carolina Bar, a former paralegal’s son was flown from Cyprus to Atlanta (and then to South Carolina) for cancer treatment. Members of the Georgia and South Carolina bars worked together to get Gabriel and his family home from their long-term mission work.

The purpose of the SOLACE program is to allow the legal community to provide help in meaningful and compassionate ways to judges, lawyers, court personnel, paralegals, legal secretaries and their families who experience loss of life or other catastrophic illness, sickness or injury.

In each of the Georgia SOLACE requests made to date, Bar members have graciously stepped up and used their resources to help find solutions for those in need.

Contact SOLACE@gabar.org for help.
Dear ICLE Seminar Attendee,

Thank you for attending this seminar. We are grateful to the Chairperson(s) for organizing this program. Also, we would like to thank the volunteer speakers. Without the untiring dedication and efforts of the Chairperson(s) and speakers, this seminar would not have been possible. Their names are listed on the AGENDA page(s) of this book, and their contributions to the success of this seminar are immeasurable.

We would be remiss if we did not extend a special thanks to each of you who are attending this seminar and for whom the program was planned. All of us at ICLE hope your attendance will be beneficial as well as enjoyable. We think that these program materials will provide a great initial resource and reference for you.

If you discover any substantial errors within this volume, please do not hesitate to inform us. Should you have a different legal interpretation/opinion from the speaker’s, the appropriate way to address this is by contacting him/her directly.

Your comments and suggestions are always welcome.

Sincerely,

Your ICLE Staff

Jeffrey R. Davis
Executive Director, State Bar of Georgia

Michelle E. West
Director, ICLE

Rebecca A. Hall
Associate Director, ICLE
AGENDA

PRESIDING:
Eric James Hertz, Program Chair; Eric J. Hertz PC, Atlanta

7:45 REGISTRATION AND CONTINENTAL BREAKFAST (All attendees must check in upon arrival. A jacket or sweater is recommended.)

8:30 WELCOME AND PROGRAM OVERVIEW
Eric James Hertz

8:40 PUNITIVE DAMAGES IN ASSAULT AND BATTERY CASES
Mark D. Link, Link & Smith, P.C., Tucker

9:15 ANATOMY OF A BAD FAITH TRIAL
Richard E. “Rich” Dolder, Jr., Slappey & Sadd LLC, Atlanta
James N. “Jay” Sadd, Slappey & Sadd LLC, Atlanta

10:00 BREAK

10:15 PUNITIVE DAMAGES: ARGUMENTS THAT WORK
Eric James Hertz

11:00 DEFENDING PUNITIVE DAMAGES
Michael D. “Mike” St. Amand, Gray, Rust, St. Amand, Moffett & Brieske, LLP, Atlanta

11:45 LUNCH (Included in registration fee.)

12:15 ETHICS IN LITIGATION: YES, YOU CAN BE A SUCCESSFUL CIVIL ADVOCATE... BY ADVOCATING CIVILLY!
Harry D. Revell, Nicholson Revell LLP, Augusta

1:00 PUNITIVE DAMAGES IN TRUCKING CASES
Trent S. Shuping, Warshauer Law Group PC, Atlanta

1:50 BREAK

2:05 PUNITIVE DAMAGES IN DOG BITE CASES
Wm. Dixon James, Wm. Dixon James P.C., Decatur

2:55 APPEALING A PUNITIVE DAMAGE AWARD
Michael B. Terry, Bondurant Mixson & Elmore LLP, Atlanta

3:40 ADJOURN
# TABLE OF CONTENTS

FOREWORD ........................................................................................................................................ 6

AGENDA........................................................................................................................................... 7

PUNITIVE DAMAGES:

PUNITIVE DAMAGES IN ASSAULT AND BATTERY CASES ................................................................. 9

ANATOMY OF A BAD FAITH TRIAL .................................................................................................. 25

PUNITIVE DAMAGES: ARGUMENTS THAT WORK ............................................................................. 28

DEFENDING PUNITIVE DAMAGES ......................................................................................................... 40

ETHICS IN LITIGATION: YES, YOU CAN BE A SUCCESSFUL CIVIL ADVOCATE...BY ADVOCATING CIVILLY! ................................................................................................................................. 53

PUNITIVE DAMAGES IN TRUCKING CASES ......................................................................................... 55

PUNITIVE DAMAGES IN DOG BITE CASES ......................................................................................... 74

APPEALING A PUNITIVE DAMAGE AWARD ....................................................................................... 103

APPENDIX:

ICLE BOARD ....................................................................................................................................... 157

GEORGIA MANDATORY CLE FACT SHEET ......................................................................................... 158
PUNITIVE DAMAGES IN ASSAULT AND BATTERY CASES
Mark Link

- Mark Link has been an Atlanta resident since he graduated from the University of Georgia School of Law. Prior to law school Mr. Link attended the University of Florida where he graduated with a business degree (cum laude). Mr. Link is licensed to practice law in Alabama, Florida and Georgia as well as all the Federal District Courts in the State of Georgia. Mark Link is the co-author of Georgia Law of Damages and he has co-authored select articles for the plaintiffs’ bar including, “Punitive Damage Trial Preparation.” Mr. Link has also been a guest speaker for various seminars for the Institute of Continuing Legal Education (ICLE) and the National Business Institute (NBI).

- Mr. Link has narrowed his practice to cases involving wrongful death and catastrophic injury claims. Mr. Link has successfully litigated personal injury and wrongful death claims involving products liability and automobile safety claims and municipal liability. He is a managing partner in the Link & Smith P.C. law firm located in Tucker, Georgia.

- Practice Areas: Personal Injury; Wrongful Death; Tractor-Trailer Liability; Auto Collisions; Insurance Disputes.

- Admitted: 1991: Georgia; Florida; U.S. District Court, Northern District of Georgia; U.S. District Court, Middle District of Georgia; U.S. District Court, Southern District of Georgia.

- Member: American Association for Justice (AAJ); Lawyers Club of Atlanta; Georgia Trial Lawyers Association (GTLA); Bar Register of Pre-Eminent Lawyers; Multi-Million Dollar Advocates Forum.

- Biography: Member, Beta Gamma Sigma; Member, Golden Key; Member, Georgia Society of International and Comparative Law, 1988-1989.


- Email: link@linksmithpc.com
# Punitive Damages in Assault & Battery/Intentional Torts

Mark D. Link  
Link & Smith, P.C.  
Tucker, Georgia

## TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Introduction</td>
<td>1</td>
</tr>
<tr>
<td>Requisite Standard of Conduct</td>
<td>1</td>
</tr>
<tr>
<td>Assault and Battery</td>
<td>3</td>
</tr>
<tr>
<td>Intentional Torts</td>
<td>5</td>
</tr>
<tr>
<td>Uncapped Awards for Intentional Torts</td>
<td>5</td>
</tr>
<tr>
<td>Suing the Estate of the Defendant</td>
<td>7</td>
</tr>
<tr>
<td>Driving Under the Influence</td>
<td>9</td>
</tr>
<tr>
<td>Punitive Damages and Bad Faith Award of Attorneys Fees</td>
<td>11</td>
</tr>
<tr>
<td>Punitive Damages in Relation to Real Property</td>
<td>11</td>
</tr>
<tr>
<td>Jury Verdict Form</td>
<td>12</td>
</tr>
</tbody>
</table>

I.
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.

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).


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


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 preponderance 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 Torts 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 “preponderance 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.

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 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.

**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

If a person commits a trespass punitive damages may be awarded. Ready–Mix
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

**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.

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).
ANATOMY OF A BAD FAITH TRIAL
Richard E. Dolder

- Richard E. Dolder is a partner who joined Slappey & Sadd to expand the firm’s work on insurance coverage and insurance bad faith. Rich represents individuals and businesses who are improperly denied coverage or treated unfairly by their insurance companies. Some of his litigation successes include the following:
  - Securing an $8.25 million settlement for a hotel that was improperly denied coverage by its property insurer.
  - Negotiating a $1 million settlement for a small business that had to defend itself in court after its liability insurer denied coverage and refused to defend.
  - Forcing a life insurer to pay benefits to the rightful beneficiary, after the insurer had already paid the benefits to the wrong beneficiary.
  - Convincing a jury to award compensatory and punitive damages to a contractor after the contractor’s insurer denied coverage and refused to defend.
- Rich also counsels individuals and businesses in insurance issues not requiring litigation. Rich can help insureds in the following situations:
  - Prompting insurance companies to make quicker decisions when they delay payment on valid claims while the insurance company conducts an endless “investigation.”
  - Standing by insureds when their insurance company insists on intrusive and repeated Examinations Under Oath.
  - Providing honest and thoughtful evaluations of your claim when your insurance company denies coverage.
- Before going to law school, Rich was an award-winning journalist. He graduated at the top of his class from the University of Florida College of Law in 1998. He moved to Atlanta, where he initially worked for a large law firm that specialized in representing certain underwriters in the insurance market at Lloyds of London. Switching sides, Rich later joined an international law firm where he represented Fortune 500 companies in coverage disputes with their insurance companies. He lives in Dunwoody with his wife, Kathy, and three children.
Jay Sadd

• James (Jay) Sadd is a lawyer and partner of the firm Slappey & Sadd, LLC, Atlanta, Georgia. With his law partner, Scott Slappey, Jay formed Slappey & Sadd, LLC in 1992 to represent families, workers, and consumers who have been critically injured or lost a loved one because of the negligence or willful conduct of others. Slappey & Sadd, LLC represent people who have been seriously injured or suffered other losses by car accidents, trucking accidents, defective products, defective premises, malpractice, insurance bad faith, and other acts of negligence.

• Jay practices in every court of Georgia, including the Georgia Supreme Court, Court of Appeals, and all Georgia Superior and State Courts. Jay is also admitted to the Federal Bar, and practices in the United States District Courts of Georgia, and the United States Court of Appeals for the 11th Circuit. He is also licensed to practice in West Virginia, where he was born and raised. Jay represents his clients from the settlement negotiation stage to trial to the appeal of a case, if necessary.

• Jay has received the Georgia Law-Related Education Consortium Award for outstanding service to the Consortium and the children of Georgia and a Certificate of Commendation from The West Virginia State Bar and The Pro Bono Referral Project for service to individual needy citizens of West Virginia. He is also a member of the East Tennessee State University Letter Winner’s Club. In addition to membership in the Million Dollar Advocates Forum, which is limited to trial lawyers who have achieved verdicts, awards or settlements in the amount of one million dollars or more, Jay has been counsel in cases in which his client has been awarded or recovered $10,250,000; $7,000,000; $5,600,000; $5,000,000; $3,450,00; $2,600,000; $2,250,000; $2,100,000; $1,700,000; $1,600,000; $1,200,000; $1,000,000 and numerous other significant confidential awards to compensate his clients for losses suffered due to other’s wrongdoing and/or negligence.

• Jay holds a Juris Doctorate from the Walter F. George School of Law, Mercer University, 1987. He is a member of the State Bar of Georgia, Atlanta Bar Association, Atlanta Lawyers Club, Georgia Trial Lawyers Association, American Association for Justice, West Virginia Bar Association, Sandy Springs Bar Association, and the DeKalb Bar Association. Jay is named “Best of the Best” of Georgia’s Super Lawyers as published in Atlanta magazine and Georgia Super Lawyers Magazine. He has been named by Georgia Trend Magazine as among Georgia’s “Legal Elite”. He holds the highest rating possible (AV) by Martindale-Hubble, a nationally recognized lawyer directory. The AV rating recognizes “the highest level of skill and integrity” in the profession. His law firm has been recognized as “Best Lawyers” by US News and World Report. Jay is a Fellow of the Lawyers Foundation of Georgia, an honor that recognizes those lawyers whose public and private careers demonstrate outstanding legal abilities and a devotion to their communities.

• Jay lives in Atlanta with his wife Laura and 2 children. Outside interests include watching baseball, an occasional round of golf, exercise, and hanging out with his family to the extent his teenage children will allow.
PUNITIVE DAMAGES: ARGUMENTS THAT WORK
PUNITIVE DAMAGES: ARGUMENTS THAT WORK

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INTRODUCTION .................................................................................................................................................. 1

I. AUTHORIZING PUNITIVE RELIEF .................................................................................................................. 1

A. The Requisite Standards of Conduct ............................................................................................................ 2
   i. Willful Misconduct or Wantonness .................................................................................................................. 2
   ii. Malice .......................................................................................................................................................... 2
   iii. Fraud .......................................................................................................................................................... 3
   iv. Oppression .................................................................................................................................................. 3
   v. Conscious Indifference to Consequences ...................................................................................................... 4

B. Proving the Standards of Conduct ................................................................................................................. 4

II. ESTABLISHING THE AMOUNT OF PUNITIVE RELIEF ............................................................................ 6

III. COUNTERING PUNITIVE RELIEF .................................................................................................................. 7

A. Defeating Liability and Amount ..................................................................................................................... 8

B. Procedural Considerations of the Defendant ................................................................................................... 8

CONCLUSION ...................................................................................................................................................... 9

* Eric J. Hertz is a double Board Certified Trial Attorney who has tried over 100 jury trials as Lead Attorney. He has collected multi-millions of dollars for his clients, including several record high verdicts. Mr. Hertz is the Author of Nursing Home Abuse and Your Loved Ones 2016 and Co-Author: Punitive Damages in Georgia, 1997-2019; Co-Author: Georgia Law of Damages, 1998-2019; Co-Author: Georgia Law of Torts, Forms, all Published by Thomson-West. He is also the Author of Hertz’s Trial Notebook, Institute of Continuing Legal Education of Georgia and Co-Author of Verdict, “Punitive Damage Trial Preparation,” Fall, 1999; Verdict: “Representing David Against Goliath,” Summer, 2000, Published by Georgia Trial Lawyer Association. He has also tried over 100 jury trials and has handled over 100 wrongful death cases.
INTRODUCTION

The nature of compensatory relief is designed to make the plaintiff whole: The defendant pays damages it actually or metaphorically took from the plaintiff as a result of tortious conduct. In contrast, punitive damages are not designed to compensate, but to penalize, punish, or deter a defendant’s conduct.¹ Thus, to receive an award of punitive damages, the plaintiff must point to the defendant’s willful misconduct, wantonness, or conscious indifference of the consequences.² In practice, moreover, punitive damages raise two distinct questions that must be proven at trial: liability and amount. Part I of this paper will present the standards of punitive conduct that must be met in order to authorize punitive relief. Part II will discuss the substantive issues that a plaintiff should consider when arguing for an amount of punitive damages. Finally, Part III will explore what actions and arguments the defendant can make to help counter a request for punitive relief.

I. AUTHORIZING PUNITIVE RELIEF

There are two questions that must be answered before a plaintiff can acquire punitive relief: (1) whether the defendant’s liability authorizes an imposition of punitive damages; and (2) what amount of damages are necessary to punish, penalize, or deter the defendant.³ Because the question of amount permits a wider range of evidentiary support than is permitted in determining liability, the Supreme Court of Georgia has long recognized the necessity of distinguishing these two questions in separate proceedings.⁴ After the Tort Reform Act of 1987, bifurcation of trials dealing with liability and amount became mandatory, with the court reserving the discretion to further trifurcate the trial in rare cases.⁵ Therefore, when making its case in chief for the defendant’s

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¹ O.C.G.A. § 51-12-5.1(c).
² Id. at (b).
³ Id. at (d)(1)-(2).
liability for compensatory damages, a plaintiff must argue that the defendant’s liability extends to the level of culpability that authorizes punitive relief.

A. The Requisite Standards of Conduct

O.C.G.A. § 51-12-5.1(b) has codified the level of culpability necessary to award punitive damages. Specifically, it must be “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.”

i. Willful Misconduct or Wantonness

Willful conduct or wantonness, as used in determining whether the imposition of punitive damage is authorized, have been defined by the courts as intentional, conscious, and deliberate disregard of the interests of another that precludes a finding of good faith on the part of the defendant.\(^6\) Despite the distinction of willful and wantonness in the language of O.C.G.A. § 51-12-5.1(b), the courts have held the terms and their evidentiary burden synonymous.

ii. Malice

Malice is a higher form of liability than mere willful or wanton misconduct, requiring an action by the defendant that is calculated to injure or born from ill-will or personal spite. Importantly, it is unnecessary to show malice by the defendant to authorize punitive damages, as the lesser standard of willful and wanton misconduct can suffice.\(^7\) However, this showing of

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\(^7\) Bowen v. Waters, 170 Ga. App. 65, 66, 316 S.E.2d 497, 500 (1984) (“The malice required for the recovery of exemplary damages need not amount to ill-will, hatred, or vindictiveness of purpose. It is sufficient if the defendant's acts were wanton or were done with a reckless disregard for or a conscious indifference to the rights of the plaintiff to use and enjoy his property.”).
specific intent to cause harm is necessary in order to overcome the statutory cap imposed by O.C.G.A. § 51-12-5.1(g), and, therefore, its assertion should be a strategic consideration of the plaintiff when making its argument.  

iii. Fraud

Proving that a defendant committed fraud is a powerful avenue allowing the imposition of punitive damages. This is because the demonstration of the plaintiff’s case in chief simultaneously meets the standard of liability for punitive damages. Indeed, “the perpetration of fraud is one of the specific reasons for allowance of punitive damages” set forth in O.C.G.A. § 51-12-5.1(b). Additionally, the tort of fraud has been held by the Court of Appeals of Georgia to be an action made with specific intent to cause harm, thereby alleviating the statutory cap of O.C.G.A. § 51-12-5.1(g) and opening the door to greater potential relief. Furthermore, even if the cause of action is not one for fraud, the plaintiff can still be awarded punitive damages by demonstrating a “fraudulent or evil motive” behind the defendant’s actions.

iv. Oppression

Oppression is perhaps the least established qualifier for punitive damages due to a lack of consistent judicial definition in Georgia. Courts in others states most often group oppression alongside the standards of fraud or malice without further explanation, which tends to dilute oppression’s individual significance. However, in at least one instance the Court of Appeals of

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8 O.C.G.A. § 51-12-5.1(f)(withholding the statutory cap in section (g) if defendant acted or failed to act with a specific intent to cause harm).
Georgia defined oppression as a conscious disregard of an individual’s legal rights, a definition mirrored fifty years later in California’s Civil Code. That said, this definition closely resembles willful misconduct or wantonness, thus leaving oppression’s importance tentative.

v. Conscious Indifference to Consequences

Demonstrating that a defendant acted with a want of care and a conscious indifference to the consequences obviates the need for a finding of willful or intentional misconduct. Nevertheless, the standard is higher than a finding of gross negligence, and it requires a demonstration that the defendant had a complete absence of care that amounts to a knowing or willful disregard for another’s rights—though not requiring any affirmative conduct on the part of the defendant itself.

**B. Proving the Standards of Conduct**

When in the liability phase of the bifurcated trial, the plaintiff has the burden of establishing the requisite culpability authorizing punitive damages by meeting one of the standards set forth above. These evidentiary arguments are often inadmissible in the plaintiff’s case in chief but become admissible to demonstrate liability for punitive damages after a limiting instruction by the

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court.\textsuperscript{19} The central crux of these arguments stem from similar acts or omissions in the past that indicate the defendant knew of the danger of his conduct but chose to continue despite of such danger.\textsuperscript{20} Such evidence is sufficient to demonstrate “willful misconduct, fraud, wantonness, oppression, or a course of pattern of conduct which would raise the presumption of conscious indifference to consequences.”\textsuperscript{21} Because of its wide applicability, the plaintiff should work to establish similarity of past conduct by the defendant that could indicate a potential pattern that will be admissible for determining liability.\textsuperscript{22} As noted above, the court will always predicate the admission of such evidence with a limiting instruction to the jury, though failure to do so places the burden on the defense to raise a timely objection, as discussed in Part III. The most obvious form of past similar conduct comes in the shape of prior pleas and convictions by the defendant. If the conduct engaged by the defendant in a civil trial amounts to a criminal violation, then evidence of the defendant’s plea of guilty to such conduct in the past is admissible to determine whether punitive damages are authorized.\textsuperscript{23}

While looking at past similar conduct by the defendant is often best suited for establishing a pattern for liability, it is also possible to look forward to the defendant’s subsequent conduct after committing the tort at issue. The results of doing so are wide ranging in the Georgia courts, with some holding that evidence of subsequent conduct can be indicative of punitive behavior\textsuperscript{24} and

others holding that such evidence inadmissible.\textsuperscript{25} However, the crux of admissibility appears to depend upon the connection the subsequent act has to the underlying tort itself.\textsuperscript{26}

Regardless of the evidence introduced, the plaintiff must take care not to make inadmissible references during opening and closing statements. Where punitive damages are not at issue, reference to punishment or penalizing the defendant is inadmissible, as only punitive relief—not compensatory—is designed to serve this function.\textsuperscript{27} If punitive damages are at issue, then evidence that their award is based upon a purpose other than to punish or deter the defendant can render the subsequent judgment reversible error.\textsuperscript{28} Therefore, the plaintiff must consider the implications of its arguments and ensure that such arguments align with the purposes of O.C.G.A. § 51-12-5.1

II. ESTABLISHING THE AMOUNT OF PUNITIVE RELIEF

Once the issue of liability has been established by clear and convincing evidence—and punitive damages have been authorized—the trial then proceeds into the second phase, where the central question is the amount of damages necessary to punish, penalize, or deter the defendant.\textsuperscript{29} There is no strict limitation or instruction on the nature of the arguments a plaintiff may offer to establish the amount of punitive damages. For example, evidence of the defendant’s wealth,\textsuperscript{30} subsequent remedial measures,\textsuperscript{31} and circumstances surrounding defendant’s conduct\textsuperscript{32} have all been held admissible to argue for an amount of punitive relief, despite their inadmissibility during the plaintiff’s case in chief.

\textsuperscript{29} O.C.G.A. § 51-12-5.1(d)(2); Webster v. Boyett, 269 Ga. 191, 193, 496 S.E.2d 459, 461 (1998).
Whatever the form the plaintiff chooses for its argument of amount, there are constitutional issues the plaintiff must consider when doing so. While a broad sweeping argument that punitive damages are unconstitutional will not succeed in Georgia,\textsuperscript{33} disparities in ratios between compensatory and punitive relief can violate federal due process.\textsuperscript{34} Notably, while the Supreme Court of the United States has not adopted a bright-line rule of what amounts to an appropriate ratio, dicta has indicated that few awards warrant exceeding a single-digit ratio between punitive and compensatory relief.\textsuperscript{35} However, while this holding should be considered, its application in practice among the lower courts has been far less stringent, with higher ratios regularly being affirmed.\textsuperscript{36} The Court of Appeals of Georgia has set forth three criteria of degree, disparity, and difference when ruling upon whether an award violates due process, and all three should be considered by the plaintiff when making its initial argument so as to create support it can turn to should the award be appealed.\textsuperscript{37}

III. COUNTERING PUNITIVE RELIEF

The defendant is not helpless after losing its case in chief. Fighting against the imposition of punitive damages, whether during the first or second phase of the bifurcated trial, can substantially reduce the amount of damages it will become liable for. Any and all surrounding circumstances accompanying the cause of action can be used to help lessen the amount of punitive relief sought or even defeat the claim entirely.\textsuperscript{38}

\textsuperscript{36} See generally Mathias v. Accor Econ. Lodging, Inc., 347 F.3d 672 (7th Cir. 2003) (ratio of 37.2 to 1); Williams v. Kaufman County, 343 F.3d 689, 711 (5th Cir. 2003) (ratio of 150 to 1); S. Union Co. v. Sw. Gas Corp., 281 F. Supp. 2d 1090, 1099 (D. Ariz. 2003) (ratio of 153 to 1).
\textsuperscript{37} Sumitomo Corp. of America v. Deal, 256 Ga.App. 703, 569 S.E.2d 608 (2002).
A. Defeating Liability and Amount

Argument during the first phase essentially seeks to lessen the degree of the defendant’s culpability to avoid meeting the standards of conduct set forth in Part I. Evidence of good faith on the part of the defendant precludes the possibility of a willful or wanton disregard—wrongful conduct alone does not necessarily amount to bad faith. However, the presence of good faith does not create a prima facie defense to punitive relief and a jury may still impose such damages if it deems that the circumstances as a whole warrant such relief.

When liability is otherwise clear, the defendant is left with the option of attempting to lessen the amount of damages imposed by introducing evidence of mitigating factors pertinent to the defendant’s degree of punishment, as it is ultimately the purpose of punitive relief to punish the defendant. As a result, evidence of actual or potential criminal punishment has been held to be admissible, so long as they arise from the same acts that led to the punitive damages liability. Even the substantial nature of the compensatory award can help to lessen the need for excessive punitive relief.

B. Procedural Considerations of the Defendant

Beyond the substantive arguments against liability and amount, the defendant must always stay familiar with the procedural requirements of bifurcation imposed by O.C.G.A. § 51-12-5.1(d). As discussed above, the process of bifurcation helps to avoid unfair prejudice to the defendant that would result in permitting the introduction of evidence otherwise inadmissible. It is left to the

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defendant to ensure an objection to any failure to follow the procedures of O.C.G.A. §51-12-5.1(d) is raised, less they waive the error on appeal. This preservation of the bifurcation process also provides the defendant a strategic opportunity by permitting it to withhold the presentation of evidence during the first phase in order to take opening and concluding argument in the second phase.

Another strategic consideration that the defendant can utilize to help alleviate further possibility of unfair prejudice is the request of a trifurcated trial, as opposed to a bifurcated one, whereby the issue of punitive damages liability is completely removed from the case in chief. While it is in the discretion of the court to further sever the case beyond the statutory mandated bifurcation, the Supreme Court of Georgia has held that such situations are rare in practice, thus the defendant should present a strong case of unfair prejudice absent further severance to succeed.

CONCLUSION

An award of punitive damages can substantially affect the nature of a final judgment, with its potential size shadowing the compensatory relief sought by the plaintiff. Because of this, courts can be quick to require reversal or remittitur of awards unfounded on tangible evidence. In addition, a lack of a proactive scheme by the plaintiff to establish the requisite standard of conduct can leave punitive relief unattainable from the start. The defendant, meanwhile, must capitalize on these shortcomings and mitigate the effect any potential arguments may have on a jury already predisposed to rule against it. A successful argument for or against punitive relief is ultimately a

combination of substantive factors set against a backdrop of procedural guidelines—some of which are not always clear. Despite this, their ability to make or break a party’s case renders them too important to ignore.
DEFENDING PUNITIVE DAMAGES
Michael D. St. Amand

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Mr. St. Amand began practicing law with Messrs. Gray and Rust upon graduation from law school in 1988 and was joined by Messrs. Moffett and Brieske in 1990 and 1994, respectively. Mr. St. Amand is a 1982 graduate of The Westminster Schools, Atlanta, Georgia. He graduated, with honors, from Trinity University in San Antonio, Texas in 1985, and received his law degree, cum laude, from the University of Georgia School of Law in 1988. Mr. St. Amand’s academic honors include: Bryant T. Castellow Scholarship Award (UGA); National Merit Scholarship (Trinity); Special Presidential Scholarship (Trinity); First Graduate of Trinity University Honors Program (1985); Mortar Board; American Jurisprudence Trusts and Estates Award; and Russell Best Brief Award (UGA).
PUNITIVE DAMAGE CLAIMS:
A DEFENSE PERSPECTIVE UNDER GEORGIA LAW

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TABLE OF CONTENTS

I. Punitive Damage Laws in Georgia.................................................................3
   A. Grounds for making a punitive damage claim ...........................................3
   B. When there is no basis for punitives ..........................................................4

II. Evaluation of punitive damages claims ......................................................6
    A. The underlying basis for punitives ..............................................................6
    B. Mitigating factors .......................................................................................8

III. Concluding Thoughts ................................................................................10
I. Punitive Damage Laws in Georgia

A. Grounds for making a punitive damage claim

My assumption is that the basics of when you can and cannot make a claim for punitive damages is thoroughly covered in the materials of other speakers and in Eric’s book. From my practice, I see most claims for punitive damages when a driver is under the influence of alcohol and/or drugs or when they legitimately flee the scene of an accident. I see MANY claims for punitive damages where the property damages are minimal and the defendant decides not to wait around for the cops or thinks the claimant has given him a sign (waved at him, given a thumbs up) or stated that there is no reason to involve the police in such a small incident. These are generally crap and a waste of time and resources for all involved. Jurors tend not to get jacked up about someone leaving when there are minimal property damages and no apparent injuries.

For the DUI claims, even if the charges are dropped or the defendant beats the charges based upon a low BAC or improper procedures by the police, the police are ALWAYS prepared to defend their original suspicion by recalling that the driver was glassy-eyed, unstable, and slurred her speech. If there is an officer who investigated and suspected DUI, there will be an officer ready to back it up with training, years of experience and the report they filled out 2 ½ years prior. With the advent of dash cam
and body cam video, the reliance on the accuracy of recollection and old reports is
becoming less attractive to pursue questionable DUI/punitive damage claims, but so is
the defense reliance upon the ability to question an investigating officer’s expertise and
credibility. If there is video/audio, somebody’s story is going to look suspect.

In some cases, the plaintiff is the only witness to allege impaired driving.

Georgia law provides wide discretion in allowing a lay opinion as to impairment, but if
not supported by police officer testimony, a lay person’s opinion with nothing more is
not likely persuasive on the issue.

B. **When there is no basis for punitives**

Many cases are filed with a valid punitive damage claim against the at fault
driver, who is either uninsured or has insufficient insurance to cover compensatory and
punitive damages. The UM carrier is served and threats are made to bust limits and get
punitives against the UM carrier. Everyone smart enough to come to this seminar
knows that punitive damages cannot be recovered against a UM carrier. O.C.G.A. § 33-7-11; *Bonamico v. Kisella*, 290 Ga. App. 211, 659 S.E.2d 666 (2009), *certiorari denied* (uninsured motorist insurer could not be liable for punitive damages awarded against driver who rear-ended insured while intoxicated, under uninsured motorist statute, since punitive damages were not designed to compensate a victim's injury or property damage, but to punish; punishing insurer, who had done no wrong, would be
Likewise, punitive damages are not recoverable against the estate of a deceased tortfeasor for the same reasons. *Morris v. Duncan*, 126 Ga. 467, 54 S.E. 1045, 1046 (1906) (when a tortfeasor dies, punitive damages for the tortfeasor's conduct may not be recovered from the tortfeasor's estate). However, the same rule does not preclude a claim for punitive damages against the former employer of a since deceased tortfeasor. *Sightler v. Transus, Inc.*, 208 Ga. App. 173, 430 S.E.2d 81 (1993).

Although punitive damages may not be recovered against a UM carrier or the estate of a deceased tortfeasor, the fact of the tortfeasor’s impairment may be admissible and if it is may have a profound effect on compensatory damages. In many (not all) cases with a drunk or impaired defendant driver, the party ultimately defending the claim (UM carrier or estate) is left with a defense to contest damages – either the reasonableness of the treatment/costs or causal relationship of the accident to the claimed injuries. In many cases, a jury simply sees the “defense team” as one and will discount the usual arguments of exaggeration of injuries or damages. In other words, those sitting at the table with the drunk or representing the estate of the drunk are not likely to be given the benefit of the doubt on issues of causation and damages. In effect, the burden of proof is shifted and the defense cannot rely upon the healthy skepticism of fair and impartial jurors to hold the plaintiff’s feet to the fire on the
II. **Evaluation of punitive damages claims**

A. **The underlying basis for punitives**

The first and most obvious basis to evaluate a punitive damages claim is the underlying basis for the claim. An individual who steals a car from his employer, flees and eludes the police on a high speed chase through a residential neighborhood, and slams 72 mph into two girls sitting on wall in a park next to an elementary school is not a good start. When the tortfeasor then jumps out, runs and hides out in a MARTA station for two days is pretty bad. When both of the girls sustain life-changing injuries, including an amputated leg, it’s really bad. I know. I had that guy.
Note that the jury DID NOT determine to award punitive damages against Defendants Avis or their local operator CSYG who had hired Mr. Perry as a customer service representative and gave him access to their cars and keys despite his prior felony convictions for car theft and fleeing and eluding police. In fact, when first hired, Mr. Perry did not have a driver’s license because he had recently been released from a rather lengthy prison term. As a matter of public interest (and my reputation), the punitive damage claim against Mr. Perry was settled for $1.00 prior to re-commencing the trial for receiving evidence on punitive damages. I recall that there was an issue of collectability on the verdict against Mr. Perry that influenced negotiations.
Likewise, someone who bumps into another car in the Checkers parking lot and “flees the scene” only to find out that all 5 occupants of the other car hired lawyers and then figured out they had neck and back soft-tissue injuries – that one is not so scary.

Counties that are known to be “conservative” are not necessarily so when it comes to tolerance of drunk driving. You cannot sit 2 jurors out of 12 in Cobb County who are not themselves or have family members who support MADD. They’ve all had family members or friends hit by drunk drivers and you will hear it all in voir dire. Some on the panel will have their own driving issues, but they will not likely end up in the box.

B. Mitigating factors

Here is where the rubber meets the road. You’ve got the drunk guy who caused the accident. The plaintiff was actually injured and is seeking only the compensatory damages caused by your accident. The jury will be asked to award an amount sufficient to punish the defendant and deter him from similar conduct in the future. What now? How much is it worth on punitives? It depends on EVERYTHING:

1. Was this an isolated incident? **It does not matter if this is the first arrest, the first conviction or the first time caught.** If there is evidence introduced that demonstrates a pattern of similar conduct, both before and after the episode at issue, the jury will likely value this information. On the other hand, a 70 year
old church volunteer who had never driven DUI before and had 2 glasses of wine at dinner may not be looked at by the jurors as one who needs punishment or to be deterred.

2. Is the defendant remorseful? Too many defendants want to convince the world of their innocence in the face of insurmountable evidence to the contrary. This is not a good situation to defend.

3. Has the defendant already been punished enough? Many times, the defendant in the civil case has “beat the rap” and either had criminal charges dismissed or received a slap on the wrist. In other instances, the defendant plead guilty or nolo contendre and received a stiff sentence, fines and incurred probation fees, license suspension or restrictions and attorney’s fees. The argument that the legislature has determined what is a reasonable punishment for a crime can work in the right circumstances.

4. Financial resources of the defendant are admissible and will help or hurt the case. For an individual defendant, many cases proceed to the punitive damages phase and the jury never hears what the defendant has or might be able to pay. If that is the case, then someone messed up. Either the defendant is loaded and this information should be brought out by plaintiff’s counsel or he is destitute and the defense attorney should let the jury know that you cannot squeeze blood
from a turnip.

5. Corporate versus individual defendant. 99 times out of 100, I would much rather defend a punitive damages case solely against an individual. A corporate defendant liable for punitive damages is in a much worse position to present evidence of a lack of financial resources and cannot demonstrate that they have been sufficiently punished and deterred through criminal punishment.

6. Plaintiff’s or others’ comparative or contributory fault. In *Suzuki Motor of Am., Inc. v. Johns*, 830 S.E.2d 549, 554 (June 28, 2019), recently affirmed by the Georgia Court of Appeals, the Plaintiff sued Suzuki based upon an alleged design defect in the braking system, a failure to warn and a negligent recall. Prior to the fateful ride, the Plaintiff had noticed the front brakes felt “spongy” and attempted to bleed the brakes to get rid of any air in the brake lines. The jury found in favor of Johns and awarded him $10.5 million in compensatory damages. When asked to assign the relative percentages of fault to the parties, the jury assessed 49 percent fault to the Plaintiff and 51 percent fault to Suzuki. The jury declined to award punitive damages.

III. **Concluding Thoughts**

I receive several assignments a year that start with - “What do you think this is worth in punitive damages?” My response is usually to inquire about the factors listed
above and the company/person asking me the question does not know if the person charged with DUI: (1) plead guilty; (2) was convicted; (3) has been sentenced; (4) what the sentence was; (5) if they are truly remorseful; (6) has been arrested or convicted before or since; or (7) what financial resources are available. In other words – I don’t know!! The analysis cannot begin and end simply with the event itself. To determine early on the potential value of a claim for punitive damages is really an effort to look at what lies at the end of the road. What evidence will a jury have to determine: “What amount of damages is sufficient to punish the defendant for his/her conduct and to deter him/her from engaging in similar conduct in the future?” As with any type of claim, the best way to answer that question early on is to pose the question as if presented to a jury at the end of a long trial. Good luck to all of you!
ETHICS IN LITIGATION: YES, YOU CAN BE A SUCCESSFUL CIVIL ADVOCATE…BY ADVOCATING CIVILLY!
Since starting his legal career in 1987, Harry Revell has earned a reputation for committing himself totally to the best interests of his clients. Although comfortable with all aspects of civil litigation, Mr. Revell’s particular interest and expertise is in complex litigation such as professional negligence, serious and catastrophic injury cases, land condemnation cases, and business and commercial litigation. He has achieved several multi-million-dollar verdicts & settlements, including class actions that resulted in substantial cash payments and other benefits to thousands of individuals throughout the country.

Harry was born and raised with traditional small-town values in Louisville, Georgia. He received his undergraduate degree from the University of Georgia in 1976 and joined Georgia Power Company shortly after graduation. At Georgia Power Mr. Revell progressed through various management positions and ultimately relocated to Washington D.C. where he became a Director for the U.S. Committee for Energy Awareness. Following completion of his legal education at the George Mason University School of Law in Arlington, VA and the Woodrow Wilson College of Law in Atlanta, GA, Harry moved to Augusta in 1987 and joined what later became the Burnside, Wall, Daniel, Ellison & Revell law firm. In August 2004 he partnered with Sam Nicholson to form Nicholson Revell LLP.

Harry is an active member of the Augusta Bar Association, having served as a member of the Executive Committee before becoming President in 2005. He is also a member of the State Bar of Georgia, the American Bar Association and the Georgia Trial Lawyers Association. In 2006 and 2007, the Georgia Supreme Court appointed Harry as a mentor in the Transition into Law Practice Program sponsored by the State Bar of Georgia. Martindale-Hubbell’s Peer Review Rating System recognizes Harry with its “AV” rating, the height of professional excellence based on skill and integrity.

Harry has been married to Sheila Dixon Revell for more than 35 years. They have three grown children, Hunt, Dixon and his wife Charlene, and Eleanor and her husband Dr. Benton Johnson, and five grandchildren. Harry is an active member of Reid Memorial Presbyterian Church where he has served as Ruling Elder & Deacon and now serves as a Trustee for the church’s Foundation. He has been involved in various community activities including serving on the Boards of Child Enrichment, Inc., United Cerebral Palsy, Augusta Ballet, The Family Y, the Lakeside Panther Athletic Association and the Columbia County Greenspace Committee.
PUNITIVE DAMAGES IN TRUCKING CASES
Trent Shuping

• A partner at the Warshauer Law Group since 2013, Trent Shuping has taken cases to trial in state and federal courts throughout Georgia on behalf of clients injured by the carelessness of others. Trent focuses on cases involving defective products, railroad accidents, tractor-trailer, and motor vehicle wrecks and general negligence cases. In addition to his work in the trial courts, Trent has extensive experience handling appeals in state and federal courts and has argued in front of the Georgia and Tennessee Courts of Appeals and the Georgia Supreme Court. As a result of his efforts, Trent has been selected as one of Super Lawyer’s Rising Stars.

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  A native of Marietta, Georgia, Trent graduated summa cum laude from the University of Georgia with a degree in Criminal Justice and the Duke University School of Law. He is a long time member of the board of Restoration Atlanta, a non-profit focused on serving families transitioning out of homelessness. He lives in Mableton, Georgia with his wife and two daughters. When he is not working he enjoys spending time with his family, listening to music, and running.

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PUNITIVE DAMAGES IN TRUCKING CASES

2019

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I. Introduction

If the purpose of punitive damages is to punish and deter, we as trial lawyers have our work cut out for us in Georgia. There is a lot of punishing and deterring to do. According to the Insurance Institute for Highway Safety, in 2013 and 2014, Georgia ranked fourth in the number of fatalities involving large trucks - even though it was 8th in population. To put this in perspective, in 2013 California, with more than 38,000,000 people, had only 243 truck related fatalities. Georgia, with only about 9,900,000 people, had 163. In that year, Georgia had 14.21 fatal crashes involving large trucks per million people. In comparison the rate in Illinois was 9.55, in Michigan, 7.48 and in New Jersey, only 6.40. In 2015 and 2016, the fatality rate per 100 million total vehicle miles traveled is .16 in Georgia. This makes Georgia tied for 15th place in fatalities per mile driven in 2015 and 13th in 2016 according to this most recent data. There were 387 deaths during that two-year period. There is simply no doubt about it – in Georgia, trucks are more dangerous than just about anywhere else in the United States. Perhaps the aggressive use of claims for punitive damages will wake dangerous trucking companies up from their slumber and deter bad conduct.

The statistics show that there are a lot of truck wrecks in Georgia. Whether there is a truck involved or not, recoverable damages include compensatory (general and special) and punitive (to punish and deter) damages. This paper focuses on recovery of punitive damages in wrecks involving large trucks. Punitive damages are a statutory creation and therefore we must first make sure we understand Georgia’s punitive damages statute before we can focus on how to use that statute to increase the value of our client’s recoveries, while simultaneously making our highways and byways safer.

II. O.C.G.A. § 51-12-5.1 is the statutory basis for punitive damages.

O.C.G.A. § 51-12-5.1 is the statute that governs the recovery of punitive damages in Georgia. Familiarity with the punitive damages statute is essential. It provides that:
(a) 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.

(b) 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.

(c) Punitive damages shall be awarded not as compensation to a plaintiff but solely to punish, penalize, or deter a defendant.

(d)(1) An award of punitive damages must be specifically prayed for in a complaint. In any case in which punitive damages are claimed, the trier of fact shall first resolve from the evidence produced at trial whether an award of punitive damages shall be made. This finding shall be made specially through an appropriate form of verdict, along with the other required findings.

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

(e)(1) In a tort case in which the cause of action arises from product liability, there shall be no limitation regarding the amount which may be awarded as punitive damages. Only one award of punitive damages may be recovered in a court in this state from a defendant for any act or omission if the cause of action arises from product liability, regardless of the number of causes of action which may arise from such act or omission.

(2) Seventy-five percent of any amounts awarded under this subsection as punitive damages, less a proportionate part of the costs of litigation, including reasonable attorney's fees, all as determined by the trial judge, shall be paid into the treasury of the state through the Office of Treasury and Fiscal Services. Upon issuance of judgment in such a case, the state shall have all rights due a judgement creditor until such judgement is satisfied and shall
stand on equal footing with the plaintiff of the original case in securing a recovery after payment to the plaintiff of damages awarded other than as punitive damages. A judgment debtor may remit the state’s proportional share of punitive damages to the clerk of the court in which the judgment was rendered. It shall be the duty of the clerk to pay over such amounts to the Office of Treasury and Fiscal Services within 60 days of receipt from the judgment debtor. This paragraph shall not be construed as making the state a party at interest and the sole right of the state is to the proceeds as provided in this paragraph.

(f) 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, or that 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 against an active tort-feasor but such damages shall not be the liability of any defendant other than an active tort-feasor.

(g) For any tort action not provided for by subsection (e) or (f) of this Code section in which the trier of fact has determined that punitive damages are to be awarded, the amount which may be awarded in the case shall be limited to a maximum of $250,000.00.

(h) This Code section shall apply only to causes of action arising on or after April 14, 1997.

O.C.G.A. § 51-12-5.1 was enacted in 1987 and consolidated previously used terms including “exemplary damages” and “vindictive damages” into the single term “punitive damages.” Most importantly, this change in the law made it clear that punitive damages are not intended to compensate the plaintiff for the damages he suffered as a proximate cause of the defendant’s conduct. The purpose is to punish and deter the defendant. That is why Georgia’s statute can be so useful in cases involving big trucks.

Without going too deep into the psychology of how or why juries render verdicts, it is important to know that their perception of the extent to which the defendant has placed the broader community at risk is crucial. In other words, when jurors feel that they are personally at risk by the defendant’s conduct the chance of a substantial verdict goes up dramatically. Because every juror drives on the highway, and every juror shares those highways with big trucks, the chances of recovering punitive damages are increased when jurors understand the case as being necessary to deter dangerous conduct. This deterrence feature of the statute protects the jurors and their families.
III. Punitive damages must be pleaded for in the complaint.

There are some procedural issues that are important. First, as noted in the statute, to recover punitive damages the plaintiff must include a specific prayer for punitive damages in the complaint. This is not required by the Civil Practice Act’s more general notice pleading statutory provision so it is often overlooked (compare O.C.G.A. § 9-11-10).

In addition to including a prayer for punitive damages, a plaintiff wishing to recover more than the $250,000 cap, should ensure that the prayer for punitive damages in the complaint asserts that there was a “specific intent to cause harm.” Additionally, there must be some actual damages suffered, because under O.C.G.A. § 51-12-5.1 if the entire injury is to the peace and happiness of the plaintiff, there can be no punitive damages imposed. Although not actually “procedural,” if the victim died as a result of the truck wreck, there must be pre-death pain and suffering onto which the punitive damage award can attach. This is because Georgia’s wrongful death statute is considered punitive in nature too. Lastly, as noted, the plaintiff must prove his claim for punitive damages by clear and convincing evidence instead of the usual preponderance of the evidence.

A relatively recent Georgia Supreme Court decision in a medical malpractice case is worth discussing at this juncture. The case is Johnson v. Omondi 294 Ga. 74 (2013) and it arose from alleged medical malpractice in an emergency room. This is because it stands for the proposition that regardless of the burden, it is for the jury to decide if there is a breach, not judges. While not yet used to defeat a motion for partial summary judgment on punitive damages, the case should be considered for this purpose.

In medical malpractice cases in which the malpractice was committed in an emergency room, the applicable statute employs the term “clear and convincing” as the standard of proof - the same standard applicable to the recovery of punitive damages. It relates to the level of proof the plaintiff must bring to recover against the allegedly negligent emergency room physician. The Johnson case is important in our discussion of punitive damages because it should allow more of these cases to proceed to trial as opposed to being decided on a motion for summary judgment. The argument goes like this: Under Georgia law, a heightened evidentiary burden, such as the “clear and convincing” burden, does not mean that the party bearing the burden must convince the trial or appellate court of his claim’s merits. Instead, the focus is on whether there is evidence that would support a reasonable jury’s decision. The fact that the plaintiff bears a high burden, or that a plaintiff may be unlikely to succeed with a jury, is not grounds for taking away the right of a jury to consider the issue.
The appropriateness of letting jurors decide cases, even when a heightened burden is in play, was discussed by Justice Blackwell of the Georgia Supreme Court in a concurrence, joined by Justice Nahmias, to the court’s unanimous decision in *Johnson v. Omondi*.

Justice Blackwell explained that even where a heightened burden is at play, the familiar rules of summary judgment still apply. *Id.*

Thus, if a defendant in a [medical malpractice case where the plaintiff needs to show “gross negligence” to a “clear and convincing” burden] moves for summary judgment and points to the favorable testimony of a dozen winners of the Nobel Prize for Medicine (all of whom say that he did not deviate at all from the accepted standard of medical care), but the plaintiff responds with the admissible testimony of a barely qualified medical expert (who shows that the defendant substantially and grossly deviated from the accepted standard of medical care), the trial court must assume — as unlikely as it may be — that the jury will believe the plaintiff’s expert and disbelieve the expert array offered by the defendant. For purposes of the motion for summary judgment, the trial court would consider the testimony of the plaintiff’s expert, but not the conflicting testimony of the Nobel Prize winners.

That OCGA § 51-1-29.5 may not produce many more summary judgments, however, does not mean that it is insignificant. The statute essentially tells a jury to put one thumb on the scale for the defendant as to “gross negligence,” and to put the other thumb as well on the scale for the defendant as to “clear and convincing” proof. Unlike at summary judgment, these thumbs on the scale may produce far more defense verdicts at trial than in ordinary malpractice cases. In criminal cases, after all, the prosecution must prove guilt beyond a reasonable doubt, a burden even heavier than the burden to prove fault by clear and convincing evidence. Yet, we do not see criminal cases routinely decided by directed verdicts of acquittal. Most criminal cases go to the jury, but juries — when charged with their obligation to acquit unless the evidence proves the guilt of the defendant beyond a reasonable doubt — render defense verdicts in no small number of cases. No one should be surprised if medical malpractice cases under OCGA § 51-1-29.5 turn out in much the same way.

Since the Georgia Supreme Court’s opinion in *Johnson v. Omondi*, there appears to be only one case in which punitive damages and the burden of proof has been explicitly considered consistent with this argument. That opinion, *Kabrich v. Simon Prop. Group, L.P.*,[xiv] is a trial court opinion but it is consistent with this argument. Furthermore, the *Johnson* logic has been applied in an injunction case that also requires clear and convincing evidence. See, *Danforth v. Apple Inc.*, 294 Ga. 890 (2014). Additionally, in
the last couple of years our Court of Appeals, evidencing a decided leaning towards allowing juries to consider factual issues, has reversed summary judgments involving punitive damages on several occasions. Whether punitive damages are appropriate is a fact issue for jury determination. E.g., Caldwell v. Church, 342 Ga. App. 852, 802 SE2d 835 (2017); McDonald v. Silver Homes, LLC, 343 Ga. App. 194, 806 SE 2d 651 (2017); Weinstein v. Holmes, 344 Ga. App. 391, 819 SE2d 320 (2018).

IV. More than mere negligence is required for punitive damages.

The mere fact that a big truck caused a wreck is not enough for the imposition of punitive damages. Punitive damages cannot be recovered because the truck driver or trucking company was merely negligent. Even gross negligence is not enough. However, if the act that caused the wreck is so blatant that it shows a wanton disregard for the rights of others, the requisite level of intent can be inferred. This can arise from the actions of a defendant whose carelessness while driving shows an indifference to the consequences. Of course, if the truck driver is suffering from a mental illness he might not be liable for punitive damages.

The Court of Appeals describes the circumstances justifying the imposition of punitive damages as follows:

In vehicle collision cases, punitive damages are not available if a driver merely violated a rule of the road; rather, an award of punitive damages requires “that the collision result from a pattern or policy of dangerous driving, such as driving while intoxicated or speeding excessively.” We have held that punitive damages are not available against a person who causes a collision while driving without a valid license or driving at a time of day when he is restricted from doing so. This is because the violation at issue was not the proximate cause of the collision. Similarly, Anderson's actions after the collision occurred were not the proximate cause of the collision.

In other words, there has to be more than just bad driving. The driver’s conduct must be really offensive or part of a policy and pattern of dangerous driving. It helps if the conduct is part of a pattern and practice of wrongful activity because

“in automobile collision cases, punitive damages are not recoverable where the driver at fault simply violated a rule of the road.” (Citations and punctuation omitted.) Brooks v. Gray, 262 Ga. App. 232, 233(1), 585 S.E.2d 188 (2003). Rather, to support an award of punitive damages in such cases, Georgia courts have
“required that the collision result from a pattern or policy of
dangerous driving, such as driving while intoxicated or speeding
excessively.” (Citations and punctuation omitted.) Id.

In Brooks v. Gray, this Court affirmed the grant of summary
judgment on a claim of punitive damages arising out of a collision
involving a teenage driver, who was driving at a time not allowed
by his restricted license. Id. at 234(2), 585 S.E.2d 188. The driver's
Class D license prohibited him from driving between the hours of
1:00 a.m. and 5:00 a.m., during which time the collision occurred.
The plaintiffs argued that this conduct justified an award of
punitive damages. Id. But this Court rejected that argument noting
that “[e]ven if operating a vehicle without a proper license affords a
basis for actionable negligence,**625 it does not warrant
consideration of punitive damages” under the circumstances of the
case. Id. at 233(1), 585 S.E.2d 188. In reaching this conclusion, the
Court noted that the teenager's driving during the restricted period
was not the proximate cause of the accident and further that “his
action did not constitute a pattern or policy of dangerous driving.”
(Citation and punctuation omitted.) Id.xx

In a recent case in the United States District Court, Southern District of Georgia, Judge
Royal granted summary judgment to the defendant trucking company because driving on
the interstate with a flat tire, below the posted speed limit, into the path of plaintiff’s
truck without no lights or flashers is not punitive in nature – at most it is just gross
negligence. This is because there was no “pattern or policy of dangerous driving, such as
driving while intoxicated or speeding excessively.” Vannes v. Smith, 2016 U.S. Dist.

While in most tort cases, for conduct to be relevant, it must be a proximate cause of the
event that is the basis of the lawsuit, that is not always the case with claims for punitive
damages. In fact, punitive damages can be imposed not only for causing the wreck, but
also for what occurs afterwards. For example, in Langlois
v. Wolford,xxi the Court allowed conduct of a defendant who left the scene of a collision,
without speaking to the other party, to be the basis of a punitive damages claim because
it “demonstrated a conscious indifference to the consequences and an entire want of care
as to the victim's well-being”. In contrast, if the driver does not flee the scene but instead
sticks around and acts badly, punitive damages cannot be imposedxxii.

V. Juries decide punitive damage claims.

While the case law is certainly instructive, it is the jury that will ultimately decide if
punitive damages will be imposed or not. That is why, as one last topic before the focus
shifts completely to punitive damages in truck cases, it is important to consider the
likely jury instructions. So, here are some of the critical jury instructions on what
constitutes a punitive damages case, right from the pages of the Council of Superior
Court Judge’s Pattern Jury Instructions book (the numerous instructions relating to the amount and method of determining that amount are left to other papers). Refer to these instructions in planning the discovery efforts that are necessary in your case.

66.700 Punitive Liability

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

66.702 Punitive Liability, continued

If the plaintiff fails to prove, by clear and convincing evidence, that the defendant was guilty of willful misconduct, malice, fraud, wantonness, oppression, or entire want of care that would raise the presumption of conscious indifference to consequences, then you would not be authorized to award (impose) punitive damages. Mere negligence, although amounting to gross negligence, will not alone authorize an award (imposition) of punitive damages. Punitive damages, when authorized, are awarded (imposed) not as compensation to a plaintiff but solely to punish, penalize, or deter a defendant. In your verdict, you should specify whether you do or do not decide (that the plaintiff should receive) (to impose) punitive damages.

66.711 Intent to Harm; Acting with

If you decide (You have decided) to award (impose) punitive damages, you should further specify whether you find that the defendant acted with specific intent to cause harm. A party possesses specific intent to cause harm when that party desires to cause the consequences of its act or believes that the consequences are substantially certain to result from it. Intent is always a question for the jury. It may be shown by direct or circumstantial evidence.

66.712 Intent to Harm; Amplified

Intent is ordinarily ascertained from acts and conduct. You may not
presume the defendant acted with specific intent to harm, but intent may be shown in many ways, provided you, the jury, find that it existed from the evidence produced. The jury may find such intent, or the absence of it, upon consideration of the words, conduct, demeanor, motive, and all the other circumstances connected with the alleged act.

66.720 Influence of Alcohol; Drugs; Acting under

If you decide (You have decided) to award (impose) punitive damages,(;) you should further specify whether you find that the defendant acted while under the influence of (alcohol) (drugs) (intentionally consumed glue, aerosol, or other toxic vapor) to that degree that his or her judgment is substantially impaired.

66.721 Prescription Drugs; Exception

(If you find that the defendant acted under the influence of drugs, you should further specify whether such drugs were or were not lawfully prescribed drugs administered in accordance with prescription.)

02.040 Clear and Convincing Evidence

As to the issue of ____________, the (plaintiff) (defendant) must prove to a reasonable certainty by clear, convincing, and decisive evidence that the (plaintiff) (defendant) is entitled to relief. This is a different and higher burden of proof than a mere preponderance of the evidence.

Clear and convincing evidence is defined as evidence that will cause the jury to firmly believe each essential element of the claim to a high degree of probability. Proof by clear and convincing evidence requires a level of proof greater than a preponderance of the evidence (but less than beyond a reasonable doubt).

VI. Trucking specific issues that could trigger punitive damages.

Obtaining punitive damages in a truck wreck case requires not only the basic knowledge described above, but also a thorough understanding of the special statutes, regulations, and professional requirements applicable to interstate trucking. When scouring the facts for the kind of reprehensible conduct that will support a punitive damages verdict, it makes sense to break the process down into subparts. A careful analysis for punitive damages will follow the same road map that is used to determine liability. There are three main stops on the map, and each needs to be carefully visited. In order of likely helpful information, these places or interest are first the driver, second the truck, and third the
employer.

A. The Driver

The driver and his conduct are usually the most obvious causes of the wreck in question. Intoxication, speeding, uninspected equipment, and sleep deprivation are common driver errors. Also, consider whether the driver was physically fit to drive. Was the driver suffering from diabetes, sleep apnea or vision problems?

There are several regulations governing drivers, and each must be carefully analyzed. Just a few will be touched on here.

Obviously, the driver’s qualifications and physical condition must be determined to see if they meet the minimum standards. The qualifications for driving a truck include having a CDL (and meeting the medical requirements for that license) being 21, able to read, having the ability to drive safely, etc. xxiii The physical requirements are minimal – in fact only one foot and hand are necessary. xxiv However the medical requirements are worth looking at more closely and can more easily be hidden from discovery. Unsafe medical conditions include insulin-controlled diabetes, heart problems, high blood pressure, epilepsy, or even certain psychiatric conditions.xxv

Although the failure to have a driver’s license is not necessarily the basis for the impositions of punitive damages in a regular car wreck, it might well be for someone driving an 80,000-pound tractor trailer.

When a truck driver is drunk at the time he causes a collision, punitive damages are appropriate. xxvi Drug use is also illegal, and a driver cannot be on non-prescribed amphetamines, narcotics, or habit-forming drugs. xxvii Just because a drug is prescribed does not mean it is ok however. The prescribing physician must be aware of the driver’s duties and have approved the drug with that knowledgexxviii. Additionally, drugs properly prescribed may be used improperly.

Sleep deprivation must also be considered. In many ways sleep deprivation is similar to intoxication. xxix Sleepiness is a very big problem in the trucking business. According to the Federal Motor Carrier Safety Administration more than 750 people die and 20,000 more are injured each year because of sleepy commercial vehicle drivers. The National Highway Transportation Safety Administration reports that truck driver fatigue contributes to between 30 and 40% of all big truck wrecks.xxx This is why it must be suspected in every case. Fatigue is likely to be a problem in about three quarters of all cases where the truck goes out of its lane – either into oncoming traffic or off the shoulder. Fatigue increases as a possible cause of the wreck by a factor of two between the driver’s 8th and 10th hour, and doubles again between the 10th and 12th hour on the road.xxxi There is a reason for all these fatigue related events – drivers regularly violate the hours of service regulations. An Insurance Institute for Highway Safety Survey in 1992 showed that almost 75% of drivers violate the hours of service regulations.
Under the most recent regulations, a driver can only drive for 11 hours in a row. But the
driver can only drive this long if this follows a minimum of 10 hours off-duty. The
regulation addressing Hours of Service is set forth below. As a result of the
Consolidated and Further Continuing Appropriations Act, 2015, the provisions of
sections (c) and (d) are suspended, and the former provisions of section (c) apply. See 79
F.R. 76241. Therefore, in the regulation, as set forth below, the suspended provisions are
struck through while the applicable provision is italicized.

Maximum driving time for property-carrying vehicles.

(a) Except as otherwise provided in Sec. 395.1, no motor carrier
shall permit or require any driver used by it to drive a property-
carrying commercial motor vehicle, nor shall any such driver drive
a property-carrying commercial motor vehicle, regardless of the
number of motor carriers using the driver’s services, unless the
driver complies with the following requirements:

(1) Start of work shift. A driver may not drive without first
taking 10 consecutive hours off duty;

(2) 14-hour period. A driver may drive only during a period of
14 consecutive hours after coming on duty following 10
consecutive hours off duty. The driver may not drive after the
end of the 14-consecutive-hour period without first taking 10
consecutive hours off duty.

(b) No motor carrier shall permit or require a driver of a property-
carrying commercial motor vehicle to drive, nor shall any driver
drive a property-carrying commercial motor vehicle, regardless of the number of motor carriers using the driver's services, for any period after--

(1) Having been on duty 60 hours in any period of 7 consecutive days if the employing motor carrier does not operate commercial motor vehicles every day of the week; or

(2) Having been on duty 70 hours in any period of 8 consecutive days if the employing motor carrier operates commercial motor vehicles every day of the week.

(c)(1) Any period of 7 consecutive days may end with the beginning of an off-duty period of 34 or more consecutive hours that includes two periods from 1:00 a.m. to 5:00 a.m.

(2) Any period of 8 consecutive days may end with the beginning of an off-duty period of 34 or more consecutive hours that includes two periods from 1:00 a.m. to 5:00 a.m.

(d) A driver may not take an off-duty period allowed by paragraph (e) of this section to restart the calculation of 60 hours in 7 consecutive days or 70 hours in 8 consecutive days until 168 or more consecutive hours have passed since the beginning of the last such off-duty period. When a driver takes more than one off-duty period of 34 or more consecutive hours within a period of 168 consecutive hours, he or she must indicate in the Remarks section of the record of duty status which such off-duty period is being used to restart the calculation of 60 hours in 7 consecutive days or 70 hours in 8 consecutive days.

(c)(1) Any period of 7 consecutive days may end with the beginning of any off-duty period of 34 or more consecutive hours; or (2) Any period of 8 consecutive days may end with the beginning of any off-duty period of 34 or more consecutive hours.

In addition to discovering violations of the hours of service rules, it is important to discover what the driver was actually doing while off duty. A driver who takes to the road after staying up all night playing video games shows the same indifference to safety as one who continues to drive after exceeding the hours of service regulations. Information about the driver’s rest can come from the driver during his or her deposition but may also be discovered by deposing those who live with the driver. Even if there is not information specific to the time period immediately preceding the event in suit, a driver’s past practice of failing to take rest may be part of the policy or pattern of indifference that may justify punitive damages.
Daily inspection records are a good source for evidence of callous conduct. Drivers must inspect their trucks and prepare an inspection record showing inspection of the trailer brake connections, the steering mechanism, lighting and reflectors, and tires. When looking for evidence that justifies an award of punitive damages it is imperative that these reports be compared with the maintenance records and annual inspection documents to see if one or the other is being fudged.

A driver who stops his truck without putting out required warnings markers can also be subjected to punitive damages. Federal regulations demand appropriate warning signals be used to protect approaching motorists.

The key to obtaining punitive damages is not just a single violation, but a pattern and practice of ignoring the law and putting the public at risk. Examine not only the driver’s log book, which he is required to keep and have on his truck, but also his employer’s records as well as DOT audit records. The specifications for the log book, called the Driver’s Record of Duty Status are quite detailed. When the driver fraudulently keeps this log, or has two books, punitive damages are appropriate. In one federal case, the driver “admitted in his deposition that he had lied to the State Trooper following the accident, had falsified his records of duty status (drivers logs), and had grossly exceeded his maximum hours of service prior to the collision, by as much as 10 hours over the 10 hour maximum.” This was a sufficient set of facts to allow the plaintiff’s expert to testify and likely enough to allow a punitive damage claim to go to the jury.

Jurors will readily accept evidence that drivers exceed the hours of service law. In fact, a 2004 Louis Harris poll shows that 84% of Americans are in favor of mandatory black box recorders on trucks to monitor hours of service compliance. Today, technological methods of evaluating a driver’s compliance with the rules are a reality. This opens up new ways of discovering the truth, but also new ways of obscuring or hiding the truth. A good trucking expert will be able to help you evaluate the available evidence and discover evidence that you may otherwise not have known existed.

It is also important to look at the driver’s traffic citation record. This not only can show a pattern and practice of bad driving but can also establish negligent hiring and be so bad as to disqualify the driver from driving at all. Some offenses result in lifetime disqualification.

B. The Truck

In looking at the truck the obvious defects will be the brakes, steering, tires and load. Regulations govern all of these elements of the truck. Again, for purposes of obtaining punitive damages, a pattern and practice of gross negligence is important. Fortunately, jurors are predisposed to believe bad conduct by truckers and that the bigger the truck the more dangerous it must be. For example, a 2004 Louis Harris
poll shows that 80% of Americans think tandem trailers are less safe.

As noted above, Georgia is a particularly scary place to be on the road with trucks. A report by the GAO\(^{xlii}\) found numerous bus and truck companies in Georgia that have been ordered to cease operation because of excessive regulatory violations, to have remained in business by simply changing their names. This means we have to not only look at the company itself, but also its history to see if it is nothing more than a dangerous company masquerading as a safe one by changing its name to avoid being shut down.

If a truck is used when it is known that there is a safety defect such as defective brakes, in violation of federal regulations, punitive damages can be imposed.\(^{xliii}\) The use of such a dangerous truck exhibits a “conscious indifference to the consequences”.\(^{xliv}\)

Just about all of the safety features on a truck are covered by federal regulations. The regulations are beyond the scope of this paper but can easily be found by looking at the Title 49 of the Code of Federal Regulations.

C. The Employer

Much of the punitive damages litigation relating to trucks in Georgia, and throughout the country for that matter, relates to employer conduct. This is most likely because a driver is usually making a simple mistake, but the employer has had a pattern and practice of making unsafe profit motivated decisions. Always check out the trucking company, and any potential predecessors, by using web sites such as SAFER – Safety and Fitness Electronic Records System.\(^{xlv}\) The data available at SAFER will give you a good idea whether you have a company that ought to be punished based on its past conduct and practices.

Employers are responsible for every aspect of the operation of their trucks. This includes training, driver selection, and maintenance.\(^{xlvi}\) The employer is liable for bad hiring decisions. If the hiring practices are bad enough punitive damages are appropriate. If there is a conscious indifference to the consequences when an employer hires and retains its drivers, punitive damages are appropriate.\(^{xlvii}\)

Employers will also be punished for having systems in place that encourage fast driving, ignore traffic violations, and encourage unsafe equipment.\(^{xlviii}\) Pay attention to incentive programs and learn how the driver was compensated and how loads were dispatched to certain drivers. Because conscious indifference and repetitive conduct are the keys to punitive damages, negligent hiring, entrustment, and retention claims can be the basis for punitive damages. Every day bad drivers are on the road there is a repetition of the danger caused by the employer.
Employers are supposed to monitor their drivers’ hours of service compliance. Trucking companies are also required to monitor their drivers’ speeds. Simply put, if an 80-mile trip is completed in an hour, the employer is not allowed to ignore this obvious speeding conduct. Employers are not allowed to schedule trips in a way that requires speeding. Nor is it enough merely to monitor. A trucking company that monitors its drivers but fails to put in place (or to follow) a system to deter violations creates the same danger as if they did not monitor their drivers at all. A trucking company that turns a blind eye, or actually encourages excessive hours and high-speed driving needs to be punished.

Employers must also maintain and periodically inspect the trucks they use. Look for records of annual inspections that show no defects as this is indicative of a company that is probably not being truthful. This is because it is virtually impossible for a truck with 500,000 or more miles to be defect free. A company that does not provide adequate tools to its service technicians and encourages the use of dangerous trucks is ripe to be punished. Similarly, a company that forces drivers to use unsafe equipment at the risk of losing their jobs needs to be punished too.

VII. Conclusion

While it is certainly true that trucks cause a lot of wrecks and that many of these careless drivers and companies deserve the imposition of punitive damages, the reality is that punitive damages are rarely awarded. In fact, in Georgia the likelihood of a punitive damages award in a civil case is about .01% - yes, you read that correctly. Punitive damages are awarded in only about 1 tenth of 1 percent of all civil cases. As a result, the mere prayer for punitive damages does not seem to have any measurable effect on how a defendant trucking company will process a claim. However, where there is a claim for punitive damages that is not capped (i.e., one involving alcohol for example) a claim for punitive damages makes it more likely that the case will be resolved by trial as opposed to settlement. This shows that when there is this kind of wild card, the settlement possibility is diminished because the parties have such a wide variance on possible values for the case.

If there is an industry that needs to be punished and deterred when they err, it is the interstate trucking industry. Although most drivers are hardworking, professional and safe, there will always be drivers who drive too long, too fast and with dangerous equipment. The imposition of punitive damages serves as a strong deterrent that is not being accomplished by regulation or civil penalties.

ii US DOT, 2018 Pocket Guide to Large Truck and Bus Statistics
iii O.C.G.A. §§ 51-12-1,2,3 and 4
 iv O.C.G.A. § 51-12-5.1
 v For a general overview of punitive damages law in Georgia, see: Eric James Hertz & Mark G. Bergethan, Georgia Law of Damages with Forms (2000)
 vii O.C.G.A. §51-12-5.1(g)
 x O.C.G.A. §51-12-5.1(b); Alliance Transp. Inc. v. Mayer, 165 Ga. App. 344, 345 (1983)
 xi 294 Ga. 74 (2013)
 xii 294 Ga. 74, 84-87 (2013)
 xiv 2014 Ga. State LEXIS 545, State Court of Fulton County
 xviii Sauers v. Sack, 34 Ga. App. 748 (1925)
 xiii 49 CFR 391.11
 xiv 49 CFR 391.41
 xv id.
 xvii 49 CFR 391.41
 xviii 49 CFR 391.41(b)(12)
 xix E.g., Kuo, Does Sleep Deprivation impair cognitive and motor performance as much as alcohol intoxication?, Western Journal of Medicine, March 2001, 174(3) 180.
 xxi (NHTSA , 1994)
 xxi NTSB 1995
 xxi (FMCSA 2000).
xxxiii 49 CFR 395.3
xxxiv 49 CFR 392.7
xxxv 49 CFR 396.3(b)
xxxvi 49 CFR 396.17
xxxviii Violated 49 CFR § 392.22(b)
xxxviii 49 CFR 395.8.
xxxix 49 CFR 395.8.
xl 49 CFR 383.51(b) and table 1
xli Hope Yen, GAO: Unsafe truck, bus operators still on highway, Associated
(1992)
xliii Id. at 255, 427 SE2d at 503.
xliv www.safersys.org
xlvi 49 CFR §392.1
435 S.E.2d 54 (1993)
xlvii 49 C.F.R. § 395.3
lvi 49 C.F.R. § 392.6
54, 56 (1993)
lii 49 C.F.R. § 396.11
1987).
(1992)
lv Eaton and Mustard, The Effects of Seeking Punitive Damages on the
lvi Id.
lvii Id. As an aside, the most unexpected finding of Professor Eaton was that judges
are more likely to impose punitive damages than were juries.
PUNITIVE DAMAGES IN DOG BITE CASES
Dixon James

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TABLE OF CONTENTS

Introduction 1

I. THEORIES OF RECOVERY 2

A. The Dangerous Animal Liability Statute – O.C.G.A. § 51-2-7 2
   1. The “Prior Bite” or “First Bite” Rule 4
      a. Dogs Presumed Harmless 4
      b. Vicious Propensity 4
      c. Owner’s Knowledge– “Scienter” 5
      d. Erosion of the “First Bite” Rule 7
      e. “Menacing Behavior” Alone is Insufficient 8
      f. Recent Developments 9
   2. Violation of Local Ordinance or “Leash Law” 10
      a. Proof of Local Ordinance or Leash Law 11
      b. Factual Analysis 12

B. The Premises Liability Statute – O.C.G.A. § 51-3-1 14

C. Negligent Performance of Voluntarily Assumed Duty 15
   1. Origin of “Negligence” Claim 15
   2. Recent Developments – Negligent Performance of Voluntary Duty 17

D. Landlord Liability 18
   1. Georgia’s Limited Liability for Landlords 18
   2. “Common Areas” Exception 20

II. PUNITIVE DAMAGES 20
    A. Punitive Damages in Dog Bite Cases 20
    B. Trials - Bifurcated vs. Trifurcated Procedure 24
    C. The Punitive Damages Cap 25

III. CONCLUSION 26
Serious or fatal injuries inflicted by dogs are the frequent subject of today’s news reporting, and further constitute a major public health concern. According to the Centers for Disease Control and Prevention, about 4.5 million people are bitten by dogs each year.\(^1\) Children are more likely than adults to receive medical treatment from dog bites, with the highest rate of dog-bite related injuries for children 5 to 9 years old.\(^2\) In 2015, dog bites were among the top 10 leading causes of nonfatal injuries treated in the ER for children between 1 and 9 years of age.\(^3\)

Nationwide, the average cost per claim increased 103 percent between 2003 and 2018, due in part to the increase in size of settlements and verdicts, which are “trending upwards” according to the Insurance Information Institute.\(^4\) For example, homeowners insurers paid out $675,000,000 in liability claims related to dog bites and other dog-related injuries in 2018, according to the Insurance Information Institute and State Farm.\(^5\) State Farm, the nation’s largest homeowner’s insurer, paid $123,000,000 for dog-related injury claims in 2018 and has paid over $1.1 billion over the past decade.\(^6\)

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\(^1\)Insurance Information Institute, Spotlight on: Dog Bite Liability (March, 2019), https://www.iii.org/article/spotlight-on-dog-bite-liability


\(^3\)Centers for Disease Control and Prevention, National Estimates of the 10 Leading Causes of Nonfatal Injuries Treated in Hospital Emergency Departments, United States - 2015, https://www.cdc.gov/injury/wisqars/LeadingCauses.html

\(^4\)Insurance Information Institute, Spotlight on: Dog Bite Liability (March, 2019), https://www.iii.org/article/spotlight-on-dog-bite-liability

\(^5\)Id.

And State Farm has ranked Georgia as a “Top 10” state for dog bite claims in 2018. It is no wonder, then, that dog attacks will continue to generate a substantial number of injuries and claims here in Georgia.

This paper is intended as a primer on dog bite liability for the personal injury practitioner, together with a discussion of significant issues, including potential liability for punitive damages. In order to better understand the application of punitive damages to dog bite cases, let’s begin with an overview of liability issues and the various theories of recovery applicable in dog attack cases.

I. THEORIES OF RECOVERY

There are several legal avenues to civil recovery for dog bite victims in Georgia, including liability under Georgia’s “Dangerous Animal Liability Statute,” the “Premises Liability Statute” and other non-statutory negligence-based claims.

A. The Dangerous Animal Liability Statute – O.C.G.A. § 51-2-7

O.C.G.A. § 51-2-7 provides the primary basis for liability of owners and keepers of dangerous animals. This statute is most often applied in cases of dog attacks. O.C.G.A. § 51-2-7 provides:

A person who owns or keeps a vicious or dangerous animal of any kind and who, by careless management or by allowing the animal to go at liberty, causes injury to another person who does not provoke the injury by his own act may be liable in damages to the person so injured. In proving vicious propensity, it shall be sufficient to show that the animal was required to be at heel or on a leash by an ordinance of a city, county, or consolidated government, and the said animal was at the time of the occurrence not at heel or on a leash. The foregoing sentence shall not apply to domesticated fowl including roosters with spurs. The foregoing sentence shall not apply to domesticated livestock.

The statute provides, in essence, two bases of liability for an animal attack— (1) proof of the animal’s vicious propensity and the owner’s prior knowledge thereof— commonly referred to as the “first bite” or “prior bite” rule; or (2) proof of a “leash law” violation. Succinctly stated, under O.C.G.A. § 51-2-7, “a plaintiff must show that (a) the owner carelessly managed or allowed the animal to go at liberty; (b) that the animal was vicious or that the animal was unrestrained at the time and place of the injury in violation of the local ordinance requiring such restraint; and (c) the animal caused injury.”

It is important to remember that the statute imposes liability on anyone who owns or keeps a vicious or dangerous animal— thereby expanding liability to non-owners in possession of the dog when it attacks.

Ironically, the legislature has imposed strict liability against the owner or custodian of a dog which, while not on the owner’s property, attacks livestock, poultry, or pets, or causes property damage. In these situations, the owner’s liability accrues irrespective of any prior knowledge of the dog’s dangerous propensity. For Georgia’s human victims, however, liability is not so strict.

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10See O.C.G.A. § 51-2-6 (Owner or custodian “shall be” liable for damages for injury to livestock); and O.C.G.A. § 4-8-4 (Owner or custodian “shall be” liable for injury or death to livestock, poultry, or pet, as well as any damage to public or private property; liability includes consequential damages). Compare O.C.G.A. § 51-2-7 (Owner “may be” liable for injuries).

11Kiser v. Morris, 156 Ga.App. 224, 274 S.E.2d 610 (1980) (“The rule as to scienter, or knowledge on the part of the owner of a vicious or dangerous propensity of the dog, if one exists, has no application here in view of the provisions of [O.C.G.A. § 4-8-4].” “If a dog is wrongfully in the place where he does the mischief, the owner is liable, irrespective of prior knowledge by the owner of the dog’s dangerous proclivities. This was a clear and precise pronouncement of the law of this state, and can not be shunted aside or disregarded as being obiter.”) But see Mintz v. Frazier, 160 Ga.App. 668, 288 S.E.2d 24 (1981).
1. The “Prior Bite” or “First Bite” Rule

“The first sentence of O.C.G.A. § 51-2-7 has been applied in dog bite cases in Georgia since Cobb’s Code of 1863. After 1863, appellate courts modified the statute by asserting that it was ‘but a restatement of the common law, and at common law it was necessary to show, not only that the animal was vicious or dangerous, but also that the owner knew this fact. The scienter was the gist of the action.’”12 “Moreover, the defendant’s knowledge of the dangerous propensity must be greater than any such knowledge possessed by the plaintiff.”13

a. Dogs Presumed Harmless

Breed is irrelevant to liability.14 Traditionally, Georgia courts have presumed all dogs to be of a harmless species and hence required proof of the dangerous nature of a particular dog and proof of the owner’s knowledge of that dog’s deviation from presumptive harmlessness.15

b. Vicious Propensity

Since all dogs are presumed harmless, a dog attack victim must prove the particular dog’s “vicious propensity.” O.C.G.A. § 51-2-7 requires proof that the dog was vicious or dangerous, and that the owner knew it.16 “The dog’s nature and the owner’s

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13Johnston, 252 Ga.App. at 676.


knowledge are two separate issues, and proof of both is necessary for recovery.”

Traditionally, proof of vicious propensity required a showing “that the errant animal has the propensity to cause the specific type of harm from which the cause of action arises.” “In other words, an essential element of a dog bite claim is that defendants knew of the dog’s propensity to inflect harm in the particular manner in which plaintiff was injured.”

c. **Owner’s Knowledge— “Scienter”**

In addition to establishing the dog’s “vicious propensity,” a plaintiff must also prove the dog owner's (or keeper's) knowledge of the vicious propensity. This knowledge of the danger is also known as “scienter,” a term frequently employed in fraud cases to denote knowledge or awareness of the falsity of statements made. Bearing a more innocent connotation in dog bite cases, proof of “scienter” must establish the defendant’s awareness of the fact that he is exposing the public to a dangerous dog.

Although traditionally requiring knowledge of the specific type of conduct which caused plaintiff’s injury, i.e., biting, scienter has been inferred in other limited circumstances. “To infer the requisite knowledge there must be at least one incident that would cause a prudent person to anticipate the actual incident that caused the

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injury.”20 For example, in Sanders v. Bowen21 scienter was inferred from “habits of aggressiveness and attack which common sense says would not be confined to inanimate objects” despite no prior biting of humans.

On the subject of guard dogs or specially trained dogs, it is generally accepted that the same standard is applied to both guard dogs and all other dogs as was the case in Wade v. American National Ins. Co.;22 however, the Court of Appeals held in McBride v. Wasik23 that scienter could be inferred since the animal was a “trained attack dog.” Similarly, in Eshleman v. Key24 the Court of Appeals noted that proof of specialized training may suffice as evidence of the dog’s propensity to attack and defendant’s scienter. In Eshleman, the dog was a police canine being kept at home by a police canine officer when it escaped from a vehicle kennel and bit a neighborhood child.25 The dog was specially trained to apprehend suspects and, as a result, there was “some evidence that ‘the animal had a propensity to do the act which caused the injury and that the defendant knew of it.”26 The Eshleman opinion focused on the canine officer’s

25The Eshleman decisions primarily addressed official immunity of the police officer for negligence in failing to secure the dog. The Court of Appeals held that defendant officer’s failure to secure the dog may constitute a violation of a ministerial duty for which the officer could be held liable. In reversing this decision, the Supreme Court held that, under circumstances where the police department lacked specific policies regarding dog restraint, and where Georgia law and local ordinances mandated “reasonable” measures be taken in securing the dog, then handling of the police dog was left to the K-9 officer’s discretion, thereby entitling the officer to official immunity and dismissal of plaintiff’s claims.
26Eshleman, 326 Ga.App. at 887.
official immunity, and was later reversed on this issue by the Supreme Court. For its part, the Supreme Court merely “assume[d]” “[f]or our present purposes” that the trained police dog qualified as a “vicious or dangerous animal” under O.C.G.A. § 51-2-7. As a result, it is not entirely clear whether police dog training satisfies the element of scienter in a dog attack case.

d. **Erosion of the “First Bite” Rule**

Beginning with Supan v. Griffin, some reported cases appear to “liberalize” the requisite showing of vicious propensity—leading to what has periodically been described as the “end of the first bite rule.” This shift in jurisprudence is better characterized as “erosion,” rather than the dramatic “END” heralded in the occasional commentary or dissenting opinion. Instead of putting an “end” to the rule, these cases have merely shifted the focus from proof of a “prior bite” to proving the defendant’s “superior knowledge of his dog’s temperament.” As a result, proof of an actual bite which draws blood is no longer strictly mandated; however, establishing vicious propensity still

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27Eshleman v. Key, 297 Ga. 364, 774 S.E.2d 96 (2015) (Holding that police officer was entitled to official immunity where police department did not provide specific direction with regard to off-duty dog restraint, and where O.C.G.A. § 51-2-7 and local ordinances implied only a duty of ordinary care, allowing for discretion in choosing reasonable measures to restrain the dog. As a result, no ministerial duty was violated and defendant officer was entitled to summary judgment).

28Eshleman v. Key, 297 Ga. at 367.

29Supan v. Griffin, 238 Ga.App. 404, 519 S.E.2d 22 (1999) (Prior incident where defendant’s dogs came onto a neighbor’s front porch, viciously attacked neighbor’s dog, and threatened neighbor with bared fangs, growls and attack behavior was sufficient to create jury question as to vicious propensity). This idea is not new—in Carter v. Ide, 125 Ga.App. 557, 188 S.E.2d 275 (1972) the Court noted that “[w]hile a previous attack would not necessarily be required, at least some form of menacing behavior would be;” however, the Court moved away from this concept later in Banks v. Adair, 148 Ga.App. 254, 251 S.E.2d 88 (1978). More recent cases demonstrate a trend back toward Carter, and a less restrictive view of the proof required to demonstrate prior aggressive behavior. See subsection (f) herein.
requires proof of an act tantamount to an unprovoked attack upon a human being.30

A review of cases reveals that prior incidents in which a person was forced to take evasive action in order to avoid being bitten probably will suffice to establish vicious propensity; whereas mere “menacing behavior” generally exhibited is not sufficient to put the owner on notice of the dog’s dangerous propensity to bite people.31

e. “Menacing Behavior” Alone is Insufficient

“A dog’s menacing behavior alone does not demonstrate its vicious propensity or place its owner on notice of such propensity.”32 Barking or growling, without more, does not demonstrate vicious propensity.33 For example, in Kringle v. Elliott, the Court held: “Under this rule, a dog owner will be liable for damages only if the owner has knowledge that the dog has the propensity to do the particular act (biting) which caused injury to the complaining party. Under this test, the plaintiff must show whether the dog had the propensity to do the act that caused the injury and, if so, whether the owner had

30Hamilton v. Walker, 235 Ga.App. 635, 510 S.E.2d 120 (1998) (Dog’s aggressive behavior insufficient to establish liability), disapproved of by Steagald v. Eason, 300 Ga. 717, 797 S.E.2d 838 (2017); Thurmond v. Saffo, 238 Ga.App. 687, 520 S.E.2d 43 (1999) (Directed verdict reversed where evidence indicated that shortly before the dog attacked plaintiff, another visitor to defendants’ home was almost attacked in the same manner, but managed to escape and tell defendants of their dog’s conduct); and Torrance v. Brennan, 209 Ga.App. 65, 67, 432 S.E.2d 658 (1993) (Where dog on prior occasions grabbed or nipped people, or ripped their clothes without actually biting, evidence was sufficient to place owner on notice of dog’s propensity to bite).

31Id.

32Stennette v. Miller, 316 Ga.App. 425, 729 S.E.2d 559 (2012) (Dog had jumped on plaintiff in aggressive manner on prior visit to house, but did not attempt to bite or scratch her).

33Raith v. Blanchard, 271 Ga.App. 723, 725, 611 S.E.2d 75 (2005) (Plaintiff did not assume risk of being bitten after dog growled since “barking and growling amount, at most, to what has been characterized as menacing behavior. Standing alone, such behavior does not demonstrate a vicious propensity or put a dog owner on notice that the dog will bite”).

Page 8
knowledge of that propensity.”34 Similarly, in Custer v. Coward, the Court affirmed summary judgment because “Butkus” had never previously attacked or bitten a human.35 “Moreover, the few occasions where Butkus growled do not constitute notice to the [defendants] of the dog’s propensity to bite.”36

f. Recent Developments

In the recent case of Green v. Wilson,37 the Court of Appeals reversed summary judgment where the dog on prior occasions had to be restrained by the defendant as it “lunged, barked, and growled at the housecleaners.” In Green, the plaintiff was a different housekeeper who was injured when “Nani” jumped the backyard fence and chased plaintiff into her vehicle. The Green majority opinion characterized the facts as “more than simply evidence of Nani’s aggressive or menacing behavior;” while the dissent interpreted the same as “at best ... aggressive or menacing behavior” insufficient to put the owner on notice of the animal’s vicious tendencies.38

Still more recently, in Steagald v. Eason,39 the Georgia Supreme Court weighed in on the question of “how much is enough?” when examining prior aggressive conduct in

34Kringle v. Elliott, 301 Ga.App. 1, 2, 686 S.E.2d 665 (2009) (Inference that dog previously killed puppy and kitten, without evidence that harm was caused by vicious attack, deemed insufficient to establish vicious propensity to attack a person).


the absence of an actual prior bite. In Steagald, the Supreme Court reversed a grant of summary judgment based on behavior the Court of Appeals had earlier characterized as “merely menacing behavior that ‘alone is not sufficient to place its owner on notice of a propensity to bite.’”40 The Supreme Court specifically held that “Rocks’s” behavior of “snapping at” defendant homeowner and plaintiff’s husband a week prior to biting plaintiff was sufficient evidence on summary judgment to create a jury question as to whether the owner had knowledge of the dog’s propensity to bite without provocation.41

2. Violation of Local Ordinance or “Leash Law”

“In 1985, the General Assembly expanded upon the scienter rule, also known as the ‘first bite rule’ by amending the statute to add the second sentence, which creates liability based upon a violation of a local or county ordinance and requires no proof of scienter. As amended, O.C.G.A. § 51-2-7 allows cities and counties, if they wish, to afford a higher degree of protection to people than allowed at common law.”42 The local ordinance provision of O.C.G.A. § 51-2-7 thus creates a “local” standard which varies from one county or municipality to the next– and Georgia is well endowed with both. As a result, liability analysis in a dog bite case must include careful examination of local


42 Johnston v. Warendh, 252 Ga.App. 674, 676, 556 S.E.2d 867 (2001). Accord Abundant Animal Care, LLC v. Gray, 316 Ga.App. 193, 196, 728 S.E.2d 822 (2012) (“This Code provision relieves a plaintiff from producing evidence of a dog’s vicious propensity based on evidence of a violation of an ordinance that restricts dogs from running at large”) and Fields v. Thompson, 190 Ga.App. 177, 378 S.E.2d 390 (1989) (“By this language the General Assembly has abrogated in situations meeting the statutory requirements the prior case law of this court and the Supreme Court requiring proof in all instances that the owner of the animal had knowledge of the animal’s vicious propensity”).
ordinances governing the keeping of animals. In rural areas, there may be no ordinance at all. In more densely populated areas, there may be overlapping city and county ordinances. The specific terms of local ordinances vary widely, so what constitutes a violation in one jurisdiction may be perfectly compliant in another.

A comprehensive collection of local ordinances may be found at www.municode.com and is available for free browsing when conducting initial research. As would be expected, animal control ordinances are usually listed under “Animals” in the table of contents, and there may be several ordinances which apply to the facts of a specific case. Keep in mind, however, that the ordinance must be properly proved in order to prevail at trial or on summary judgment.

a. **Proof of Local Ordinance or Leash Law**

One of the most frequently encountered mistakes in dog bite litigation is plaintiff’s counsel’s failure to properly “prove up” the local ordinance at issue. Fortunately, this pitfall is easily avoided, thanks to numerous instructive appellate decisions. Despite the well-documented necessity of “proving” the ordinance, failure to adhere to this procedure remains a frequent subject of appellate decisions— bringing to mind the old adage that “bad facts make bad law.”

“It is well established by numerous decisions of this court that judicial notice cannot be taken by the superior court or this court of city or county ordinances, but they must be alleged and proved. The proper method of proving a city ordinance is by production of the original or of a properly certified copy.”\(^{43}\) Even more recently, the Court of Appeals held: “It is well established that in order for a superior court or this

court to consider city or county ordinances they must be alleged and proved, and the proper method of proving a city or county ordinance is by production of the original or of a properly certified copy.”44 Moreover, it is error for the trial court to consider the terms of an ordinance not properly before the court.45 With regard to proof of local ordinances, best practice requires a close study of relevant case law as well as O.C.G.A. §§ 24-2-221, 24-9-920, 24-9-902(1)&(2), and 36-80-19(b)(1), collectively governing self-authentication, admissibility, and judicial notice of properly certified copies of county or city ordinances. As noted above, the ordinance should also be “alleged” in the Complaint.

b. **Factual Analysis**

Once the ordinance itself is proven, it remains incumbent upon the plaintiff to prove conduct which constitutes an actual violation of the ordinance. For example, in Huff v. Dyer,46 defendant’s dog was chained in the bed of a pickup truck when it bit a child who approached the dog. “O.C.G.A. § 51-2-7 relieves a plaintiff from producing evidence of a dog’s vicious propensity based on evidence of a violation of an ordinance that restricts dogs from running at large. Here, however, there is no evidence that the [defendant’s] dog was ‘running at large.’”47

On the other hand, where an ordinance forbids “running at large” and requires


47 Huff, 297 Ga.App. at 763.
dogs to be “confined within the property limits of his owner or custodian,” the owner may be liable when a dog breaks its chain in the back yard then runs around to the front yard and bites a child, since the dog is no longer “confined” within its owner’s property.48 Similarly, where dogs were allowed to escape through the front door of the house into the front yard where they bit the victim, a jury issue was raised under the local ordinance requiring the dogs to be “confined.”49 In the subsequent case of Cowan v. Carillo, the Court held that even where proof of vicious propensity was dispensed with by establishing a clear violation of the local ordinance, “the plaintiffs still had to establish that the owners carelessly managed the [dog] or allowed the animal to go at liberty.”50 More recently, in Myers v. Ogden, the Court reversed a grant of summary judgment to plaintiff on a negligence per se claim arising from an ordinance violation, finding a jury question as to whether the defendant “carelessly managed the dog at the time” of the attack.51

As demonstrated above, when proceeding under the local ordinance provision of O.C.G.A. § 51-2-7, it is critically important to prove both the ordinance itself and facts demonstrating a violation due to the defendant’s careless management or allowing the animal to go free.

50Cowan v. Carillo, 331 Ga.App. 387, 771 S.E.2d 86 (2015) (Jury question as to owners’ careless management where evidence indicated that owners’ guests let the dog out during the subject incident; however, additional evidence indicated dog had escaped on prior occasions and that owners had previously allowed the dogs out unrestrained).
B. **The Premises Liability Statute – O.C.G.A. § 51-3-1**

O.C.G.A. § 51-3-1 provides:

Where an owner or occupier of land, by express or implied invitation, induces or leads others to come upon his premises for any lawful purpose, he is liable in damages to such persons for injuries caused by his failure to exercise ordinary care in keeping the premises and approaches safe.

In addition to its application in slip and fall cases and instances of negligent security, O.C.G.A. § 51-3-1 also covers “premises liability” claims arising from dog attacks. “In a typical dog bite case, regardless of whether the cause of action is based on the premises liability statute (O.C.G.A. § 51-3-1) or the dangerous animal liability statute (O.C.G.A. § 51-2-7), a plaintiff must produce evidence of the vicious propensity of the dog in order to show that the owner of the premises had superior knowledge of the danger.”

In *Wade v. American National Insurance Co.*, summary judgment was affirmed because there was no evidence of the dog’s prior vicious behavior or of any knowledge on the owner’s part. The Court clarified that a premises liability claim still requires evidence of vicious propensity of which the premises owner had superior knowledge. “In other words, the true test of liability” is the owner’s “superior knowledge of his dog’s temperament.” In *Wade*, the evidence failed to demonstrate defendants “had knowledge of Champ’s temperament superior to that of the [plaintiffs].”

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55 Id.
As in other types of premises liability claims, proof that the plaintiff possesses “equal knowledge” of the hazard bars recovery. In other words, when both the plaintiff and the defendant dog owner have equal knowledge of the dog’s propensity to bite, the plaintiff cannot prove that the owner had the requisite “superior knowledge” of the dog’s temperament to sustain a claim under either the dangerous animal statute (O.C.G.A. § 51-2-7) or the premises liability statute (O.C.G.A. § 51-3-1).\textsuperscript{56}

\textbf{C. Negligent Performance of Voluntarily Assumed Duty}

The most recent major development in the law of dog bite liability is the formal recognition of a claim arising from the negligent performance of a voluntarily assumed duty. Since this is the sole theory which does not rely upon proof of superior knowledge of vicious propensity or an ordinance violation, a claim for negligent performance of a voluntarily assumed duty is unique among the predominant claims arising from dog attacks.

\textbf{1. Origin of “Negligence” Claim}

\textit{Osowski v. Smith} is the first reported decision recognizing a dog bite claim arising from the negligent performance of a voluntary undertaking.\textsuperscript{57} In \textit{Osowski}, “plaintiff was working on defendant’s property installing a cable. He was injured by one of defendant’s dogs, that defendant had assured him would be secured and confined while he completed his work on the premises.” In reversing summary judgment, the


Court of Appeals held that “the record shows the existence of material disputed facts as to whether [defendant] voluntarily undertook a duty to restrain the dogs and whether that voluntary undertaking was negligently performed.”58 “[A] person may be held liable for the negligent performance of a voluntary undertaking.”59

“Under this principle, one who undertakes to do an act or perform a service for another has the duty to exercise care, and is liable for injury resulting from his failure to do so, even though his undertaking is purely voluntary or even though it was completely gratuitous, and he was not under any obligation to do such act or perform such service, or there was no consideration for the promise or undertaking sufficient to support an action ex contractu based thereon.”60 “When one undertakes an act that he has no duty to perform and another person reasonably relies upon that undertaking, the act must generally be performed with ordinary or reasonable care. The person assuming such responsibility may be held liable for negligently performing the duties so assumed.”61 It is important to remember that a key element in this type of case is the plaintiff’s “reasonable reliance” upon defendant’s non-negligent performance of the voluntarily assumed duty.

60 Id. at 540.
61 Id. at 540.
2. **Recent Developments – Negligent Performance of Voluntary Duty**

In several recent cases, the Georgia Court of Appeals has revisited and confirmed this avenue of recovery. For example, in *Abundant Animal Care, LLC v. Gray*, the Court held: “When one undertakes an act that he has no duty to perform and another person reasonably relies upon that undertaking, the act must generally be performed with ordinary or reasonable care. The person assuming such responsibility may be held liable for negligently performing the duties so assumed.” The Court reached a similar conclusion in *Stennette v. Miller*.63

Most recently, in *Swanson v. Tackling*, the Court of Appeals reiterated that “it is certainly true that ‘a person may be held liable for the negligent performance of a voluntary undertaking,’” however, there was no evidence of any such voluntary undertaking presented in *Swanson* and summary judgment was therefore appropriate.64 The *Swanson* Court further distinguished the facts of *Osowski*, *Stennette*, and *Abundant Animal Care, LLC* on grounds that each of these “voluntary undertaking” cases “involve an affirmative promise by the dog owner to restrain the dog while the injured person was at his or her home to perform a job. But here, although [plaintiff] advised [defendant’s adult son] that she did not want Willow [the dog] to be on the loose around [plaintiff’s minor child], there is no evidence that she asked either of the [defendants] to

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restrain Willow or that they promised to do so.”

Thus, it appears that facts demonstrating a defendant’s “affirmative promise” or agreement with regard to the voluntarily assumed duty will improve the likelihood of success on a “voluntary undertaking” claim.

D. Landlord Liability

1. Georgia’s Limited Liability for Landlords

Landlords enjoy limited liability under Georgia law, as set forth in the provisions of O.C.G.A. § 44-7-14:

Having fully parted with possession and the right of possession, the landlord is not responsible to third persons for damages resulting from the negligence or illegal use of the premises by the tenant; provided, however, the landlord is responsible for damages arising from defective construction or for damages arising from the failure to keep the premises in repair.

Where the landlord has parted with possession, his retention of “the right to enter the leased premises for landlord-related purposes does not evidence such dominion and control of the premises so as to vitiate the landlord’s limited liability imposed by O.C.G.A. § 44-7-14 and replace it with the liability imposed by O.C.G.A. § 51-3-1, the premises liability statute...” Thus, any viable dog attack claim against a landlord must arise from the landlord’s defective construction or failure to keep the premises in repair.

The Georgia Supreme Court has recently held, in essence, that the “scienter”

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65 Swanson, 335 Ga.App. at 814-815.

element also must be applied to the landlord in order to establish liability under

O.C.G.A. § 44-7-14.67 The Court in Matta-Troncoso held:

“[P]laintiffs seeking to hold out-of-possession landlords liable under O.C.G.A. § 44-7-14 for injuries caused by their tenants’ dogs must therefore present some evidence showing that the landlord had knowledge of the dogs’ tendencies or propensities to do harm in order to demonstrate reasonable foreseeability. That means that here, without some evidence rebutting the presumptive harmlessness of the [defendant owner’s] dogs, the [plaintiffs] cannot establish that it was reasonably foreseeable that [plaintiff’s] injuries would arise from [defendant landlord’s] failure to repair the gate latch.” Id. at 487.

In Forsh v. Williams,68 however, the Court held that plaintiff’s allegation charging the defendant landlord with a “failure to make other repairs to be shown at trial” was sufficient to withstand a challenge at the motion to dismiss stage, where plaintiff’s injuries arose from a dog attack.

In addition, whether the claim against a landlord is based upon defective construction or failure to repair, the plaintiff must establish that her damages were attributable to the defective construction or failure to repair. For example, in Ranwez v. Roberts summary judgment for the landlord was proper where the plaintiff was attacked as a result of the tenant’s relatives’ failure to keep the dog inside the fence—therefore plaintiff’s damages were not attributable to any defective construction or disrepair of the

67Tyner v. Matta-Troncoso, 305 Ga. 480, 826 S.E.2d 100 (2019) (“Inextricably entwined with concepts of negligence and proximate cause is a notion of foreseeability...” which apparently requires landlord knowledge of a dog’s vicious propensity even where liability would otherwise attach for defective construction or failure to repair).

68Forsh v. Williams, 321 Ga.App. 556, 560, 740 S.E.2d 297 (2013) (“Because it was possible for the [plaintiffs] to introduce evidence showing that [defendant landlord] had failed to make repairs on the property, and that such failure(s) resulted in the injuries allegedly sustained by [plaintiff], the trial court erred” in dismissing the case).
fence itself. Finally, in defective construction claims it is important to keep in mind that a “landlord’s liability for defective construction only exists in cases when the structure is built by him or under his supervision.”

2. **“Common Areas” Exception**

The foregoing notwithstanding, a landlord may be held liable for attacks occurring in the common areas of rental properties under the premises liability statute, O.C.G.A. § 51-3-1, where the landlord has retained possession and control of these areas and plaintiff establishes the dog’s vicious propensity and landlord’s knowledge thereof.

II. **PUNITIVE DAMAGES**

Georgia’s punitive damages statute– O.C.G.A. § 51-12-5.1– requires proof “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.”

A. **Punitive Damages in Dog Bite Cases**

Obviously, in the event a dog owner intentionally caused an unjustified attack, such an act would authorize punitive damages. In most instances, however, punitive damages will be premised upon willful misconduct, wantonness, or “that entire want of care which would raise the presumption of conscious indifference to consequences.”

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69Ranwez, 268 Ga.App. at 82-83.

70Ranwez, 268 Ga.App. at 82.


72O.C.G.A. § 51-12-5.1(b)&(f).
Although the Supreme Court of Georgia has never weighed in on the substantive aspects of punitive damages in dog attack cases, it has recognized the availability of punitive damages in such cases.73

The genesis of punitive damages in dog bite cases, however, is Parsons v. Ponder,74 a 1982 Court of Appeals case which remains the single published opinion affirming a jury award of punitive damages in a dog bite scenario. Significantly, the Court noted:

Appellant points out and our research has shown that there are no cases in Georgia in which punitive damages have been awarded in a dog bite situation. However, this does not necessarily mean that there is a prohibition against punitive damages in such cases. Each case should be viewed on its facts and in accordance with our laws and statutes regarding exemplary damages.75

Although Parsons was tried under the old punitive damages statute, prior to the 1987 creation of O.C.G.A. § 51-12-5.1, the type of conduct warranting punitive damages was the same as it exists today under O.C.G.A. § 51-12-5.1.76 In Parsons the following evidence constituted sufficient aggravating circumstances to authorize punitive damages:

The record discloses that on more than one occasion prior to the incident in question “Bite Reports” and orders to quarantine [defendant’s] dog were issued by the County Health Department. There was testimony from [defendant’s] neighbors that the dog had attacked and bitten a child and that [defendant] had been asked to keep the dog locked up. Despite [defendant’s] knowledge of the dog’s propensity to bite human beings, the

75Parsons, 161 Ga.App. at 724.
dog was allowed to run at large.\textsuperscript{77}

Given the egregious facts in \textit{Parsons}, there can be little doubt about the validity of a punitive damages award under the circumstances. Despite the fact that \textit{Parsons} clearly authorizes punitive damages in dog bite cases, there are few other instances where our appellate courts have specifically addressed this issue.

In one recent case, \textit{Weinstein v. Holmes},\textsuperscript{78} the defendant’s dogs pulled the leash out of her hands as they were leaving a dog park, and attacked another dog and its owner. The Court reversed a grant of partial summary judgment on punitive damages, finding a sufficient factual basis to send the punitive damages issue to the jury:

Here, there was evidence that [defendant] weighed little more than the combined weight of her dogs, on at least one other occasion she had lost control of both dogs and that on the prior occasion a neighbor had to intervene to prevent injury to another person. Additionally, [defendant] knew that Lacy [defendant’s dog] still had a lot of energy when they left the dog park and she testified that Lacy was “usually calm and not aggressive” “unless Lacy saw a dog that she wanted to play with.” Nevertheless, [defendant] attempted to leave the dog park with both dogs while Teddy [plaintiff’s dog] was present. On these facts, it is for the jury to determine whether [defendant] acted with “that entire want of care which would raise the presumption of conscious indifference to consequences.”

On the other hand, in \textit{Powell v. Ferreira},\textsuperscript{79} the Court affirmed partial summary judgment on the issue of punitive damages where the defendants knew their dog had bitten another child about two years earlier, and took subsequent precautions to keep the dog inside their home. In \textit{Powell}, there was evidence that defendants discouraged

\textsuperscript{77}\textit{Parsons}, 161 Ga.App. at 724.


visitors and kept the dog closed off in another room on those occasions when visitors were invited to the home.

Contrary to Parsons, the evidence here shows the defendants exercised at least some degree of care to confine the dog in their house, and keep it closed off in another room when they knew a non-family member was present. Though the defendants’ lack of strict control over access to the house by non-family members may have amounted to negligence, even gross negligence, it is not evidence of willful misconduct or an entire want of care necessary to create a genuine issue with respect to punitive damages. 80

Again, in Rowlette v. Paul, 81 the Court affirmed a grant of summary judgment as to the entire case, including punitive damages, despite the fact that “Flash” had previously bitten the defendant’s uncle in the buttocks. Significantly, biting the uncle’s buttocks was the only prior act of aggression committed by Flash. In addition, the uncle had been dressed in work clothes from the local rock quarry, had on a white dust mask and hat, and had “surprised the sleeping dog by banging on the back porch.” 82 Although this prior bite tore the uncle’s pants, it did not require medical attention. 83

In Johnston v. Warendh, 84 the Court affirmed a grant of partial summary judgment on vicious propensity and punitive damages where vicious propensity and defendants’ knowledge thereof were not supported by the evidence. Similarly, the Court

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80Powell, 198 Ga.App. at 466.


82Rowlette, 219 Ga.App. at 599. It would seem more prudent to “let sleeping dogs lie.”

83Rowlette may well have turned out differently had the Court utilized the “superior knowledge of the dog’s temperament” test articulated a few years later in Supan v. Griffin, 238 Ga.App. 404, 519 S.E.2d 22 (1999).

84Johnston v. Warendh, 252 Ga.App. 674, 556 S.E.2d 867 (2001) (Affirming (1) grant of partial summary judgment as to vicious propensity, scienter, and punitive damages, and (2) denial of summary judgment as to local ordinance violation).
affirmed summary judgment as to punitive damages in *Phiel v. Boston*\(^{85}\) due to plaintiff’s failure to prove a prior bite, vicious propensity, or defendant’s knowledge thereof.

As a result, it appears that proof of defendant’s knowledge of *at least* one other prior similar event– plus some additional facts demonstrating an awareness that the defendant’s current actions are likely to place others at risk– would be necessary to survive summary judgment on the issue of punitive damages.\(^{86}\) Better yet, two or more prior instances, coupled with defendant’s knowledge thereof, should ensure that the issue of punitive damages will go to the jury.\(^{87}\) It stands to reason that multiple prior violations of the local leash law would be treated similarly.

**B. Trials - Bifurcated vs. Trifurcated Procedure**

Although not a dog bite case, in *Webster v. Boyett* the Supreme Court did address the timing of admission of *prior* and *subsequent* similar act evidence to support liability for punitive damages under the bifurcated proceeding mandated by O.C.G.A. § 51-12-5.1(d).\(^{88}\) The Court also addressed the concept of trifurcation of punitive damage trials in *Webster*.\(^{89}\)

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\(^{86}\) *Weinstein v. Holmes*, 344 Ga.App. 391, 395-396, 810 S.E.2d 320 (2018) (Prior aggression nearly resulting in injury, coupled with defendant being physically over-matched by her own dogs, and defendant’s knowledge that her dog still had a lot of energy at time of encounter– and could be aggressive when playing with other dogs– were sufficient facts to send punitive damages issue to jury).

\(^{87}\) *Parsons*, 161 Ga.App. at 724.


\(^{89}\) *Webster* is mandatory reading with regard to punitive damage procedural issues.
Many of the issues raised in Webster are not a concern in dog bite cases. For example, proof of prior similar acts must be established during the liability phase of a dog bite trial where the plaintiff seeks to recover under the “prior bite” rule. Thus, there is no undue prejudice in admitting this evidence during the first (liability) phase of a bifurcated proceeding since the evidence is directly relevant to the dog owner’s prior knowledge of vicious propensity. Similarly, there is no need to ever trifurcate a dog bite case since the prejudicial evidence of prior similar acts is relevant not only to punitive damages, but to liability under the “prior bite” rule—thus necessitating admission during the first phase of trial and eliminating any need for a trifurcated proceeding.

Accordingly, in a “vicious propensity” dog bite trial involving punitive damages, liability for both compensatory and punitive damages should be decided in the first phase, together with a determination of the amount of compensatory damages. In the second phase, the amount of punitive damages should be determined.

C. The Punitive Damages Cap

Punitive damages in Georgia are capped at $250,000, with three (3) categories of exceptions to this cap: (1) cases of product liability; (2) tort cases where “the defendant acted, or failed to act, with the specific intent to cause harm,” and (3) where the defendant was under the influence of alcohol or drugs at the time of the commission of the tort.90 As a result, any award of punitive damages in a dog bite case will be subject to the punitive damage cap of $250,000 absent extenuating circumstances involving “specific intent to cause harm” or “alcohol or drugs.”

90O.C.G.A. § 51-12-5.1(e),(f)&(g).
III. CONCLUSION

As Georgia dog bite jurisprudence continues to evolve, dog bite cases will continue to provide fact-intensive challenges to the practitioner seeking to establish liability. As the dog bite case is worked up, careful attention should be paid to facts and circumstances which may warrant punitive damages. Not only will this focus make or break the case for punitive damages, it remains critical to establishing the defendant’s knowledge of the dog’s vicious propensity in cases where liability is based upon the “first bite” rule. As the incidence of serious injury from dog attacks continues to rise, punitive damages will remain an important tool to deter irresponsible dog ownership and the increasing danger of unprovoked attacks on Georgia’s citizens.
APPEALING A PUNITIVE DAMAGE AWARD
Mike Terry

- Mike Terry represents plaintiffs and defendants in complex commercial and appellate matters, as well as class actions. Over the past 15 years, his practice has focused heavily on appellate litigation, particularly in the areas of class actions and punitive damages. He is a Fellow of the American Academy of Appellate Lawyers, an organization founded to advance the highest standards and practices of appellate advocacy and to recognize outstanding appellate lawyers.

- Mike recently argued and achieved a 7-0 victory before the Georgia Supreme Court in a challenge to the constitutionality of the state’s caps on pain and suffering damages in medical malpractice cases. In 2016, Mike argued and achieved a 7-0 reversal of the denial of class certification for a class of consumers alleging they had been charged usurious fees by their Bank. In 2015 Mike was selected by the Council of State Court Judges of Georgia to represent that body in a Georgia Supreme Court challenge to actions taken by Georgia Judicial Qualifications Commission. That case remains pending.

- A strong supporter of the Atlanta legal community, he recently served as president of the Atlanta Bar Association, where he set a focus on judicial funding and services for lawyers in transition. He is also a member of the Board of Governors of the State Bar of Georgia. Mike is a frequent lecturer and author on business litigation topics including class actions, punitive damages and appellate issues. He is also often asked to moderate debates and panel discussions involving judges.

- Representative Work

  - Co-counsel for successful plaintiffs in a breach of fiduciary duty case which resulted in a $454 million jury verdict that was affirmed on appeal.

  - Appellate counsel for defense that successfully reversed a $457 million judgment against one of the world’s largest forest product companies, Weyerhaeuser Co.

  - Appellate counsel for plaintiffs in Bogle v. McClure, which affirmed an award of $16.6 million to seven employment discrimination plaintiffs.

  - Appellate counsel for defense in obtaining reversal of an intermediate appellate decision certifying a class action to pursue a $110 million claim under the federal Telephone Consumer Protection Act.

  - Obtained dismissal of four putative class actions against not-for-profit hospitals challenging the hospitals’ pricing policies, and appeared as lead appellate counsel for the hospitals in having those cases affirmed on appeal.

  - Appellate counsel on behalf of a major peanut processor in obtaining a new trial following a $20 million jury verdict.

  - Appellate counsel for a class of policyholders in upholding class certification of a case involving credit life insurance.

  - Retained to submit amicus curiae briefs (and at times to present oral argument on behalf of amicus) on behalf of the Democratic Party of Georgia, the ACLU of Georgia, the Medical Association of Georgia, the Hospital Authority of Clarke County, and the Georgia Canoe Association.
APPEALS OF PUNITIVE DAMAGES AWARDS

September 6, 2019

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# APPEALS OF PUNITIVE DAMAGES AWARDS

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## TABLE OF CONTENTS

INTRODUCTION .............................................................................................................. 1  
A. Punitive Damages Available in Tort Actions Only ............................................... 2  
B. Mere Negligence Not Enough – Aggravation Is Required ................................. 4  
C. Punitive Damages Cannot Be Awarded Without Compensatory Damages ....... 5  
D. Pleading Requirements ...................................................................................... 7  
E. Jury Charge Errors ............................................................................................. 8  
F. Improper Argument of Counsel ......................................................................... 11  
G. Failure to Bifurcate ............................................................................................ 13  
H. Exceeding the Cap – Specific Intent to Cause Harm ........................................ 14  
I. Common Law Excessiveness .............................................................................. 16  
J. Constitutional Excessiveness ............................................................................. 18  
   1. BMW Established Three “Guideposts” for Assessing Punitive Damages .......... 18
2. *Cooper* Imposed *de novo* Appellate Review of Punitive Damages Excessiveness Challenges ................................................................. 25

3. *State Farm* Provided Greater (if Arbitrary) Guidance to Courts Assessing Punitive Damages ........................................................................ 29

4. Supreme Court Punitive Damages Jurisprudence After *State Farm* .......... 33

5. Punitive Damages Awards in Excess of Single Digit Rat ios Continue to be Affirmed by Other Courts After *State Farm* ........................................ 35

6. Defendants’ Financial Status Remains Relevant to Punitive Damages After *State Farm* .................................................................................. 36

7. “Other Bad Acts” Remain Relevant in Punitive Damages Cases ................. 42

8. Waiver Remains an Issue After *State Farm* ........................................... 44

9. Eleventh Circuit and Georgia Cases Applying *State Farm* ......................... 45
Introduction

The first appeal of a punitive damages award in Georgia occurred 165 years ago. In 1852, a jury returned a verdict for Isaac McCrary in the amount of $1,049 for the intentional seduction of his 21-year-old daughter. Defendant moved for a new trial arguing that plaintiff had only proven actual damages in the amount of forty-nine dollars – the balance of the award was some form of “vindictive” damages. The trial court denied the motion for new trial.

On appeal Justice Lumpkin, writing for the Supreme Court of Georgia, held that the Court would not limit the “vindictive” damages awarded by the jury.

_It has been truly said, that more instructive lessons are taught in Courts of Justice, than the Church is able to inculcate. Morals come in the cold abstract from the pulpit; but men smart under them practically, when Juries are the preachers._

_Kendrick v. McCrary, 11 Ga. 603, 606 (1852) (emphasis added)._ With this holding, punitive damages firmly took their place in Georgia law.

There are many appellate issues that arise from punitive damages decisions by trial courts and juries. The most fruitful grounds for reversing a punitive damages award (and thus the grounds that should be anticipated and prepared for by plaintiffs) include:

A) The claim proven was not a tort claim;

B) The tort was one such as a simple negligence that cannot sustain an award of punitive damages;

C) No compensatory damages were proven/awarded;

D) Failure to specifically request punitive damages in the pleadings;

E) Jury charge errors;
F) Improper arguments;

G) Lack of bifurcation;

H) Exceeding the cap – specific intent to cause harm;

I) Common law excessiveness;

J) Constitutional excessiveness.

A. Punitive Damages Available in Tort Actions Only

Punitive damages are restricted to tort claims. O.C.G.A. § 51-12-5.1(b). There are a number of appellate decisions overturning punitive damages awards because the claim on which the plaintiff prevailed before the jury was not a tort claim – even if it was denominated as one. See ServiceMaster Co. v. Martin, 252 Ga. App. 751, 757 (2001) (reversing $135 million punitive damages verdict after concluding the duty breached was contractual in nature: “It is well settled that punitive damages are not available in breach of contract claims.”); Howell v. Normal Life of Georgia, Inc., 2016 Ga. App. LEXIS 405 (Ga. Ct. App. July 7, 2016) (“Punitive damages are not available in actions for breach of contract.”); Trust Co. Bank v. Citizens & S. Trust Co., 260 Ga. 124, 126 (1990) (reversing trial court on grounds that “[p]unitive damages are not available in actions for breach of contract.”); McDuffie v. Argroves, 230 Ga. App. 723, 726 (1998) (“punitive damages are not authorized in cases asserting a breach of contract”); Geiger v. Ga. Farm Bureau Mut. Ins. Co., 305 Ga. App. 399, 403 (2010) (“This is true even in situations where the contract is breached in bad faith, where the courts have consistently held that punitive damages are not available because there has been no _____________________________

1 In addition to O.C.G.A. § 51-12-5.1, there are other sections of the Georgia Code that expressly allow recovery for statutory violations. For example, the Fair Business Practices Act authorizes punitive damages in addition to mandating treble damages for intentional violations. Conseco Fin. Servicing Corp. v. Hill, 252 Ga. App. 774 (2001).
tort.”). There are many more cases overturning punitive damages because plaintiffs did not identify or prove a tort duty. However, this does not always preclude an award of punitive damages in an action arising out of a contract, if the breach of contract also constitutes a tort. *Thomas v. Atlanta Cas. Co.*, 253 Ga. App. 199 (2001). “A plaintiff in a breach of contract case has a tort claim only where, in addition to breaching the contract, the defendant also breaches an independent duty imposed by law.” *Lancaster v. Storage USA P’ship, L.P.*, 300 Ga. App. 567, 570 (2009). See *Taylor v. Powertel, Inc.*, 250 Ga. App. 356 (2001) (if breach of contract also constitutes a breach of public duty, punitive damages may be recovered as tort, not contract, damages).

The punitive damages verdict also goes away if a verdict for the plaintiff on a valid tort theory is reversed, leaving only an affirmed verdict on a contract claim. See, e.g., *Cline v. Lee*, 260 Ga. App. 164, 169-70 (2003) (“we reverse the jury’s verdict with regard to the fraud claim. And because that leaves only the breach of contract claim, we also reverse the award of punitive damages. It is well settled that punitive damages are not available in breach of contract claims.”).

The plaintiff seeking punitive damages in a case in which there is a contractual relationship should take extra care to identify, argue and support with evidence the existence of a duty imposed by law independent of the contract.

In *Lyman v. Cellchem International, Inc.*, 300 Ga. 475 (2017), punitive damages were awarded in a case that included traditional tort claims, and a statutory claim for violation of the Georgia Computer Systems Protection Act (“GCSPA”). The GCSPA allows the recovery of “any damages sustained” by violation of the act. Unlike some other statutes discussed by the Supreme Court, it does not mention punitive damages.
The Court held that punitive damages were not compensatory and thus were not “sustained” by a plaintiff but rather “imposed” upon a defendant. Thus, punitive damages were not available for a violation of the GCSPA. This was not a holding that punitive damages are not available for statutory causes of action. Rather, the Court required a textual analysis of the statute to reach the conclusion that no punitive damages were available under this statute.

B. **Mere Negligence Not Enough – Aggravation Is Required**

Not all torts will support a claim for punitive damages. A finding of negligence, even gross negligence, is insufficient to support a claim for punitive damages. *Southern Ry. Co. v. O'Bryan*, 119 Ga. 147, 148-49 (1903). Thus, the record before the court, at the summary judgment stage, or the evidence adduced at trial must demonstrate willful or malicious conduct, or conduct demonstrating an entire want of care and an indifference to consequences, to authorize recovery of punitive damages. *Segars v. Cleland*, 255 Ga. App. 293 (2002).

For example, in *Langlois v. Wolford*, the court held that the defendant’s conduct in leaving the scene of a collision without even speaking to the other party, as mandated by statute, was an intentional and culpable act. This conduct demonstrated a conscious indifference to the consequences and an entire want of care as to the victim’s well-being permitting the jury to find that such conduct was of an aggravated and indifferent nature for purposes of imposing punitive damages. 246 Ga. App. 209 (2000). *See also Middlebrooks v. Hillcrest Foods, Inc.*, 256 F.3d 1241 (11th Cir. 2001) (holding that restaurant cook’s actions directed against plaintiff customers, including using profanity and a racial epithet, calling the police, and having plaintiffs removed from the
restaurant, were the sort of willful misconduct that suffices to present a jury question on whether plaintiffs were entitled to punitive damages).

“In automobile collision cases decided under [O.C.G.A. § 51-12-5.1], punitive damages are not recoverable where the driver at fault simply violated a rule of the road.” *Carter v. Spells*, 229 Ga. App. 441, 442 (1997) (citation omitted). However, “punitive damages are recoverable under the statute where the collision resulted from a pattern or policy of dangerous driving,” such as driving while intoxicated or speeding excessively. *Id.* See also *Miller v. Crumbley*, 249 Ga. App. 403 (2001).


**C. Punitive Damages Cannot Be Awarded Without Compensatory Damages**

Punitive damages cannot be awarded in the absence of some award of compensatory damages. A finding of liability for a tort without the award of damages, and even a grant of injunctive relief, is not sufficient to support an award of punitive damages. Many appellate decisions reverse punitive damages awards where no
compensatory damages are awarded, or where the award of compensatory damages is reversed on appeal:

[T]he trial court awarded no compensatory damages. “[Punitive] damages cannot be awarded in the absence of any finding of compensatory damages.” Although Virlyn Martin was awarded injunctive relief, “[t]here can be no recovery of [punitive] damages where the sole recovery is in equity.” “In accordance with O.C.G.A. § 51-12-5.1, punitive damages can only be awarded as additional damages.” Because the trial court awarded no monetary damages, the award of punitive damages was improper as a matter of law. The award of punitive damages is reversed.


However, the extent of the actual tort injury and damages awarded to the plaintiff is not dispositive. Even where a fact finder may find that a plaintiff is entitled to only a nominal award for actual tort damages, this finding does not prohibit a punitive damages award. See McClure v. Gower, 259 Ga. 678 (1989) (allowing $1,500 in punitive damages, even though jury had returned verdict of only $33 in actual damages); Tyler v. Lincoln, 272 Ga. 118 (2000) (reversing trial court’s grant of summary judgment although plaintiffs had not presented evidence of specific amount of damage
at summary judgment stage holding that even where actual damages may be small, punitive damages are still recoverable).

D. Pleading Requirements

An award of punitive damages must be specifically prayed for in the complaint. O.C.G.A. § 51-12-5.1(d)(1). Although it may be difficult to believe this would come up, appellate courts will reverse a punitive damages verdict if there was no prayer for punitive damages in the pleadings prior to trial. This includes not only a request for punitive damages in the *ad damnum* clause, but pleading the aggravating facts which would justify such an award:

“Punitive damages must be specifically prayed for in [the] complaint,” which must be more than a mere prayer for punitive damages in the *ad damnum*. O.C.G.A. § 51-12-5.1(d)(1); “We cannot affirm an award of punitive damages in which the trial court declined to follow the procedures and standards now required by O.C.G.A. § 51-12-5.1, awarded punitive damages against [the defendant] to a party who did not pray for them.” “[The plaintiff] is not entitled to punitive damages because the complaint’s prayer for relief contained no specific prayer for punitive damages (O.C.G.A. § 51-12-5.1(d)(1)) on his behalf from [the defendant].” The complaint must set forth a claim for punitive damages as well as the aggravating circumstances which authorize such damages. Thus, the complaint must set forth facts that bring the claim within the aggravating circumstances authorized by statute, i.e., “willful misconduct, malice, fraud, wantonness, oppression, or that ... want of care which would raise the presumption of conscious indifference to consequences.” O.C.G.A. § 51-12-5.1(b); In this case, punitive damages were not properly pled nor prayed for in the complaint.

*Lawrence v. Direct Mortg. Lenders Corp.*, 254 Ga. App. 672, 683 (2002) (some internal citations omitted). *See Ticor Constr. Co. v. Brown*, 255 Ga. 547 (1986) (holding that defendant in default who had been put on notice that plaintiff was originally bringing suit for negligence could not be held to have consented to an amendment of the pleadings that would have supported an award of punitive damages). *See also*
Brandenburg v. All-Fleet Refinishing, Inc., 252 Ga. App. 40 (2001) (holding that exemplary damages prayed for under the Georgia Trade Secrets Act, unlike O.C.G.A. § 51-12-5.1(d)(1), does not require that punitive damages be specifically asked for in the complaint). The complaint must also contain factual allegations, which if true, would warrant the imposition of punitive damages.

If the plaintiff fails to put the prayer in the initial complaint, plaintiff may amend the complaint to cure that defect up to the day of trial if a pretrial order has not been entered. O.C.G.A. § 9-11-14. See Lawrence, 254 Ga. App. at 683 (“punitive damages were not properly pled nor prayed for in the complaint, which is an amendable defect”).

In 2017, the Court of Appeals upheld an award of punitive damages against a conservator appointed by the court. A substitute temporary conservator accused the original conservator of wrongdoing, but did not request punitive damages. The conservator appealed the punitive damages award “because punitive damages were not specifically pled in the relief sought by the substitute temporary conservator.” In re Estate of Gladstone, 341 Ga. App. 72, 76 (2017). The Court of Appeals noted that the trial court had informed the conservator that it was considering imposing “damages or other redress.” The trial court also cited a statute allowing for “sanctions” but which was silent as to punitive damages. The Court of Appeals held that given this notice, “compliance with the procedural requirements of O.C.G.A. § 51-12-5.1(d) was not necessary.”

E. Jury Charge Errors

There are a number of jury charge issues which frequently arise in appeals from punitive damages verdicts.
In Phase I of a bifurcated trial, the jury should be instructed, *inter alia*, (a) the standard for the imposition of punitive damages; (b) that they are not to set an amount for the punitive damages at that time; (c) that the imposition of punitive damages must be based upon clear and convincing evidence; and (d) a definition of “clear and convincing evidence.” Some courts have given the clear and convincing evidence charge only in Phase II.


Another charge error that has arisen multiple times is the failure to charge the definition of specific intent to cause harm to get past the $250,000 cap imposed by O.C.G.A. § 51-12-5.1(g). “[W]e take this opportunity to adopt henceforth a bright line rule 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 (1998). This charge error is subject to a special rule of preservation (or non-preservation) – no objection or post-trial motion is required to allow the defendant to raise this issue on appeal if the punitive damages verdict exceeds $250,000.

Pretermitting whether or not Quay properly objected to the alleged omission/error at trial or raised the issue in a timely post-judgment motion, the bright line rule announced in McDaniel means that failure to object to the absence or inadequacy of a specific intent charge or finding
does not constitute a waiver of the error for the purpose of appellate review. Because the claimant for punitive damages bears the burden of meeting the procedural requirements of OCGA § 51-12-5.1(g), a verdict for punitive damages in excess of $250,000 may not stand unless the record reflects both a request to charge on specific intent to cause harm and a separate finding of specific intent to cause harm by the trier of fact.


Another charge error which arises in punitive damages cases is where the jury is instructed on the statutory scheme for the distribution or limitation of punitive damages. Under O.C.G.A. § 51-12-5.1(g), punitive damages in non-products liability cases are limited to a maximum of $250,000 for any tort action, unless the properly instructed jury finds that “the defendant acted, or failed to act, with the specific intent to cause harm.” *Alta Anesthesia Assocs. of Ga., P.C. v. Gibbons*, 245 Ga. App. 79, 89 (2000). And, under O.C.G.A. § 51-12-5.1(e), 75 percent of punitive damages awards in products liability cases are paid to the state.

In *Ford v. Uniroyal Goodrich Tire Co.*, 267 Ga. 226 (1996), the court held that the requirement in O.C.G.A. § 51-12-5.1(e) that 75 percent of punitive damages awards in products liability cases be paid to the state is an improper subject for a jury instruction. Such a jury instruction is improper because the distribution of a punitive damages award injects prejudicial issues that are irrelevant to the purpose of punitive damages – to penalize, punish and deter the wrongdoer. Although no appellate opinion directly so holds, it seems probable that the same logic would be applied to a jury instruction as to the $250,000 cap under O.C.G.A. § 51-12-5.1(g). It would be risky to instruct a jury as to the existence of the cap or the reason that they are being asked to answer the jury interrogatory as to specific intent to cause harm. *But see Rolleston v.*
Other issues that have arisen as to jury instructions during Phase II include whether or not the jury should be told about certain tax implications involving punitive damage awards. In *Ford*, the Georgia Supreme Court held that it is improper to instruct the jury that it should consider the fact that defendants would have to pay tax on punitive damages. 267 Ga. at 230-32.

**F. Improper Argument of Counsel**

Arguments made by counsel can present a practitioner with appealable issues. For example, it is improper to argue that any punitive damages assessed against the defendant would not be paid by it, but would be paid by numerous reinsurers who were not parties to the case. *Myrick v. Stephanos*, 220 Ga. App. 520 (1996). However, it is entirely appropriate for a defendant to argue, during Phase II, that punitive damages are unnecessary due to a large compensatory award already made by the jury. *Ford*, 267 Ga. 226.

In *Shaw v. Brannon*, 253 Ga. App. 673, 674-75 (2002), the Georgia Court of Appeals indicated that, in making a closing argument that addresses whether compensatory damages should be awarded, counsel should not make a “send a message” argument. The court indicated that the making of such an argument is “tantamount to requesting punitive damages.” *Id.* at 674. The court implies, therefore, that a “send a message” closing argument is appropriate in the punitive damages context.

In *Vineyard v. County of Murray*, 990 F.2d 1207, 1213-14 (11th Cir. 1993), a section 1983 excessive force case, the Eleventh Circuit concluded that the district court’s
cautionary instruction to the jury cured the defect caused by plaintiff’s improper “send a message” closing argument. The plaintiff had argued to the jury that it should award punitive damages to send a message “to everybody in Murray County,” including the politicians, the sheriff, and the deputies there. *Id.* at 1213. Upon defense counsel’s objection, the district court instructed the jury that, with respect to punitive damages, “the purpose of a verdict is not really to send messages out generally to people,” but to punish a specific defendant. *Id.* at 1214 (emphasis added).

More generally, in *Myrick v. Stephanos*, 220 Ga. App. 520, 523 (1996), the Georgia Court of Appeals ruled that the plaintiff should not make a “Golden Rule” argument to the jury, that is, an argument that “urges the jurors to place themselves in the position of plaintiff or to allow such recovery as they would wish if in the same position.” *Id.* The opinion, however, does not differentiate closing arguments that address whether compensatory damages should be awarded from closing arguments that address whether punitive damages should be awarded.

In another case with application both to compensatory and punitive damages arguments, *Stoner v. Eden*, 199 Ga. App. 135, 136-37 (1991), the Georgia Court of Appeals stated that it was improper for defense counsel, during closing argument, to inform the jury that plaintiff’s counsel was representing plaintiff on a contingency basis and that plaintiff’s counsel would get “a piece of th[e] pie” of any damages awarded. The court noted that the defense counsel’s comment “had no relevance to any issue of liability or damages in the case.” *Id.* at 137.
G. Failure to Bifurcate

O.C.G.A. § 51-12-5.1(d), expressly requires a bifurcation of the punitive damages issues. The statute provides:

(d)(1) In any case in which punitive damages are claimed, the trier of fact shall first resolve from the evidence produced at trial whether an award of punitive damages shall be made. This finding shall be made specially through an appropriate form of verdict, along with the other required findings.

(2) If it is found that punitive damages are to be awarded, the trial shall immediately be recommenced in order to receive such evidence as is relevant to a decision regarding what amount of damages will be sufficient to deter, penalize, or punish the defendant in light of the circumstances of the case.

In a bifurcated trial, the issues for the first phase are liability, the amount of compensatory damages, and liability for punitive damages. The amount of punitive damages is to be determined in the second phase. Webster v. Boyett, 269 Ga. 191, 193 (1998). The issue of specific intent to cause harm is generally determined in the second phase.

Plaintiffs should be aware that if a trial court fails to comply with the procedural requirements of O.C.G.A. § 51-12-5.1(d), by not holding a bifurcated hearing to consider the amount of punitive damages to be awarded, there must be an objection raised as to this deficiency or the error will be deemed waived. Lawrence, 254 Ga. App. 672; Shaw v. Ruiz, 207 Ga. App. 299, 300 (1993); Wal-Mart Stores, Inc. v. Forkner, 221 Ga. App. 209, 210 (1996). To preserve the right to a bifurcated trial, a party must request bifurcation or object to the court’s refusal to bifurcate.

The questions to be answered in Phase II (the “punitive damages phase”) are the amount of punitive damages and, if requested and appropriate, the question of the
existence of specific intent to cause harm. The amount of punitive damages is generally left to the enlightened consciences of fair and impartial jurors. However, that “enlightened conscience” is now subject to intense trial court scrutiny and “de novo” appellate review. Preparing to survive that review as a plaintiff and to overturn or reduce a punitive damages verdict through that review as a defendant are crucial parts of the trial of Phase II of a punitive damages case, as discussed in detail below.

Phase II is to follow immediately upon the conclusion of Phase I. O.C.G.A. § 51-12-5.1(d)(2). Each party is entitled to make a closing argument during Phase II. *McClure v. Gower*, 259 Ga. 678 (1989). Presumably, and as a matter of practice, each party is entitled to an opening statement. Evidence previously admitted in Phase I need not be re-tendered. The jury should be charged at the conclusion of Phase II. The entire charge need not be repeated.

**H. Exceeding the Cap – Specific Intent to Cause Harm**

Both trial courts on motions for remittitur and the appellate courts on appeal are frequently asked to review punitive damages awards for alleged excessiveness. That excessiveness can take three forms – (1) a punitive damages verdict in excess of the statutory cap without the required finding of specific intent to cause harm and sufficient evidence to support that finding; (2) “common law excessiveness” – the punitive damages award exceeds the amount justified by the evidence and/or is the product of prejudice or bias; (3) constitutional excessiveness – the punitive damages award exceeds the amount allowed by the Constitution.

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As set forth above, in non-products liability cases, punitive damages are limited to $250,000 in the absence of a finding of “specific intent to cause harm” and evidence to support that finding. O.C.G.A. § 51-12-5.1(g). The existence of the required finding is now a “bright line” without which any punitive damages award in excess of the cap will fail. The existence of specific intent need be proven only by a preponderance of the evidence, not clear and convincing evidence. Kothari v. Patel, 262 Ga. App. 168, 173-74 (2003). The existence of sufficient evidence to support a finding of specific intent to cause harm is reviewed under the “any evidence” standard. Brewer v. Insight Tech., Inc., 301 Ga. App. 694 (2009).

The evidence sufficient to support a finding of specific intent must be evidence that the defendant “desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it. On the other hand, the mere knowledge and appreciation of a risk, short of a substantial certainty, is not the equivalent of intent.” J. B. Hunt Transp. v. Bentley, 207 Ga. App. 250 (1992). “A finding of specific intent to cause harm may not be based on the rebuttable presumption that a person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts as set forth in O.C.G.A. § 16-2-5.” Wal-Mart Stores v. Johnson, 249 Ga. App. at 89.

The most recent analysis of this requirement is in McGinnis v. Am. Home Mortg. Servicing, Inc., No. 17-11494, 2018 U.S. App. LEXIS 23596, at *17 (11th Cir. Aug. 22, 2018). The Eleventh Circuit (Branch, J.) held in a wrongful foreclosure case that specific intent to cause harm was supported by the evidence. The McGinnis court set forth the standard:
Specific intent to cause harm exists where an actor desires to cause the harm resulting from his or her actions or believes that the resulting harm is substantially certain to result from his or her actions. *Action Marine*, 481 F.3d at 1313. In other words, specific intent can be established by showing that the actor engaged in a course of conduct even though he or she believed the conduct was almost certain to cause harm.

*Id.* The Court then found the standard was met by looking at four facts: (1) the defendant “knew its escrow analysis was in error yet proceeded to demand payment repeatedly without explanation and then foreclose;” (2) “putting [plaintiff’s] payments in a suspense account from which it ‘deducted, as its own income, late fees and other expenses’ [that] were not in fact owed;” (3) a large volume of adversarial threats from the lender combined with communications from plaintiff complaining of stress and harm to her reputation; and, (4) “offering” to stop the foreclosure only if plaintiff paid all amounts claimed, including amounts not actually due. *Id.* at **17-20.

**I. Common Law Excessiveness**


In their enumeration of error, however, the Defendants assert only that the award must be reversed because it was 25 times greater than the nominal damages awarded. Thus, because the Defendants do not assert that the punitive damages award violated their constitutional rights, we
are not required to analyze the award using the test articulated in *State Farm*.

An award of punitive damages will not be disturbed on appeal under a common law challenge unless it is “so excessive or inadequate as to shock the judicial conscience.” *Clarke v. Cotton*, 207 Ga. App. 883, 883-84 (1993). This test, which has been applied to damages awards based on jury verdicts generally, has a very long history and has been more fully elaborated thus:

Before the verdict will be set aside on the ground that it is excessive, where there is no direct proof of prejudice or bias, the amount thereof, when considered in connection with all the facts, must shock the moral sense, appear exorbitant, flagrantly outrageous, and extravagant. It must carry its death warrant upon its face. Although a verdict may be large and generous, where the evidence abundantly authorized a finding for the plaintiff, this court does not feel authorized under the law to set the verdict aside on the sole ground that it is excessive, there being nothing in the record to indicate prejudice or bias on the part of the jury, and the verdict having been approved by the trial judge.


Although, as discussed below, the ratio of punitive damages to compensatory damages plays a major role in reviews for alleged constitutional excessiveness, it is not so important in reviews for alleged common law excessiveness:

In Georgia, the purpose of punitive damages is to deter the repetition of reprehensible conduct by the defendant. OCGA § 51-12-5.1 (c). “Because deterrence is based on factors other than the actual harm caused, the Supreme Court of Georgia rejected the notion that punitive damages must necessarily bear some relationship to the actual damages awarded by the jury.” ... Although we do not mechanically look to the ratio between general and punitive damages to resolve the question of excessiveness, that ratio is some evidence of whether the jury’s award was infected by undue prejudice or bias.

J. Constitutional Excessiveness


1. BMW Established Three “Guideposts” for Assessing Punitive Damages

Appellate courts are frequently asked to review punitive damages judgments for alleged constitutional excessiveness. The watershed case is BMW, 517 U.S. 559. In BMW, the Alabama jury awarded Dr. Gore $4,000 in compensatory damages and $4 million in punitive damages because BMW did not inform him that they repainted his “new” car after it sustained acid rain damage. The resulting ratio of punitive to compensatory damages was 1000:1.3 Even after Alabama appellate courts cut the punitive damages award in half, a significant disparity between the punitive and compensatory damages remained – a 500:1 ratio. The Supreme Court held that “[t]he Due Process Clause of the Fourteenth Amendment prohibits a State from imposing a ‘grossly excessive’ punishment on a tortfeasor” and held the punitive damages award unconstitutional.4 The facts of the case, as well as the lack of particularly reprehensible conduct, could not sustain a 500:1 ratio of punitive to compensatory damages.5

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3 517 U.S. at 562.
4 Id.
5 Id. at 581-82.
The Court’s holding in BMW established the above-mentioned three constitutional “guideposts” for evaluating allegedly excessive punitive damage awards under the Constitution’s Due Process Clause. 6 The “guideposts” include:

the degree of reprehensibility of the [defendant’s conduct]; the disparity between the harm or potential harm suffered by [the plaintiff] and his punitive damages award; and the difference between this remedy and the civil penalties authorized or imposed in comparable cases.7

None of the three guideposts are to be dispositive or mandatory. Rather, the Court envisioned weighing each against the others and intentionally selected the “guidepost” terminology.

The term “guideposts” does not connote or suggest a cumulative series of three “tests” or “elements” which must each be met. “Rather, ... the three guideposts [are] (a) considerations to be expressly taken into account in order to give coherence and some degree of structure to the Due Process analysis of quantum of punitive damages and (b) a multifactor balancing test in which the three guideposts might give contradictory indications which must be weighed against one another to achieve a final result.”8

The first, and “most important” of the three guideposts, is the degree of reprehensibility of the defendant’s conduct.9 The Constitution permits larger punitive

6 Id. at 575.
7 Id.
9 “[T]he most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant’s conduct.” BMW, 517 U.S. at 575.
damage awards against defendants with a higher level of culpability. As the “most important” guidepost, courts are to give reprehensibility the greatest weight. Certain aggravating factors, such as intentional torts, repeated misconduct, or a course of misconduct over years, fraudulent conduct, lying or destroying evidence to hide misconduct or evil motive, and misconduct by a defendant in a fiduciary capacity, allow courts and juries to impose larger punitive damage awards. These aggravating factors enhance reprehensibility because they “provide relevant support for an argument that strong medicine is required to cure the defendant’s disrespect for the law.”

The second guidepost mandates a review of the punitive to compensatory damages ratio. Punitive damages should have some “reasonable relationship” to the

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10 Particularly reprehensible conduct includes “acts of affirmative misconduct.” *BMW*, *id.*, at 606.

11 *BMW*, *id.* at 576-77 (“evidence that a defendant has repeatedly engaged in prohibited conduct while knowing or suspecting that it was unlawful would provide relevant support for an argument that strong medicine is required to cure the defendant’s disrespect for the law.”); *Johansen v. Combustion Eng’g, Inc.*, 170 F.3d 1320, 1336 (11th Cir. 1999) (greater punitive damages would be authorized against “a recidivist that continually repeats certain misconduct.”).


13 Particularly reprehensible conduct includes “concealment of evidence of improper motive.” *BMW*, 517 U.S. at 606.


15 *BMW*, 517 U.S. at 576-77.
compensatory damages in the case.\textsuperscript{16} Additionally, reviewing courts may weigh punitive damages against the potential harm that could result from the defendant’s conduct if that potential harm exceeds the actual harm.\textsuperscript{17} While the 500:1 ratio exceeded constitutional limits due to the facts of BMW, the Court declined to set a constitutional boundary based upon ratios. “We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case.”\textsuperscript{18}

In fact, after BMW, a wide range of ratios fell within the bounds of constitutional propriety. The United States Supreme Court has affirmed cases with ratios of 526:1; 117:1; 258:1; and 4:1.\textsuperscript{19} Georgia Courts, even after BMW, have continued to affirm even larger ratios.\textsuperscript{20} In a case arising under Georgia law, the Eleventh Circuit applied BMW and held that where the conduct was not egregious and barely met the standard for imposition of punitive damages in the first instance, the maximum ratio allowable was

\textsuperscript{16} Id. at 581.
\textsuperscript{17} Id.
\textsuperscript{18} Id. at 582-83.
100:1. The Eleventh Circuit remitted the punitive damages verdict to 100:1, but rejected a defense request for further remittitur.\textsuperscript{21}

Ratios allowed after \textit{BMW} continued to be substantial, depending primarily upon the level of reprehensibility.\textsuperscript{22} Following \textit{BMW}, courts held that, given the pervasiveness of treble damage schemes, which have repeatedly withstood constitutional challenges, punitive damages awards of less than twice the compensatory award are \textit{per se} reasonable without further analysis.\textsuperscript{23} Indeed, the very concept of a proportionality/ratio requirement had its “pedigree” in the long acceptance of treble damage awards.\textsuperscript{24} Additionally, some courts held after \textit{BMW} that given the Supreme

\textsuperscript{21} \textit{Johansen}, 170 F.3d 1320.


\textsuperscript{23} See \textit{Clark v. MetroHealth Found., Inc.}, 90 F. Supp. 2d 976, 986 (N.D. Ind. 2000) (punitive damages in ratio of 3:1 or less reasonable “as a matter of law” given prevalence of treble damages awards); \textit{United States EEOC v. AIC Sec. Investigations}, 55 F.3d 1276, 1287 (7th Cir. 1995) (punitive damages in ratio of 3:1 reasonable because of prevalence of treble damages statutes).

\textsuperscript{24} \textit{BMW}, 517 U.S. at 580-81 (principle that punitive damages should have a rational relationship to compensatory damages has as its pedigree the long history of treble damages statutes).
Court’s approval of a 4:1 ratio in Haslip, a ratio under 4:1 is *per se* reasonable and constitutional as a matter of law.\textsuperscript{25}

The third guidepost requires that reviewing courts compare the punitive damages award to other potential civil or criminal sanctions for “comparable” misconduct.\textsuperscript{26} This guidepost permits comparisons to criminal fines, civil fines, regulatory fines, and prior punitive damages awards for comparable conduct.\textsuperscript{27} Of course, many torts do not constitute the violation of any statute or regulation.

Many courts have completely refused to consider the third guidepost factor after finding that there was either no applicable statutory penalty for comparable conduct.\textsuperscript{28}

\textsuperscript{25} Zimmerman v. Direct Fed. Credit Union, 262 F.3d 70, 82 (1st Cir. 2001) (because the Supreme Court in Haslip held that a ratio of 4:1 does not “cross the line into the area of constitutional impropriety,” a ratio of 2:1 “presents no cause for concern.”); Colbert v. Furumoto Realty, 144 F. Supp. 2d 251, 258 (S.D.N.Y. 2001).

\textsuperscript{26} BMW requires only “comparable” misconduct for purposes of the third guidepost analysis (517 U.S. at 583), and this does not require that the conduct committed actually constitute the offense. See, e.g., Campbell, 65 P.3d 1134 (focus under third guidepost is maximum penalties available for “comparable” misconduct, not penalties that were imposed for the precise conduct at issue). But see Johansen, 170 F.3d at 1337 n.34 (holding that the fine imposed in this case is the most relevant comparison, but that “[t]his is not to say that there may not be a case where the record reveals that the actual civil penalty imposed does not adequately reflect the state’s interest in the specific conduct at issue in the case.”).

\textsuperscript{27} See BMW, 517 U.S. at 575.

\textsuperscript{28} See, e.g., AutoZone, Inc. v. Leonard, 812 So. 2d 1179, 1188 (Ala. 2001) (“[w]e cannot consider this guidepost, because Alabama law provides no sanctions, either civil or criminal, for a retaliatory discharge”); Paracelsus Health Care Corp. v. Willard, 754 So. 2d 437, 445 (Miss. 1999) (disregarding third guidepost because “there are no other sanctions which would be imposed under the facts of this case”); Allsup’s Convenience Stores, Inc. v. North River Ins. Co., 976 P.2d 1, 19 (N.M. 1998) (disregarding third guidepost because “there is no statutory fine for this or similar misconduct”); Jacque v. Steenberg Homes, Inc., 563 N.W.2d 154, 165 (Wis. 1997) (“We consider this factor largely irrelevant in the present case because the ‘conduct at issue’ here was scarcely that contemplated by the legislative action.”); Vandeveender v. Sheetz, Inc., 490 S.E.2d 678, 692 (W. Va. 1997) (disregarding third guidepost where state law provided only a “cause of action” without establishing a “penalty limit that could be referred to for
or the relevant statutory sanction was too paltry and, thus, provided “little basis for determining a meaningful punitive damages award.”  

However, a criminal statute that includes a prison sentence as a potential penalty puts defendants on notice of substantial risk. Thus, even if the fine component of a penal scheme is small, the potential of even a short incarceration can justify large punitive damages.

In looking at comparable cases rather than fines for a third guidepost analysis, the courts compare the **ratios** of punitive damages to compensatory damages with the **ratios** in the other, similar cases. It is important not to look at absolute damages numbers.

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29 Winn Dixie v. Colburn, 709 So. 2d 1222, 1225 (Ala. 1998). See also Union Sec. Life Ins. Co. v. Crocker, 709 So. 2d 1118, 1122 (Ala. 1997) (reasoning that because “the maximum statutory sanction against insurance fraud in this state is meager ... ‘there is little basis for comparing it with any meaningful punitive damages award.’”) (quoting BMW II, 701 So. 2d at 514); Ford Motor Co. v. Sperau, 708 So. 2d 111, 122 (Ala. 1997) (“a $2,000 statutory penalty for deceitful conduct is so meager that there is little basis for comparing it with any meaningful punitive damages award”).

30 See Haslip, 499 U.S. at 23; Bielicki v. Terminix Int’l Co., L.P., 225 F.3d 1159, 1166 (10th Cir. 2000); Neibel v. TransWorld Assur. Co., 108 F.3d 1123, 1133 (9th Cir. 1997) (potential twenty year sentence constituted “severe criminal penalties” and “dictates that the punitive damages award in this case is not ‘grossly excessive’ under BMW.”).

31 See, e.g., Ammerman, 705 N.E.2d at 563 (under the third guidepost, when looking at other cases for comparable punitive awards, court must look to ratio rather than absolute numbers). Collecting other cases with high ratios (but low total punitive awards), the Court held that “In our view Ford knew or should have known that an
2. *Cooper* Imposed *de novo* Appellate Review of Punitive Damages Excessiveness Challenges

*BMW* did not end the Supreme Court’s discussion of the review of allegedly excessive punitive damages awards, however. In *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, the Court discussed “the proper standard for reviewing the District Court’s due process determination,” as opposed to “the substantive standard for determining the jury award’s conformity with due process.”

In *Cooper*, the United States Supreme Court carefully explained that it was deciding a different question from the one it resolved in *BMW*. As the Supreme Court noted, *BMW* had “already ... answered” the question of the substantive standard for reviewing the jury award itself. Nothing in *Cooper* changed that substantive standard; indeed, the Court noted that *Cooper* confirms that verdicts still may only be reduced for “gross excessiveness.”

The *Cooper* court held that, in reviewing a district court’s determination of a punitive damages verdict’s alleged constitutional excessiveness under the federal due process clause, federal circuit courts of appeal should not defer to the legal conclusions in the district court’s *BMW* analysis, but should analyze those conclusions *de novo*. When conducting the *de novo* review, the Supreme Court clearly noted that appellate courts could not tamper with the underlying factual findings supporting the award of punitive damages could have resulted in a ratio as high as 100 to 1 [citations omitted]. That is especially so given ... Ford’s economic wealth.”

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33 *Id.*
34 *Id.* at 436.
**trial court’s analysis** unless the findings were clearly erroneous.35 Further, the analysis of reprehensibility is not subject to the same level of *de novo* review as the other two *BMW* guideposts:

The reprehensibility judgment thus deserves extremely careful examination. The Court in *Cooper*, however, noted that this factor can be influenced by the demeanor and credibility of witnesses, matters on which any appellate court must defer substantially to the jury. *Cooper*, 121 S. Ct. at 1687-88. It thus appears that the reprehensibility factor presents a mixed issue for appellate review: to the extent that the judgment-call on reprehensibility can be traced to a jury’s assessment of witnesses, independent appellate review is essentially meaningless.36

Thus, in responding to a remittitur motion, a plaintiff should consider asking the trial court to make express factual findings, including a discussion of the degree of reprehensibility and the credibility of key witnesses. Such findings may help sustain a trial court’s ruling on remittitur.

The *Cooper* court recognized that its holding changing the required standard of review would not make a difference in most cases: “[t]he standard of review applied by the Court of Appeals will affect the result of the *Gore* analysis in only a relatively small number of cases.”37 Indeed, *Cooper* itself (a 90:1 ratio) was not reversed by the Supreme Court. It was instead remanded for reconsideration because of several factors. First, the 90:1 ratio of punitive to compensatory damages put the case into a questionable category. Second, the Court held that the trial court improperly and incorrectly instructed the *Cooper* jury that the defendant’s conduct was unlawful, an instruction that the Court held could have influenced the amount of punitive damages

35 *Id.*
37 *Cooper*, 532 U.S. at 441.
awarded. Third, the Court noted that the trial court looked in its BMW analysis not at the actual damages awarded but at the “potential harm Leatherman would have suffered had Cooper succeeded in its wrongful conduct.” In so doing, the trial court apparently miscalculated that potential harm. The trial court’s apparent mistakes led the Supreme Court to conclude that de novo review “might well have led the Court of Appeals to reach a different result,” and that the outcome of that particular case “may depend upon the standard of review.”

Subsequent cases have reiterated Cooper’s holding that the standard of review generally does not make a difference; it may only make a difference in a few borderline cases. Cooper did not, however, answer all questions about the proper standard of review. A question arose as to whether Cooper promulgated a constitutional rule binding upon the states or exercised supervisory authority over federal courts in a manner that does not impact the states. Many state courts have seemingly

38 Id. at 441-42.
39 Id. at 442 (emphasis added).
40 Id.
41 Id. at 441, 443.
42 See Foster v. Time Warner Entm’t Co., L.P., 250 F.3d 1189, 1194 n.3 (8th Cir. 2001) (punitive damages review would reach same result under abuse of discretion or de novo review where ratio was 1.8:1). See generally Alison H. v. Byard, 163 F.3d 2, 3 (1st Cir. 1998) (whether proper standard is abuse of discretion or de novo review makes no difference where the outcome would be the same under either standard).
disregarded this question, choosing instead to apply Cooper to federal constitutional challenges without analyzing the question.

Numerous courts have held that even after Cooper, claims of factual or state law excessiveness as opposed to federal constitutional excessiveness are not subject to the mandatory application of the de novo standard of review, but can be reviewed for abuse of discretion. “[I]f no constitutional issue is raised, the role of the appellate court, at least in the federal system, is merely to review the trial court’s determination under an abuse-of-discretion standard.”44 Therefore, Cooper’s de novo review requirement only applies if a party raises a federal due process challenge to the punitive damages award.

An important distinction should be made, however. The Cooper requirement that the appellate court conduct a de novo review does not allow a defendant to raise additional arguments before the appeals court. Defendants must expressly raise and preserve each argument relating to the appropriate level of review.45 For example, in

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44 Cooper, 532 U.S. at 433. See Northrop v. Hoffman of Simsbury, Inc., 12 F. App’x 44, 51 (2d Cir. 2001) (“When no constitutional challenge is raised, we review a district court’s decision to reduce punitive damages for abuse of discretion.”) (citing Cooper); Foster, 250 F.3d at 1194 n.3 (“Time Warner has not argued that the punitive damages award violated its right to due process which would require a de novo review of the denial of its motion, see Cooper ..., but our ultimate conclusion [affirming punitive damages without remittitur] would be the same under that standard.”); Middlebrooks, 256 F.3d at 1249 n.5 (abuse of discretion review used for claim of excessiveness of punitive damages after Cooper because “Hillcrest does not argue that the punitive damages award violates its due process rights.”) (citing Cooper); Stroud v. Lints, 760 N.E.2d 1176, 1180 (Ind. Ct. App. 2002) (where no constitutional issue is raised as to excessiveness of punitive damages, Cooper allows abuse of discretion review), superseded, remanded by 790 N.E.2d 440 (Ind. 2003); Time Warner Entertainment Co., L.P., 254 Ga. App. at 600 (holding that “if the federal constitutional claim is not raised in the court below, such arguments on appeal are ‘unavailing.’”).

45 Bocci v. Key Pharms, Inc., 35 P.3d 1106, 1111 (Or. App. 2001) (refusing to consider argument under BMW’s first guidepost where issue not properly preserved, on the grounds that “[n]othing in Cooper Industries suggests that appellate courts are required to consider unpreserved issues.”).
Six Flags II, the Georgia Court of Appeals found that Cooper “applies only to excessiveness claims raised under the due process clause of the federal constitution.” Additionally, defendants must expressly raise and preserve their federal constitutional challenge, (id.), and raise and preserve each specific BMW guidepost under which they intend to argue. Plaintiff should be alert for waiver.

Post-Cooper cases support the proposition that the substantive standards enunciated in BMW have not changed. For example, in Simon v. San Paolo U.S. Holding Co., a fraud case that was remanded (“GVR’d”) by the United States Supreme Court in light of Cooper (and again, as discussed below, in light of State Farm), the state appellate court, on remand, again affirmed a punitive damages verdict of 340:1. In Six Flags II, the Court held that federal constitutional review under BMW and the application of Cooper had been waived, but nonetheless conducted the BMW review de novo, and affirmed a punitive damages verdict in a ratio of 1.3 to 1. Again, the standard of review did not change the outcome, and should not do so except in borderline cases with high ratios and low reprehensibility.

3. **State Farm Provided Greater (if Arbitrary) Guidance to Courts Assessing Punitive Damages**

In a widely-criticized decision, the United States Supreme Court in State Farm held that “in practice, few awards exceeding a single-digit ratio between punitive and

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48 See also Callantine v. Staff Builders, Inc., 271 F.3d 1124 (8th Cir. 2001) (affirmed remittitur of punitive damages from 578,000:1 to 25,000:1 – denied further remittitur).
49 254 Ga. App. at 600.
compensatory damages, **to a significant degree**, will satisfy due process.” 538 U.S. at 410 (emphasis added).

*State Farm* arose from a car accident in which one driver was killed and another permanently disabled. State Farm proceeded to trial despite its own investigations finding its insured (Campbell) at fault. State Farm declined policy limits settlement offers. The jury returned a verdict against Campbell for $185,849. State Farm then refused to cover the excess liability (policy limits were $50,000) and notified Campbell to begin selling his property to pay the judgment. State Farm refused to post an appeal bond for Campbell.

State Farm later covered the excess liability verdict. Campbell sued State Farm, alleging bad faith and claiming damages for emotional distress arising out of being told to sell his house. At trial, the evidence showed that State Farm had instituted a scheme to meet corporate fiscal goals by capping pay-outs on claims nationwide. The Utah jury returned a verdict against State Farm for its bad faith, awarding Campbell $2.6 million in compensatory damages and $145 million in punitive damages. The trial court reduced the verdict to $1 million in compensatory damages and $25 million in punitive damages. On appeal, however, the Utah Supreme Court conducted a *de novo* review pursuant to *Cooper*, and considered the three *BMW* guideposts. The Utah Supreme Court reinstated the original $145 million punitive damages award. In reversing and remanding, the Supreme Court reiterated the use of the *BMW* three guidepost analysis. The key language is below:

> We decline again to impose a bright-line ratio which a punitive damages award cannot exceed. Our jurisprudence and the principles it has now established demonstrate, however, that, **in practice, few awards exceeding a single-digit ratio between punitive and**
compensatory damages, to a significant degree, will satisfy due process .... Single-digit multipliers are more likely to comport with due process, while still achieving the State’s goals of deterrence and retribution, than awards with ratios in range of 500 to 1, id., at 582, 116 S. Ct. 1589, or, in this case, of 145 to 1 .... Nonetheless, because there are no rigid benchmarks that a punitive damages award may not surpass, ratios greater than those we have previously upheld may comport with due process where a particularly egregious act has resulted in only a small amount of economic damages .... The converse is also true, however. Where compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee. The precise award in any case, of course, must be based upon the facts and circumstances of the defendant’s conduct and the harm to the plaintiff. In sum, courts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered.

State Farm, 538 U.S. at 425-26 (emphasis added).

Criticism of the State Farm decision began within the Court. In dissent, Justices Scalia and Thomas reiterated their view (expressed earlier in a dissent in BMW) that the federal Constitution does not regulate the size of punitive damage awards from State courts. They went on to also state that they were “also of the view that the punitive damages jurisprudence which has sprung forth from BMW v. Gore is insusceptible of principled application; accordingly, [we] do not feel justified in giving the case stare decisis effect.” Id. at 429 (emphasis added). In her dissent, Justice Ginsburg suggested that federal court checks on punitive damages from state courts is inappropriate, and also that appellate judges are ill-equipped to substitute their judgment for state legislatures. “In a judicial decree imposed on the states by this Court under the banner of substantive due process, the numerical controls today’s decision installs seem to me boldly out of order.” Id. at 438.
Commentators have also roundly criticized both the holding and the reasoning of *State Farm*. Perhaps the most interesting is that published by conservative columnist George Will:

There is Supreme Court propensity to legislate when it thinks legislatures should but won’t. However, that propensity is injurious to constitutional law and democratic practices, even when the resulting court-made social policy would be desirable if established by legislation ... what, other than the justices’ instincts, provides criteria of proportionality and arbitrariness? The justices supposedly are construing the Constitution, not their instincts. And what principle makes the justices’ instincts superior to the jury’s regarding State Farm’s documented practices? Furthermore, even if the jury’s award was unjust, the idea that “unjust” and “unconstitutional” can be synonymous gives it a license to legislate ... [concerning idea that ratios in excess of single digits violate due process clause]. Where in the name of James Madison did *that* come from? From the justices’ viscera, not Madison’s Constitution. Their viscera will be consulted in future cases to clarify those “few” awards that may deviate from the justices’ rule to a degree that is “significant.” ... The court propounded three sensible guidelines for determining when damage awards violate due process. What was not sensible was pretending the guidelines were emanations of the Constitution.


50 See Richard Thornburgh & David Fine, *A Recent Supreme Court Punitive Damages Decision Unites Usually-Opposed Justices On The Need For More Guidance In This Area*, FindLaw.com, May 28, 2003 (the dissents of Scalia and Ginsberg are correct – strange where “most liberal “ and “most conservative” members of Court agree); Fred B. Moore, *A Collective Sigh of Relief*, In Layman’s Terms, April 2003 (“the Court overstepped its bounds and ruled on an area that should be left to the legislature.”); *Punitive Damages Capped by High Court*, Court Monitor, June 21, 2003 (“It is not entirely clear what constitutional principle justified the Court’s decision.”); Dan Ackman, *The Supreme Court’s Wacky Guideposts*, Forbes.com, April 8, 2003 (“Before the Supreme Court decides policy for the system, it might consider the millions of cases it never sees rather than simply focus on the one case it deigns to decide”); Stuart Lieberman, *State Farm Decision Is Bad News For Property Owners*, Realty Times, April 17, 2003 (“the Campbell case is too pro-business, pro insurance industry. For the rest of us, it is not great news.”).
4. **Supreme Court Punitive Damages Jurisprudence After State Farm**

Perhaps the most interesting “post-State Farm” developments are those from the Supreme Court itself. At the time it decided *State Farm*, the Supreme Court had before it at least 11 petitions for certiorari from punitive damages decisions. In the vast majority of these cases, the Court granted the petition for certiorari, vacated the appellate decision affirming the punitive damages award, and remanded for reconsideration in light of *State Farm*. This procedure, known as a “GVR” (Grant, Vacate & Remand) was followed in every case then pending that the author could identify except *Six Flags II*. In *Six Flags II*, the ratio of punitive damages to compensatory damages was 1.3 to 1; the compensatory damages were over $197 million; and, the punitive damages were $257 million – in excess of a 1:1 ratio, but still within single digits. The United States Supreme Court denied certiorari, and denied an express request to “GVR” the *Six Flags II* decision in light of *State Farm*. 538 U.S. 977 (2003).

An examination of the other cases considered by the United States Supreme Court in light of *State Farm* shows that ratios as low as 3.33 to 1 were subject to a “GVR.” However, a GVR is not an expression of disapproval of the result below. And, appellate courts around the country are regularly affirming punitive damages well in excess of that ratio since *State Farm*. Indeed, appellate courts continue to affirm cases with ratios well in excess of the “single digit” ratios referenced in *State Farm*.

**Cases considered by the U.S. Supreme Court in light of State Farm**

<table>
<thead>
<tr>
<th>compensatory damages (rounded) punitive damages ratio</th>
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51 Punitive damages to compensatory damages. Ratio is as of time case was considered by United States Supreme Court. Some punitives had been remitted by lower courts.
<table>
<thead>
<tr>
<th>Compensatory Damages (Rounded)</th>
<th>Punitive Damages</th>
<th>Ratio</th>
<th>Outcome</th>
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<tbody>
<tr>
<td>$197,000,000</td>
<td>$257,000,000</td>
<td>1.3 to 1</td>
<td>cert. denied&lt;sup&gt;52&lt;/sup&gt;</td>
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<td>$15,000,000</td>
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<td>3.33 to 1</td>
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<td>$3,000,000</td>
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<tr>
<td>$101,000</td>
<td>$1,000,000</td>
<td>9.92 to 1</td>
<td>GVR&lt;sup&gt;55&lt;/sup&gt;</td>
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Punitive damages to compensatory damages. Ratio is as of time case was considered by United States Supreme Court. Some punitives had been remitted by lower courts.

<sup>52</sup> *Six Flags II.*


<sup>56</sup> Punitive damages to compensatory damages. Ratio is as of time case was considered by United States Supreme Court. Some punitives had been remitted by lower courts.


<sup>60</sup> *Bocci v. Key Pharms., Inc.*, 76 P.3d 669 (Or. App. 2003) (reducing verdict to 7:1 ratio after GVR).


5. **Punitive Damages Awards in Excess of Single Digit Ratios Continue to be Affirmed by Other Courts After State Farm**

Although several courts have reduced punitive damages awards to nine to one (or lower) ratios in response to *State Farm*, many courts have taken seriously the Supreme Court’s statement that it was not establishing a “bright-line” at the single-digit mark, and have continued to affirm higher ratios, even where substantial compensatory awards existed, depending upon the facts of the case.64 This outcome was anticipated and authorized in *State Farm*.

In the case of comparatively small compensatory awards, even larger ratios are still being affirmed after *State Farm*.65

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64 Cases since *State Farm* with ratios of punitive to compensatory damages greater than single digits include: *Mathias v. Accor Écon. Lodging, Inc.*, 347 F.3d 672 (7th Cir. 2003) (holding that *State Farm* did not establish a bright line rule and affirming punitive damages in a ratio of 37.2 to 1); *S. Union Co. v. Sw. Gas Corp.*, 281 F. Supp. 2d 1090, 1099 (D. Ariz. 2003) (punitive verdict of $60 million on compensatory verdict of $390,072.58 (ratio of 153 to one) affirmed in light of *State Farm*), aff’d in part, vacated in part, 415 F.3d 1001 (2005); *Jones v. Rent-A-Center, Inc.*, 281 F. Supp. 2d 1277 (D. Kan. 2003) (29 to 1 ratio affirmed in Title VII case in light of *State Farm*); *Dunn v. Put-In-Bay, Ohio*, No. 3:02CV7252, 2004 U.S. Dist. LEXIS 882 (N.D. Ohio Jan. 26, 2004) (15:1 ratio between the compensatory damage and punitive damage awards affirmed in light of *State Farm*). See also *Madeja v. MPB Corp.*, 821 A.2d 1034 (N.H. 2003) (punitive damage award for the plaintiff of 35 times the compensatory damage award was not excessive under *State Farm*).

65 See, e.g., *Tate v. Dragovich*, No. 96-4495, 2003 U.S. Dist. LEXIS 14353 (E.D. Pa. Aug. 14, 2003) (civil rights case alleging discrimination and retaliation, punitive award 10,000 times the amount of non-punitive damages affirmed in light of *State Farm*, where compensatory award was small); *Williams v. Kaufman County*, 343 F.3d 689, 711 (5th Cir. 2003) (ratio of 150 to 1 affirmed in light of *State Farm*); *Local Union No. 38, Sheet Metal Workers’ Int’l Ass’n v. Peella*, 350 F.3d 73, 90 (2d Cir. 2003) (ratio of 25,000 to one affirmed in light of *State Farm* where compensatory award was very small – there was also a waiver issue, discussed below); *Willow Inn, Inc. v. Public Serv. Mut. Ins. Co.*, No. 00-5481, 2003 U.S. Dist. LEXIS 9558 (E.D. Pa. July 21, 2003), aff’d,
6. **Defendants’ Financial Status Remains Relevant to Punitive Damages After State Farm**

The United States Supreme Court held in *State Farm* that:

The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award. *Gore*, 517 U.S., at 585 (“The fact that BMW is a large corporation rather than an impecunious individual does not diminish its entitlement to fair notice of the demands that the several States impose on the conduct of its business”); see also id. at 591 (BREYER, J., concurring) (“[Wealth] provides an open-ended basis for inflating awards when the defendant is wealthy.”).

538 U.S. at 427-28. After *State Farm*, a number of commentators seizing upon that language in isolation have opined that *State Farm* had rendered inadmissible evidence of a defendant’s wealth or financial status at the punitive damages phase of a case.66

Such reports simply ignore the balance of the same paragraph from the *State Farm* opinion, which continues:

> “That does not make its [evidence of wealth of a defendant] use unlawful or inappropriate; it simply means that this factor cannot make up for the failure of other factors, such as ‘reprehensibility,’ to constrain significantly an award that purports to punish a defendant’s conduct.”

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876 A.2d 1136 (Conn. 2005) (affirming punitive award of 75 to 1 in light of *State Farm* where potential harm was greater); *Bearoff v. Craton*, 830 S.E.2d 362, 378 (Ga. Ct. App. 2019) (citing but declining to apply *State Farm* in affirming ratio of 25 to 1 with very small compensatory damages award). See also *Hadelman v. DeLuca*, CV9700602795, 2003 Conn. Super. LEXIS 1748, at *15 (Conn. Super. Ct., June 12, 2003), aff’d, 876 A.2d 1136 (Conn. 2005) (“where the monetary value of the noneconomic harm suffered by the plaintiffs was difficult to determine,” award of $0 compensatory damages and $300,000 punitive damages affirmed despite “infinite” ratio).

66 See, e.g., Kathryn Kranhold, *Mega-damages Against Industry May Be History*, Wall St. J., Apr. 9, 2003, at B1, B4 (“The Supreme Court ruling says a jury can’t consider a defendant’s wealth.”); Tony Mauro, *Justices Say Intimidation Isn’t Free Speech*, Nat’l Law J., April 8, 2003 (“the Court ruled that neither a defendant’s wealth nor its out-of-state conduct could be a factor in calculating punitive damages.”); Linda Greenhouse, *Supreme Court Sets Limits on Size of Damage Awards*, N.Y. Times, April 8, 2003 (after *State Farm*, juries will “not be permitted to consider a defendant’s wealth when setting a punitive damage award.”)
Id. at 428. Consistent with this express holding of State Farm, since State Farm, virtually all reported cases have held that such evidence remains admissible.

[I]f punitive damages are to continue to serve the broader functions of deterrence and retribution, see 123 S. Ct. 1513, the defendant’s wealth must be a consideration in calculating any award .... The Court concludes that if the punitive damages award is to have any punitive or deterrent effect – the stated rationale of such damages – then it is apparent that Amana’s wealth and financial condition must be taken into consideration.

Eden Elec., LTD v. Amana Co., 258 F. Supp. 2d 958, 972 (N.D. Iowa 2003), aff’d, 370 F.3d 824 (8th Cir. 2004) (citing State Farm) (emphasis in original). Although “[a] defendant’s wealth is not a sufficient basis for awarding punitive damages” after State Farm, it is “relevant” to assessing the amount of punitive damages. Mathias, 347 F.3d at 677 (emphasis added).67

67 See DiSorbo v. Hoy, 343 F.3d 172, 189 n.9 (2d Cir. 2003) (in punitive damages trial, “District Court should admit evidence of Pedersen’s financial situation. One purpose of punitive damages is deterrence, and that deterrence is directly related to what people can afford to pay.”) (citing State Farm); Freund v. Nycomed Amersham, 347 F.3d 752 (9th Cir. 2003) (post-State Farm case affirming consideration of defendants’ financial condition in punitive damages analysis) (citing State Farm); Horney v. Westfield Gage Co., 77 F. App’x 24 (1st Cir. 2003) (defendant’s net worth may be (but is not required to be) before the jury in assessing punitive damages (citing State Farm)); TVT Records v. Island Def Jam Music Group, 279 F. Supp. 2d 413 (S.D.N.Y. 2003) (after State Farm, jury may consider, but may not give “undue weight” to defendant’s wealth) (citing State Farm). See also Liggett Group, Inc. v. Engle, 853 So. 2d 434, 458 (Fla. App. 2003) (after State Farm, punitive damages award “cannot be justified solely upon the wealth of the defendant.”) (emphasis added) (citing State Farm); Honzawa v. Honzawa, 766 N.Y.S.2d 29, 30-31 (N.Y. App. Div. 2003) (given “the immense value of the family businesses ... [and] [s]ince the purpose of punitive damages is solely to punish the offender and to deter similar conduct on the part of others, a more substantial penalty than $ 10 million is appropriate.”) (citing State Farm); Trinity Evangelical Lutheran Church v. Tower Ins. Co., 661 N.W.2d 789, 804 (Wis. 2003) (“Defendant’s wealth is oftentimes a significant factor. In this case, the evidence presented to the jury ... appears sufficient to justify the size of the punitive damages award.”) (citing State Farm); Gibson v. Overnite Transp. Co., 671 N.W.2d 388, 395 (Wis. Ct. App. 2003) (“As a final factor, we consider Overnite’s wealth. Wealth of the wrongdoer is an appropriate factor in determining the amount of punitive damages to award.”) (citing State Farm); Fritzmeier v. Krause Gentle Corp., 669 N.W.2d 699, 710 (S.D. 2003) (“The fourth factor
In remitting a punitive damages verdict from $5 billion to $4 billion in light of

\textit{State Farm}, the District of Alaska addressed this issue as follows:

“The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award.” \textit{State Farm}, 123 S. Ct. at 1525. However, the Court also observed that it was neither unlawful nor inappropriate to consider the defendant’s wealth. \textit{Id}. Punitive damages are intended to punish and deter; they are not intended to be an economic death sentence. Here, after judgment was entered on the punitive damages award, Exxon’s treasurer advised the court that \textbf{“the full payment of the Judgment would not have a material impact on the corporation or its credit quality.”} n108. In fact, Exxon was able to protect itself from the risk of the plaintiffs executing on the $5 billion judgment by posting an irrevocable, syndicated standby letter of credit for over $6 billion. There is absolutely no chance of a $5 billion punitive damages award amounting to an economic death sentence for Exxon. \textbf{This is at least some evidence of the absence of overdeterrence.} In any event, this is not a case where Exxon’s size and wealth has been used by the plaintiffs as a surrogate for the “failure of other factors, such as “reprehensibility.”” \textit{State Farm}, 123 S. Ct. at 1525 (quoting \textit{BMW}, 517 U.S. at 591 (Breyer, J., concurring)).


There is another important issue as to evidence of the defendant’s financial status. A number of cases have held that a punitive damages award is excessive if it would financially destroy or bankrupt a defendant.\textsuperscript{68} Thus, a defendant’s financial

\textsuperscript{68} “[W]hatever relative wealth or power an offender may possess, the force driving a penalty cannot be motivated beyond punishment to impoverishment, or calculated not to deter but to paralyze, and utterly to prostrate rather than properly humble the

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status can be used to support or attack a punitive damages award, depending upon that financial status and the amount of the punitive damages award eventually entered.

Our cases have determined that a defendant’s wealth can be either an aggravating or a mitigating factor in determining the size of a punitive damage award, since punitive damages should be tailored to what is necessary to deter the particular defendant, as well as others similarly situated, from repeating the prohibited conduct.


For this reason a defendant objecting to admission of evidence of financial condition must realize that the exclusion of such evidence could backfire in the event of a really large award. This is so because courts uniformly require that the defendant offer evidence of financial status as a prerequisite to making the argument that the award will financially destroy or bankrupt the defendant:

Finally, if the trial court deems it appropriate to reduce the punitive damages awards as so “grossly excessive” in violation of due process on the basis of the individual defendants’ ability to pay, it may do so only to the extent the record substantiates their wealth.

Bell v. Clackamas County, 341 F.3d 858, 868 (9th Cir. 2003) (emphasis added) (reversing trial court’s remittitur of punitive damages in light of State Farm). Other cases concur:

[D]efendants argue that the punitive damage award here is excessive because it would “bankrupt the defendants,” whom they say are “now retired and living on government pensions” .... However, the defendants offered no evidence at trial as to the financial status of Mr. Edwards or Mr.

offender into compliance with the law. ‘An award should not be so high as to result in the financial ruin of the defendant ... Nor should it constitute a disproportionately large percentage of a defendant’s net worth.’” TVT Records, 279 F. Supp. 2d at 452. See Liggett Group, 853 So. 2d at 456 (“It is well established that punitive damages may not be assessed in an amount which will financially destroy or bankrupt a defendant.”).
Velasco. The Court may not review a punitive damages award based on the defendant’s alleged financial status, when the defendants chose not to offer evidence of financial status at trial.

Jones v. Sheahan, No. 99C3669, 2003 U.S. Dist. LEXIS 19804, at *67 (N.D. Ill. Nov. 3, 2003) (citing State Farm).69 This was the law long before State Farm as well.70 Plaintiffs confronted with a motion to exclude evidence of financial status should not only point out that State Farm does not preclude such evidence; it should affirmatively request a representation from defendant that it does not intend to and will not make the “financial destruction” argument in response to any punitive damages verdict.

Finally, several courts have indicated that, by making the argument that its financial condition renders a punitive damages verdict excessive, the defendant may

69 See Horney, 77 F. App’x at 34 (“Under Federal law, the burden of showing net worth is placed on the defendant,” and trial court’s rejection of punitive damages award because plaintiff did not offer evidence of defendant’s finances sufficient to show defendant could pay the award is reversed); S. Union Co., 281 F. Supp. 2d at 1093 (“the burden is on Irvin to show that the verdict would actually financially destroy him.”); Jones, 281 F. Supp. 2d at 1283 (D. Kan. 2003) (“it was defendant’s burden to present evidence [of its financial status] to minimize any potential punitive damages”) (citing State Farm); Freund, 347 F.3d 752 (defendant may not complain of insufficiency of financial evidence to show it could pay punitive damages award where it did not put in evidence to contradict or clarify financial evidence from plaintiffs).

70 Provost v. City of Newburgh, 262 F.3d 146, 163-64 (2d Cir. 2001) (placing the burden on the defendant to show evidence of financial condition warranting a limitation in a punitive damages award); Mathie v. Fries, 121 F.3d 808, 816 (2d Cir. 1997) (“under well established precedent in this Circuit, ‘it is the defendant’s burden to show that his financial circumstances warrant a limitation of the award.’” (quoting Smith v. Lightning Bolt Prods, Inc., 861 F.2d 363, 373 (2d Cir. 1988)). See Zarcone v. Perry, 572 F.2d 52, 56 (2d Cir. 1978) (“[T]he decided cases and sound principle require that a defendant carry the burden of showing his modest means [by] facts peculiarly within his power if he wants this considered in mitigation of damages.”); Fishman v. Clancy, 763 F.2d 485, 490 (1st Cir. 1985) (declining to overturn a jury verdict where the defendants “failed to create a record of their financial capabilities’’); Tri-Tron Int’l v. Velto, 525 F.2d 432, 438 (9th Cir. 1975) (refusing to “interfere with [a punitive damages] award” because the defendants “offered no evidence on their financial ability to pay”); El Ranco, Inc. v. First Nat’l Bank, 406 F.2d 1205, 1218-19 (9th Cir. 1968) (same).
make relevant the existence of insurance coverage or indemnification agreements, or conversely, that the existence of such liability insurance prevents the award from being excessive.

Similarly, to the degree that the defendants seek reduction of punitive damages because of their inability to pay, any indemnification by the County for the payment of such damages may be taken into account. *Bell*, 341 F.3d at 868 (reversing trial court’s remittitur of punitive damages in light of *State Farm*).

Shiv-Ram concedes that it has liability insurance and it proffers no evidence that payment of the damages awarded will cause it any undue financial hardship. Therefore, this factor weighs against a finding of excessiveness.


A related dimension of the defendant’s wealth arises in connection with other considerations, also in contention here: the availability and relevance of insurance covering punitive damages, and indemnification agreements and vicarious liability principles.

*TVT Records*, 2003 U.S. Dist. LEXIS 15271, at *46-47. *See Kent71* (absence of insurance coverage relevant to assessment of alleged excessiveness of punitive damages, because defendant would have to satisfy compensatory damages and attorneys’ fees award out of his personal assets, as well as punitive damages award.).

This is not a new concept. There is ample caselaw in other circumstances indicating that where there is an issue as to ability to pay or worldly circumstances, evidence of insurance coverage becomes admissible. For example, in *Whelan v. Moone*, 242 Ga. App. 795, 796 (2000), the court affirmed the admission of a lack of insurance

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coverage where ability to pay was put at issue: “Although as a general rule evidence relating to the wealth of the parties and the existence of insurance coverage is inadmissible, an exception exists where issues concerning those matters have been made relevant by the parties.” *Id. See McGee v. Jones*, 232 Ga. App. 1, 3 (1998), where an issue was raised as to a plaintiff’s failure to follow her doctor’s advice so as to mitigate her damages. She claimed she was unable to afford the recommended surgery. This made the presence or absence of insurance coverage relevant. However, the evidence of insurance was properly excluded in that case because the defendant was unable to show that the surgery was covered by the available insurance.

More fundamentally, however, evidence of the existence of insurance coverage will be admissible to rebut or impeach a defendant’s testimony that it cannot afford to pay a judgment or will be put out of business by a judgment. In *Warren v. Ballard*, 266 Ga. 408, 410 (1996), the Court held that “impeachment by evidence of collateral sources is only allowed if the false testimony is related to a material issue in the case.” In the punitive damages phase, it seems clear that untrue evidence of the financial impact of a judgment or a defendant’s inability to pay would be material, allowing the use of evidence of collateral sources to impeach.

Even if not deemed admissible before the jury, at the least, plaintiffs should put in the record the existence and extent of applicable insurance coverage. If there is no coverage, defendant should make a record of that.

7. **“Other Bad Acts” Remain Relevant in Punitive Damages Cases**

*State Farm* criticized the Utah Supreme Court’s reliance on “other bad acts” of State Farm (including particularly bad acts from other states), in order to justify the
punitive damages verdict. Although some commentators immediately assumed that other bad acts evidence (particularly that from other states) would no longer be admissible, subsequent cases have established that such evidence remains admissible for certain purposes, and subject to appropriate limiting instructions.

The Supreme Court found that the Utah courts erred in relying and awarding punitive damages on evidence of lawful out-of-state conduct that bore no relation or was dissimilar to the conduct which harmed the plaintiffs. Id. at 1523-26. The Court expressly stated, however, that “evidence of other acts need not be identical to have relevance in the calculation of punitive damages.” Id. at 1523. Thus, evidence of similar conduct or conduct having a nexus to the specific harm suffered by the plaintiff may still be admitted and considered in assessing punitive damages.


Defendant contends that these limitations render the award here unconstitutional because the jury heard substantial evidence of wrongful conduct outside California, conduct that may have been lawful where (and when) it occurred, and conduct having no causal connection to the harm suffered by plaintiff.... Defendant also substantially overstates this aspect of Campbell by suggesting that it rendered such evidence categorically inadmissible. On the contrary, the court acknowledged that such evidence may be considered if a sufficient “nexus” is shown to the plaintiff’s claim.


Admissibility of evidence of other misconduct outside of the state was also addressed in In re Exxon Valdez, 296 F. Supp. 2d at 1093, which held in considering such evidence:

The Supreme Court stated in State Farm that even “[l]awful out-of-state conduct may be probative when it demonstrates the deliberateness and culpability of the defendant’s action in the State where it is tortious, but that conduct must have a nexus to the specific harm suffered by the plaintiff.”

Perhaps the most detailed analysis is from a state court in Texas:
Haggar cites *Campbell*, 123 S. Ct. at 1523, in support of its argument that the trial court impermissibly allowed the jury to consider evidence involving other Haggar employees in the award of punitive damages. Haggar argues that in *Campbell*, the U.S. Supreme Court held the consideration of such “other acts” evidence in the calculation of punitive damages to be a violation of due process. *See id.* In *Campbell*, the Supreme Court held that a punitive damages award of $145 million, where full compensatory damages were $1 million, was excessive and violated the due process clause of the Fourteenth Amendment. *Id.* at 1526. *Campbell* involved whether evidence of State Farm’s national scheme to meet corporate fiscal goals by capping claim payments and engaging in fraudulent practices was properly admitted for purposes of calculating punitive damages in a suit against the insurer for bad faith, fraud, and intentional infliction of emotional distress. *Id.* at 1518-19. The Supreme Court found that the Utah courts erred in awarding punitive damages on evidence of lawful out-of-state conduct that bore no relation or was dissimilar to the conduct that harmed the plaintiffs. *Id.* at 1523-24. The Court noted that the *Campbells* had identified “scant evidence of repeated misconduct of the sort that injured them.” *Id.* at 1523 (emphasis added). The Court expressly stated, however, that “evidence of other acts need not be identical to have relevance in the calculation of punitive damages.” *Id.* Thus, evidence of similar conduct or conduct having a nexus to the specific harm suffered by the plaintiff may still be admitted and considered in assessing punitive damages. *See id.* Here, the evidence Haggar complains of involved testimony regarding its practices and treatment of injured employees at its Weslaco plant over a period of time including the time Hernandez was employed there. We hold that the “other acts” evidence admitted was relevant to the calculation of punitive damages and that the trial court did not err in admitting it. *See id.* at 1523-24; see also *Gore*, 517 U.S. at 577 (repeated misconduct is more reprehensible than an individual instance of malfeasance).


8. **Waiver Remains an Issue After State Farm**

As discussed earlier, it has long been clear that constitutional challenges to excessiveness of punitive damages can be waived. *See, e.g.*, *Time Warner Entm’t*, 254 Ga. App. 598. This remains true after *State Farm*. For example, in *Local Union No. 38, Sheet Metal Workers’ Int’l Ass’n v. Pelella*, 350 F.3d 73, 90 (2d Cir. 2003), the Court held that a constitutional challenge to excessiveness of a punitive damages award had
been waived because the defendant had not raised it in the trial court. The Court rejected defendant’s contention that it need not have raised the issue because it could not have anticipated the holding of State Farm, noting that State Farm did not change the substantive test set forth in BMW. The Court affirmed a 25,000 to one ratio based upon this waiver.

9. Eleventh Circuit and Georgia Cases Applying State Farm

The first case from the Eleventh Circuit applying State Farm is Bogle v. McClure, 332 F.3d 1347 (11th Cir. 2003).\(^{72}\) Bogle was a Section 1983 case arising out of the discriminatory transfer of seven Fulton County, Georgia, librarians, on the basis of their race. In Bogle, the jury awarded compensatory damages of $7 million and punitive damages of approximately $16 million. The trial court remitted the awards to $3.5 million in compensatory damages and $13.3 million in punitive damages.

After remittitur, the punitive damages in Bogle were in a ratio of less than four to one. The Eleventh Circuit expressly discussed and applied each of the three “guideposts” set forth in BMW.\(^{73}\) The Eleventh Circuit expressly conducted the de novo review mandated by Cooper.\(^{74}\) It discussed at length and applied the strictures set forth in State Farm, noting that the 4:1 ratio was well within the “single digit” ratio discussed in State Farm.

In discussing reprehensibility, the Eleventh Circuit held that:

Appellants’ wrongdoing was more than mere accident. There was evidence that, in the face of repeated warnings, Appellants intentionally

\(^{72}\) For the sake of full disclosure, the author of this paper was associated as appellate co-counsel for the plaintiffs in Bogle.

\(^{73}\) See Bogle, 332 F.3d at 1360-62.

\(^{74}\) See Bogle, 332 F.3d at 1360.
discriminated against the Librarians on the basis of race and used trickery and deceit to cover it up under the guise of a “reorganization.” Furthermore, Appellants intentionally discriminated against the Librarians with full knowledge of recent cases of employment discrimination brought by Caucasian employees against other Fulton County officials which resulted in jury verdicts for the plaintiffs or settlements. A reasonable jury could have concluded from the evidence that Appellants knew that transferring the Librarians on the basis of race was illegal, were warned not to make the transfers, and knew that other Fulton County officials had been caught and punished for making employment decisions on the basis of race; yet Appellants intentionally discriminated against the Librarians and concocted the “reorganization” plan to hide their discriminatory motives. Repeatedly, courts have found intentional discrimination to be reprehensible conduct under Gore’s first guidepost.

Bogle, id. at 1361. The Eleventh Circuit ultimately held that “[a]pplying the Gore guideposts to the facts in this case, we conclude the punitive damages ... are not so excessive as to violate due process.” Id. at 1362.

There are several appellate cases from the state courts in Georgia applying State Farm. In Craig v. Holsey, 264 Ga. App. 344, 349-50 (2003), the Court of Appeals addressed an award of $8,801 in compensatory damages and $200,000 in punitive damages, arising out of an automobile accident where the defendant was driving under the influence of drugs. This is a ratio of 22 to one. The court affirmed the award, focusing, as authorized by BMW, 517 U.S. at 580, on the much greater potential harm that could have resulted from the conduct. The analysis of the risks associated with driving under the influence and potential harm that could result therefrom pre-dates and anticipates the careful analysis of the district court in In re Exxon Valdez, 296 F. Supp. 2d 1071. The Craig court also noted that the third guidepost issue of notice of the potential severity of the potential penalty for the conduct at issue was satisfied by O.C.G.A. § 51-12-5.1(f), which exempts from the $250,000 statutory cap on punitive
damages torts committed under the influence of drugs or alcohol. Finally, the Craig court affirmed the admission of evidence of defendant’s other misconduct (other, including subsequent, drug use and driving under the influence), the details of a criminal conviction, and evidence that the defendant had violated the terms of his probation.

In Bowen & Bowen Construction Co. v. Fowler, 265 Ga. App. 274 (2004), the Court of Appeals affirmed a punitive damages verdict arising out of claims for nuisance and fraud. The ratio was five to one, well within the guidance of State Farm. Consistent with the many cases cited above, the Court of Appeals interpreted State Farm to mean what it says about the defendant’s wealth – while wealth cannot salvage an excessive award, consideration of wealth is not prohibited.

Bowen also argues that the wealth of the defendant cannot justify an otherwise unconstitutional punitive damages award. It cites to testimony showing that Millard Bowen, the sole shareholder and president of the company was paid $1.5 million in salary in the past year and that the company also made a profit of $1.5 million that year. Because we have held that the award of punitives was not unconstitutional, we need not consider this argument.


A recent trial court opinion from Georgia dealing with the discoverability of defendant’s financial status in light of State Farm reaches the same conclusion:

The Court specifically rejects Defendants’ arguments that a defendant’s wealth is not relevant in determining the amount of punitive damages and thus, not discoverable.

Patterson v. Life Care Centers of America, Inc., State Court of DeKalb County, Civil Action File No. 02A: 93670-3 (Order of Feb. 11, 2004, at 2-3) (Purdom, J.). The Patterson Court went on to hold that:
Although, in *State Farm* the high Court reasoned that “[t]he wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award,” the Court further explained: “That does not make its use unlawful or inappropriate; it simply means that this factor cannot make up for the failure of other factors, such as ‘reprehensibility,’ to constrain significantly an award that purports to punish a defendant’s conduct.”

*Patterson*, at 2-3 n.2 (emphasis in original) (citations omitted).

One of the most recent cases applying *BMW* and *State Farm* is *McGinnis v. Am. Home Mortg. Servicing, Inc.*, No. 17-11494, 2018 U.S. App. LEXIS 23596 (11th Cir. Aug. 22, 2018), the wrongful foreclosure case discussed above. The court found a high degree of reprehensibility in part because the harm was not purely economic, but physical (emotional distress) as well. *Id.* at *10. The Court also focused on the fact that the wrongful conduct included repeated actions rather than an isolated event. *Id.* at **10-11. Finally, the Court noted that the lender refused to correct its error when it was pointed out, could not explain at trial how the “error” occurred, and that its use of a suspense account to seize disputed fees and penalties “involved malice, trickery, or deceit.” *Id.* at **11-12.

On the *State Farm* ratio analysis, *McGinnis* affirmed that a ratio of 5.9:1 was acceptable, rejected as *dicta* the language in *State Farm* suggesting a lower ratio for higher dollar compensatory awards, and rejected the argument that the Court “must discount emotional distress damages when conducting the ratio analysis....” *Id.* at **13-15.
APPENDIX
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<thead>
<tr>
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