

GEORGIA TORT LAW MANUAL



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STANDARD OF PROOF FOR COMMON CAUSES OF ACTION

- **Negligence Standard**
 - o **Ordinary Negligence**
 - In general, ordinary diligence is that degree of care which is exercised by ordinarily prudent persons under the same or similar circumstances. The absence of such diligence is termed ordinary negligence. O.C.G.A. § 51-1-2
 - o **Professional Negligence**
 - The same standard as ordinary negligence applies except that instead of comparing a person's actions with the ordinary prudent person, the professional's actions are compared to what a competent professional would have done under similar circumstances. Crosby v. DeMeyer, 229 Ga. App. 672, 494 S.E.2d 568 (1997).
- **Common Carriers**
 - o Common carriers are required to exercise the highest degree of care to passengers and to the shipment of goods. O.C.G.A. §§ 46-9-1, 46-89-132. Extraordinary diligence requires extreme care and caution which very prudent and thoughtful persons exercise under the same or similar circumstance.
- **Negligence Per Se**
 - o The violation of a statute constitutes negligence per se if the injured person falls within the class of persons intended to be protected by the statute and the harm complained of was the harm the statute was intended to guard against. Childers v. Monson, 241 Ga. App. 70, 524 S.E.2d 326 (1999). Negligence per se does not mean liability per se. Keith v. Beard, 219 Ga. App. 190, 464 S.E.2d 633 (1995). A finding of *negligence per se* does not excuse the plaintiff from having to prove elements of causation and damages. Id.
- **Respondeat Superior**
 - o In Georgia, "every person shall be liable for torts committed by his . . . servant by his command or in the prosecution and within the scope of his business, whether the same are committed by negligence or voluntarily." O.C.G.A. § 51-2-2.
 - o At the time of the injury, the employee must be engaged in the employer's business and not upon some private and personal matter. If the tort is committed by the employee while the employee is partaking in an activity unrelated to the

business of the employer, the employer is not responsible under the doctrine of *respondeat superior*. May v. Phillips, 157 Ga. App. 630, 278 S.E.2d 172 (1981).

- **Negligent, Hiring, Training and Retention**

- o In order to sustain a claim for negligent hiring or retention a claimant must show that the employer knew or should have known of the employee's propensity to engage in the conduct which caused the plaintiff's injury. Proof of such propensity must consist of evidence substantially related to the injury-causing conduct. Piney Grove Baptist Church v. Goss, 255 Ga. App. 380, 565 S.E.2d 569 (2002).
- o Under Georgia law, if an employer admits liability under *respondeat superior*, then the plaintiff does not have grounds to bring a claim based on negligent hiring, training, or retention unless there is evidence to support an independent cause of action of punitive damages on those claims. Bartja v. National Union Fire Ins. Co. Of Pittsburgh, 218 Ga. App. 815, 463 S.E.2d 358 (1995).

- **Negligent Entrustment**

- o To establish a punitive claim for negligent entrustment, the plaintiff must prove that the employer had actual knowledge that the driver was incompetent or habitually reckless, or the employer held a legal duty to check the driver's qualifications and failed to discover the relevant information. Smith v. Tommy Roberts Trucking Company, 209 Ga. App. 826, 829 (1993).

- **Family Purpose Doctrine**

- o Under the Family Purpose Doctrine, the "head of household" may be liable for the negligent use of a vehicle by a family member if the following conditions are present: (1) the owner must have given permission to a family member to drive the vehicle; (2) the owner must have relinquished control of the vehicle to the family member; (3) the family member must be in the vehicle; and (4) the vehicle must be engaged in a family purpose. Quattlebaum v. Wallace, 156 Ga. App. 519, 275 S.E.2d 104 (1980). "Although the four factors prescribe the parameters of the doctrine, the determinative test under the family purpose doctrine is whether the non-driving family member exerted authority and control over the vehicle. In other words, after it is determined that the four factors listed above are present, the inquiry becomes whether the owner of the vehicle exerted sufficient authority and control for the doctrine to be applied. The vehicle owner is vicariously liable only if he had the right to exercise such authority and control that it may be concluded that an agency relationship existed between him and the [driving] family member with respect to the use of the vehicle." Bailey v. Butler, 199 Ga. App. 753, 754, 406 S.E. 2d 97 (1991).

- **Negligent Inflection of Emotional Distress**

- o Georgia applies the Impact Rule which permits a plaintiff to recover for negligent infliction of emotional distress only when the defendant's conduct causes a direct physical impact on the plaintiff. Ford v. Whipple, 225 Ga. App. 276, 483 S.E.2d 591. The contact may be *de minimis* and still be sufficient for the plaintiff to recover. Id.

- **Wrongful Death**

- o An action for wrongful death accrues to the surviving spouse or, if there is no surviving spouse, to the child or children. O.C.G.A. § 51-4-2. If the decedent was not survived by a spouse or children, the action is vested in the parents. If there are no surviving parents, the action may be brought by the administrator or executor of the estate. O.C.G.A. § 51-4-5.

STATUTE OF LIMITATIONS

- **Bodily Injury**

- An action for personal injury based on negligence or intentional conduct must be brought within two (2) years after the plaintiff first discovers, or through reasonable diligence should have discovered, both the nature of his injury and the causal connection between the injury and the alleged conduct of the defendant. O.C.G.A. § 9-3-33; King v. Seitzingers, Inc., 160 Ga. App. 318, 287 S.E.2d 252 (1981). A plaintiff's claim will be barred if the plaintiff does not exercise reasonable diligence in pursuing his claim after discovery of his personal injury within the statute of limitations period.
- The statute of limitations is tolled in personal injury actions if the defendant driver is cited with a rules of the road violation. Pursuant to O.C.G.A. § 9-3-99, the statute of limitations is tolled until the prosecution of such crime or act has become final or otherwise terminated. Beneke v. Parker, 285 Ga. 733, 684 S.E.2d 243 (2009).

- **Property Damage**

- A claim for property damage must be brought within four (4) years of the alleged damage to the property. O.C.G.A. § 9-3-32. This statute of limitations applies to actions for the recovery of personal property and/or damages for conversion or destruction of property.

- **Loss of Consortium**

- A loss of consortium claim must be brought within four (4) years of the personal injury of the claimant's spouse. O.C.G.A. § 9-3-33. A plaintiff may pursue a loss of consortium claim even if the statute of limitation for the plaintiff's spouse's underlying personal injury claim has expired. Elwell v. Haney, 169 Ga. App. 481, 313 S.E. 2d 499 (1984). The loss of consortium claim, however, does not extend the two (2) year period for claiming physical injuries. Branton v. Draper Corp., 185 Ga. App. 820, 366 S.E.2d 206 (1988).

- **Wrongful Death**

- The statute of limitations for a wrongful death action is two (2) years from the time of death of the claimant's decedent. O.C.G.A. §9-3-33. The action begins to accrue at the time of the death of the plaintiff's decedent, even if the death does not occur for years after the tortious act which caused it. Burns v. Brickle, 106 Ga. App. 150, 126 S.E.2d 633 (1962).
- The estate's claim under the survival statute is also governed by the two (2) year statute of limitations. The running of the statute, however, is tolled for up to five

years for an unadministered estate and six (6) months after the appointment of an administrator.

- **Breach of Contract/Bad Faith Claims**

- Breach of contract -- simple contracts - six (6) years O.C.G.A. § 9-3-24
- All other contracts and contracts for the sale of goods – four (4) years O.C.G.A. § 11-2-725 (for sale contracts)
- Bad faith claims -- Bad faith claims in Georgia are statutory causes of action. However, the statute regarding such claims does not specify a statute of limitations. Generally, statutory causes of action are subject to a twenty (20) year statute of limitations. However, in order to recover bad faith, a plaintiff must prove that the insurance provider breached the contract of insurance. This contract action would be subject to a six (6) year statute of limitations. Therefore, since a breach of the contract of insurance is a prerequisite to the bringing of a statutory bad faith claim, it is arguable that the six (6) year limitations period is applicable to such claims. However, the limitations period can be shortened by the policy of insurance.

- **Uninsured Motorist Carrier**

- Since an uninsured motorist carrier stands in the shoes of the injured claimant, Georgia courts apply a two (2) year statute of limitation for a tort action, which commences at the time of the accident. O.C.G.A. § 9-3-33; Bailey v. Lawrence, 235 Ga. App. 73, 508 S.E.2d 450 (1998).

- **Indemnity**

- Contractual indemnity: an action based upon a simple contract in writing must be brought within six (6) years after it becomes due and payable. O.C.G.A. § 9-3-24. An action based upon an implied contract must be brought within four (4) years after the right of action accrues. O.C.G.A. § 9-3-25. All other actions upon contracts express or implied not otherwise provided for must be brought within (4) years from accrual of the right of action.

- **Subrogation**

- Statutory subrogation: a cause of action based on enforcement of any statutory right, such as subrogation, must be brought within twenty (20) years from the time of accrual of the right. O.C.G.A. § 9-3-22; Hanover Ins. Co. v. Canal Ins. Co., 163 Ga. App. 20, 293 S.E. 509 (1982).

- Because an uninsured motorist carrier stands in the shoes of its insured, it must bring a subrogation claim against the tortfeasor within two (2) years. Whirl v. Safeco Ins. Co., 241 Ga. App. 654 (1999).
- **Claims of a Minor**
 - There are special rules for the application of statutes of limitations when the person who is injured is a minor (under the age of 18) or is legally disabled. If the claimant is a minor, the applicable statute of limitations for the injury is tolled until the minor reaches the age of majority. O.C.G.A. § 9-3-90. The statute of limitations for the applicable injury is tolled during any period of disability, such as mental illness.
 - It should be noted that the claim for medical expenses incurred by a minor is owned by the minor's parents and, therefore, is not tolled.

DEFENSES

- Answers
 - Automatic Default - In Georgia, a party that has been served with process automatically goes into default if defensive pleadings are not filed within 30 days of service. A party is entitled to open the default as a matter of right between day 30 and day 45 following the service of process. However, a party moving to open default as a matter of right must pay all existing court costs.
 - No Informal Extensions - Informal extensions to answer a complaint are insufficient under Georgia law. They lead to automatic default. A stipulation for an extension must be filed with the court by the parties.
- Standard Defenses That Should Be Raised
 - There are certain obvious defenses that should be asserted if they apply. These include lack of subject matter jurisdiction, lack of personal jurisdiction, improper venue, insufficiency of process, insufficiency of service of process, failure to state a claim, and failure to join a party. O.C.G.A. § 9-11-12. Further, other affirmative defenses include accord and satisfaction, arbitration and award, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver and workers' compensation (Georgia Workers' Compensation serves as an exclusive remedy. However, there are a few limited exceptions). O.C.G.A. § 9-11-8(c).
 - With regard to a negligence action, the following defenses are applicable: Comparative/contributory negligence, avoidance, assumption of the risk, and sudden emergency. It should be noted that the defense of accident is no longer valid in Georgia, and the doctrine of last clear chance can be asserted by both plaintiff and defendants.

VENUE

- **General Rule of Venue is Based on County of Residence** - The Georgia Constitution requires that defendants be sued in the county of their residence.
 - In cases involving corporations, the corporation is deemed to reside in the county in which its registered agent is located. Coastal Transp., Inc. v. Tillery, 270 Ga. App. 135, 605 S.E.2d 865 (2004).
 - **Motor Carrier Venue** - One notable exception to the general rule is that tort actions involving motor carriers may be filed in the county where the accident occurred. O.C.G.A. § 40-1-117.
- **Venue in Cases with Co-defendants** - In cases involving co-defendants, venue is proper in any county where a defendant resides.
 - However, if venue is based on the residence of a defendant who is dismissed voluntarily or involuntarily, venue in that county vanishes and venue becomes proper in the county in which the remaining defendant resides. O.C.G.A. § 9-10-31.
 - Moreover, if at the trial of the matter the plaintiff fails to obtain a judgment against the resident defendant, any verdict against the non-resident defendant is lost. O.C.G.A. § 9-10-31. The non-resident defendant is entitled to have the case retried in a county where venue against it is proper. If venue against the non-resident defendant exists in more than one county, the plaintiff gets to decide to which venue the case is transferred. O.C.G.A. § 9-10-31.
- **Anticipated Jury Pool by County** - A Georgia county map denoting the type of jury pool that can be anticipated in each county is attached as Appendix A.

DAMAGES

- **Damages Recoverable in Personal Injury Action**

- **GENERAL DAMAGES:** General damages are those which the law presumes to flow from the alleged tortious conduct, even those damages that are requested without a specific proof of amount. O.C.G.A. §51-12-2. General damages include damages for physical and mental pain and suffering, both past and future. Humiliation, shock, and fright, as well as diminished capacity to work, labor and earn money are encompassed in the definition of pain and suffering.
 - **Pain and Suffering** - Pain and suffering are general damages awarded to a plaintiff to compensate for all non-pecuniary loss, inconvenience, hardship, pain, discomfort and anxiety whether mental, physical or both experience as a consequence of a personal injury. The measure of damages is the enlightened conscience of a fair and impartial jury. Roberts v. Chapman, 228 Ga. App. 365, 492 S.E.2d 144 (1997).
 - **Future Pain and Suffering** - If the plaintiff shows that he or she has sustained physical pain and suffering as a result of a physical injury which has continued for a period of time prior to trial, the jury may infer that the plaintiff's physical pain and will continue into the future. Bennett v. Haley, 132 Ga. App. 512, 208 S.E.2d 302 (1974). Unlike special damages, an award for future pain and suffering need not be reduced to present cash value. Valdosta Housing Auth. v. Finnessee, 160 Ga. App. 552, 287 S.E.2d 569 (1981).
 - **Diminished Capacity to Work** – A plaintiff's diminished capacity to labor and earn money is an additional element of damages included in a pain and suffering award. Baxter v. Bryan, 122 Ga. App. 817, 178 S.E.2d 724 (1970). Diminished capacity to labor arises from loss or impairment by permanent injury of a bodily function or of the body as a whole preventing the plaintiff from working. National Upholstery Co. v. Padgett, 108 Ga. App. 847, 143 S.E. 2d 444 (1964).
- **SPECIAL DAMAGES:** Special damages are those damages that flow from the tortious conduct. O.C.G.A. § 51-12-2. Special damages must be specifically proved by the plaintiff. Such damages include: medical expenses (past and future), lost wages, future earnings, and lost profits.
 - **Lost Wages** - In order to prevent speculation, the plaintiff must provide evidence as to his rate of compensation at the time of the injury and the duration of his absence from work. Georgia Law of Damages, supra, § 2A-5; Smith v. Doe, 176 Ga. App. 711, 712, 337 S.E.2d 367 (1985); Ferrence v. Lacy, 114 Ga. App. 692, 152 S.E.2d 605 (1966). A plaintiff who was not employed or otherwise earning wages or compensation on

the date of the incident in question is not entitled to recover damages for loss of earnings. Mathis v. Copeland, 139 Ga. App. 68, 69, 228 S.E.2d 23 (1976).

- **Damages in Wrongful Death Action**

- Death claims are divided into two separate claims in Georgia. One is for the wrongful death, as measured by the full value of the life of the decedent without deducting for any of the necessary or personal expenses of the decedent had he lived. Jurors are allowed to consider the health, habits, age, life expectancy, and present value of projected earnings, without reduction for taxes or consumption, but jurors are expressly prohibited from considering grief or anguish. O.C.G.A. §51-4-1. Traditionally, the Georgia courts have restricted this determination to a prominently economic projection of the value of a decedent's services to the decedent had he lived. Recently, Georgia has taken a less economic approach and has allowed the award to include consideration of the value of a loved one's relationship from the perspective of the deceased. Consolidated Freightways Corp. v. Futrell, 201 Ga. App. 233 (1991). The more recent approach recognizes that the full value of the life has two components which consist of the economic value of the deceased and the intangible value of life incapable of exact proof. Although Georgia state trial court judges have reached different conclusions on this subject, there are no Georgia or United States Court of Appeals for the Eleventh Circuit decisions authorizing hedonic damages (the value of the enjoyment of life) under the Georgia Wrongful Death Act.

- Mental suffering, grief, or wounded feelings of the beneficiaries are not compensable, nor is the loss of society or of companionship which they might have suffered. Bulloch County Hosp. Auth. v. Fowler, 124 Ga. App. 242 (1971), overruled on other grounds, 131 Ga. App. 321 (1974); Glawson v. Southern Bell Tel. & Tel. Co., 9 Ga. App. 450 (1911). Similarly, damages for depriving a decedent's minor children of the decedent's guidance and assistance are not recoverable separately from the value of the life of the deceased. Southern Ry. v. Turner, 89 Ga. App. 785 (1954).

- **Action by the Estate**: The second death claim that exists in Georgia is asserted by the deceased's estate. All causes of action that would have accrued to the decedent had lived, survive to the estate. That includes claims for property damage, medical expenses, funeral and burial expenses, conscious pain and suffering and punitive damages. O.C.G.A. § 51-4-5(b); Walden v. Archbold Memorial Hosp. Inc., 197 Ga. App. 275, 398 S.E.2d 271 (1990).

- **Punitive Damages - Standards for Recovery**

- Punitive damages are allowed only in tort actions where it is proven by "clear and convincing evidence that the defendant's actions showed willful misconduct,

malice, fraud, wantonness, oppression, or the entire want of care which would raise the presumption of conscious indifference to the consequences." O.C.G.A. § 51-12-51.1(b). Punitive damages in a tort case in which the cause of action does not arise from product liability are generally limited to a maximum of \$250,000.00. However, if it is found that the defendant's actions occurred while under the influence of alcohol or drugs or that the defendant acted or failed to act with a specific intent to cause harm, then there is no limitation on the amount of punitive damages. O.C.G.A. §51-12-5.1(2)(f).

- **Insurability of Punitive Damages**

- Georgia law allows insurance coverage of punitive damages. See Lunceford v. Peachtree Cas. Ins. Co., 230 Ga. App. 4 (1998); See also Nationwide Mut. Fire Ins. Co. v. Kim, 294 Ga. App. 548 (2008).

- **Damages Recoverable in Property Damage Action**

- **Measure of Property Damages** - When the plaintiff seeks recovery for damages to an automobile, he may claim the reasonable value of repairs made necessary by the accident, together with hire on the vehicle while rendered incapable of use, and the value of any permanent impairment, provided the aggregate amount of these items does not exceed the value of the automobile before the injury. . . . In the alternative, plaintiff may prove the difference in value of the property before the injury and afterwards. Archer v. Monroe, 165 Ga. App. 724, 302 S.E.2d 583 (1983).
- **Diminished Value** - Georgia courts interpret standard collision coverage to require that insurers pay for any lost value, including diminution of value despite repair. State Farm Mut. Auto. Ins. Co. v. Mabry, 274 Ga. 498, 508, 556 S.E.2d 114 (2001). Georgia Courts recognize that damage can reduce the overall value of a vehicle, even after it is repaired. Mabry, 274 Ga. at 502. The formula for calculating diminished value is unsettled after the Georgia Insurance Commissioner in 2008 issued a directive stating, "Total reliance on one particular formula or method in making that evaluation [of diminished value] may not be appropriate given the subjective nature of the claim." Georgia Office of Insurance and Safety Fire Commissioner, Directive 08-P&C-2, December 1, 2008. The result of this recent development draws into question the use of any formula to calculate diminished value claims and leaves insurers without an approved standard method for calculating this figure.

COMPARATIVE FAULT

- **Type of Comparative Fault System**

- Georgia is a 50 percent contributory negligence state. A plaintiff may not recover if his or her negligence was equal to or greater than any negligence chargeable to the defendant. Pollard v. Boatright, 57 Ga. App. 565, 575 (1938).
- The plaintiff cannot recover if by ordinary care he could have avoided the consequences to himself caused by the defendant's negligence. O.C.G.A. § 51-11-7.
- **Comparative Fault of Minors** - Georgia law no longer recognizes that children of a certain age are conclusively presumed to be incapable of contributory negligence. Clanton v. Gwinnett County School Dist., 219 Ga. App. 343, 464 S.E.2d 918 (1995); Hawkins b/n/f Pearson v. Small World Day Care Center, Inc., 234 Ga. App. 843, 508 S.E.2d 200 (1998). Instead, on a case by case basis, a jury question exists regarding whether a child of tenders years exercises such care as his mental and physical capacities enabled him to exercise in the actual circumstances. O.C.G.A. §51-1-5.

- **Status of Joint and Several Liability**

- **Apportionment of Fault Now Governs**- For all causes of action arising on or after February 21, 2005, joint and several liability has been abolished. Prior to that date, a defendant found even one percent liable would be 100 percent responsible for paying a judgment. The amended O.C.G.A. §§ 51-12-31, 51-12-33 now provide that damages can be recovered only up to the amount of liability apportioned to each defendant.
- **Method and Effect of Apportionment** - Damages are apportioned according to the liability attributed to each defendant, including nonparty defendants. These nonparty defendants may be parties dismissed by reason of settlement or persons identified by the defendants by pleading 120 days prior to trial. The nonparty defendants are not independently liable, but liability attributed to them acts a reduction against liability attributable to the party defendants. The ultimate result is that each defendant only pays the damages for which it is liable.
- **Apportionment Applies to Intentional Torts** – Georgia's rule of apportioning fault to nonparties extends to intentional tortfeasors. Couch v. Red Roof Inns, Inc., 291 Ga. 359, 729 S.E. 2d 378 (2012). This rule is particularly meaningful in inadequate security, premises liability cases because fault can be apportioned to the criminal assailant who perpetrated the crime.

EVIDENCE/DISCOVERY

- **Federal Rules of Evidence Generally Adopted**
 - Beginning January 1, 2013, Georgia's evidence code was amended to adopt the Federal Rules of Evidence. There are some notable exceptions where Georgia will continue to apply different rules.
 - Since February 21, 2005, Georgia has adopted the federal Daubert standard for experts.

- **Admissibility of Traffic Citations/Criminal Charges Against the Driver**
 - Under Georgia law, traffic citations or criminal charges are only admissible in a subsequent civil action if the driver pleads guilty to the charge. If the driver pleads *nolo contendere*, the citation is inadmissible. Likewise, if the driver pleads not guilty and is adjudicated guilty by a trier of fact, then the citation is inadmissible.

- **Admissibility of Seatbelt Usage**
 - Evidence of a plaintiff's use of a seatbelt, or lack thereof, is inadmissible for all purposes under Georgia law. O.C.G.A. § 40-8-76.1; King v. Davis, 287 Ga. App. 715 (2007).

- **Discoverability of Statements/Claims Files**
 - The general rule in Georgia is that parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. O.C.G.A. § 9-11-26(b)(1).
 - Statements taken in anticipation of litigation are not discoverable without a showing of substantial need. O.C.G.A. § 9-11-26(b)(3); See also Tobacco Rd., Inc. v. Callaghan, 174 Ga. App. 539, 330 S.E.2d 768 (1985).
 - All statements made by a plaintiff must be produced to that person upon request.

- **Discoverability of Internal Corporate Accident Review Documents**

- While admissibility at trial remains an issue, documents stemming from a corporation's internal review of an accident can be discoverable. Tyson v. Old Dominion Freight Line, Inc., 270 Ga. App. 897, 608 S.E.2d 266 (2004).

- **Discoverability of Insurance Information**

- Under Georgia law, a claimant is entitled to receive certain insurance information from the alleged tortfeasor's insurer or from the alleged tortfeasor himself. Specifically, the plaintiff is entitled to "the name of the insurer, the name of each insured, and the limits of coverage." O.C.G.A. § 33-3-28.

OFFERS OF SETTLEMENT GIVING RISE TO CLAIM FOR ATTORNEYS' FEES

- **Requirements for an Enforceable Offer of Settlement** – Pursuant to O.C.G.A. § 9-11-68, a plaintiff or defendant may serve upon the other a written offer to settle at any time thirty (30) days from service of the complaint until thirty (30) days before trial. The offer must be specifically designated as an offer of settlement pursuant to § 9-11-68 and must satisfy all of the following criteria:
 - Be in writing;
 - Identify the party making the offer and the party to whom the offer is being made;
 - Identify the claims attempting to be resolved;
 - State with particularity any conditions;
 - State the total of the proposal and any nonmonetary terms;
 - Specifically state any amount proposed to settle a punitive claim;
 - State whether the proposal includes any attorneys' fees and whether the fees are part of the legal claim; and
 - Include a certificate of service.

- **Rejection of the Offer** - Offers made under O.C.G.A. § 9-11-68 remain open for thirty (30) days unless withdrawn in writing prior to that time.
 - If no action is taken by the offeree within thirty (30) days, the offer is deemed rejected.

- **Basis for Recovering Fees Under O.C.G.A. § 9-11-68** - If an offeree rejects an offer and the judgment finally obtained by the offeree is not at least 25 percent more favorable than the last offer, the offeree shall pay the offeror's reasonable attorney's fees and costs incurred after the rejection of the last offer. As an example, if the defendant offered to settle for \$100,000 and the plaintiff recovers \$74,000 or less at trial, the defendant's fees can be recovered. Conversely, if a plaintiff makes a demand for \$100,000 and then recovers \$126,000 or more at trial, the plaintiff's fees can be recovered.

- **Manner in Which Fees are Pursued** – A party entitled to fees under O.C.G.A. § 9-11-68 may file a motion with the court within 30 days after the entry of judgment and the court will then determine if the offer of judgment and outcome meets the criteria for the award of fees. If it does, the court is obligated to award the fees unless it finds that the offer was not made in good faith.

UNLIQUIDATED DAMAGES DEMAND FOR PREJUDGMENT INTEREST

- **General Rule for Prejudgment Interest in Tort Cases** - Prejudgment interest cannot be recovered on damages that constitute an unliquidated sum (which generally includes all personal injury tort damages).
 - **Unliquidated Damages Demand** - To avoid the general rule, a plaintiff can send a certified letter demanding a certain sum to be paid within 30 days to settle a case. If the defendant or insurer does not pay the amount demanded by the plaintiff within 30 days, and the plaintiff receives a verdict of at least the amount demanded, the plaintiff will be entitled to receive interest on the amount of the demand. O.C.G.A. §51-12-14.
 - The applicable interest rate will be an annual rate equal to the prime rate 30 days from the date the demand letter is sent, plus three percent. The recoverable interest starts to accrue 30 days after the date the unliquidated damages demand letter is sent. O.C.G.A. §51-12-14.

SETTLEMENT AND RELEASE

- **Effect of Settlement with a Co-Defendant**

- In Georgia, the fact that one co-defendant has been released does not release the other co-defendants. A general release given to a co-defendant does not release the other defendants if the remaining defendants are not specifically named in the release. Lackey v. McDowell, 262 Ga. 185, 415 S.E.2d 902 (1992).

- **Limited Liability Release**

- Georgia law provides for a statutory limited liability release. See O.C.G.A. § 33-24-41.1. Pursuant to that statute, the parties may enter into a limited release whereby the defendant is released from further personal exposure for a certain claim. However, the limited release allows the plaintiff to pursue claims against the defendant to the extent that he or she is covered by other available insurance.
- The limited liability release includes language releasing the insurer that pays its limits to obtain the limited liability release for the insured.

- **Required Language for Release**

- By statute, a release for any settlement reached by an insurer on behalf of its insured must include language stating that:

This release is taken and the consideration stated above is paid in whole or in part by the liability insurer of a party released hereby. In taking this release, said insurer is acting as an independent contractor and not as an agent of any party released hereby. The undersigned understands and agrees that unless otherwise stated herein, this Release of All Claims and Indemnity Agreement is taken without the knowledge and consent of any party released hereby and the taking of this release shall not preclude the assertion of any claim that such party may have against the undersigned. The undersigned further acknowledges receipt of prior written notice that unless otherwise stated herein, this Release of All Claims and Indemnity Agreement is taken without the knowledge and consent of any party released hereby and all further notice thereof is expressly waived.

See O.C.G.A. § 33-7-12.

- **Sample Release** – A sample release that complies with Georgia law is attached as Appendix B.

LIENS

- **Who is Entitled to Assert a Lien**

- Any person, firm, hospital authority, corporation operating as a hospital, nursing home, physician practice, or traumatic burn care medical practice shall have a lien for the reasonable charges incurred during the course of care and/or treatment of an injured Plaintiff. O.C.G.A. § 44-14-470.

- **Requirements for Filing a Lien**

- The person, firm, hospital authority, corporation operating as a hospital, nursing home, physician practice, or traumatic burn care medical practice seeking to perfect a lien shall:
 - within the statutorily proscribed time limits, provide written notice to the plaintiff as well as any other person identified by the plaintiff as potentially liable for the costs of the plaintiff's care and/or treatment; and
 - within the statutorily proscribed time limits, file a statement with the clerk of the superior court in the county in which the care provider is located as well as the county of the plaintiff's residence which sets forth the name and address of the care provider as well as the dates of the plaintiff's admission and discharge. O.C.G.A. § 44-14-471.
 - This notice must be filed within 75 days of the patient being discharged for hospitals, nursing homes, and the provider of traumatic burn care medical practices.
 - For a physician, the statement shall be filed within 90 days after the person first sought treatment from the physician for the injury.

- **Prudent Course of Action**

- Upon negotiating a settlement with an injured plaintiff, a prudent defendant will require the injured plaintiff to execute an affidavit stating that all of plaintiff's medical bills arising out of the incident which gave rise to the injury have been paid in full. O.C.G.A. § 44-14-473.

- **Relationship to Attorney's Liens**

- Attorneys are permitted to assert a lien against his/her client for services rendered to that client. O.C.G.A. § 15-19-14. Any lien asserted by a person, firm, hospital authority, corporation operating as a hospital, nursing home, physician practice, or traumatic burn care medical practice for medical services rendered is secondary or subject to any attorney's lien. O.C.G.A. § 44-14-470(b).

- **Worker's Comp. Lien**

- An employee has to be made whole from worker's comp. and tort damages before a lien arises. Rowland v. Dept. of Admin. Serv., 219 Ga. App. 899 (1996). The Court of Appeals of Georgia has clarified that the worker's comp. carrier does not have a lien that is enforceable against the tort-feasor. Rowland; Canal Ins. Co. v. Liberty Mut. Ins. Co., 256 Ga. App. 866, 570 S.E.2d 60 (2002). That is the case even if the tort-feasor knows about the potential for a worker's comp. lien when it settles with the plaintiff.
- In addition to proving that an employee has been made whole to establish a lien, the employer or worker's comp. insurer must intervene in the underlying tort action to assert that lien. Canal Ins. Co., 256 Ga. App. 866.

DIRECT ACTION CLAIMS AGAINST INSURERS

- Georgia law allows for a motor carrier's insurer to be joined as a defendant to a tort action in certain situations. Pursuant to O.C.G.A. § 46-7-12, insurers of intrastate motor carriers of household goods and passengers can be joined as defendants in certain cases. Moreover, O.C.G.A. § 40-2-140(c) allows the insurer of a motor carrier of property to be joined as a defendant in certain situations. Because of recent changes in the governing federal and Georgia statutes, the law on this issue is still developing.
 - **Direct Action Authority Before 2008** - Prior to 2008, the Single State Registration System (SSRS) governed how motor carriers registered with the Federal Motor Carrier Safety Administration and states. Under that system, O.C.G.A. § 46-7-12.1 dictated when a motor carrier's insurer could be added as a defendant to a tort action. Under that statute, several courts held that a direct action could only be brought against an insurer if the insured motor carrier had selected Georgia as its home state for SSRS filing, or if the motor carrier had intrastate operating authority in Georgia. See Dundee Mills, Inc. v. John Deere Ins., 248 Ga. App. 39, 545 S.E.2d 604 (2001); See also Caudill v. Strickland, 230 Ga. App. 644, 498 S.E.2d 81 (1998); Cain v. Shoreline Transp., Inc., Civil Action No. 1:07-cv-2635-GET (N.D. GA. 2008); Erving v. Vanliner Ins. Co., Civil Action No. 407-CV-84 (S.D. GA 2008); Clark v. Irvin, et. al., Civil Action No. 1:09-CV-101 (M.D. GA. 2011).
 - **New Registration System** - As of January 1, 2008 The Unified Carrier Registration Agreement ("UCR") replaced SSRS. 49 U.S.C.A. § 14504a. Georgia has joined the UCR and it enacted O.C.G.A. § 40-2-140 in 2009 to administer the system. Since 2009 neither the Court of Appeals of Georgia nor the Supreme Court of Georgia has rendered an opinion regarding the application of O.C.G.A. § 40-2-140. Insurers are still arguing that the Direct Action Statute does not apply to the insurer of a motor carrier that only conducts interstate operations through Georgia.
- If an insurer is a proper party to a tort action under the Direct Action Statute, the limits of the policy is the extent of the insurer's liability. Gates v. DeWitt, Inc., 528 F.2d 405 (1976).
- At the trial of the action, the limits of the policy are not disclosed to the jury because of the potential for prejudice. Carolina Cas. Ins. Co. v. Davalos, 246 Ga. 746, 272 S.E.2d 702 (1980).

INSURER'S DUTY TO DEFEND UNDER GEORGIA LAW

- **General Rule Regarding Duty to Defend in Georgia** - The duty to defend is a separate contractual obligation from the duty to indemnify. American Family Life Assur. Co. of Columbus, Ga. v. U.S. Fire Co., 885 F.2d 826 (11th Cir. 1989). The duty to defend is also broader than the insurer's obligation to pay damages or indemnify the insured. In determining the duty to defend, an insurer must look to the insurance contract itself and:

since the contract obligates the insurer to defend claims asserting liability under the policy; even if groundless, the allegations in the complaint are looked to to determine whether a liability covered by the policy is asserted.

Great American Ins. Co. v. McKemie, 244 Ga. 84, 85, 259 S.E.2d 39 (1979). Accordingly, if the allegations of a complaint are arguably within coverage, then there will be a duty to defend the insured. However, "[w]here the complaint filed against the insured does not assert any claims upon which there would be insurance coverage, the insurer is justified in refusing to defend the insured's lawsuit." C. Ingram Co. v. Philadelphia Ind. Ins. Co., 303 Ga. App. 548, 694 S.E.2d 181 (2010).

- **Georgia Does Not Strictly Adhere to the Eight Corners Rule** – In some states, the Eight Corners Rule dictates that courts look exclusively to the insurance policy and the complaint to determine if a duty to defend exists. However, Georgia takes a broader approach. When a complaint against an insured shows no coverage on its face, but the insured notifies the insurer of factual contentions that would place the claim within the policy coverage, the insurer has an obligation to give due consideration to the insured's factual contentions and to base its decision as to whether to provide a defense on "true facts." The requirement that an insurer base its decision on true facts will necessitate that the insurer conduct a reasonable investigation into its insured's contentions. Anderson v. S. Guar. Ins. Co., 235 Ga. App. 306, 508 S.E.2d 726 (1998).
- **Duty to Defendant Additional Insured** - Under Georgia law, a defendant who may be entitled to additional insured status under an insurance policy must 'elect' coverage by forwarding a copy of the complaint to the insurer. Grange Mut. Cas. Co. v. Snipes, 298 Ga. App. 405, 680 S.E.2d 438, 440 (2009). However, where the insurer is already on notice of the complaint through another source (i.e., the named insured), the insurer cannot use lack of notice as a means for denying the duty to defend. BBL-McCarthy, LLC v. Baldwin Paving Co., 285 Ga. App. 494, 646 S.E.2d 682 (2007).
- **When the Duty to Defend Terminates** - An insurer's unilateral tender of its policy limits does not terminate its obligation to provide a defense. American Family Life Assur. Co. of Columbus, Ga. v. U.S. Fire Co., 885 F.2d 826 (11th Cir. 1989) citing Anderson v. United States Fidelity and Guaranty Co., 177 Ga. App. 520, 339 S.E.2d 660, 661 (1986). However, when an insurer exhausts its policy limits by settlement or by payment of a judgment, then the duty to defend ceases. See Anderson, 177 Ga. App. 520; See also BBL-McCarthy, LLC v. Baldwin Paving Co. 285 Ga. App. 494, 646 S.E.2d 682

(2007)(holding that exhausting policy limits “means the payment either of a settlement or of a judgment, which wholly depletes the policy amount.”).

- **Insurers Must Reserve Rights to Contest Coverage Before a Defense is Provided** - In Georgia, it is imperative for an insurer to reserve its right to contest coverage before a defense is provided to an insured. World Harvest Church, Inc. v. Guideone Mut. Ins. Co., 287 Ga. 149, 695 S.E.2d 6 (2010). At a minimum the reservation of rights letter should fairly inform the insured that, notwithstanding the insurer’s defense of the action, it disclaims liability and does not waive the defenses available to it against the insured. Id. Providing a defense without such a reservation of rights can constitute waiver and estoppel of the insurer’s right to contest coverage.
- **Insurer Cannot Deny a Defense and Then Raise Coverage Defenses that Were Not Part of the Initial Denial** – The Supreme Court of Georgia recently held that an insurer cannot both deny a claim outright and attempt to reserve the right to assert a different defense in the future. Hoover v. Maxum Indem. Co., 291 Ga. 402, 730 S.E.2d 413 (2012). The Court noted that an effective reservation of rights must “[a]t a minimum, ... fairly inform the insured that, notwithstanding [the insurer’s] defense of the action, it disclaims liability and does not waive the defenses available to it against the insured.” More importantly, the Court held that an insurer cannot reserve its rights in a denial letter because “a reservation of rights is only available to an insurer who undertakes a defense while questions remain about the validity of coverage.”

POLICY LIMITS DEMANDS/BAD FAITH STANDARD

- In Georgia, a bad faith failure to settle claim was first recognized in So. General Ins. Co. v. Holt, 262 Ga. 267, 268-260 (1992) where the court held that:

An insurance company may be liable for damages to its insured for failing to settle the claim of an injured person where the insurer is guilty of negligence, fraud, or bad faith in failing to compromise the claim. In deciding whether to settle a claim within the policy limits, the insurance company must give equal consideration to the interests of the insured. The jury generally must decide whether the insurer, in view of the existing circumstances, has accorded the insured the same faithful consideration it gives its own interest...The issue is whether...the insurer acted unreasonably in declining to accept a time-limited settlement offer.

- **Handling Policy Limits Demands When Multiple Insurers Cover the Same Insured -**

In the event that multiple insurers provide coverage to a defendant and the plaintiff makes a joint demand for all policies, each insurer has an obligation to tender its policy to avoid a potential claim of bad faith. Cotton States Mut. Ins. Co. v. Brightman, 276 Ga. 683 (2003). Therefore, even if a demand includes conditions that are beyond an insurer's control, it still has an obligation to offer its limits if the value of the case is reasonably expected to exceed that insurer's policy limits.

- Additionally, if multiple insurers provide coverage to a defendant and the plaintiff makes a joint demand for all policies, if one insurer elects to tender its limits but the other does not, the tendering insurer cannot demand a general release of all claims in return for the payment. Fortner v. Grange Mutual Insurance Company, 286 Ga. 189 (2009). Instead, the tender should be accompanied by a demand for a statutory limited liability release for the insured.

- **Failing to Accept a Time Limited Policy Limits Demand Upon Its Specific Terms -**

In two different opinions, the Supreme Court of Georgia has held that when an insurer responds to a time-limited policy limits demand and conditions the tender of the policy limits upon the plaintiff agreeing to satisfy all outstanding hospital liens, the insurer issues a counteroffer and a settlement is not reached. Frickey v. Jones, 280 Ga. 573, 630 S.E.2d 374 (2006); McReynolds v. Krebs, 290 Ga. 850, 725 S.E.2d 584 (2012). Neither Frickey nor McReynolds involved the question of whether the insurer acted in bad faith.

- **Insurer's Tender of Limits in Response to Time Limited Demand does Not Relieve Obligation to Ensure that Liens Are Satisfied -** In So. Gen. Ins. Co. v. Wellstar Health Systems, Inc., 315 Ga. App. 26, 726 S.E.2d 488 (2012) an insurer accepted a plaintiff's time-limited policy limits demand. The insurer sent a release to the plaintiff's counsel that included an indemnity agreement for outstanding hospital liens. The plaintiff advised that he would not sign an indemnity agreement. Being aware of the holding from Frickey, the insurer

tendered the limits to the plaintiff without getting an indemnity agreement. Shortly thereafter, the insurer was sued by the hospital that treated the plaintiff because its lien was not satisfied. The insurer argued that the holdings from Holt, Frickey and the hospital lien statute created an unresolvable conflict for insurers. The Court of Appeals disagreed and held that the hospital's lien could be enforced against the insurer. In dicta, the Court of Appeals noted that a plaintiff's failure to agree to satisfy outstanding hospital liens may create a safe harbor for an insurer in a subsequent bad faith case. The Court of Appeals also noted in dicta that the insurer could have paid the money directly to the hospital because that payment would have been to the benefit of the plaintiff.

THIRD PARTY BAD-FAITH PROPERTY DAMAGE CLAIMS

- Georgia now recognizes a statutory third-party bad faith claim arising from automobile property damage. O.C.G.A. § 33-4-7. This statute is implicated if a claimant whose vehicle has been damaged in an accident sends a demand via certified mail to the tortfeasor's insurer demanding a sum of money. If that demand is not accepted within 60 days, the claimant can then file suit against the tortfeasor. If the claimant recovers equal to, or more than the amount demanded pre-suit, the claimant will be entitled to bad faith penalties against the tortfeasor's insurer which include: (1) the greater of 50 percent of the judgment or \$5,000; and (2) all reasonable attorney's fees incurred by the claimant's attorney.

APPENDIX B

SAMPLE RELEASE

NOTICE: This Release is taken without the knowledge and consent of any party released hereby and does not preclude the assertion of any claim that such party may have against the undersigned.

STATE OF _____

COUNTY OF _____

RELEASE OF ALL CLAIMS AND INDEMNITY AGREEMENT

Know all men by these presents, that the undersigned, **(name of plaintiff/claimant)**, being of lawful age, for the sole consideration of **(amount of settlement)** Dollars, receipt whereof and the adequacy and sufficiency of which the undersigned hereby acknowledges, has remised, released and forever discharged, and for herself, her heirs, executors, administrators and assigns does hereby remise, release, acquit and forever discharge **(name of defendant/releasee)**, and all persons, firms, partnerships, associations and corporations, whether named or referred to or not, who may be jointly or derivatively liable to the undersigned on account of any claimed acts or omissions of the foregoing named parties released, all of whom are hereinafter referred to as "Payors", their officers, directors, shareholders, employees, agents, independent contractors, insurers, excess insurers, heirs, executors, administrators, successors and assigns, of and from any and all claims, demands, debts, rights, actions, and causes of action and costs of whatsoever kind and nature, including those arising from and by reason of any and all known and unknown, foreseen and unforeseen, bodily and personal injuries, punitive damages, lost wages or earnings, pain and suffering, mental anguish or suffering, emotional or psychological conditions, medical and hospital expenses, damage to property and the consequences thereof, resulting and to result from a certain incident that occurred on **(date of accident)** on **(location of accident)** as more particularly described in the pleadings and other matters on file in the Civil Action styled **(style of lawsuit)** which action will be dismissed with prejudice upon execution of this Release, for

which the undersigned has claimed the said Payors to be legally liable, which liability Payors expressly deny.

The undersigned warrants, covenants and agrees that the consideration set forth in this Release constitutes a full and complete satisfaction of all damages arising out of the incident referred to above. The undersigned acknowledges and agrees that she is responsible for any outstanding liens and/or medical bills, and warrants and covenants that she will negotiate and/or pay all liens or bills accrued by or for the benefit of the undersigned relating to the incident referred to above. The undersigned further separately covenants and agrees that she will indemnify and forever hold the said Payors harmless from and against any and all claims, demands, actions or causes of action, whether by way of contribution, indemnity, subrogation, liens or otherwise, on account of medical or hospital expenses, loss of earnings, property damage or any other claims of injury or damages sustained by the undersigned, brought by any other person, firm or corporation as a result of the incident referred to above. The undersigned will make good any and all loss, damage, expense, attorney's fees and costs that the Payors may have to pay if claim, demand, action, cause of action, suit proceeding, litigation or settlement arises, relating to the injuries of the undersigned from the incident as set forth above. The undersigned hereby waives any and all rights of exemption, both as to real and personal property, to which the undersigned may be entitled under the laws of this or any other state as against such claim for reimbursement or indemnity pursuant to this agreement. This indemnity agreement shall include all reasonable attorney's fees, costs, and expenses incurred by any Payors in conjunction with asserting a claim against the undersigned for indemnity pursuant to this agreement.

It is understood and agreed that payment of said amount by the said Payors is not to be construed as an admission of liability on the part of said Payors, but said payment is in compromise and settlement of the undersigned's claims which are not admitted, but are denied and disputed by said Payors; that this Release is being given by the undersigned voluntarily and not based upon any representations or statements of any kind made by the Payors or the representatives, as to the merits, legal liability, or value of the undersigned's claims or any matters relating thereto.

The undersigned further represents and warrants that no other person or entity has or had any interest in the claims, demands, obligations, or causes of action referred to in this Release; that she has the sole right and exclusive authority to execute this Release; and that she has not

sold, assigned, transferred, conveyed, or otherwise disposed of any of the claims, demands, obligations, or causes of action referred to in this Release.

In order to procure the payment of the sum stated above, the undersigned declares that no representations regarding the nature or extent of the damages, injuries, or disabilities made by any physician, attorney or agent of any party released hereby nor any representation regarding the nature and extent of any legal liability or financial responsibility of any party released hereby has induced the undersigned to enter into this settlement.

This Release is taken and the consideration stated above is paid in whole or in part by the liability insurer of a party released hereby. In taking this Release, said insurer is acting as an independent contractor and not as an agent of any party released hereby. The undersigned understands and agrees that unless otherwise stated herein, this Release is taken without the knowledge and consent of any party released hereby and the taking of this Release shall not preclude the assertion of any claim that such party may have against the undersigned. The undersigned further acknowledges receipt of prior written notice that unless otherwise stated herein, this Release is taken without the knowledge and consent of any party released hereby and all further notice thereof is expressly waived.

This Release contains the entire agreement between the parties hereto, and the terms of this agreement are contractual and not a mere recital. This Release is executed with the full knowledge and understanding on the part of the undersigned that there may be more serious consequences, damages or injuries or separate or distinct consequences, damages or injuries as a result of the occurrence aforementioned, which are not now known, and any draft issued to the undersigned in consideration of this Release is accepted as full and final payment of the considerations set out hereinabove.

The undersigned states that she has carefully read the foregoing Release of All Claims and Indemnity Agreement and knows the contents thereof, and she signs the same of her own free act.

[Signatures to appear on next page]

IN WITNESS WHEREOF, I have hereunto set my hand and seal this _____ day of _____, 2013.

(name of plaintiff/claimant)

Sworn to and subscribed before me this _____ day of _____, 2013__.

Notary Public

My Commission Expires:

I, the undersigned attorney (**for name of plaintiff/claimant**), Individually, hereby certify that this Release of All Claims and Indemnity Agreement has been carefully and fully explained to my client by me, and I have recommended that she execute the said release for the consideration therein expressed.

By:_____
(name of attorney for plaintiff/claimant)



MCMICKLE, KUREY & BRANCH, LLP