STATE OF GEORGIA TRANSPORTATION COMPENDIUM OF LAW

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A. ELEMENTS OF PROOF FOR DERIVATIVE NEGLIGENCE CLAIMS

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

If an employee is on company business at the time of the accident, his employer is vicariously responsible for any negligence committed on his part. O.C.G.A. §51-2-2; Allen Kane's Major Dodge, Inc. v. Barnes, 243 Ga. 776 (1979); Wright v. Pine Hills Country Club, Inc., 583 S.E.2d 569 (Ga.App. 2003).

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

a. Lease Liability

Georgia recognizes the concept of "lease liability," and in any case where the accident occurs during the term of the lease liability will be imposed on the motor carrier irrespective of whether the driver was technically in the scope of employment for the motor carrier. Hot Shot Express, Inc. v. Assicurazioni Generali, S.P.A., 252 Ga. App. 372, 556 S.E.2d 475 (2001); Nationwide Mut. Ins. Co. v. Holbrooks, 187 Ga. App. 706, 371 S.E.2d 252 (1988).

2. NEGLIGENT ENTRUSTMENT

Under the theory of negligent entrustment, liability is predicated not on the doctrine of "scope of employment" but on a negligent act of the owner in lending his automobile to another to drive when the owner of the vehicle has *actual knowledge* that the driver is incompetent or habitually reckless. This negligence must concur, as a part of the proximate cause, with the negligent conduct of the driver on account of his incompetence and recklessness. Cherry v. Kelly Services, Inc., 319 S.E.2d 463 (Ga. App. 1984); Spencer v. Gary Howard Enterprises, Inc., 256 Ga. App. 599 (2002); Western Industries, Inc. v. Poole, 280 Ga.App. 378, 634 S.E.2d 118 (2006). In motor carrier cases, however, where the motor carrier has a legal duty to check the driver's qualifications, the Federal Motor Carrier Safety Regulations may establish constructive knowledge of driver information that would have been revealed by a proper driver qualification. 49 C.F.R. § 391 et seq.; Smith v. Tommy Roberts Trucking Co., 209 Ga. App 826 (1993).

3. NEGLIGENT HIRING, RETENTION AND SUPERVISION

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

The negligent selection and retention of incompetent servants allows a plaintiff who is injured as a result of this negligence to bring a cause of action against the employer. To sustain a claim for negligent hiring or retention, a plaintiff must show that *the employer knew or should have known of the employee's propensity to engage in the conduct which caused the plaintiff's*

injury. The Supreme Court has now added that the defendant/employer has a duty of exercising ordinary care not to hire or retain an employee the employer knows or should have known poses a risk of harm to others, **where it is reasonably foreseeable from the employee's *tendencies or propensities* that the employee could cause the type of harm sustained by the plaintiff**. In Munroe v. Universal Health Services, Inc., 227 Ga. 861, 596 S.E.2d 604 (2004). The same standard is applied with respect to negligent supervision claims. Alexander v. A. Atlanta Autosave, Inc., 272 Ga. App. 73, 77, 611 S.E.2d 754 (2005).

Specifically, a plaintiff can establish liability "only by showing that an employer had actual knowledge of numerous and serious violations on its driver's record, or, at the very least, when the employer has flouted a legal duty to check a record showing such violations." Western Industries, Inc. v. Poole, 280 Ga. App. 378, 381-82, 634 S.E.2d 118 (2006). The key is whether there is any evidence to suggest that the employee was incompetent in the first place. For example, if his driving record does not contain any violations that would alert an employer that he was not competent to drive, then the employer may avoid liability. If the employer conducted all of the necessary steps in order to properly evaluate the employee's driving capabilities; conducted an extensive review of his driver's record before he was hired, which included sending for records from his previous employer; and continued to monitor his driving while he was employed, then employer can avoid liability. In addition, under the new standard, without some evidence to suggest that the specific harm suffered by the plaintiff was reasonably foreseeable based on the specific tendencies or propensities of the employee, the employer may avoid liability. However, if the court finds a violation of the federal motor carrier safety regulations (which would have been revealed by a proper driver qualification file), summary judgment on negligent hiring can be authorized against the motor carrier, and a jury issue can also be created on punitive damages. Smith v. Tommy Roberts Trucking Co., 209 Ga. App. 826 (1993); Meyer v. Trux Transp., Inc., 2006 U.S. Dist. LEXIS 81869 (N.D. Ga. 2006).

It remains a requirement for a negligent hiring, retention, and supervision claim that that the employee actually be in the scope of employment at the time of the accident. Lear Siegler v. Stegall, 184 Ga. App. 27, 360 S.E.2d 619 (1987).

4. NEGLIGENT TRAINING

There is no specific case finding a tort based on this theory. It is usually lumped with negligent supervision, and then analyzed using the same theories as negligent hiring and retention. Remediation Resources, Inc. v. Balding, 281 Ga. App. 31, 635 S.E.2d 332 (2006). Some cases have discussed the facts particular supporting liability under this theory but without really giving any legal analysis about what is required for a *prima facia* to be shown. Ledbetter v. Delight Wholesale Co., 191 Ga. App. 64, 380 S.E.2d 736 (1989).

5. NEGLIGENT MAINTENANCE

Under Georgia law, there is a statutory duty for an owner of a vehicle to keep its vehicle in good working order. O.C.G.A. 40-8-50(a); Lewis v. Harry White Ford, 129 Ga. App. 318, 319(2), 199 S.E.2d 599 (1973). Thus, an owner who permits another to operate the vehicle when the owner knows or should know that the vehicle is not in repair is liable for injuries proximately

caused by the defect. Cantrell v. U-Haul Company of Georgia, Inc., 224 Ga. App. 671, 482 S.E.2d 413 (1997). A defendant can defeat such a claim if it can establish that regular maintenance and servicing of the vehicle occurred prior to the accident and that this regular maintenance did not reveal any problems that would alert the owner that something was defective.

B. DEFENSES, PUNITIVE DAMAGES AND WRONGFUL DEATH

1. ADMISSION OF AGENCY IN DIRECT NEGLIGENCE CLAIMS

Once it is conceded that the employer is in fact vicariously liable for negligence of the employee under a theory of *respondeat superior*, then direct negligence claims (negligent hiring, retention, entrustment, etc.) are moot, and evidence supporting them is rendered irrelevant, and inadmissible. See Bartja v. National Union Fire Ins. Co. of Pittsburgh, 218 Ga. App. 815 (1995); Durben v. Am. Materials, 232 Ga. App. 750, 503 S.E.2d 618 (1998); Scroggins v. Yellow Freight Sys., 98 F. Supp. 2d 928 (E.D. Tenn. 2000) .

The exception to this rule is where a separate punitive damage claim is brought against the motor carrier. In these cases, the claim is that the employer's conduct justifies a separate award of punitive damages. Thus, it is the conduct of the Employer that is considered in awarding punitive damages and not the actions of the employee. Clarke v. Cotton, 263 Ga. 861, 440 S.E,.2d 165 (1994). For cases considering punitive damages in trucking-direct negligence cases, see Smith v. Tommy Roberts Trucking Co., 209 Ga. App. 826 (1993); Meyer v. Trux Transp., Inc., 2006 U.S. Dist. LEXIS 81869 (N.D. Ga. 2006); Hutcherson v. Progressive Corp., 984 F.2d 1152 (11th Cir 1993); and Bartja v. National Union Fire Ins. Co. of Pittsburgh, 218 Ga. App. 815 (1995).

2. PUNITIVE DAMAGES AND THE TRUCKING CASE

If the employee's conduct warrants imposition of punitive damages, the employer is also liable for these. Sightler v. Transus, Inc., 208 Ga. App. 173, 430 S.E.2d 81 (1993). Where a plaintiff has a valid claim for punitive damages against the employer based on its independent wrongdoing in hiring, retaining or supervising the employee or entrusting a vehicle to that employee (which must be a higher standard of culpability than negligence), then these direct claims against the employer are not merely duplicative of the *respondeat superior* claims. Durben v. Am. Materials, 232 Ga. App. 750, 503 S.E.2d 618 (1998). In cases where a valid punitive damages claim would justify trying the negligent retention/supervision or entrustment claims as well as the *respondeat superior* claim, the Georgia courts have held the direct liability claims should be bifurcated to avoid any possible prejudice to the employer on the vicarious liability claim. *Id.*

Unfortunately, Georgia has a very complicated punitive damage statute. The punitive damage statute is found at O.C.G.A. § 51-12-5.1. This statute was amended in the late ‘80s in response to a tort reform movement and has been amended a couple of times since then. Under the terms of that statute, punitive damages are to be awarded only in tort actions where it is proven by “clear and convincing evidence" that the defendants’ actions showed “willful

misconduct, malice, fraud, wantonness, oppression, or that entire want of care which would raise the presumption of conscious indifference to consequences." Another section of that statute provides that the punitive damages are to be awarded not as compensation to a plaintiff but solely to "punish, penalize, or deter a defendant."

By the terms of the statute, punitive damages in Georgia are capped at $250,000. O.C.G.A. §51-12-5.1. There are only three exceptions to capping: one for product liability cases, another for intentional act cases ("specific intent to cause harm"), and last for cases involving drugs or alcohol while driving a motor vehicle. If none of those three is involved in the facts of the case, then the $250,000 cap would apply. The punitive damage cap applies to each plaintiff separately, no matter how many defendants. Bagley v. Shortt, 261 Ga. 762, 410 S.E.2d 738 (1991).

Subsection (d) of that code section provides that the punitive damage case has to be bifurcated. The trier of fact is supposed is supposed to resolve first, whether an award of punitive damages should be made, and then, in the second phase of the case, the amount. Originally, the case law in Georgia allowed a trial judge the discretion to bifurcate the liability and punitive damage portions of the case to avoid prejudice to the defendants in the liability phase of the case. Moore v. Thompson, 255 Ga. App. 236, 336 S.E.2d 749 (1985) (a trucking case). However, the passage of the revised punitive damage statute as part of the Tort Reform Act in 1987 changed the standard. The statutory bifurcation scheme does not require bifurcation of the punitive damage aspects of the case from the liability aspects, thus adding potential prejudice in the liability phase of the case. The trial court is still vested with discretion to divide the case so as to avoid prejudice. Hanie v. Barnett, 213 Ga. App. 158, 444 S.E.2d 336 (1994). However, the trial court can no longer simply bifurcate the liability and punitive phases of the trial (as in the pre-tort reform days) Webster v. Boyett, 269 Ga. 191, 496 S.E.2d 459 (1998). Instead, the trial court is authorized to actually *trifurcate* the case (i.e., cut it into three parts).

Under the *statutory* scheme of bifurcation, the issue of *whether* to award punitive damages (thus requiring the jury to hear all of the harmful conduct), would actually come in during the compensatory damage phase of the case. Our courts have recognized that this punitive evidence might also inflame the jury on liability and compensatory damages and create unfairness to the defendant. For that reason, the courts have allowed, at the discretion of the trial judge, for trifurcation. Hanie v. Barnett, 213 Ga. App. 158, 444 S.E.2d 336 (1994); Webster v. Boyett, 269 Ga. 191, 496 S.E.2d 459 (1998); Moresi v. Evans, 257 Ga. App. 670, 572 S.E.2d 327 (2002); General Motors Corp. v. Mosely, 213 Ga. App. 875, 447 S.E.2d 302 (1994). In trifurcation, phase one of the trial would simply resolve fault, causation, and compensatory damages. Phase two would then consider whether or not the defendants' actions were willful, wanton, or showed conscious indifference to consequences. In the event the jury decides that the defendant's actions did constitute one of the grounds for punitive damages, then the amount of punitive damages would be awarded in the third and last phase. The decision about whether to trifurcate a punitive damage case is left entirely with the trial judge. For cases discussing these issues, see Smith v. Tommy Roberts Trucking Co., 209 Ga. App. 826 (1993); Bartja v. National Union Fire Ins. Co. of Pittsburgh, 218 Ga. App. 815 (1995); and especially Webster v. Boyett, 269 Ga. 191, 496 S.E.2d 459 (1998).

Evidence of financial circumstances is relevant in a punitive damage case. J.B. Hunt Transportation v. Bentley, 207 Ga. App. 250, 427 S.E.2d 499 (1993). However, a mere demand for punitive damages does not entitle the plaintiff to discovery on the defendant's financial circumstances. Instead, an evidentiary showing must be made. Holman v. Burgess, 199 Ga. App. 61, 404 S.E.2d 144 (1991); Ledee v. Devoe, 225 Ga. App. 620, 484 S.E2d 344 (1997). Prior similar incidents are admissible on punitive damages. Mack Trucks v. Conkle, 263 Ga. 539, 436 S.E.2d 635 (1993); Gunthorpe v. Daniels, 150 Ga.App. 113, 257 S.E.2d 199 (1979); cf, Holt v. Grinnell, 212 Ga. App. 520, 441 S.E.2d 874 (1994). In addition, even after discovery, a court can conclude that the evidence fails to meet the standard of clear and convincing as a matter of law. Durben v. Am. Materials, 232 Ga. App. 750, 503 S.E.2d 618 (1998); Frey v. Gainey Transp. Servs., 2006 U.S. Dist. LEXIS 90639 (N.D. Ga. 2006).

As noted above, in direct negligence cases, it is the conduct of the Employer that is considered in awarding punitive damages and not the actions of the employee. Clarke v. Cotton, 263 Ga. 861, 440 S.E,.2d 165 (1994). For cases considering punitive damages in trucking-direct negligence cases, see Smith v. Tommy Roberts Trucking Co., 209 Ga. App. 826 (1993); Meyer v. Trux Transp., Inc., 2006 U.S. Dist. LEXIS 81869 (N.D. Ga. 2006); Hutcherson v. Progressive Corp., 984 F.2d 1152 (11th Cir 1993); and Bartja v. National Union Fire Ins. Co. of Pittsburgh, 218 Ga. App. 815 (1995). In these cases, the Georgia courts have allowed the trial court discretion to bifurcate the direct negligence case so as to avoid prejudice the driver.

3. WRONGFUL DEATH AND PUNITIVE DAMAGES

A wrongful death claim is actually brought in two parts in Georgia. One is brought by the "statutory wrongful death claimant" and the other by the estate. Under the wrongful death *statute*, certain individuals are empowered to bring claims for wrongful death on behalf of a decedent. In the case of married adults, this right is placed in their spouse. Unmarried adults are represented by the children or parents. If no living relatives can be found, the estate will have the statutory death claim. The measure of damages in the statutory wrongful death claim is the "full value of the life of the decedent, unreduced by the expenses of living". The "full value of the life" damages will include the economic component testified to by the plaintiff's economists, and another amount equal to the "intangible" or "non-economic" aspects of life, which the jury is free to award in any amount according to their "enlightened conscience". Punitive damages are not allowed in statutory wrongful death claims. Ford Motor Co. v. Stubblefield, 171 Ga. App. 331, 319 S.E.2d 470 (1984).

The second portion of a wrongful death claim concerns the estate. The estate has any claim for medical and funeral expenses. In addition, in the event there is any sort of "survivor's claim", this would be the right of the estate to pursue. A survivor's claim simply means that if a decedent dies with an existing personal injury claim, that claim can survive his or her death and be pursued by the estate. For example, if a claimant is injured and survives for some period of time before dying, then the injury claim and the claim for any pain and suffering incurred before death would be part of the survivor's claim owned by the estate. This is separate and apart from the statutory wrongful death claim. Georgia also allows recovery for what are known as "pre-impact fright damages." Pre-impact fright damages are awarded to a claimant to compensate them for their fright in realizing that they were about to have a possibly fatal accident. If there is

clear evidence that the decedent was aware of the impending accident and would no doubt have been frightened to some degree, then the claim exists. This fright claim will survive death and is part of the estate claim. In appropriate circumstances, a punitive damage claim may also exist which relates to the survivorship claim. If so, and the decedent had a valid claim for punitive damages at the time of death, this claim, too, will survive death and will become a part of the estate claim. Donson Nursing Facilities, Inc. v. Dixson, 176 Ga. App. 700, 337 S.E.2d 351 (1985).

In summary, most plaintiffs seek:

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

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