

# DIGEST OF INSURANCE LAW

## GEORGIA

Courtesy of  
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### CIVIL JUDICIAL SYSTEM

#### Courts of Original Jurisdiction

Georgia has an unified judicial system, created by state constitution, consisting of five classes of trial courts (superior, state, magistrate, juvenile, and probate courts) and two appellate courts (the Supreme Court of Georgia and the Georgia Court of Appeals).

Each county is assigned a judicial circuit and a Superior Court is the trial court of general jurisdiction for counties in that circuit. O.C.G.A. § 15-6-1. Superior Courts have exclusive jurisdiction of felony cases, equity cases, cases respecting title to land, and divorce cases. Superior Courts have appellate jurisdiction from judgments of probate and magistrates courts. O.C.G.A. § 15-6-8. Probate courts, state courts, juvenile courts and magistrate courts are trial courts of limited jurisdiction. O.C.G.A. Title 15. There are also inferior courts which exist independent of the unified judicial system, including certain municipal courts, county recorder's courts, and civil courts. GA. CONST. art. VI.

Some counties have a State court that has concurrent jurisdiction with Superior Courts for civil actions without regard to the amount in controversy, except those actions in which exclusive jurisdiction is vested in Superior Courts. State courts have concurrent jurisdiction with Superior Courts in criminal cases below the grade of felony, applications for issuance of arrest and search warrants, punishment of contempt by fine not exceeding \$500 or imprisonment not exceeding 20 days or both, and review of decisions of other courts as provided by law. O.C.G.A. §§ 15-7-1 through 4.

The Supreme Court of Georgia adopted Uniform Rules for Superior Courts and State Courts, effective July 1, 1984.

Each county may also have a magistrate court with jurisdiction over civil claims in which exclusive jurisdiction is not vested in a Superior Court and the amount demanded or value of property claimed does not exceed \$15,000.00. O.C.G.A. § 15-10-2.

#### Appellate Courts

Appellate courts include a Court of Appeals and Supreme Court. The Supreme Court has jurisdiction of cases involving construction of the Georgia or United States Constitution; questions of whether a law, ordinance, or constitutional provision is constitutional; election contests; cases involving title to land, extraordinary remedies; wills; all equity cases; and certain criminal and domestic cases. The Supreme Court may review cases from the Court of Appeals by way of certiorari which involves cases of gravity or great public importance. GA. CONST. art. VI, § VI. The Court of Appeals has appellate jurisdiction for all cases from superior courts, juvenile courts, and county state courts if exclusive jurisdiction has not been conferred on the Georgia Supreme Court. GA. CONST. art. VI, § V.

### LAW

#### Abbreviations

Ga. – Georgia Reports.  
Ga. App. – Georgia Appeals Reports.  
Ga. R. Prof'l Conduct – Georgia Rules of Professional Conduct.  
O.C.G.A. – Official Code of Georgia Annotated.  
S.E. – South Eastern Reporter.  
S.E.2d – South Eastern Reporter, Second Series.

### ACCIDENT AND HEALTH INSURANCE

See "DISABILITY."

Accident and sickness insurance defined. O.C.G.A. § 33-7-2.

Definition of individual accident and sickness insurance. O.C.G.A. § 33-29-1.

Definition of group accident and sickness insurance. O.C.G.A. § 33-30-1.

Loss Contributed to by Disease. When a policy excludes any loss resulting from bodily injury which is caused or contributed to by disease or illness, no recov-



ery can be had for death or disability to which a pre-existing disease or illness substantially contributed and which would not have occurred in the absence of such disease or illness. *Gulf Life Ins. Co. v. Braswell*, 101 Ga. App. 133, 112 S.E.2d 804 (1960). Outside evidence of injury is not necessary for a determination that the injury resulted from an accident rather than from disease. *National Acc. & Health Ins. Co. v. Childs*, 62 Ga. App. 633, 9 S.E.2d 108 (1940).

When a policy requires an autopsy to reveal internal injuries, there must be an autopsy. *Phillips v. Home Security Life Ins. Co.*, 632 F.2d 1302 (5th Cir. 1980).

“Disease,” unless otherwise defined in a health insurance policy, is defined as “[the] deviation from the healthy or normal condition of any of the functions or tissues of the body; an alteration in the state of the body or of some of its organs, interrupting or disturbing the performance of the vital functions, and causing or threatening pain or weakness.” Black’s Law Dictionary 467 (6th ed. 1990). This definition includes exogenous obesity. *Aetna Life Ins. Co. v. Sanders*, 127 Ga. App. 352, 193 S.E.2d 173 (1972).

Unless the policy specifically excludes congenital conditions, “disease” as defined by Black’s Law Dictionary would encompass a “deviation from the healthy or normal condition of any of the functions or tissues of the body...” that arose before birth. *Beggs v. Pacific Mut. Life Ins. Co.*, 171 Ga. App. 204, 205, 318 S.E.2d 836, 837 (1984).

The Eleventh Circuit Court of Appeals has held that a health insurance policy’s exclusion for “experimental” treatment was ambiguous because the term was not defined in the policy. *Dahl-Eimers v. Mutual of Omaha*, 986 F.2d 1379 (11th Cir. 1993), *aff’d*, 35 F.3d 577 (11th Cir. 1994).

**Double Indemnity.** There are no statutory provisions applicable to double indemnity clauses. General rules of construction apply to the construction of a double indemnity clause. When liability under a double indemnity clause is limited by carefully chosen words, courts will not extend coverage by strained construction. *Life & Cas. Ins. Co. of Tenn. v. Brown*, 213 Ga. 390, 99 S.E.2d 98 (1957). In an action on a life policy containing a provision for double indemnity in case of accidental death, there is a rebuttable presumption in favor of an accidental death and against suicide. *Liberty Nat. Life Ins. Co. v. Tidmore*, 71 Ga. App. 271, 30 S.E.2d 668 (1944).

When an airline crew member is injured in an emergency landing and several hours later dies from drowning and overexposure, an aircraft travel exclusion applies and beneficiaries are not entitled to double in-

demnity benefits. *Prudential Ins. Co. of Am. v. Howe*, 232 Ga. 1, 205 S.E.2d 263 (1974).

Asphyxiation is considered to be a violent and accidental cause of death where one’s windpipe is clogged by undigested food, within a double indemnity provision for death caused “solely by external, violent, and accident[al] means.” *Life Ins. Co. of Ga. v. Thomas*, 133 Ga. App. 134, 134, 210 S.E.2d 250, 250 (1974).

It is generally within the province of the jury as to whether death was an accident. *Pittman v. Massachusetts Mut.*, 904 F. Supp. 1384 (S.D. Ga. 1996).

Summary judgment in favor of an insurer is precluded by the existence of a material issue of fact concerning whether an insured’s epiglottis malfunction constituted an “accidental means” under Georgia law, whether it was merely a physiological reaction to voluntary ingestion of alcohol, or whether it was the result of other causes. *Lee v. Fidelity & Cas.*, 567 F.2d 1340, 1342 (1978).

Hang glider was device for aerial navigation and, therefore, an insured’s death was excluded under an accidental death policy. *Fireman’s Fund Am. Life Ins. v. Long*, 148 Ga. App. 216, 251 S.E.2d 133 (1978).

The term “driving” is not synonymous with “operating.” Where insured lost an arm in a corn harvester while attempting to fix the machine, there was no coverage within the accidental dismemberment provision for injury while “driving for hire.” *Touchton v. Allstate Ins.*, 128 Ga. App. 754, 757, 197 S.E.2d 869, 870 (1973).

**Contestability.** An insurer in Georgia can limit the operation of an incontestability clause. *Gulf Life Ins. v. Lanier*, 114 Ga. App. 277, 151 S.E.2d 161 (1966). Subsequent to the issuance of policies in *Gulf Life, supra*, the Georgia legislature enacted O.C.G.A. § 33-25-7, which provides that a “clause in any policy of life insurance which provides that the policy shall be incontestable after specified period...shall not preclude the assertion at any time of defenses based upon provisions in the policy which exclude or restrict coverage, whether or not the restrictions or exclusions are excepted in clause.” O.C.G.A. § 33-25-7. After the period of incontestability has run, an insurer is only barred from contesting the validity of the policy itself. An insurer still reserves the right to deny any claim if it is not within coverage as stated under the policy’s terms. *Keaten v. Paul Revere Life*, 648 F.2d 299 (5th Cir. 1981); *Blue Cross v. Sheehan*, 215 Ga. App. 228, 450 S.E.2d 228 (1994).

**Excepted Risks.** O.C.G.A. § 33-25-5 lists the following as permissible, excepted risks in life insurance policies: “ 1) Death as a result, directly or indirectly, of war, declared or undeclared, or of any act or hazard of

such war; 2) Death as the result of aviation or any air travel or flight; 3) Death as a result of a specified hazardous occupation or occupations; 4) Death while the insured is a resident outside the continental United States and Canada; or 5) Death within two years from the date of issue of the policy as a result of suicide, while sane or insane.” This section does not apply to “group life insurance, reinsurance, annuities, or to any provision of life insurance policy, or contract supplemental thereto, relating to disability benefits, or to additional benefits in event of death by accident or accidental means.” O.C.G.A. § 33-25-5.

A policy which excludes liability for disability resulting from injury or sickness contracted while an insured is engaged in war is construed to be prospective and not retrospective. *Pacific Mut. Life Ins. Co. v. Barfield*, 57 Ga. App. 43, 194 S.E. 258 (1937).

Where a policy excludes liability for disability occurring while an insured is engaged in employment for wage or profit, the test for determining whether the insured is engaged in employment is whether the employer has the right to control the activities of the employee in employment duties. *Metropolitan Life Ins. Co. v. Forsyth*, 122 Ga. App. 463, 177 S.E.2d 505 (1970).

**Intentional Injuries.** A policy provision excluding injuries “intentionally inflicted upon [an] insured by any other person, sane or insane,” contemplates injuries intended to be inflicted on the insured and not intended against another. An insurer is liable for injury to an insured who had been mistaken for another individual. *Newsome v. Travelers Ins. Co. of Hartford*, 143 Ga. 785, 85 S.E. 1035 (1915). *But see Travelers’ Ins. Co. v. Newsome*, 147 Ga. 608, 95 S.E. 4 (1918).

Policy exclusions for any damage or injuries sustained from intentional, willful and malicious acts are upheld. In *State Farm Fire & Cas. Co. v. Moss*, 212 Ga. App. 326, 441 S.E.2d 809 (1994), the insured plead guilty to a charge of aggravated assault relating to the incident and then sought coverage from his insurer for injuries sustained from the acts. Distinguishing between honest and intentional mistakes, the court held that the insured’s guilty plea indicated that the mistake was intentional. Thus, no coverage was provided. The death of an insured resulting from a shotgun blast fired by a customer whom the insured had instructed to leave a bar fell within the life insurance policy exclusion for death resulting from bodily injury intentionally inflicted by another person. *Drew v. Life Ins. Co. of Georgia*, 170 Ga. App. 147, 316 S.E.2d 512 (1984).

A policy insuring against “entire and irrecoverable loss of sight” did not cover loss of sight for “all practical purposes” when the insured could see well enough to

count fingers and ascertain shirt color. *State Farm Mut. Auto. Ins. v. Sewell*, 223 Ga. 31, 153 S.E.2d 432 (1967). Likewise, the total loss of arm use was not covered under a policy requiring severance of an arm. *Boyes v. Continental Ins.*, 139 Ga. App. 609, 229 S.E.2d 75 (1976).

A policy clause subrogating an insurer to all rights of recovery of the injured person against the tortfeasor with regard to payment of any medical expenses under the policy are void. Such a provision violated O.C.G.A. § 44-12-24 as Georgia prohibits assignment of bodily injury claims and “‘amounted to no more than an agreement to assign a personal injury claim to the insurer...’” *Government Employees Ins. Co. v. Hirsh*, 211 Ga. App. 374, 374, 439 S.E.2d 59, 60 (1993), *citing Wrightsman v. Hardware Dealers Mut. Fire Ins. Co.*, 113 Ga. App. 306, 307, 147 S.E.2d 860, 861 (1966). Insurers, however, may include a provision for right of reimbursement for amounts paid under medical payments coverage. *Duncan v. Integon Gen. Ins. Co.*, 267 Ga. 646, 482 S.E.2d 325 (1997).

**Notice and Proof of Loss.** O.C.G.A. § 33-29-3 sets forth required policy provisions including that specifically written notice of claims under individual accident and sickness policies must be given to an insurer “within 20 days after the occurrence or commencement of any loss covered by the policy or as soon thereafter as is reasonably possible.” O.C.G.A. § 33-29-3(b)(5)(A). “Written proof of loss must be furnished to the insurer...in case of a claim for loss for which this policy provides any periodic payment contingent upon continuing loss, within 90 days after the termination of the period for which the insurer is liable and, in case of claim for any other loss, within 90 days after the date of such loss.” O.C.G.A. § 33-29-3(b)(7). O.C.G.A. § 33-30-6 contains a similar provisions relative to group and blanket accident and sickness insurance. This section, however, provides that a written proof of loss for claims of loss of time for disability must be provided within 30 days. O.C.G.A. § 33-30-6(b)(4). Both individual and group, accident and sickness insurers have 15 working days to respond to claims other than for loss of time benefits, including a statement of the reasons for failure to pay a claim, in whole or in part, and an itemization of any information needed to process the claim. After receipt of all information, both individual and group, accident and sickness insurers have 15 working days to pay or deny claims, in whole or in part, giving the insured the reasons for the denial. O.C.G.A. §§ 33-30-6(b)(5), 33-29-3(b)(8), and 33-24-59.5(b)(1). Failure to comply with these specific time requirements subjects an insurer to pay interest at 12% per annum on proceeds due. O.C.G.A. §§ 33-30-6(b)(5), 33-24-59.5(c) and 33-29-3(b)(8). An insurer’s absolute refusal to pay benefits

within the time required, waives appreciation of these policy provisions. *Metropolitan Life Ins. v. Jackson*, 79 Ga. App. 263, 53 S.E.2d 378 (1949). When a policy provides for notice of an injury, and oral notice is given, the question of whether an insurer by its course of conduct waived its right to deny benefits is a question of fact when conflicting evidence is presented. *Browder v. Aetna Life Ins.*, 126 Ga. App. 140, 190 S.E.2d 110 (1972).

When an accidental death policy excludes coverage from death resulting from an insured's commission of a felony, the felonious activity must have a causal connection with death in order for the exclusion to be operative. *Liberty Nat'l Life Ins. v. Morris*, 132 Ga. App. 631, 208 S.E.2d 637 (1974).

Disease and bodily infirmity exclusion. Embolus in coronary artery dislodged in accident is sufficient to preclude coverage under a policy relieving an insurer of liability if the death is due wholly or in part to a pre-existing disease or bodily infirmity. *Interstate Life & Acc. Ins. v. Upshaw*, 134 Ga. App. 394, 214 S.E.2d 675 (1975). The burden of proving that a loss is not within a disease or bodily infirmity exclusion rests on the insured. *Life Ins. Co. of Virginia v. McDaniel*, 141 Ga. App. 746, 234 S.E.2d 379 (1977).

When a pre-existing medical condition contributes to an insured's disability, a policy excluding coverage for loss contributed to directly or indirectly by a disease or bodily infirmity does not require pre-existing conditions for the pre-existing condition exclusion applies even where the pre-existing condition does not make a "substantial" contribution to death. *Colonial Life & Acc. Ins. v. McClain*, 144 Ga. App. 201, 240 S.E.2d 759 (1977).

### ACCIDENTAL MEANS

Certain types of insurance policies provide coverage for death or injuries caused by an "accident" or by "accidental means." While the terms seem similar, they are, in fact, very different. Georgia law distinguishes "accidental injuries" from "injuries resulting from accidental means" for the purpose of determining coverage under an insurance policy. "An accidental injury is an injury that is unexpected but may arise from a conscious voluntary act." In contrast, an injury from an accidental means is one that is the unexpected result of an unforeseen or unexpected act that was involuntarily or unintentionally done. *Provident Life & Accident Ins. Co. v. Hallum*, 276 Ga. 147, 576 S.E.2d 849 (2003). In general, policies addressing "accidental injuries" focus on whether the injury was accidental, while policies addressing "injuries from accidental means" focus on whether the cause of the injury was accidental.

It is incumbent upon the party seeking coverage to affirmatively define the cause of the injury or death in a manner consistent with the language in the insurance policy. Where an accident policy insured against loss "from bodily injuries effected solely through external, violent and accidental means," it is incumbent upon a party seeking coverage to show that, the act, which preceded the injury alleged to have caused his death, was something "unforeseen, unexpected, or unusual..." *Johnson v. Aetna Life Insurance Co.*, 24 Ga. App. 431, 432, 101 S.E. 134, 134 (1919).

Courts will review the specific language of an insurance policy to determine if the facts support coverage under the policy. For example, the Georgia Court of Appeals determined that the accidental injection of a fatal dosage of penicillin into a patient with a hypersensitivity to penicillin was deemed to be an "accident", but was not a death caused by "accidental means." There were several policies of insurance at issue, each containing different language. The court determined there was no coverage under the policy which required injury or death by "accidental means," but that there was coverage under the policy which required injury or death "which was effected accidentally and through external and violent means." *Johnson v. National Life & Cas. Ins. Co.*, 92 Ga. App. 818, 819, 90 S.E.2d 36 (1955).

In another case, the court determined that a person who unexpectedly suffers from carpal tunnel syndrome brought on by years of intentional repetitive hand motions that renders him disabled has suffered an "injury" when the term "injuries" is defined as "accidental bodily injuries occurring while your policy is in force." *Provident Life & Acc. Ins. Co. v. Hallum*, 276 Ga. 147, 147 576 S.E.2d 849, 850 (2003). Therefore, the existence of coverage depends on the specific language in a policy.

In *Amer. Empire v. Hathaway*, 288 Ga. 749, 707 S.E.2d 369 (2011), the Georgia Supreme Court held that negligently-installed plumbing which damaged other parts of a construction project could be an "accident" (and therefore a covered "occurrence" under contractor's GCL policy) even though the faulty plumbing was intentionally installed. Citing a "trend in a growing number of jurisdictions," the court held that an accident "can arise where faulty workmanship causes unforeseen or unexpected damage to other property," because a negligently-performed deliberate act "is an accident if the effect is not the intended or expected result . . ." *Id.* at 371, 372 citing *Lamar v. Mid-Continent Cas. Co.*, 242 S.W.3d 1, 16 (Tex. 2007)

When a party seeks recovery under an accident policy, there is no legal presumption that death was accidental. Plaintiff must show facts pointing to death by accidental means, that is, he must show that something

unforeseen, unexpected or unusual happened. *Continental Assur. Co. v. Rothell*, 227 Ga. 258, 181 S.E.2d 283 (1971).

Under Georgia law, in order to constitute “accidental means” it is sufficient to show that an act is unforeseen, unexpected, and unusual. *Lee v. Fidelity & Cas.*, 567 F.2d 1340 (1978). For example, when an insured hospital patient was found dead on the floor beside his bed with an injured big toe which bled considerably, but evidence showed that the immediate cause of death was heart failure, a jury question was presented about whether the heart attack was precipitated by an accident within the terms of an accident insurance policy. *Halligan v. Underwriters at Lloyd’s London*, 102 Ga. App. 905, 118 S.E.2d 107 (1960).

Recovery may not be had under an “accidental means” policy provision for an injury caused by intentional conduct, unless “something unforeseen occurs in the doing of the [intentional] act . . .” *Capone v. Aetna*, 592 F.3d 1189, 1198 (11<sup>th</sup> Cir. 2010). For example, where insured intentionally and voluntarily drank alcohol that caused his death and there was no contention that some mischance, slip or mishap occurred to cause him to consume more than he intended, such conduct was not within coverage under an “accidental means” policy, though the fatal result was unexpected. *Laney v. Continental Ins. Co.*, 757 F.2d 1190 (11<sup>th</sup> Cir. 1985). However, where intoxicated insured was paralyzed after intentionally diving off boat dock and striking his head on ocean bottom, there was coverage under “accidental means” policy provision because insured had made previous dives without injury and the water suddenly and unexpectedly became shallower due to wave or tidal activity. *Capone v. Aetna*, 592 F.3d at 1198.

Strain while pushing boat in water causing rupture of blood vessel in stomach, resulting in death, held not by “accidental means.” *Fulton v. Metropolitan Cas. Ins.*, 19 Ga. App. 127, 91 S.E. 228 (1916).

Death from drug overdose not “death by accidental means” within coverage of policy. *Jackson v. National Life & Acc. Ins.*, 130 Ga. App. 208, 208, 202 S.E.2d 711, 711 (1973).

Death resulting from sunstroke while performing ordinary duties of locomotive fireman not caused by “accidental means.” *Continental Cas. Co. v. Pittman*, 145 Ga. 641, 89 S.E. 716 (1916).

Death or injury by external and violent means (following assault) is presumed to be accident when the issue is whether it was due to an accident or to some cause excepted by a policy. *New York Life Ins. v. Jennings*, 61 Ga. App. 557, 6 S.E.2d 431 (1939); *Interstate Life & Acc. Ins. v. Wilmont*, 123 Ga. App. 337, 180 S.E.2d 913

(1971); *Security Life Ins. Co. v. Blich*, 155 Ga. App. 167, 270 S.E.2d 349 (1980). However, when an insured was stabbed, being mistaken for another, the policy beneficiary must show that the injury causing death was unforeseen and not the result of misconduct or provocation of the insured before he can recover on an accident policy. *Travelers Ins. Co. of Hartford v. Newsome*, 147 Ga. 608, 95 S.E. 4 (1918).

Cases involving an allegation of injury caused by “external, violent and accidental means” will be determined on the specific facts of each case. For example:

An eye infection caused by common towel usage was not effected by “external and violent means.” *Prudential Ins. Co. of Am. v. Herndon*, 40 Ga. App. 692, 694, 151 S.E. 399, 399 (1929).

Death by choking on partially digested food was within coverage of life insurance policy providing double indemnity for death by “external, violent and accidental means.” *Life Ins. Co. Of Ga. v. Thomas*, 133 Ga. App. 134, 134, 210 S.E.2d 250, 250 (1974).

Statement that the cause of death was a self-inflicted gunshot wound does not necessarily mean that person intentionally took his life. *Schneider v. Metropolitan Life Ins. Co.*, 62 Ga. App. 148, 7 S.E.2d 772 (1940).

When an insured is innocent of aggression or wrongdoing and is killed in an encounter with another, his death is considered accidental. Even where the insured is the aggressor, if he could not have reasonably anticipated bodily injury resulting in death to himself at the hands of another, the beneficiary may recover. *Riggins v. Equitable Life Assur. Soc’y of the U.S.*, 64 Ga. App. 834, 14 S.E.2d 182 (1941). However, when an insured acts as an aggressor, attacking with a lethal weapon, and is subsequently killed in an ensuing struggle, death is not caused by an accident. *Carolina Life Ins. v. Young*, 99 Ga. App. 848, 110 S.E.2d 67 (1959). There must be some causative connection between the insured’s felonious activity and his death or injury when considering an exclusion due to the commission of a felony. *Liberty Nat’l Life Ins. Co. v. Morris*, 132 Ga. App. 631, 208 S.E.2d 637 (1974); *Chattanooga-Hamilton County Hosp. Auth. v. Alliant Health Plans, Inc.*, 2004 U.S. Dist. LEXIS 27700 (E.D. Tenn. 2004).

## ADJUSTERS

An *Adjuster* is “any individual who for a fee, commission, salary or other compensation investigates, settles, or adjusts and reports to his or her employer or principal with respect to claims arising under insurance contracts on behalf of the insurer or the insured or a person who directly supervises or manages such individ-

ual.” O.C.G.A. § 33-23-1(a)(1). An adjuster must be properly licensed by the state. O.C.G.A. §§ 33-23-4, 33-23-5, 33-23-6, and 33-23-8.

The term “adjuster” does not include: 1) “[i]ndividuals who adjust claims arising under contracts of life or marine insurance or annuities.” O.C.G.A. § 33-23-1(a)(1)(A); 2) “agent or a salaried employee of an agent or a salaried employee of an insurer who adjusts or assists in adjusting losses under policies issued by such agent or insurer.” O.C.G.A. § 33-23-1(a)(1)(B); 3) “attorney at law admitted to practice in this state, when handling the collections of premiums or advising clients as to insurance as a function incidental to the practice of law or who, from time to time, adjusts losses which are incidental to the practice of his or her profession.” O.C.G.A. § 33-23-1(b)(1); 4) “[a]ny representative of ocean marine insurers.” O.C.G.A. § 33-23-1(b)(2); 5) “[a]ny representative of farmers’ mutual fire insurance companies as defined in Chapter 16 of this title.” O.C.G.A. § 33-23-1(b)(3); 6) “[a] salaried employee of a credit or character reporting firm or agency not engaged in the insurance business who may, however, report to an insurer.” O.C.G.A. § 33-23-1(b)(4); 7) “[a] person acting for or as a collection agency.” O.C.G.A. § 33-23-1(b)(5); 8) “[a] person who makes the salary deductions of premiums for employees or, under a group insurance plan, a person who serves the master policyholder of group insurance in administering the details of such insurance for the employees or debtors of the master policyholder or of a firm or corporation by which the person is employed and who does not receive insurance commissions for such service; provided, further, that an administration fee not exceeding 5 percent of the premiums collected paid by the insurer to the administration office shall not be construed to be an insurance commission.” O.C.G.A. § 33-23-1(b)(6); and, 9) “[p]ersons exempted from licensure as provided by subsection (h) of Code Section 33-23-4.” O.C.G.A. § 33-23-1(b)(7).

An *Independent Adjuster* is “an adjuster representing the interests of the insurer who is not an employee of such insurer.” O.C.G.A. § 33-23-1(a)(8).

A *Public Adjuster* is “any person who solicits, advertises for, or otherwise agrees to represent only a person who is insured under a policy covering fire, windstorm, water damages, and other physical damage to real and personal property other than vehicles licensed for the road, and any such representation shall be limited to the settlement of a claim or claims under the policy for damages to real and personal property, including related loss of income and living expense losses but excluding claims arising out of any motor vehicle accident.” O.C.G.A. § 33-23-1(a)(13). In addition to other applicable provisions of this chapter, an applicant for a public

adjuster’s license must have previously filed a bond as required by rule or regulation of the Insurance Commissioner. O.C.G.A. § 33-23-6.

Agents acting as adjusters and non-resident adjusters: “On behalf of and as authorized by an insurer for which he or she is licensed as an agent, an agent may from time to time act as an adjuster and investigate and report upon claims without being required to be licensed as an adjuster.” O.C.G.A. § 33-23-29(a).

Further, no license by this state shall be required: 1) “Of a nonresident independent adjuster for the adjustment in this state of a single loss or of losses arising out of a catastrophe common to all such losses; or 2) Of a nonresident adjuster who regularly adjusts in another state and who is licensed in such other state, if such state requires a license, to act as adjuster in this state for emergency insurance adjustment work for a period not exceeding 60 days and performed for an employer who is an insurance adjuster licensed by this state or who is a regular employer of one or more insurance adjusters licensed by this state, provided that the employer shall furnish to the Commissioner a notice in writing immediately upon the beginning of the emergency insurance adjustment work.” O.C.G.A. § 33-23-29(b).

“An individual residing in another state may be licensed by the Commissioner as a nonresident adjuster under the following circumstances and in the following manner: 1) Upon written application and payment of the required license fee and without requiring a written examination, the Commissioner shall issue a license to an individual to act as a nonresident adjuster if the individual is licensed in his or her home state as an adjuster; 2) The required fee for the license shall be the fee provided by law or the sum which is charged as a license fee for nonresident adjusters by the state of the applicant’s residence, whichever is greater; and 3) Applicants whose home state does not require a license to transact business may be licensed in this state, provided that the applicant takes the examination issued by the Commissioner where required pursuant to this chapter and the applicant submits written documentation from such applicant’s resident state demonstrating the lack of licensing requirements in such state and such state’s reciprocity with residents of this state.” O.C.G.A. § 33-23-29(c).

“The Commissioner shall issue a license to an individual to act as a nonresident adjuster if, by the laws of the state of the applicant’s residence, residents of this state may be licensed as nonresident adjusters in the same manner.” O.C.G.A. § 33-23-29(d).

“The Commissioner is authorized to enter into reciprocal agreements with the appropriate official of any



other jurisdiction for the purpose of implementing this Code section.” O.C.G.A. § 33-23-29(e).

Regulation of Adjusters. “An adjuster licensed as both an independent and a public adjuster shall not represent both the insurer and the insured in the same transaction.” O.C.G.A. § 33-23-43(a).

“An adjuster shall have authority under his or her license only to investigate, settle, or adjust and report to his or her principal upon claims arising under insurance contracts on behalf of insurers only if licensed as an independent adjuster or on behalf of insureds only if licensed as a public adjuster.” O.C.G.A. § 33-23-43(b).

“No public adjuster, at any time, shall knowingly:  
 1) Suggest or advise the employment of or name for employment a specific attorney or attorneys to represent a person in any matter relating to a person’s potential claims, including any motor vehicle accident claims for personal injury, loss of consortium, property damages, or other special damages; 2) Accept or agree to accept any money or other compensation from an attorney or any person acting on behalf of an attorney which the adjusters knows or should reasonably know is payment for the suggestion or advice by the adjuster to seek the services of the attorney or for the referral of any portion of a person’s claim to the attorney; or 3) Hire or procure another to do any act prohibited by this subsection.” O.C.G.A. § 33-23-43(c).

“For purposes of subsection (c) of this Code section, the term ‘public adjuster’ shall include licensed public adjusters as defined by Code Section 33-23-1 and persons representing themselves to be public adjusters who are not properly licensed by the Commissioner.” O.C.G.A. § 33-23-43(d).

“Any person who violates any provision of subsection (c) of this Code section shall be guilty of a misdemeanor and such violation shall be grounds for suspension or revocation of licenses under this chapter.” O.C.G.A. § 33-23-43(e).

**AGE**

See “AUTOMOBILES,” LIABILITY INSURANCE,” and “NEGLIGENCE.”

Age of Majority. Generally, the age of majority is 18 years of age. Until this age, all person are considered minors. O.C.G.A. § 39-1-1(a).

Age of Consent. Generally, the age of consent is 16 years of age. O.C.G.A. § 16-6-3.

Alcohol. In order to purchase or possess alcohol, a person must be 21 years of age. O.C.G.A. § 3-3-23.1.

Contracts. “Generally the contract of a minor is voidable. If in a contractual transaction a minor receives property or other valuable consideration and, after arrival at the age of majority, retains possession of such property or continues to enjoy the benefit of such other valuable consideration, the minor shall have thereby ratified or affirmed the contract and it shall be binding on him. Such contractual transaction shall also be binding upon any minor who becomes emancipated by operation of law or pursuant to Article 6 of Chapter 11 of Title 15.” O.C.G.A. § 13-3-20(a).

Criminal Law. “A person shall not be considered or found guilty of a crime unless he has attained the age of 13 years at the time of the act, omission, or negligence constituting the crime.” O.C.G.A. § 16-3-1.

Discrimination. It is unlawful for an employer to discriminate on the basis of a person’s age. O.C.G.A. § 45-19-29.

Driver’s License. Generally, in order to become a licensed driver, a person must be 16 years of age. In order to obtain a “learner’s permit,” a person must be 15 years of age. However, issues such as the type of license and prior convictions can affect this general rule. See, O.C.G.A. § 40-5-22.

Insurance. Generally, in order to contract for insurance, a person must be 15 years of age. O.C.G.A. § 33-24-5.

Marriage. Generally, in order to contract a marriage, a person must be 18 years of age. O.C.G.A. § 19-3-2.

Right to Vote. Generally, in order to become a registered voter, a person must be 18 years of age. GA. CONST. art. 2, § 1, para. II.

Torts. “Infancy is no defense to a tort action so long as the defendant has reached the age of discretion and accountability prescribed by Code Section 16-3-1 (above) for criminal offenses.” O.C.G.A. § 51-11-6.

Will. Generally, in order to make a valid will, a person must be 14 years of age. O.C.G.A. § 53-4-10.

**AGENTS AND BROKERS**

Statutory Definition of Agent. “An individual appointed or employed by an insurer who sells, solicits or negotiates insurance.” O.C.G.A. § 33-23-1(a)(3). An agent also means an individual insurance producer. O.C.G.A. § 33-23-1(a)(3). The term, with exceptions, also includes subagents. O.C.G.A. § 33-23-1(a)(16). Although the Georgia legislature repealed the legal status of insurance broker in 1992, the courts have determined that a broker is an independent agent and represents the



insured not the insurer. *Kirby v. Northwestern Nat'l*, 213 Ga. App. 673, 445 S.E.2d 791 (1994).

A person who solicits policies, conducts negotiations leading up to the issuance of an insurance contract and delivers the policy is, as to a particular policy, a general agent of the insurance company. *Progressive Life v. James*, 62 Ga. App. 387, 8 S.E.2d 91 (1940).

An agent may act for both the insurer and insured if they consent to such dual agency. Further, dual agency does not in and of itself relieve the agent of responsibility to either of the principals. *Home Materials v. Auto Owners Ins. Co.*, 250 Ga. 599, 300 S.E.2d 139 (1983); *Byrne v. Reardon*, 196 Ga. App. 735, 397 S.E.2d 22 (1990) (a fiduciary relationship may arise between an otherwise independent insurance agency and an insurer when the insurance agency customarily accepts premiums and claims on the insurer's behalf; a duty upon the insurance agency to forward notice of suits could arise if the insurance agency, through the custom, had also received at least some limited authority to receive such notice). It is possible that "[a] mistake made by a dual agent [will] be attributed to both parties." *Am. Mfrs. Mut. Ins. Co. v. E A Technical Servs., Inc.*, 270 Ga. App. 883, 885 S.E.2d 275, 277 (2004).

An independent insurance agent upon whom an insured relies to select an insurer is the agent of insured. *European Bakers, Ltd. v. Holman*, 177 Ga. App. 172, 338 S.E.2d 702 (1985). In Georgia, although it is possible for an insurance broker to be a "dual agent," insurance brokers are normally "agents for insureds and not insurers." *Hartford Cas. Ins. Co. v. Bankers Note, Inc.*, 817 F. Supp. 1567, 1572 (N.D. Ga. 1993); *Kirby v. Northwestern*, 213 Ga. App. 673, 445 S.E.2d 791 (1994). Even when an insurance broker does not act as a dual agent for both insurer and insured, one of the principals may not hold the other liable for the tortious acts of an agent where the other principal does not directly engage in tortious conduct. *Id.* Generally, one engaged in selling insurance is the legal agent of the insurer when the agent is granted authority by the insurer to bind coverage. *WMH, Inc. v. Thomas*, 195 Ga. App. 61, 392 S.E.2d 539, *aff'd in part, rev'd in part*, 260 Ga. 654, 398 S.E.2d 196, *on remand*, 199 Ga. App. 465, 405 S.E.2d 768 (1990).

While an independent insurance agent or broker is normally considered the agent of the insured, it can also, depending on the specific facts of each case, be a dual agent for both the insurer and the insured. *Bowen Tree Surgeons, Inc. v. Canal Indem. Co.*, 264 Ga. App. 520, 591 S.E.2d 415 (2003). Likewise, evidence that the independent insurance agent customarily accepted premiums and notices of claims on behalf of the liability insurer, and where the insurer never voiced any objection

to this custom, may raise a question of fact precluding summary judgment as to whether the agent acted as an agent of the insurer such that the agent's notice of the lawsuit could be attributed to the insurer as the principal. *Id.*

Liability for agent. When an agency is dual by its principals' consent, neither principal is civilly liable to the other in tort for acts of dual agent unless there is collusion or direct participation in that conduct by one of the principals. *Hartford Cas. Ins. Co. v. Bankers Note, Inc.*, 817 F. Supp. 1567 (N.D. 1993); *Hodges v. Mayes*, 240 Ga. 643, 242 S.E.2d 160 (1978). However, when an action is in contract, equity will not relieve a principal of responsibility for misrepresentations of the dual agent upon which other principals relied. *Home Materials, Inc. v. Auto Owners Ins. Co.*, 250 Ga. 599, 300 S.E.2d 139 (1983). Liability may also be imposed for contracts made by one with apparent authority acting on behalf of a principal with third persons. *Vickery v. Chambers*, 215 Ga. App. 48, 449 S.E.2d 885 (1994).

Insurance agency and insurance agent were liable to an insurer for compensatory damages where the agent and agency failed to timely forward an insured's complaints, resulting in the insurer settling lawsuits after they were in default where evidence was presented that the agency collected premium payments from the insured, issued a notice of policy expiration and prepared accident reports, and therefore, the agency owed a duty to insurer to use reasonable care to forward suit papers from an insured in a timely manner. *Byrne v. Reardon*, 196 Ga. App. 735, 397 S.E.2d 22 (1990).

An insurance company is not bound by a local agent's oral assurances that applicant was insured from the application date. *Karp v. Western Life*, 182 Ga. App. 693, 356 S.E.2d 893 (1987). Agent's opinion as to coverage does not work estoppel, even against the agent who voiced it or against his principal. *Id.*; *Marett Properties, Inc. v. Prudential Ins.*, 167 Ga. App. 631, 307 S.E.2d 69 (1963).

When an application does not limit an agent's authority to waive false answers, actual knowledge of an insurer's agent in regard to false statements of an insured on his application will be imputed to the insurer and will estop insurer from asserting defense of misrepresentation. *Patriot General Ins. Co. v. Millis*, 233 Ga. App. 867, 506 S.E.2d 145 (1998); *Jones v. United Ins. Co.*, 177 Ga. App. 102, 338 S.E.2d 532 (1985); *Jennings v. Life Ins. Co. of Ga.*, 212 Ga. App. 140, 441 S.E.2d 479 (1994); *Allstate v. Anderson*, 121 Ga. App. 582, 174 S.E.2d 591 (1970); *Chester v. State Farm Mut. Auto*, 121 Ga. App. 599, 174 S.E.2d 582 (1970); *James, Hereford, McClelland, Inc. v. Powell*, 198 Ga. App. 604, 402 S.E.2d 348 (1991). *But see Burkholder v. Ford Life Ins.*,

207 Ga. App. 908, 429 S.E.2d 344 (1993), wherein the court affirmed summary judgment to the insurer based upon material misrepresentations on his insurance application. In that case, the insured had heart disease, had suffered a heart attack and stroke, and was being treated for lung cancer, yet signed a statement indicating he was in good health. The insurer presented uncontroverted evidence that it would not have issued policy had it known about the illness, and there was no evidence agent had actual or specific knowledge of the illness. *Burkholder*, 207 Ga. App. at 908-09.

The insurer was not liable in tort to the insured for any negligence or wrongdoing on the part of the independent insurance broker where the broker was an agent for both the insurer and insured, insurer was not aware of any preliminary discussions between the insured and the broker regarding coverage to be procured, and that the insurer was not otherwise complicit with the broker with respect to any misrepresentations he may have made regarding the extent of coverage. *Canal Ins. Co. v. Harrison*, 189 Ga. App. 681, 376 S.E.2d 923, cert. denied, (1988). The insurer was not contractually liable to the insured for any misrepresentations made by the independent insurance broker regarding the extent of coverage where the broker had no actual or apparent authority to contract with the insured on the insurer's behalf. *Id.*

Once the group policy has been issued, the master policyholder under a group insurance plan covering employees is an agent of the insurance company for every purpose necessary to make effective the group policy, and the insurance company has imputed to it knowledge of facts which the master policyholder knows. *Dawes Mining Co. v. Callahan*, 246 Ga. 531, 272 S.E.2d 267 (1980).

Fraud of Agent. An insured is obligated to examine an insurance policy and to reject it if it does not furnish the desired coverage. *Canales v. Wilson Southland Ins. Agency*, 261 Ga. App. 529, 583 S.E.2d 203 (2003). Likewise, a party to a contract - including an insurance contract - must read the contract. Fraud excuses the duty to read only if it is such fraud as would prevent the party from reading the contract. *Id.* This rule is based on the commonsense principle that one cannot claim to be defrauded about a matter equally open to the observation of all parties where no special relationship of trust or confidence exists. *Id.* This rule does not apply when the agent has held himself out as an expert and the insured has reasonably relied on the agent's expertise to identify and procure the correct type or amount of insurance, or the evidence reflects a special relationship of trust or other unusual circumstances which would have prevented or excused the insured of his duty to exercise ordinary diligence. *Id.*; *Heard v. Sexton*, 243 Ga. App.

462, 532 S.E.2d 156 (2000). Moreover, fraud of an agent is waived when the insured seeks recovery of the benefits provided for in the policy. *National Old Line Ins. Co. v. Lane*, 172 Ga. App. 519, 323 S.E.2d 707 (1984); *Curry v. Washington Nat.*, 56 Ga. App. 809, 194 S.E. 825 (1937).

Liability of Agent. O.C.G.A. § 33-23-41 provides that agents who procure insurance contracts for insurers not authorized to do business in this state shall be personally liable "to the same extent as the insurer upon every contract of insurance made by the insurer with reference to a risk having a situs in this state, if the violator participated in the solicitation, negotiation, or making of the contract or in any endorsement to the contract, in any modification of the contract, or in the collection or forwarding of any premium or portion of the premium relating to such contract." And such persons "shall pay a sum equal to the state, county, and municipal taxes and license fees required to be paid by the insurance companies legally doing business in this state." Both agents and brokers are liable to the insured for negligently failing to procure the required coverage. See *Georgia Farm Bureau Mut. Ins. Co. v. Arnold*, 175 Ga. App. 850, 334 S.E.2d 733 (1985). See also *Clark v. Tile Technology*, 217 Ga. App. 809, 459 S.E.2d 450 (1995). The potential liability of a broker is limited to the terms of the insurance policy the broker negligently failed to procure. "One [who] undertakes to procure insurance for another and is guilty of ... negligence in his undertaking... is liable for loss or damage to the limit of the agreed policy." *J. Smith Lanier & Co. v. Southeastern Forge, Inc.*, 280 Ga. 508, 509, 630 S.E.2d 404, 406 (2006) (emphasis in original) (quoting *Beiter v. Decatur Fed. Savings &c.*, 222 Ga. 516, 518, 150 S.E.2d 687 (1966)). An agent of the insurer is not personally liable to the insured for failure to attach a rider to a fire insurance policy when the agent had contracted on behalf of the insurer only and not on his own behalf. *Fields v. Goldstein*, 97 Ga. App. 286, 102 S.E.2d 921, aff'd, 214 Ga. 277, 104 S.E.2d 337 (1958).

License and Regulations. The Official Code of Georgia Annotated provides licensing procedures and prescribes extensive regulations governing the activities of insurance companies and agencies. "Any individual who sells, solicits, or negotiates insurance in this state must be licensed as an agent," and "[a]ny business entity that sells, solicits, or negotiates insurance in this state must be licensed as an agency." O.C.G.A. § 33-23-4(a)(2), (3). Only one duly licensed as an agent or agency may pay commissions or valuable consideration to another for services as an agent, subagent, adjuster, or counselor, and that person should also be duly licensed as an agent or subagent. O.C.G.A. § 33-23-4(b)-(d). Applicants for licenses must submit to a written examina-

tion. O.C.G.A. §§ 33-23-5(a)(5), and 33-23-10(a). Individual applicants need not take any written examination, provided that: (a) An individual who applies for an insurance agent's license in this state who was previously licensed for the same lines of authority in another state shall not be required to complete any pre-licensing education or examination. This exemption [is] only available if the individual is currently licensed in the state or if the application is received within 90 days of the cancellation of the applicant's previous license and if the prior state issues a certification that, at the time of cancellation, the applicant was in good standing in that state or the state's producer database records maintained by the National Association of Insurance Commissioners, its affiliates, or subsidiaries indicate that the agent is or was licensed in good standing for the line of authority requested; and (b) An individual licensed as an insurance agent in another state who moves to this state shall make application within 90 days of establishing legal residence to become a resident licensee pursuant to Code Section 33-23-8. No pre-licensing education or examinations shall be required of that individual to obtain for any line of authority previously held in the prior state except where the Commissioner determines otherwise by rule or regulation. O.C.G.A. § 33-23-5(a),(b). The Georgia Insurance Commissioner is given extensive power in promulgation of rules and regulations governing insurance business. O.C.G.A. § 33-2-9.

Licensure of a life insurance agent must be proven to exist both at the time services were rendered and at the time recovery is sought. *See Management Comp. Group/Southeast, Inc. v. United Security Empl. Programs, Inc.*, 194 Ga. App. 99, 389 S.E.2d 525 (1989). Contracts made in violation of the statutes regulating life insurance agents are void and unenforceable and will bar any recovery on the basis of a contractual claim. *Id.*

**ARBITRATION**

Generally. Permitted and governed by the Georgia Arbitration Code (GAC), O.C.G.A. Title 9, Chapter 9, §§ 1-84. The GAC provides the exclusive means by which an arbitration agreement will be enforced. *Greene v. Hundley*, 266 Ga. 592, 595-596, 468 S.E.2d 350 (1996); *Henderson v. Millner Developments, LLC*, 259 Ga. App. 709, 578 S.E.2d 289 (2003). An arbitration award applied for by a party within one year after its delivery to that party must be affirmed unless it is vacated or modified as provided in the Code. O.C.G.A. § 9-9-12. The GAC demands that courts give extraordinary deference to the arbitration process and awards so that the trial court cannot alter the award. *Scana Energy Marketing, Inc. v. Cobb Energy Mgmt. Corp.*, 259 Ga. App. 216, 576 S.E.2d 548 (2002). Therefore, unless prejudice is shown and one of the statutory grounds for

vacating or modifying an award is established, the Code requires a trial court to affirm an arbitration award. *Henderson v. Millner Developments, LLC*, 259 Ga. App. 709, 578 S.E.2d 289 (2003); *Sweatt v. Intl. Dev. Corp.*, 242 Ga. App. 753, 754-755, 531 S.E.2d 192 (2000); *see also* O.C.G.A. Title 9, Chapter 9, §§ 11, 13.

Setting Aside an Arbitration Award. An arbitration award cannot be set aside for mistakes of fact or inadvertent mistakes of law made by the arbitrators. *Scana Energy Marketing, Inc. v. Cobb Energy Mgmt. Corp.*, 259 Ga. App. 216, 576 S.E.2d 548 (2002); *ABCO Builders, Inc. v. Progressive Plumbing, Inc.*, 282 Ga. 308, 647 S.E.2d 574 (2007). An award may only be set aside for violation of one or more of the statutory grounds because these are the exclusive grounds to vacate all or part of an arbitration award: “(1) Corruption, fraud, or misconduct in procuring the award; (2) Partiality of an arbitrator appointed as a neutral; (3) An overstepping by the arbitrators of their authority or such imperfect execution of it that a final and definite award upon the subject matter submitted was not made; (4) A failure to follow the procedure of this part, unless the party applying to vacate the award continued with the arbitration with notice of this failure and without objection; [and] (5) The arbitrator's manifest disregard of the law.” O.C.G.A. § 9-9-13(b). Arbitrators that incorrectly interpret the law have not manifestly disregarded the law – to manifestly disregard the law, one must be conscious of the law and deliberately ignore it. *ABCO Builders, Inc. v. Progressive Plumbing, Inc.*, 282 Ga. 308, 647 S.E.2d 574 (2007). Review must be confined to the statutory grounds because the GAC is in derogation of the common law and must therefore be strictly construed. *Scana Energy Marketing, Inc. v. Cobb Energy Mgmt. Corp.*, 259 Ga. App. 216, 576 S.E.2d 548 (2002).

Arbitrability. Generally, arbitration is a matter of contract and a party cannot be required to submit to an arbitration any dispute which he has not agreed to submit. *AT&T Technologies v. Communications Workers of Am.*, 475 U.S. 643, 648, 106 S. Ct. 1415 (1986). However, when a nonignatory to the arbitration contract asserts a claim that presumes the existence of a contract containing an arbitration provision or is so intertwined with a signatory's claim, the nonsignatory may be compelled to arbitration and is estopped from avoiding the same. *Helms v. Franklin*, 305 Ga. App. 863, 700 S.E.2d 609 (2010). An arbitration agreement between a contractor and subcontractor is binding on parties and controlled by provisions of the Georgia Arbitration Code. *Bishop v. Center*, 213 Ga. App. 804, 445 S.E.2d 780 (1994); *see also* O.C.G.A. § 9-9-2(c). But insurance contracts are not subject to the Georgia Arbitration Code, although arbitration clauses or provisions in a contract between insurance companies are subject to the Code. O.C.G.A.



§ 9-9-2(c)(3). Arbitration is limited to agreed issues set out in a contract. *Goodrich v. Southland*, 214 Ga. App. 790, 449 S.E.2d 154 (1994). The question of arbitrability, *i.e.*, whether an agreement creates a duty for the parties to arbitrate the particular grievance, is an issue for judicial determination. *Id.*; *Galindo v. Lanier Worldwide*, 241 Ga. App. 78, 83, 526 S.E.2d 141 (1999). An injunction against arbitration is appropriate only where an asserted claim “clearly falls outside of the substantive scope of the agreement.” *Hornor, Townsend & Kent, Inc. v. Hamilton*, 218 F. Supp. 2d 1369, 1374 (N.D. Ga. 2002). The GAC grants a superior court authority to entertain an application for a preliminary injunction “only upon the ground that the award to which the applicant may be entitled may be rendered ineffectual without such provisional relief.” O.C.G.A. § 9-9-4(e). Likewise, the GAC further provides that “the court shall not consider whether the claim with respect to which arbitration is sought is tenable nor otherwise pass upon the merits of the dispute.” O.C.G.A. § 9-9-4 (d). Courts cannot inquire into the merits of an arbitrable controversy, but must confine their review to the statutory grounds. *Hornor, Townsend & Kent, Inc. v. Hamilton*, 218 F. Supp. 2d 1369, 1374 (N.D. Ga. 2002); *Ralston v. City of Dahlo-nega*, 236 Ga. App. 386, 387, 512 S.E.2d 300 (1999). When the parties to a contract have agreed to submit all their disputes and other matters relating to the contract to the arbitrator, the function of the court is very limited; it is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract. *Yates Paving & Grading Co. v. Bryan County*, 265 Ga. App. 578, 594 S.E.2d 756 (2004). Whether the party is right or wrong is a question of contract interpretation for the arbitrator. *Id.* Any dispute between the parties to the contract as to the meaning, interpretation, and application of the agreement is for the arbitrator. *Id.*

**Form of Award.** O.C.G.A. § 9-9-10(a) provides in part that the arbitration award “shall be in writing and signed by the arbitrators joining in the award.” There is no mandate that the award include specific findings or reasons, or that it expressly address each and every issue and collateral issue arising in an arbitration. *Marchel-letta v. Seay Constr. Servs., Inc.*, 265 Ga. App. 23, 583 S.E.2d 64 (2004).

**Waiver.** An agreement to arbitrate is waived by any action of a party which is inconsistent with the right of arbitration. *JOJA Partners, LLC v. Abrams Props., Inc.*, 262 Ga. App. 209, 585 S.E.2d 168 (2003). In those cases where a waiver was held to have occurred, the party seeking to rely upon an arbitration clause did not promptly invoke or seek to enforce the clause. *Id.*; *Tillman Group v. Keith*, 201 Ga. App. 680, 411 S.E.2d 794 (1991); *Nat’l Parents’ Resource v. Peachtree Hotel*

*Co.*, 201 Ga. App. 637, 411 S.E.2d 884 (1991). The considerations that apply to waiving the right to arbitration also apply to waiving the right to stay arbitration – a party waives its right to litigate by taking action inconsistent to that right and participating in the arbitration process. *Atlantic Station, LLC v. Vratsinas Constr. Co.*, 307 Ga. App. 398, 705 S.E. 2d 191 (2010).

**Preemption.** State arbitration law, due to preemption by the federal arbitration code when interstate commerce is involved, will never be applicable where one party is not from Georgia. *Tampa Motel v. Stratton*, 186 Ga. App. 135, 366 S.E.2d 804 (1988); *Ceco Concrete v. J.T. Schrimsher*, 792 F. Supp. 109 (N.D. Ga. 1992).

**Expenses.** The expenses of arbitration other than attorney’s fees are controlled by the arbitration award. O.C.G.A. § 9-9-17; *Hope & Assoc., Inc. v. Marvin M. Black Co.*, 205 Ga. App. 561, 422 S.E.2d 918 (1992).

**Discovery.** Parties to arbitration “may obtain discovery in the same manner as provided by law for discovery in civil cases in the superior courts.” O.C.G.A. § 9-9-72.

**Appeal.** Either party to the dispute may, within 30 days from the date the findings are entered, appeal from the arbitration award to the superior court of the county in which the arbitration was authorized. O.C.G.A. § 9-9-80(a).

**Not Applicable to Medical-Malpractice Claims.** The GAC does not apply to agreements relating to arbitration of medical malpractice claims. O.C.G.A. § 9-9-2(c)(1). Parties to medical malpractice claims may submit the claim for arbitration in accordance with O.C.G.A. §§ 9-9-60 through 9-9-84.

## ATTORNEYS

Georgia Rules of Professional Conduct provide that a lawyer is a representative of clients, an officer of the legal system and a citizen having special responsibility for the quality of justice. As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client’s legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client’s position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others. As intermediary between clients, a lawyer seeks to reconcile their divergent interests as an advisor and, to a limited extent, as a spokesperson for each client. A lawyer acts as evaluator by examining a client’s legal affairs and reporting about them to the client or to others. In professional functions, a



lawyer should be competent, prompt and diligent. All members of the Georgia Bar shall comply with the terms and intent of the Georgia Rules of Professional Conduct adopted by the Georgia State Bar. Ga. R. Prof'l Conduct 4-101, 4-102. (Note: June 12, 2000, the Supreme Court of Georgia adopted the Georgia Rules of Professional Conduct that became effective on January 1, 2001. The Georgia Rules of Professional Conduct replaced the rules 4-101 and 4-102 of Part IV, Discipline, of the rules of the State Bar of Georgia. Part III, Canons of Ethics, is deleted in its entirety and reserved for future use.)

Where an attorney-client relationship exists, the client is bound by the ordinary rules of agency by the acts of his attorney within the scope of the attorney's authority. *Atlantic v. Farris*, 62 Ga. App. 212, 215, 8 S.E.2d 665 (1940); *Plant v. Trust Co. of Columbus*, 168 Ga. App. 909, 310 S.E.2d 745 (1983). An attorney has implied authority to do whatever is necessary incident to the purposes for which he was retained. *Jackson v. Fincher*, 128 Ga. App. 148, 195 S.E.2d 762 (1973). Through the enactment of the State Bar Rule 4-202, the Supreme Court empowered the office of the general counsel of the state bar to receive and screen grievances filed against members of the state bar. *Scanlon v. State Bar of Georgia*, 264 Ga. 251, 443 S.E.2d 830 (1994). Attorneys may make any agreement or stipulation which appears to be necessary or expedient for the advancement of the client's interest except where such agreement constitutes a compromise of the client's case or a surrender of substantial rights. *Hodges v. Doctor's Hosp.*, 150 Ga. App. 77, 256 S.E.2d 625 (1979). "Attorneys have authority to bind their clients in any action or proceeding by any agreement in relation to the cause, made in writing, and by signing judgments, entering appeals, and entering such matters, when permissible, on the dockets of the court. O.C.G.A. § 15-19-5. "An attorney of record is the client's agent in pursuing a cause of action and under Georgia law, 'an act of an agent within the scope of his apparent authority binds the principal.'" *Hayes v. National Service Ind.*, 196 F.3d 1252 (1999) (quoting *Glazer v. J.C. Bradford & Co.*, 616 F.2d 167, 168 (5th Cir. 1980).

"Without special authority, attorneys cannot receive anything in discharge of a client's claim but the full amount in cash." O.C.G.A. § 15-19-6. Authority to compromise may be granted by a client but is revocable at any time before it is executed. *Wimberly v. Tanner*, 34 Ga. App. 313, 129 S.E. 306 (1925). Attorney's authority is determined by representation agreement between client and attorney, and any instructions given by a client, and that authority is considered plenary unless it is limited by a client and that limitation is communicated to opposing parties. *Hayes.*, 196 F.3d at 1254.

Attorneys can be held liable for legal malpractice only when a client can show that the attorney was employed by the plaintiff; that the attorney failed to exercise ordinary care, skill, and diligence; and that the plaintiff was proximately injured as a result of such negligence. *Tante v. Herring*, 264 Ga. 694(1), 453 S.E.2d 894 (1994). Claims for breach of fiduciary duty, breach of contract, and breach of an implied duty of good faith and fair dealing are simply duplications of a legal malpractice claim. *Oehlerich v. Llewellyn*, 285 Ga. App. 738, 647 S.E.2d 399 (2007). In Georgia legal malpractice is based upon the breach of a duty imposed by the attorney-client contract of employment; thus, the applicable statute of limitations for asserting a legal malpractice claim is four years. *Royal v. Harrington*, 194 Ga. App. 457, 458, 390 S.E.2d 668 (1990); O.C.G.A. § 9-3-25.

An attorney has a general duty to avoid conflicts of interest. Generally, a lawyer shall not represent or continue to represent a client if there is significant risk that the lawyer's own interests or the lawyer's duties to another client, former client, or third person will materially and adversely affect the representation of the client. Ga. R. Prof'l Conduct 1.7.

O.C.G.A. § 9-11-9.1 requires a plaintiff in a malpractice action to file an affidavit with his complaint specifically setting forth at least one negligent act or omission and a factual basis for each claim. *Richmond Leasing v. Cooper, Cooper, Maioriello & Stalnaker*, 207 Ga. App. 623, 428 S.E.2d 603 (1993); *Stamps v. Johnson*, 244 Ga. App. 238, 535 S.E.2d 1 (2000). Complaints asserting claims for intentional misconduct against a professional, including fraud and misrepresentation, do not require the inclusion of an expert affidavit. *Walker v. Wallis*, 289 Ga. App. 676, 658 S.E.2d 217 (2008). Additionally, claims for breach of fiduciary duty do not require an expert affidavit, as they are not based on negligence involving the performance of the professional's services. *Tante v. Herring*, 264 Ga. 694, 453 S.E.2d 894 (1994). Ga. R. Prof'l Conduct 1.8(h) prohibits an attorney from limiting his liability to his client for malpractice unless permitted by law, and the client is independently represented in making the agreement. Further, attorneys are prohibited from settling a claim for such liability with an unrepresented client or former client without first advising that person, in writing, that independent representation is appropriate in connection therewith. (Note: Rule 3-106 was part of the Bar's Canon of Ethics, which has since been deleted and reserved.)



## AUTOMOBILES

Georgia abolished no-fault automobile insurance effective October 1, 1991. O.C.G.A. Title 33, Chapter 34, §§ 1-9. Operating a motor vehicle without proof of insurance is a misdemeanor, and upon conviction thereof, offenders shall be subject to a fine of not less than \$200.00 nor more than \$1,000.00 or imprisonment for not more than 12 months, or both. O.C.G.A. § 40-6-10(a)(4). Certain provisions of Chapter 34 of Title 33 of O.C.G.A. were repealed, effective January 1, 1991, and incorporated into O.C.G.A. Title 40. Motor vehicle liability policies issued or delivered in Georgia must conform to the requirements of O.C.G.A. § 33-7-11(a)(1)(A) demanding minimum uninsured motorist coverage of \$25,000 per person in any one accident for bodily injury or death; \$50,000 for bodily injury or death to two or more persons in any one accident; and \$25,000 for property damage. Alternatively, uninsured motorist coverage may equal the liability amounts in the insured's personal coverage provided that coverage exceeds the minimums of O.C.G.A. § 33-7-11(a)(1)(A). But, the insured may affirmatively choose to carry less uninsured motorist coverage than the liability amounts in their personal coverage. O.C.G.A. § 33-7-11(a)(1)(B). An insured may elect to be insured for uninsured motorist limits in excess of the minimum limits.

Insurers may not generally subrogate medical payments made to insureds when seeking recovery from the tortfeasor or the tortfeasor's insurer. *Gov't Employees Ins. Co. v. Hirsh*, 211 Ga. App. 374, 439 S.E.2d 59 (1993). The insured may reject the minimum coverage in writing pursuant to O.C.G.A. § 33-7-11(a)(3). Georgia Uninsured Motor Vehicle coverage includes coverage against the "underinsured" motor vehicles. O.C.G.A. § 33-7-11(b)(1)(D)(ii). Depending on the option elected by the insured, the uninsured motorist coverage limits are not reduced by the liability insurance limits available to a tortfeasor. O.C.G.A. § 33-7-11(b)(1)(I).

When federal law *requires* insurers to subrogate medical and income payments made to the insured and as a result, the injured has not been fully compensated for his/her injuries, the amount reimbursed to the insurer constitutes a reduction in uninsured motorist limits under O.C.G.A. § 33-7-11(b)(1)(D)(ii), such that the insured will ultimately be able to recover the amount reimbursed under his/her UM policy. *State Farm Mut. Ins. Co. v. Adams*, 288 Ga. 315, 702 S.E.2d 898 (2010); *Thurman v. State Farm Mut. Auto. Ins. Co.*, 278 Ga. 162, 598 S.E.2d 448 (2004).

Uniform Rules of Road are effective in Georgia and govern operation of all motor vehicles on public roads of State. *Powell v. State*, 193 Ga. 398, 18 S.E.2d 678 (1942); O.C.G.A. Title 40, Chapter 6, §§ 1-397.

Georgia has adopted the Uniform Commercial Driver's License Act. O.C.G.A. § 40-5-140.

**Age.** The minimum age for licensed automobile operation is 16 years old except that the Department of Motor Vehicles may issue an instruction permit limited to passenger vehicle operation to any person who is at least 15 years of age. O.C.G.A. §§ 40-5-22, 40-5-24. O.C.G.A. § 40-5-22 provides for certain license classifications based upon age and qualifications. After January 1, 1985, no license will be issued to a person under 18 who has not had an alcohol or drug course as prescribed by O.C.G.A. § 20-2-142(b). However, a person under 18 years of age who becomes a resident of this state and who has in his or her immediate possession a valid license issued to him or her in another state or country shall not be required to take or complete the alcohol and drug course. O.C.G.A. § 40-5-22(a).

**Agency.** An owner of an automobile is not generally responsible for its negligent operation by another unless a special relationship exists. *Johnson v. Webb-Crawford Co.*, 89 Ga. App. 524, 80 S.E.2d 63 (1954). Agency can be determined by "proof of circumstances, apparent relations, and the conduct of the parties." *Chrostowski v. G& MSS Trucking*, 198 Ga. App. 140, 401 S.E.2d 53 (1990). The employer/owner of a vehicle is not liable under the doctrine of respondeat superior for injuries inflicted by the negligence of an employee/operator while the vehicle is being operated on a purely personal mission. *May v. Phillips*, 157 Ga. App. 630, 278 S.E.2d 172 (1981). However, where it appears that the owner had actual knowledge of the operator's incompetency as driver, liability may be asserted on the theory of negligent entrustment. *Thomason v. Harper*, 162 Ga. App. 441, 289 S.E.2d 773 (1982).

**Alcohol.** O.C.G.A. § 40-6-392(c)(1) provides that a blood-alcohol content of .08 grams or more at any time within three hours after such driving or being in actual physical control from alcohol consumed before such driving or being in actual physical control ended constitutes driving under the influence per O.C.G.A. § 40-6-391(a)(5). Georgia's Dram Shop Statute, O.C.G.A. § 51-1-40, provides the exclusive remedy for personal-injury claims stemming from the consumption of alcohol and provides for liability against a person or establishment which sells, furnishes or serves alcohol to a minor or a noticeably intoxicated person with knowledge that the individual would soon operate a motor vehicle and when the sale, furnishing or serving is the proximate cause of the injury. *Hansen v. Etheridge*, 232 Ga. App. 408, 501 S.E.2d 517 (1998). If a driver is under the age of 21, an alcohol concentration of .02 grams or more at any time within three hours after such driving or being in physical control from alcohol consumed before such driving or



being in actual physical control ended constitutes driving under the influence. O.C.G.A. § 40-6-391(k)(1). If a driver is operating a commercial vehicle, .04 grams constitutes driving under the influence. O.C.G.A. § 40-6-391(i).

**Excess Insurance.** An excess insurer of an automobile which pays a loss as a mere volunteer is not permitted to recover its loss from the insured's primary insurer who had denied coverage. *Allianz Ins. Co. v. State Farm Fire & Cas. Co.*, 214 Ga. App. 666, 449 S.E.2d 5 (1994).

**Family Purpose Doctrine.** In Georgia, when an automobile is maintained by the owner for the use and convenience of his family, that owner is liable for the negligence of a family member having authority to drive the car while it is being used for a family purpose. *Cabral v. White*, 181 Ga. App. 816, 354 S.E.2d 162 (1987). The four requirements of the family purpose doctrine are: 1) owner must have given permission to family member to drive vehicle; 2) owner must have relinquished control of vehicle to family member; 3) family member must be in the vehicle; and 4) vehicle must be engaged in a family purpose. *Danforth v. Bulman*, 282 Ga. App. 421, 638 S.E.2d 852 (2006); *Harvey v. Taylor*, 193 Ga. App. 172, 387 S.E.2d 403 (1989). The doctrine has been extended to include a person operating the family car at the direction of the owner's son while the son remains in the car, *Phillips v. Dixon*, 236 Ga. 271, 223 S.E.2d 678 (1976); in airplanes, *Kimbell v. DuBose*, 139 Ga. App. 224, 228 S.E.2d 205 (1976); and in a boat being operated by the owner's daughter with the father's permission, *Wallace v. Lessard*, 248 Ga. 575, 285 S.E.2d 14 (1981); O.C.G.A. § 51-1-21(b). An owner who allows a sibling, not residing in his household, to operate the owner's vehicle is not liable under the family purpose doctrine. *Wingard v. Brinson*, 212 Ga. App. 640, 442 S.E.2d 485 (1994); O.C.G.A. § 51-2-2.

**Guest Cases.** Effective November 1, 1982, the guest passenger proof requirement of gross negligence was abolished. Thus, a driver owes a passenger the same duty of ordinary care as he owes to others. O.C.G.A. § 51-1-36; *Bostwick v. Flanders*, 171 Ga. App. 93, 318 S.E.2d 801 (1984).

**Last Clear Chance.** Two elements: 1) plaintiff, by his own negligence, must have placed himself in a position of peril from which he could not extricate himself; 2) defendant must have knowledge and appreciation of plaintiff's peril in time to avoid the injury. *Fouts v. Builders Transport, Inc.*, 222 Ga. App. 568, 474 S.E.2d 746 (1996).

**Motor Vehicle Safety Responsibility Act.** An insurer will be barred from asserting that coverage does not exist under an automobile liability policy if it has been certified in accordance with the Georgia Motor Vehicle Safety Responsibility Act, O.C.G.A. § 40-9-1-103) that the policy issued to the insured does provide such coverage and their driver's license is issued on the basis of such certificate. *Davis v. Reserve Ins. Co.*, 220 Ga. 335, 138 S.E.2d 657 (1964). However, limitations contained in such certificates are effective. *LaSalle Nat'l Ins. Co. v. Popham*, 125 Ga. App. 724, 188 S.E.2d 870 (1972). Any person who has one or more vehicles in his name may apply for a certificate of self-insurance from the Commission of Insurance. In his or her discretion, the Commissioner may issue a certificate if they are satisfied that the applicant will maintain proper insurance coverage, benefits, and claims handling procedures "substantially equivalent to those afforded by a policy of vehicle insurance in compliance with Chapter 34 of Title 33." O.C.G.A. § 33-34-5.1(a)(1).

**Seat Belts.** O.C.G.A. § 40-8-76.1(b) provides that each front seat occupant of a passenger vehicle must wear a seat belt approved under Federal Motor Vehicle Safety Standard 208. O.C.G.A. § 40-8-76.1(a) was amended June 3, 2010, eliminating certain exceptions to the required use of safety belts in passenger vehicles including the pickup truck exception. O.C.G.A. § 40-8-76.1 excludes motorcycles, motor driven cycles, off-road vehicles, and pickup trucks being used "in connection with agricultural pursuits that are usual and normal to the user's farming operation." *Id.* Subject to other requirements and exceptions, children under eight years of age in passenger cars, vans, or pickup trucks, other than taxicabs and public transit vehicles, must use the proper restraining system appropriate for their height and weight as approved by the U.S. Department of Transportation per Federal Motor Vehicle Safety Standard 213. O.C.G.A. § 40-8-76(b)(1). And "[e]ach minor eight years of age or older who is an occupant of a passenger vehicle shall, while such passenger vehicle is being operated on a public road, street, or highway of this state, be restrained by a seat safety belt approved under Federal Motor Vehicle Safety Standard 208." O.C.G.A. § 40-8-76.1(e)(3). The failure of an occupant of a motor vehicle to wear a seat belt in any seat of a motor vehicle shall not be considered evidence of negligence or causation; shall not otherwise be considered by the finder of fact on any question of liability of any person, corporation, or insurer; shall not be a basis for cancellation of coverage or increase in insurance rates; and shall not be evidence used to diminish any recovery for damages arising out of the ownership, maintenance, occupancy, or operation of a motor vehicle. O.C.G.A. § 40-8-76.1(d).



Service of Process upon Non-Resident Motorists. The Georgia Non-Resident Motorists Act, which includes O.C.G.A. §§ 40-12-1 through 8, provides for the appointment of the Secretary of State as agent for service of process for all non-resident motorists who avail themselves of the Georgia' public transportation and highway system. O.C.G.A. § 40-12-1. Service of process upon the Secretary of State, his agent, or successor, along with the Secretary's certificate of service to the court, is "sufficient service upon any such nonresident, provided that notice of such service and a copy of the complaint and process are forthwith sent by registered or certified mail or statutory overnight delivery by the plaintiff to the defendant, if his address is known, and the defendant's return receipt and the plaintiff's affidavit of compliance with this Code section are appended to the summons or other process and filed with the summons, complaint, and other papers in the case in the court wherein the action is pending." O.C.G.A. § 40-12-2. There is no service by publication authorized by the Act, *National Surety Corp. v. Hernandez*, 120 Ga. App. 307, 170 S.E.2d 318 (1969), and a tortfeasor must be personally served. *Barnes v. Continental Ins. Co.*, 231 Ga. 246, 201 S.E.2d 150 (1973).

Service of Process Upon Uninsured Motorist Carriers ("UMC"). In order to protect his rights to seek benefits from his uninsured motorist carrier, service of process must be made upon all uninsured motorist carriers "upon the existence of a reasonable belief that the defendant owner/operator is uninsured. *Retention Alternatives, LTD. v. Hayward*, 285 Ga. 437, 678 S.E.2d 877 (2009). There is no requirement that the lawsuit that is eventually served on both the defendant and the UMC be the initial lawsuit which was served only on the defendant. *Stout v. Cincinnati Ins. Co.*, 269 Ga. 611, 502 S.E.2d 226 (1998). Therefore, service of process on an uninsured motorist carrier of an original action is *not* necessary in order to allow for service in a properly filed *renewal* action.

"In cases where the owner or operator of any vehicle causing injury or damages is known, and either or both are named as defendants in any action for such injury or damages, and a reasonable belief exists that the vehicle is an uninsured motor vehicle under subparagraph (b)(1)(D) of [O.C.G.A. § 33-7-11], a copy of the action and all pleadings thereto shall be served as prescribed by law upon the insurance company issuing the policy as though the insurance company were actually named as a party defendant. If facts arise after an action has been commenced which create a reasonable belief that a vehicle is an uninsured motor vehicle under subparagraph (b)(1)(D) of [O.C.G.A. § 33-7-11] and no such reasonable belief existed prior to the commencement of the action against the defendant, and the com-

plaint was timely served on the defendant, the insurance company issuing the policy shall be served within either the remainder of the time allowed for valid service on the defendant or 90 days after the date on which the party seeking relief discovered, or in the exercise of due diligence should have discovered, that the vehicle was uninsured or underinsured, whichever period is greater." O.C.G.A. § 33-7-11(d). Service of process on an uninsured motorist carrier must be within the time allowed for service on a defendant in a tort action. *Peoples v. State Farm*, 211 Ga. App. 55, 438 S.E.2d 167 (1993).

Under the provisions of an uninsured motorist policy, a damage award to be insured *cannot* be offset by workers' compensation and similar personal injury benefits paid to the insured. *Dees v. Logan*, 282 Ga. 815, 653 S.E.2d 735 (2007).

Georgia has a statute providing for bad faith damages for failure to reasonably settle third party motor vehicle property damage claims. Under O.C.G.A. § 33-4-7, an insurer can be liable to a third party for bad faith damages in the amount of fifty percent of the liability of the loss or \$500, whichever is greater plus attorneys fees. See *Driskell v. Empire Fire & Marine Ins. Co.*, 249 Ga. App. 56, 547 S.E.2d 360 (2001) (an automobile liability insurance company was liable for damages for failing to adjust or compromise the claim of a person injured by the insured and covered by its liability policy, where the insurer was guilty of negligence, fraud, or bad faith in failing to compromise the claim of the third party).

**AVIATION**

Lex loci delicti determines the substantive rights of parties in airplane crash cases. *Yates v. Lowe*, 179 Ga. App. 888, 348 S.E.2d 113 (1986). "Unless otherwise provided by law, all crimes committed by or against an airman or by or against a passenger or other person or on or by means of an aircraft while in flight over this state shall be governed by the laws of this state." O.C.G.A. § 6-2-4.

The pilot in command has the primary and ultimate responsibility for the operation of his aircraft. *Mallen v. U.S.*, 506 F. Supp. 728 (N.D. Ga. 1979). Air traffic controllers have a duty to give warnings as required by FAA regulations and the air traffic control manuals. Whether or not required by the manuals, the air traffic controller is required to warn of dangers reasonably apparent to him. *Id.* "A person shall not operate or be in actual physical control of an aircraft in this state: (1) within eight hours after the consumption of any alcoholic beverage; (2) while under the influence of alcohol; (3) while using any drug that affects such person's faculties in any way contrary to safety; or (4) while there is 0.04 percent



or more by weight of alcohol in his blood.” O.C.G.A. § 6-2-5.1.

The rules of law governing the degree of care owed by an operator of an aircraft to passengers are the same as those governing the duty of care that an operator of a motor vehicle owes to his or her passengers. *Citizens & Southern Nat'l Bank v. Huguley*, 100 Ga. App. 75, 110 S.E.2d 63 (1959); *Osborn v. Pilgrim*, 246 Ga. 688, 273 S.E.2d 118 (1980). A pilot owes a duty of care to his passengers. Liability of an aircraft operator for injury to or death of his passengers “shall be determined by the rules of law applicable to torts on land arising out of similar relationships.” O.C.G.A. § 6-2-6. Proof of injury inflicted to persons or property on the ground by operation of any aircraft, or by objects falling or thrown from the aircraft shall be prima facie evidence of negligence on the part of the aircraft operator. O.C.G.A. § 6-2-8. Note that exculpatory clauses in Georgia are valid and binding, and are not void as against public policy when a business relieves itself from its own negligence. However, exculpatory clauses do not relieve a party from liability for acts of gross negligence or willful or wanton conduct. *McFann v. Sky Warriors, Inc.*, 268 Ga. App. 750, 603 S.E.2d 7 (2004).

The standard aviation insurance policy covering damage to an aircraft as a result of forced or crash landing provides a number of exclusions and limitations on coverage. Georgia law consistently has held that an insurance company may rightfully suspend coverage under an aviation insurance policy in light of the insured’s violation of a specific policy exclusion. *Monarch Ins. Co. of Ohio v. Polytech Industries, Inc.*, 655 F. Supp. 1058 (M.D. Ga. 1987); *Grigsby v. Houston Fire & Cas.*, 113 Ga. App. 572, 148 S.E.2d 925 (1966); *Farmers and Merchants Bank v. Ranger Ins. Co.*, 125 Ga. App. 166, 186 S.E.2d 579 (1971).

### BURGLARY INSURANCE

Losses incurred due to burglary may be covered under a casualty insurance policy. O.C.G.A. § 33-7-3(1) defines casualty insurance as “insurance against legal liability for the death, injury or disability of any human being, or for damage to property.” More specifically, casualty insurance may cover “loss or damage by burglary, theft, larceny, robbery, forgery, fraud, vandalism, malicious mischief, confiscation, wrongful conversion, disposal, concealment, mysterious disappearance, destruction of money or securities, or from any attempt at any of the foregoing, including supplemental coverages for medical, hospital, surgical, and funeral expenses incurred by the named insured or other person as a result of bodily injury during the commission of a burglary, robbery, or theft by another; also insurance against loss

of or damage to moneys, coins, bullion, securities, notes, drafts, acceptances, or any other valuable papers and documents resulting from any cause.” O.C.G.A. § 33-7-3(3). Coverage does not usually extend to loss of profits that might have resulted from the sale of the goods taken in a burglary. *Rothenberg v. Liberty Mut. Ins. Co.*, 115 Ga. App. 26, 28, 153 S.E.2d 447 (1967).

“Casualty insurance” is a catch-all category that may include various types of coverage. 1957 Op. Att’y Gen. p. 167. Casualty policies which offer coverage against burglary may also cover losses caused by theft. Theft is the wrongful and fraudulent taking and carrying away the personal goods of another with intent to steal same. O.C.G.A. § 16-8-2. Under this definition, property taken in good faith or mistaken belief of ownership is not covered by a casualty policy because it is not taken “with intent to steal”. *Walker v. State*, 86 Ga. App. 875, 72 S.E.2d 774 (1952). Additionally, property loss due to conversion, embezzlement or false pretenses is generally not covered under casualty policies. *Collier v. State Farm Mut. Auto. Ins. Co.*, 249 Ga. App. 865, 868, 549 S.E.2d 810 (2001); *Reserve Ins. Co. v. Interurban Transit Lines*, 105 Ga. App. 278, 124 S.E.2d 498 (1962).

### CANCELLATION

O.C.G.A. § 33-24-44 sets forth the procedure an insurer must follow to cancel its insurance policy. The statute requires thirty (30) days written notice in advance of the date when cancellation will be effective or such other longer period as a contract or statute may provide. O.C.G.A. § 33-24-44(b). Statutory procedures for giving notice of cancellation do not apply to cases when a policy expires according to its terms (this includes non-renewal of existing policy), or lapses due to nonpayment of premium. *Tippins Bank v. Southern Gen.*, 266 Ga. 97, 464 S.E.2d 381 (1995); *Borders v. Global*, 208 Ga. App. 480, 430 S.E.2d 854 (1993); *Cincinnati Ins. v. Perimeter Tractor & Trailer Repair, Inc.*, 192 Ga. App. 243, 384 S.E.2d 449 (1989); *Goodley v. Firemen’s Fund American Life*, 173 Ga. App. 277, 326 S.E.2d 7 (1985). Furthermore, where an insurer’s practice had been to reinstate coverage “without interruption” upon receipt of premium following cancellation, an issue arises as to whether the policy in question was effectively cancelled so as to permit the insurer to deny coverage, or whether by the past conduct of the parties, the policy was reinstated following such cancellation. *Holland v. Allstate Ins. Co.*, 200 Ga. App. 668, 409 S.E.2d 79 (1991).

Under O.C.G.A. § 33-39-11, in the event an insurer decides to terminate an insurance policy (or in event of any other “adverse underwriting decision”), the insurer or agent responsible for the decision shall either provide the policyholder with the specific reason or reasons for

the adverse underwriting decision in writing, or advise such person that upon written request he or she may receive the specific reason or reasons in writing. Also, the insurer must provide the policyholder with a summary of the rights granted him under O.C.G.A. § 33-39-9 and § 33-39-10.

Cancellation or nonrenewal of certain policies covering residential real property and its contents is governed by O.C.G.A. § 33-24-46. In a notice of cancellation, an insurer must notify the insured of possible eligibility for insurance through the Georgia Fair Access to Insurance Requirements Plan and must include the address for contacting the Plan. O.C.G.A. § 33-24-46(e).

Cancellation or nonrenewal of automobile or motorcycle liability policies is governed by O.C.G.A. § 33-24-45. A notice of cancellation must notify the insured of the possible eligibility for insurance through the Georgia Automobile Insurance Plan. Automobile or motorcycle liability policies may be cancelled on grounds set forth in O.C.G.A. § 33-24-45(c). Notice must be in writing, unequivocal, and delivered by first class mail with proof of mailing. *Reynolds v. Infinity Gen. Ins. Co.*, 287 Ga. 86, 694 S.E.2d 337 (2010). The notice may be sent via certified mail, or registered mail but a postal receipt should be obtained. Direct testimony that the postal receipt was for a particular mailing containing notice of cancellation is sufficient. O.C.G.A. § 33-24-44(b). The notice must be mailed to the last known address thirty (30) days before cancellation unless the policy is less than sixty (60) days old, then only ten (10) days notice is required. The notice must set out the reason(s) for the cancellation. O.C.G.A. § 33-24-44(d).

Failure to precisely follow the statutory provisions of O.C.G.A. §§ 33-24-44, 33-24-45 and 33-24-6, makes a cancellation a nullity so that the insurance policy remains in force despite the cancellation effort. *Bank of Toccoa v. Cotton States Mut.*, 211 Ga. App. 389, 439 S.E.2d 60 (1993). However, see *Holland, supra*; *Alexander Underwriters General Agency, Inc. v. Lovett*, 177 Ga. App. 262, 339 S.E.2d 368, *appeal after remand*, 182 Ga. App. 769, 357 S.E.2d 258 (1987); *Pennsylvania Nat'l Mut. Cas. Ins. Co. v. Person*, 164 Ga. App. 755, 297 S.E.2d 337 (1982).

When an insured acknowledges the receipt of a written notice of cancellation, the cancellation is effective even if the requirements of O.C.G.A. §§ 33-24-44 and 33-24-46 are not followed. *Bank of Toccoa v. Cotton States Mut.*, 211 Ga. App. 389, 439 S.E.2d 60 (1993); *Travelers Indem. Co. v. Guess*, 243 Ga. 559, 255 S.E.2d 55 (1979).

The procedure an insured must follow to cancel an insurance policy is set forth in O.C.G.A. § 33-24-44.1.

This section allows an insured to cancel the policy by returning the original policy to the insurer or by mailing written request for cancellation of the policy to the insurer or its "duly authorized" agent, either in person, or by first class mail, stating a future date on which the policy is to be canceled. *Id.*

An insured may also cancel its insurance policy by agreement or under the terms of the policy. However, unilateral cancellation by an insured does not waive the statutory requirements for canceling coverage as to a lien holder. *Pennsylvania Millers Mut. Ins. Co. v. Employers Fire Ins. Co.*, 118 Ga. App. 655, 165 S.E.2d 309 (1968); *Thames v. Piedmont Life Ins. Co.*, 128 Ga. App. 630, 197 S.E.2d 412 (1973).

O.C.G.A. § 33-24-21.1 enables an insured under a group health insurance policy (other than those issued in connection with extension of credit) to continue their hospital, surgical and major medical insurance for three (3) additional policy months (plus any fraction of policy month which remains at time policy would otherwise have been terminated) beyond the time coverage would otherwise have ended, provided the person was continuously covered for at least six (6) months immediately prior to such termination and provided the person pays the premium each month in advance. Also, O.C.G.A. 33-24-21.2 provides continuation of coverage under group accident and sickness plans for persons 60 years of age or older. O.C.G.A. § 33-6-5(12)(A) requires certain notice by an insurer to "cancel, non-renew, or otherwise terminate all or substantially all of an entire line or class of business for the purpose of withdrawing from the insurance market" in Georgia.

## CONSTRUCTION OF POLICY

Under Georgia law, insurance is a contract and contract law principles are to be applied to questions involving insurance. *Bradham v. Randolph Trucking*, 775 F. Supp. 395 (M.D. Ga. 1991), *aff'd*, 960 F.2d 1018 (1992); *Blitch Ford, Inc. v. MIC Prop. & Cas. Ins.*, 90 F. Supp. 2d 1377 (M.D. Ga. 2000). Ambiguity in a policy must be construed strictly against the insurer, but where the terms and conditions of a policy are unambiguous, the court must declare the contract as made by the parties. *Hercules Bumpers v. First State*, 863 F.2d 839 (11th Cir. 1989). An unambiguous policy requires no construction, and its plain terms must be given full effect even though they are beneficial to an insurer and detrimental to an insured. *Dynamic Cleaning v. First Financial Ins. Co.*, 208 Ga. App. 37, 430 S.E.2d 33 (1993); *Continental Cas. Co. v. H.S.I. Fin. Serv., Inc.*, 266 Ga. 260, 466 S.E.2d 4 (1996). In construing an insurance contract, the test is not what the insurer intended the words to mean, but rather what a reasonable person in the insured's posi-

tion would understand them to mean. Where a contract provision is susceptible of two or more interpretations, courts will construe it most favorably to the insured. *Gulf Ins. v. Mathis*, 183 Ga. App. 323, 358 S.E.2d 850 (1987); *Sun Ins. Office v. Thibadeau*, 210 Ga. App. 479, 436 S.E.2d 515 (1993). An exclusion sought to be invoked by the insurer will be liberally construed in favor of the insured and strictly construed against the insurer when it is not clear and unequivocal. *First Ga. Ins. Co. v. Goodrum*, 187 Ga. App. 314, 370 S.E.2d 162 (1988).

**Choice of Law.** Under Georgia’s choice of law rules, the interpretation of insurance contracts is governed by the law of the place of making. Insurance contracts are considered made at the place where the contract is delivered. *American Family Life v. U.S. Fire*, 885 F.2d 826, *reh’g denied*, 892 F.2d 89 (11th Cir. 1989). Place of performance: Where an insurance contract was “delivered” and “made” in Georgia and “performed” in Florida, Georgia law, not Florida law governed issues of whether there was insurance coverage for a punitive damages claim in an automobile accident lawsuit. *See Federal Ins. v. National Distributing*, 203 Ga. App. 763, 417 S.E.2d 671 (1992), *cert. denied*, (1992). When deciding whether the terms of an insurance policy are ambiguous under Georgia law, the reviewing court must apply a three-step analysis: 1) court must decide whether policy’s language is ambiguous; 2) if it is, the court must apply rules of construction; and 3) if ambiguity remains, question of interpretation must be submitted to a jury. *Essex Ins. v. Newton Agri-Systems*, 832 F. Supp. 1565 (S.D. Ga. 1993).

**DAMAGES**

See also “PENALTY AND ATTORNEYS FEES.”

Damages under Georgia law may be either general or special, direct or consequential. O.C.G.A. § 51-12-1(a). General damages, such as physical and mental pain and suffering, are those which the law presumes to flow from any tortious act, and may be recovered without proof of any amount. O.C.G.A. § 51-12-2(a).

Special damages, including necessary hospital or medical expenses, loss of past earnings, loss of earning capacity and lost future profits, are those which actually flow from a tortious act and must be proved in order to be recovered. O.C.G.A. § 51-12-2(b). Actual injury to realty must be proven in order to recover damages pursuant to a homeowner’s insurance policy. *Garner v. Blair*, 214 Ga. App. 357, 448 S.E.2d 24 (1994).

Lost Future Wages or Profits. The general rule is that expected profits of a commercial business, which are too uncertain and speculative to afford a basis for compensation, cannot be considered. However, an ex-

ception to the rule is when the type of business and history of profits make the calculation of profits reasonably ascertainable, evidence of lost profits may be considered. *Claxton Poultry Co. v. City of Claxton*, 155 Ga. App. 308, 271 S.E.2d 227 (1980).

**Mental Suffering.** Generally, damages for mental distress are not recoverable in the absence of physical injury when the claim is based upon ordinary negligence. *Ob-Gyn Assoc. v. Littleton*, 259 Ga. 663, 386 S.E.2d 146 (1989), *overruled in part*, *Lee v. State Farm Mut. Auto. Ins. Co.*, 272 Ga. 583, 533 S.E.2d 82 (2000). However, Georgia recognizes the tort of intentional infliction of emotional distress without proof of physical injury where the defendant’s actions are outrageous, or so terrifying or insulting as naturally to humiliate, embarrass, or frighten plaintiff. *Tuggle v. Wilson*, 248 Ga. 335, 282 S.E.2d 110 (1981); *see also Lee v. State Farm Mut. Ins. Co.*, 272 Ga. 583, 533 S.E.2d 82 (2000) (parent may attempt to recover for emotional distress when a parent and child sustain direct physical impact, the physical injury resulted from the negligence of another, and parent witnessed the child’s suffering and subsequent death) *Reckless and wanton disregard of consequences of one’s acts may evidence intention to inflict injury. Hamilton v. Powell, Goldstein, Frazier & Murphy*, 252 Ga. 149, 311 S.E.2d 818 (1984).

**Damage to Peace, Happiness, or Feelings.** O.C.G.A. § 51-12-6. In a tort action in which the *entire* injury is to the plaintiff’s peace, happiness, or feeling, no measure of damages can be prescribed except the enlightened consciences of impartial jurors. In such an action, punitive damages are not recoverable.

**Sentimental Property Value.** The longstanding general-rule in Georgia is that an owner can recover the fair market value of lost property. On the other hand, “there can be no recovery for the sentimental value of the lost article” and “evidence of sentimental value to the owner [is] inadmissible.” *Cherry v. McCutchen*, 65 Ga. App. 301, 16 S.E.2d 167 (1941). When it comes to personal property with no market value, the proper measure of damages is the value of the property to the owner, which “must not be any fanciful price that he might for special reasons place upon them; nor on the other hand the amount for which he could sell them to others, but the actual loss in money he would sustain by being deprived of the value of the articles.” *Id.*

**Apportionment of Damages.**

There remains some uncertainty in the application of apportionment of fault and damages after amendments to O.C.G.A. § 51-12-33 in 2005. For causes of action arising on or before February 16, 2005, if an action is brought jointly against several persons, plaintiff



may recover damages against one or all negligent parties. O.C.G.A. § 51-12-31. However, the jury may specify particular damages to be recovered from each defendant in certain cases. O.C.G.A. § 51-12-33. The jury may apportion damages among multiple defendants whose according to degree of fault of each defendant. O.C.G.A. § 51-12-33. When the jury apportions damages in this manner, defendants are not jointly liable and are not subject to any right of contribution. O.C.G.A. § 51-12-33.

For causes of action arising on or after February 16, 2005, O.C.G.A. § 51-12-33 indicates damages be apportioned among joint tortfeasors in every tort case. The jury must determine the plaintiff's percentage of fault and the judge shall reduce the plaintiff's recovery accordingly. If the plaintiff is 50% or more at fault, there is no recovery. O.C.G.A. § 51-12-33(g). Then, if there are multiple defendants, the amended statute goes on to require that the jury "apportion its award of damages among the persons who are liable according to the percentage of fault of each person." O.C.G.A. § 51-12-33(b). Once apportioned, these damages shall not be subject to any right of contribution. *Id.* Significantly, under amended O.C.G.A. § 51-12-33(d), even non-parties who contributed to an injury can now be assigned a percentage of fault by the fact finder. Prior to this amendment, it was not proper to apportion damages to a non-party. *Ross v. A Betterway Rent-A-Car*, 213 Ga. App. 288, 289 (1994). On causes of action arising after February 16, 2005, the trier of fact can now consider the negligence of a non-party if the plaintiff entered into a settlement agreement with the non-party or a named defendant provides notice designating the non-party's name and last known address or other best identification of the non-party possible, with a brief statement of the basis for their alleged negligence, at least 120 days prior to trial. O.C.G.A. § 51-12-33(d).

Apportionment against immune non-party. The jury can apportion liability against a non-party who is immune under Georgia's intra-spousal immunity doctrine. *Barnett v. Farmer*, 2011 Ga. App. LEXIS 191, decided March 10, 2011. This decision may also potentially apply to non-parties who are otherwise immune from tort suit – e.g., employers who are immune under Georgia's exclusive-remedy rules for workers' compensation claims.

Apportionment may be proper even absent plaintiff's comparative fault. *Cavalier Convenience Inc. v. Sarvis*, 305 Ga. App. 141; 699 S.E.2d 104 (2010).

Collateral Source Rule. The jury cannot consider evidence of collateral sources in tort cases. *Amalgamated Transit Union v. Roberts*, 263 Ga. 405, 434 S.E.2d 450 (1993). The Georgia Supreme Court has

suggested that if an employer's negligence contributed to an employee's injuries, a defendant in the tort action filed by the employee is entitled to set off the amount of workers' compensation paid by the employer from the verdict. *Sargent Industries v. Delta Air Lines*, 251 Ga. 91, 303 S.E.2d 108 (1983).

Obligations of an Insurer to Settle within Policy Limits. Failure to settle within policy limits on a time-limited settlement demand when liability is clear and special damages exceed policy limits gives an insured a cause of action for bad faith. *Southern General v. Holt*, 262 Ga. 267, 416 S.E.2d 274 (1992). In considering whether or not an insurer acts in good faith towards its insured in refusing to settle a case within policy limits after adverse verdict and prior to appeal, the court will apply the rule that insurer must accord the interest of its insured the same faithful consideration it gives its own interest. *Geico v. Gingold*, 249 Ga. 156, 288 S.E.2d 557 (1982).

Punitive Damages. In *Greenwood Cemetery, Inc. v. Travelers Indem. Co.*, 238 Ga. 313, 232 S.E.2d 910 (1977), the Supreme Court of Georgia held that punitive damages are covered by a liability policy insuring against "legal liabilities," from which punitive damages fall. Such policy did not expressly exclude punitive damages. *Accord, Federal Ins. Co. v. National Distributing*, 203 Ga. App. 763, 417 S.E.2d 671 (1992). Clear and convincing evidence is required to obtain punitive damages. Clear and convincing evidence is defined as "an intermediate standard of proof requiring a higher minimum level of proof than the preponderance of the evidence standard but less than that required for proof beyond a reasonable doubt." *Clarke v. Cotton*, 263 Ga. 861, 440 S.E.2d 165 (1994). Evidence of negligence or even gross negligence will not warrant the imposition of punitive damages. Evidence of willful misconduct, fraud, malice, wantonness, oppression or that entire want of care which would raise the presumption of conscious indifference to the consequences warrants the imposition of punitive damages. *Coker v. Culter*, 208 Ga. App. 651, 431 S.E.2d 443 (1993).

Interest. The Georgia Code provides for pre-judgment interest on unliquidated damages at "an annual rate equal to the prime rate as published by the Board of Governors of the Federal Reserve System, as published in statistical release H. 15 or any publication that may supersede it, on the thirtieth day following the date of the mailing of the last written notice plus 3 percent, and shall begin to run from the thirtieth day following the date of the mailing or delivering of the written notice until the date of judgment." O.C.G.A. § 51-12-14(c). When plaintiff gives written notice of a demand for unliquidated damages to the alleged tortfeasor, and the

amount demanded is not paid within 30 days of the mailing of the notice, plaintiff is entitled to receive interest if the judgment at trial is equal to or greater than the amount demanded. Pre-judgment interest on liquidated (certain and fixed) damages may be awarded from the time of occurrence of the damages at a rate of 7% per year. O.C.G.A. §§ 7-4-2, 7-4-15. Post judgment interest is awarded at a rate “equal to the prime rate as published by the Board of Governors of the Federal Reserve System, as published in statistical release H.15 or any publication that may supersede it, on the day the judgment is entered plus 3 percent.” O.C.G.A. § 7-4-12(a).

The “Tort Reform Act of 1987” was enacted by the General Assembly. The Act amends O.C.G.A. § 51-1-20 and O.C.G.A. § 51-12-1 *et seq.* so as to revise substantial provisions relating to tort claims litigation. However, the Act has been subjected to significant judicial modifications.

The Act provides qualified immunity from civil liability for governmental and nonprofit institutions’ members, directors, and trustees serving with or without compensation and for governmental and nonprofit institutions’ officers serving without compensation. O.C.G.A. § 51-1-20. The immunity of this section extends to public, charitable or non-profit institutions or organizations generally and is not limited to hospitals and other health care institutions and organizations. *Bunkley v. Hendrix*, 164 Ga. App. 401, 296 S.E.2d 223 (1982).

The Act restricts the award of punitive damages to actions involving willful misconduct, malice, fraud, wantonness, oppression or total want of care and provides that punitive damages shall be awarded solely to punish or deter defendant and not as compensation to plaintiff. An award of punitive damages is further limited by requiring a specific prayer for relief, by providing for a separate phase of trial to determine the amount of punitive damages when such damages are to be awarded, by providing that punitive damages are limited to a maximum of \$250,000 in cases which do not involve product liability or specific intent to cause harm, and punitive damages are prohibited in cases where entire injury is to peace, happiness, or feelings of plaintiff. O.C.G.A. § 51-12-5.1.

The trial court is authorized to order a new trial as to damages, or to condition the grant of a new trial upon any party’s refusal to accept the amount of damages determined by the court, if the jury’s award of damages is “clearly so inadequate or so excessive as to be inconsistent with the preponderance of the evidence.” O.C.G.A. § 51-12-12.

## DEATH

See Law Digest Tables.

Action for Wrongful Death. O.C.G.A. §§ 51-4-1 to 5, defines the action, including the nature of the wrongful act, persons entitled to suit, and the amount of damages recoverable. In death claims there can be two separate and distinct causes of action. One is by the personal representative for the full value of the life of the deceased. The other is by the deceased’s estate for conscious pain and suffering before death, punitive damages, and funeral and burial expenses. *Smith v. Memorial Medical Ctr.*, 208 Ga. App. 26, 430 S.E.2d 57 (1993). These claims may be brought together or separately. *Complete Auto Transit, Inc. v. Floyd*, 214 Ga. 232, 104 S.E.2d 208 (1958). But on the defendant’s motion, joinder is mandatory for all claims that derive from personal injuries a single individual sustains. O.C.G.A. § 9-11-19(a); *Stenger v. Grimes*, 260 Ga. 838, 400 S.E.2d 318 (1991). The statutory scheme establishes a priority of persons entitled to bring a wrongful death action as the deceased’s representative. The order of priority is as follows: the surviving spouse, the children, the parents, and the administrator or executor. O.C.G.A. §§ 51-4-2(a)-(b), 51-4-4, 19-7-1(c)(1)-(2), 51-4-5(a).

The law focuses on the value of the life lost, not the effect on the person who asserts the claim. The measure of damages is the full value of life of the deceased, which includes lifetime earnings reduced to present cash value and lost intangible (noneconomic) items. *Consolidated Freightways Corp. of DE v. Futrell*, 201 Ga. App. 233, 410 S.E.2d 751 (1991). There are two components in determining “full value of the life of the decedent.” One is the economic value. The other element of recovery for wrongful death is intangible. *Miller v. Jenkins*, 201 Ga. App. 825, 412 S.E.2d 555 (1991). A jury may consider the value of decedent’s services incapable of exact proof in determining the value of the life of the decedent. *Pollard v. Kent*, 59 Ga. App. 118, 200 S.E. 542 (1938). The “intangible” elements are aspects of the decedent’s life lost to him. This has included evidence depicting decedent’s relationship with his family, interest in playing baseball, and an audio tape depicting singing ability and involvement in religious activities. *Jones v. Livingston*, 203 Ga. App. 99, 416 S.E.2d 142 (1992). Funeral and burial expenses of the decedent(s) may be recovered under O.C.G.A. §§ 51-4-5(b) and 53-7-91(2). *Georgia Osteopathic Hosp. v. O’Neal*, 198 Ga. App. 770, 772, 403 S.E.2d 235 (1991); *Hosley v. Davidson, et al.*, 211 Ga. App. 529, 439 S.E.2d 742 (1993).

The fact that a surviving child is illegitimate does not affect the right to sue. O.C.G.A. § 51-4-2(f). Nor does the fact that the child has been adopted by his grandparents after his mother’s death, even though the

mother left a surviving spouse, child's stepfather, who had no intention of pursuing wrongful death action. *Emory University v. Dorsey*, 207 Ga. App. 808, 429 S.E.2d 307 (1993). Further, a surviving spouse may recover on behalf of decedent's child even if spouse is barred from recovery because his negligence was equal to or greater than the defendant's negligence. *Mathews v. Doublerly*, 207 Ga. App. 578, 428 S.E.2d 588 (1993).

**Death of Child.** In the event of the death of a child who does not leave a spouse or child, the cause of action belongs to the parents. Any recovery is jointly held by the parents and divided evenly, regardless of whether the parents are currently married, divorced, or separated. O.C.G.A. §§ 51-4-4, 19-7-1(c)(2)(A) & (C). It is only necessary for one parent to bring the action, and any recovery afforded will be divided between the two parents. *Blanton v. Moshev*, 262 Ga. 254, 416 S.E.2d 506 (1992).

Pain and suffering of beneficiaries are not elements of damage. Pain and suffering of a deceased prior to death are damages in the administrator's suit for tortious injury which led to eventual death under a separate statutory provision referred to as the "survival statute." O.C.G.A. § 9-2-41. This statute provides that causes of action that existed in the deceased person before death survive in the personal representative. *See Complete Auto Transit, supra*. Fright, shock, and mental suffering are compensable when attended with physical injury, and there is no requirement that physical injury precede mental pain and suffering. *Monk v. Dial*, 212 Ga. App. 362, 441 S.E.2d 857 (1994). However, plaintiff may not bring a wrongful death action if the deceased would have himself been barred by a covenant not to sue. *Turner v. Walker County*, 200 Ga. App. 565, 408 S.E.2d 818 (1991). The deceased's estate can recover punitive damages claim under O.C.G.A. § 9-2-41, if the deceased experienced conscious pain and suffering. *Ford Motor Co. v. Stubblefield*, 171 Ga. App. 331, 319 S.E.2d 470 (1984); *Donson Nursing Facilities v. Dixon*, 176 Ga. App. 700, 337 S.E.2d 351 (1985). The measure for punitive damages in the deceased's estate's claim is the enlightened conscience of the jury, subject to the \$250,000 cap applying to some events after July 1, 1987. There is no cap for injuries resulting from products liability or the specific intent to cause harm. O.C.G.A. § 51-12-5.1(e)(1); *Bagley v. Shortt*, 261 Ga. 762, 410 S.E.2d 738 (1991). As of April 14, 1997, there is no cap for punitive damages against active tortfeasor for torts not arising from products liability if it is found that defendant acted or failed to act while under 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. O.C.G.A. § 51-12-5.1(f).

Two-year statute of limitations found at O.C.G.A. § 9-3-33, as it applies to wrongful death actions, is substantive, not procedural, law. *Potts v. United Technologies Corp.*, 879 F. Supp. 1196 (N.D. Ga. 1994).

The Statute has been interpreted to provide a product liability action for wrongful death. *Stiltjes v. Ridco Exterminating Co., Inc.*, 256 Ga. 255, 347 S.E.2d 568 (1986). *See also Ryals v. Billy Poppell*, 192 Ga. App. 787, 386 S.E.2d 513 (1989). Prior recovery for child's personal injury claim and parent's claim for medical and rehabilitation expenses does not extinguish a parent's right to bring a wrongful death action where child's subsequent death allegedly is due to original injuries. *Winding River Village v. Barnett*, 218 Ga. App. 35, 459 S.E.2d 569 (1995).

**Presumption of Death.** Rebuttable presumption of death arises from continued and unexplained absence of person from his home or place of residence, without any communication from or concerning him, for period of seven years. O.C.G.A. § 24-4-21. *Ritter v. Prudential Ins. Co.*, 538 F. Supp. 398 (N.D. Ga. 1982).

## DISABILITY

There is no statutory definition of disability. Generally, the definition of disability in an insurance policy controls an insurer's liability for benefits payable under policy. *Liberty Nat'l Life v. Parrimore*, 68 Ga. App. 623, 23 S.E.2d 541 (1942). No Georgia court has defined partial disability outside the workers' compensation context. Georgia courts have sought to avoid strict and literal enforcement of policy language that leads to unreasonable results, and will not require total inability to earn money before finding total disability. *Cloer v. Life & Cas. Ins.*, 222 Ga. 798, 152 S.E.2d 857 (1966). Total disability exists when one is unable to do substantially all of the material acts necessary for the insured to transact his occupation in his customary and usual manner. *Beneficial Standard Life v. Hamby*, 142 Ga. App. 449, 236 S.E.2d 116 (1977). Unless otherwise indicated in the policy, the word substantial is to be given a quantitative, rather than qualitative, meaning and is to be read as "most" or "vast majority." *Giddens v. Equitable Life Assurance etc.*, 445 F.3d 1286 (11th Cir. 2006); *Pomerance v. Berkshire Life Ins. Co. of Am.*, 288 Ga. App. 491, 654 S.E.2d 638 (2007), *cert denied*, 2008 Ga. LEXIS 277 (2008). Questions of whether an insured is totally and permanently disabled pursuant to the terms of a policy are questions of fact for a jury. *Pomerance*, 288 Ga. App. at 496-497.

## FINANCIAL RESPONSIBILITY LAW

See Law Digest Tables; "AUTOMOBILES, Compulsory Coverage."

## FIRE INSURANCE

Under O.C.G.A. § 33-32-1 (1943 New York Standard Fire Policy), property insurance policies must conform to provisions of the Commissioner's standard form. This section does not apply to policies providing multiple line coverage that contain, in the fire portion, language at least as favorable to an insured as standard policy and that have been approved by the Commissioner. *Fireman's Fund v. Dean*, 212 Ga. App. 262, 441 S.E.2d 436 (1994). A policy of insurance may be made to cover personal property changing in its specifics. O.C.G.A. § 33-32-2. An insurer may not rebuild or repair property sustaining a loss unless such a privilege is reserved in the policy. O.C.G.A. § 33-32-3; see *North River Ins. Co. v. Godley*, 55 Ga. App. 52, 189 S.E. 577 (1936). If the insured sustains a total loss of the insured property and the insurer pays an amount less than the maximum authorized under policy, the insurer shall refund to the insured the difference between the amount of premiums actually paid for an insurance policy and the amount of premiums which would have been charged for a property insurance policy having a maximum amount payable which is equal to the amount actually paid by the insurer to the insured. O.C.G.A. § 33-32-4.

Georgia's valued policy statute provides that an insurer must pay the full amount of policy (less depreciation since date of issuance or renewal) where one or two family residential buildings owned by a natural person are wholly destroyed by fire. But, an insured is entitled to the amount of actual loss sustained not exceeding the sum insured for where a loss occurs within 30 days of the original effective date of policy. O.C.G.A. § 33-32-5. This statute protects property owners from the overwhelming burden of proving property value after total destruction by fire, and conclusively establishes that property value equals policy face value. *Marchman v. Grange Mut. Ins. Co.*, 232 Ga. App. 481, 500 S.E.2d 659 (1998). This statute does not apply to partial losses, or buildings insured under builders' risk policies, or buildings insured by more than one insurance carrier where the insured concealed the existence of other policies to insurers, or two or more buildings insured under a blanket policy. See *Georgia Farm Bureau Mut. Ins. Co. v. Garzone*, 240 Ga. App. 304, 523 S.E.2d 386 (1999). The statute also does not apply to an insurance rider providing for payment of the full replacement cost or destroyed property and requiring replacement or repair as a condition precedent. See *Marchman, supra*. An insurer is unable to escape coverage when fire occurs to a vacant premises if the exclusion in a policy is ambiguous, indistinct, and lacks certainty with respect to meaning or expression as to whether or not the premises must be inhabited. *Hill v. Nationwide*, 214 Ga. App. 715, 448 S.E.2d 747 (1994).

To be effective, an assignment must be in writing. *St. Paul Fire & Marine Ins. v. Brunswick Grocery*, 113 Ga. 786, 39 S.E. 483 (1901); *Walker v. General Ins.*, 214 Ga. 758, 107 S.E.2d 836 (1959); *Savage v. St. Paul Fire*, 255 Ga. App. 648, 566 S.E.2d 682 (2002). The effect of an assignment with the assent of the insurer is as if a new policy had been issued to the assignee upon the same terms as those contained in the old policy. *First Nat'l Bank v. Colonial Fire Underwriters Ins. Co.*, 160 Ga. 166, 127 S.E. 455 (1925). After a loss occurs, an assignment of the policy may be made, without the insurer's consent, and this does not affect the liability of an insurer. An assignee may sue on the policy. *Georgia Co-Operative Fire Assoc. v. Borchardt & Co.*, 123 Ga. 181, 51 S.E. 429 (1905); *Pacific Ins. v. R.L. Kimsey Cotton Co.*, 114 Ga. App. 411, 151 S.E.2d 541 (1966). See also *Santiago v. Safeway Insurance Co.*, 196 Ga. App. 480, 481-81, 396 S.E.2d 506 (1990) ("Interest in the proceeds of a policy...after a loss to the insured has occurred may be assigned just as any other chose in action"). However, an assignee is subject to the same defenses an insurer has against the insured assignor.

Cancellation. See "CANCELLATION."

Mortgage Clause. A mortgagee may sue in his own name on a policy payable to him on his interests. *Trust Co. v. Scottish Union*, 119 Ga. 672, 46 S.E. 855 (1904); *Phoenix Ins. v. Aetna & Co.*, 120 Ga. App. 122, 169 S.E.2d 645 (1969); *Canal Ins. v. Savannah Bank*, 181 Ga. App. 520, 352 S.E.2d 835 (1987). A mortgagee is entitled to all insurance when an insured's debt equals or exceeds the amount of insurance. *CIT Group v. Northbrook*, 237 Ga. App. 524, 515 S.E.2d 845 (1999); *Rice v. State Farm*, 208 Ga. App. 166, 430 S.E.2d 75 (1993). Common creditor-assignee of a policy cannot sue in its name alone. It must allege in the petition that at the time of fire it possessed an interest in the property insured. *Insurance Company v. Gulf Oil*, 106 Ga. App. 382, 127 S.E.2d 43 (1962). A stipulation in the loss payable clause that a mortgagee will pay the premium upon mortgagor's default was not a covenant but merely a condition precedent to recovery on the policy. *Asher v. Union Assur. Soc'y Ltd.*, 177 Ga. 662, 170 S.E. 786 (1933).

Change of Ownership. There was no forfeiture under a change in the title clause when the conveyance of property was merely a sham and a device to prevent creditors from reaching the insured property. *Georgia Farm Bureau Mut. Ins. Co. v. Brown*, 192 Ga. App. 504, 385 S.E.2d 87 (1989); see also *Thomas Mote Trucking, Inc. v. PCL Constructors*, 246 Ga. App. 306, 540 S.E.2d 261 (2000). Where three insurance policies had vacancy or unoccupancy clause, there was nothing in the policies from which it could be construed that the insured prem-



ises, a restaurant, had to be open to the public in order to be occupied, when an insured was acting in a manner consistent with occupancy of the premises. *Knight v. USF&G*, 123 Ga. App. 833, 182 S.E.2d 693 (1971); see also *Sorema North Amer. Reins. Co. v. Johnson*, 258 Ga. App. 304, 574 S.E.2d 377 (2002).

Policy held void where insureds' ownership of the insured property amounted to only an undivided one-half interest, which thereby violated the "unconditional and sole ownership" policy provision. *National Sec. Fire & Cas. Co. v. London*, 180 Ga. App. 198, 348 S.E.2d 580 (1986). A bill of sale to secure debt constitutes alienation and will void a policy. *Curtis v. Girard Fire & Marine Ins.*, 190 Ga. 854, 11 S.E.2d 3 (1940); *James v. Pennsylvania General Ins. Co.*, 167 Ga. App. 427, 306 S.E.2d 422 (1983). A lessee has an insurable interest to the extent of the leasehold. *Townsend v. Morris*, 222 Ga. 242, 149 S.E.2d 464 (1966). Insurable interest includes an actual, lawful, substantial economic interest in the preservation of the insured property from loss, destruction, pecuniary damage or impairment. *Sapp v. Georgia Farm Bureau*, 206 Ga. App. 209, 424 S.E.2d 871 (1992); O.C.G.A. § 33-24-4(a).

Proof of Loss. Georgia courts have consistently held that the mere failure to timely furnish the insurer with sworn proofs of loss within the period specified in the policy will not work a forfeiture of the policy unless there is an express stipulation to that effect. *Gilbert v. Southern Trust Ins. Co.*, 252 Ga. App. 109, 555 S.E.2d 69 (2001) (citing *Cotton States Mut. Ins. Co. v. Walker*, 232 Ga. App. 41, 500 S.E.2d 587 (1998); *Canal Ins. Co. v. Savannah Bank*, 181 Ga. App. 520, 352 S.E.2d 835 (1987); *Progressive Mut. Ins. Co. v. Burrell Motors*, 112 Ga. App. 88, 143 S.E.2d 757 (1965)). Failure of an insurer to furnish a blank proof of loss upon written request constitutes a waiver of the policy provision requiring such proofs to be filed. O.C.G.A. § 33-24-39. Also, a promise to pay the claim waives the proof of loss requirement. *Sentinel Fire Ins. Co. v. McRoberts*, 50 Ga. App. 732, 179 S.E. 256 (1934). In action on an automobile policy seeking recovery for collision damage, there was genuine issue of material fact as to whether the insurer waived the requirement of filing a proof of loss where the insured sent photographs and repair estimates to the insurer and there were ongoing settlement negotiations. *Williams v. Southern Gen. Ins. Co.*, 211 Ga. App. 867, 440 S.E.2d 753 (1994).

Recovery was permitted even though false statements were made in proof of loss statements where there was no willful intention of deceiving an insurer and the insurer in fact was not deceived. Insured notified insurer of mistake prior to denial of claim. *Superior Fire v. Peters*, 62 Ga. App. 823, 10 S.E.2d 94 (1940).

Misrepresentations in Applications. Although O.C.G.A. § 33-24-7 provides statements in application are deemed to be representations and not warranties, misstatements or misrepresentations are treated as warranties, for purpose of preventing recovery under policy, when they come under any one of three criteria in O.C.G.A. § 33-24-7. These are 1) that such misrepresentations were fraudulent; 2) that the misrepresentations were material to acceptance of risk or hazard assumed by insurer; or 3) that insurer would not, in good faith, have issued the policy, or would not have issued a policy with similar coverage at a similar premium if the true facts had been known. *Block v. Voyager Life Ins.*, 251 Ga. 162, 303 S.E.2d 742 (1983); *Marchant v. Travelers Indem. Co.*, 286 Ga. App. 370, 650 S.E.2d 316 (2007). An omission or misrepresentation is material when it influences an insurer in deciding whether to accept the risk and in fixing the amount of premiums. *Jennings v. Life Ins. Co. of Ga.*, 212 Ga. App. 140, 441 S.E.2d 479 (1994). In order to void a policy of insurance for a misrepresentation on an application, an insurer must show that such misrepresentation was false and was material in that it changed the nature, extent or character of risk. *Jackson Nat'l Life Ins. Co. v. Snead*, 231 Ga. App. 406, 499 S.E.2d 173 (1998); see also *White v. American Family Life Assur. Co.*, 284 Ga. App. 58, 643 S.E.2d 298 (2007). Actual knowledge by an insured of falsity of misrepresentations is not required in order to prevent recovery on a policy; older line of cases to the contrary are expressly overruled. *United Family Life v. Shirley*, 242 Ga. 235, 248 S.E.2d 635 (1978); see also *White, supra*; *Oakes v. Blue Cross/Blue Shield of Columbus, Inc.*, 170 Ga. App. 335, 317 S.E.2d 315 (1984).

Bad Faith Penalties and Attorney's Fees. O.C.G.A. § 33-4-6 provides the exclusive remedy for an insurer's failure to promptly pay a claim. *Global Life & Acc. Ins. Co. v. Ogden*, 182 Ga. App. 803, 357 S.E.2d 276 (1987); see also *Anderson v. Georgia Farm Bureau*, 255 Ga. App. 734, 566 S.E.2d 342 (2002). To support a cause of action under O.C.G.A. § 33-4-6, an insured bears the burden of proving that a refusal to pay a claim was done in bad faith. *Progressive Amer. Ins. v. Horde*, 259 Ga. App. 769, 577 S.E.2d 835 (2003); *Assurance Co. of America, BBB Service*, 259 Ga. App. 54, 576 S.E.2d 38 (2002). A demand for payment by an insured is a prerequisite to filing a bad-faith suit against an insurer. *Bayrock Mortgage Corp. v. Chicago Title Ins.*, 286 Ga. App. 18, 648 S.E.2d 433 (2007); *Hanover Ins. v. Hallford*, 127 Ga. App. 322, 193 S.E.2d 235 (1972). Penalties for bad faith are not authorized where an insurance company has any reasonable ground to contest a claim and where there is a disputed question of fact. *Grange Mut. Cas. Co. v. Law*, 223 Ga. App. 748, 479 S.E.2d 357 (1996). Penalties under the statute include up to 50% of the



value of the claim and attorney's fees. *Allstate Ins. Co. v. Smith*, 266 Ga. App. 411, 597 S.E.2d 500(2004); *Moon v. Mercury Ins. Co. of Georgia*, 253 Ga. App. 506, 559 S.E.2d 532 (2002).

## HOSPITALS

**Duty of Care Owed.** Hospitals have a duty to exercise such reasonable care in looking after and protecting a patient as the patient's condition, known to the hospital through its agents and servants charged with the duty of looking after and supervising patient, may require. The duty extends to known or reasonably apprehended danger. *Emory Univ. v. Shadburn*, 47 Ga. App. 643, 171 S.E. 192 (1933); *Chapman v. St. Francis Hosp.*, 156 Ga. App. 5, 274 S.E.2d 62 (1980). "Not all injuries that occur in a hospital, nursing home or other health care facility are the result of professional negligence; they may be solely attributable to ordinary or simple negligence." *Moore v. Louis Smith Memorial Hosp., Inc.*, 216 Ga. App. 299, 299 454 Ga. App. 190 (1995), citations omitted. "A professional malpractice action is merely a professional negligence action and calls into question the conduct of a professional in his area of expertise." *Id.*, (citing *Candler Gen. Hosp. v. McNorrill*, 182 Ga. App. 107, 109-110, 354 S.E.2d 872 (1987)). Nursing homes and hospitals are not insurers of the safety of their residents or patients, but owe them a duty of ordinary care to protect them from danger or injury which can reasonably be anticipated. *Associates Health Systems v. Jones*, 185 Ga. App. 798, 800-01, 366 S.E.2d 147 (1988).

While the standard of care for physicians is the degree of care and skill employed by the medical profession in general under the same or similar circumstances, and not just in the practitioner's community, the same "locality rule" applies to hospitals in cases involving the availability of equipment and facilities. *Fain v. Moore*, 155 Ga. App. 209, 270 S.E.2d 375 (1980); *Smith v. Hospital Auth.*, 161 Ga. App. 657, 288 S.E.2d 715 (1982). Availability of equipment issues such as whether certain vacuum extractor was readily available in a northwest Georgia hospital are controlled by the locality rule. *Majeed v. McBryar*, 184 Ga. App. 807, 363 S.E.2d 59 (1987). The locality rule does not usually apply to a hospital's liability, however, it may if the plaintiff seeks to impose liability on a hospital for the negligence of a staff physician, a nurse or technician through the doctrine of respondeat superior. *Wade v. John D. Archbold Mem. Hosp.*, 252 Ga. 118, 311 S.E.2d 836 (1984); *Macon-Bibb Co. Hosp. v. Ross*, 176 Ga. App. 221, 335 S.E.2d 633 (1985); *Hodges v. Effingham Co. Hosp.*, 182 Ga. App. 173, 355 S.E.2d 104 (1987).

A hospital's liability for alleged negligence where nurses failed to obtain an accurate medical history and to

repeat the content of such history and patient's symptoms to a doctor on call is a professional judgment issue; therefore, the locality rule does not apply. *Hodges v. Effingham Co. Hosp.*, 182 Ga. App. 173, 355 S.E.2d 104 (1987).

**Vicarious Liability under Apparent Agency.** Plaintiffs' attorneys frequently seek to hold hospitals liable for the acts of physicians. If the physician is a hospital employee, respondeat superior applies. If a physician is an independent contractor, the hospital may be liable under the doctrine of apparent agency. "One who represents that another is his servant or other agent and thereby causes a third person justifiably to rely upon the care or skill of such apparent agent is subject to liability to the third person for harm caused by the lack of care or skill of the one appearing to be a servant or other agent as if he were such." *Richmond County Hosp. Auth. v. Brown*, 257 Ga. 507, 508, 361 S.E.2d 164 (1987) (quoting Restatement of the Law, Agency § 267).

Under Georgia's tort reform statutes, O.C.G.A. § 51-2-5.1, if a hospital posts an appropriate notice regarding independent contractors and the patient signs a similar written acknowledgment, the hospital will not be held liable for acts of independent contractors. Whether a healthcare professional is an employee will be determined by the contract between the professional and hospital. If there is no such contract, a healthcare professional shall only be considered an actual agent or employee of hospital if it can be shown by a preponderance of the evidence that hospital reserves the right to control time, manner, or method in which healthcare professional performs the services for which he is licensed. O.C.G.A. § 51-2-5.1(g)(1) and (2) set forth factors courts may and may not consider when making this determination.

**Negligent Hiring, Retention, Management, and Supervision.** An employer "is bound to exercise ordinary care in the selection of employees and not to retain them after knowledge of incompetency." O.C.G.A. § 34-7-20. In *Munroe v. Universal Health Servs. Inc.*, 277 Ga. 861, 596 S.E.2d 604 (2004), the Supreme Court of Georgia announced a new statement as to standard of care for negligent hiring and retention in Georgia. "[A] defendant employer has a duty to exercise ordinary care not to hire or retain an employee the employer knew or should have known posed 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... [T]he relevant question is whether [the defendant] knew or in the exercise of ordinary care should have known that...the employee it hired and retained to perform duties involving personal contact with medicated, vulnerable patients, was unsuit-



able for that position because he posed a reasonably foreseeable risk of personal harm to patients like [the plaintiff].” *Id.* at 863.

**Charitable Immunity.** An incorporated hospital that is primarily maintained as a charitable institution is not liable for the negligence of its officers and employees unless it fails to exercise ordinary care in the selection of competent officers and servants or fails to exercise ordinary care in retaining such officers and employees, but it may be liable to a paying patient, with recovery limited to income derived from non-charitable sources. *Ponder v. Fulton-DeKalb Hosp.*, 256 Ga. 833, 834, 353 S.E.2d 515 (1987); *Wynn v. Fulton-DeKalb Hosp. Auth.*, 196 Ga. App. 52, 395 S.E.2d 343 (1990). Defense of charitable immunity does not extend to doctors who are employed by the hospital, however. *Cutts v. Fulton-DeKalb Hosp.*, 192 Ga. App. 517, 385 S.E.2d 436 (1989).

### HUSBAND AND WIFE

**Community Property.** Georgia is not a community property state. *Moore v. Moore*, 249 Ga. 27, 29, 287 S.E.2d 185 (1982); *see also, Mathis v. Mathis*, 281 Ga. 865, 642 S.E.2d 832 (2007). Instead, Georgia recognizes the “equitable division of property” doctrine, which provides that all marital property acquired during marriage be fairly distributed between the parties. *Campbell v. Campbell*, 255 Ga. 461, 462, 339 S.E.2d 591 (1986).

**Interspousal Immunity.** The doctrine of interspousal tort immunity bars actions between spouses with respect to personal torts committed by one spouse against the other, except where traditional policy reasons for applying interspousal tort immunity are absent, *i.e.*, where there is no marital harmony to be preserved and where there exists no possibility of collusion between the spouses. O.C.G.A. § 19-3-8; *Shoemaker v. Shoemaker*, 200 Ga. App. 182, 407 S.E.2d 134 (1991); *see also Barron v. State*, 219 Ga. App. 481, 465 S.E.2d 529 (1995) (doctrine shall be strictly applied unless extreme factual situation merits an exception). Interspousal immunity bars third-party actions for indemnity or contribution against plaintiff’s spouse absent an extreme factual situation. *New v. Hubbard*, 206 Ga. App. 679, 426 S.E.2d 379 (1992). The Georgia courts have distinguished between those interspousal tort claims involving property rights and those involving personal torts. *Fleming v. Fleming*, 246 Ga. App. 69, 539 S.E.2d 563 (2000); *Eddleman v. Eddleman*, 183 Ga. 766, 771, 189 S.E. 833 (1937). In *Eddleman v. Eddleman*, Georgia’s Supreme Court determined that the doctrine of interspousal immunity created a bar only to the latter claims. *Eddleman v. Eddleman, supra*; *see also, Shah v. Shah*, 270 Ga. 649, 650, 513 S.E.2d 730 (1999) (allowing wife to amend complaint for divorce to add tort claim relating to hus-

band’s alleged fraudulent conveyance of property to father); *Fleming v. Fleming, supra* (doctrine does not bar tort claim for conversion). The doctrine of interspousal immunity does not apply to wrongful death actions. *Jones v. Jones*, 259 Ga. 49, 376 S.E.2d 674 (1989).

**Loss of Consortium.** A loss of consortium action is a derivative of the primary action, so that if the primary action fails, so does the loss of consortium claim. *Horn v. Foodmax of Georgia*, 210 Ga. App. 506, 437 S.E.2d 336 (1993). A loss of consortium action is based solely upon the claimant’s property rights arising out of the marriage relationship to love, companionship, and conjugal affection of spouse. *Bartlett v. American Alliance*, 206 Ga. App. 252, 424 S.E.2d 825 (1992). The limitation on actions for a loss of consortium is four years. O.C.G.A. § 9-3-33.

### INFANTS

The age of legal majority in Georgia is 18 years. O.C.G.A. § 39-1-1(a). In Georgia, contracts of a minor are generally voidable except those which are for necessities of life. O.C.G.A. § 13-3-20; *Holbrook v. Montgomery*, 165 Ga. 514, 141 S.E. 408 (1928). Contracts for necessities are binding only if the person furnishing the necessities proves that the parent or guardian failed to provide necessities for the minor. O.C.G.A. § 13-3-20(b). Generally speaking, necessities for an infant include support and maintenance, food, lodging, clothing, medical attendance, and education suitable to his station in life. *McLean v. Jackson*, 12 Ga. App. 51, 76 S.E. 792 (1912). A minor may ratify a contract after he reaches the age of majority by retaining property or enjoying the benefit of consideration showing he intends to abide by the contract. O.C.G.A. § 13-3-20(a); *Jackson v. Mitchell Motors*, 123 Ga. App. 261, 180 S.E.2d 605 (1971). Conveyances made to or by minors are voidable upon reaching the age of majority. O.C.G.A. § 44-5-41. A conveyance made by a minor may be voided by reconveying the property at the age of majority. *Id.* The minor may ratify a conveyance made to him by retaining possession after the age of majority. *Id.*

**Tort Liability.** Every person is liable for torts committed by his child, by his command or in the furtherance of and within the scope of his business, whether committed by negligence or voluntarily. O.C.G.A. § 51-2-2; *Cox v. Rewis*, 207 Ga. App. 832, 429 S.E.2d 314 (1993). Every parent or guardian having custody and control over a minor child or children under the age of 18 shall be liable in an amount not to exceed \$10,000 plus court costs for the willful or malicious acts of said minor children resulting in damage to the property of another and/or reasonable medical expenses to another. O.C.G.A. § 51-2-3(a). It has been held that children un-



der 13 years of age are absolutely immune from suits in tort under O.C.G.A. § 51-11-6. *Horton v. Hinely*, 261 Ga. 863, 413 S.E.2d 199 (1992).

**Right of Infant to Sue.** Every person may recover for torts committed on them. O.C.G.A. § 51-1-9. An action commenced and prosecuted by an infant alone shall not be void. Under Georgia law, it is the joint and several duty of each parent to support his or her minor children. O.C.G.A. § 19-7-2. Therefore, an action to recover medical expenses of a minor is now vested exclusively in both parents. *Rose v. Hamilton Medical Ctr.*, 184 Ga. App. 182, 361 S.E.2d 1 (1987). In the case of the homicide of a child, there shall be some statutory beneficiary entitled to recover the full value of the life of the child. O.C.G.A. § 19-7-1(c)(1). If no one is entitled to recovery under O.C.G.A. § 19-7-1, the right of recovery vests in the personal representative of the decedent. O.C.G.A. § 51-4-5; *Kirk v. Lithonia Mobile Homes*, 181 Ga. App. 533, 352 S.E.2d 788 (1987).

**Consent.** A minor capable of consenting to conduct is precluded from suing for a tort by reason of O.C.G.A. § 51-11-2 (no tort can be committed against a person consenting thereto if consent is free and the action of a sound mind). A minor acquires capacity to consent to different kinds of invasions of conduct at different stages in his/her development. Capacity exists when a minor has the ability of an average person to understand and weigh risks and benefits. Georgia law is replete with examples of situations in which a child over the age of 14 is deemed to have the mental capacity of an adult. One such case held that a 14-year old child is presumably chargeable with the same standard of diligence for their own safety as an adult. *Redding v. Morris*, 105 Ga. App. 152, 154, 123 S.E.2d 714 (1961). A 16-year old person can marry with parental consent and there is no age limitation if a person is pregnant or if persons to marry are parents of a child born out of wedlock. Individuals over 14 years of age can make a will, witness a will, and select a custodial parent in a custody battle. Individuals over the age of 13 are responsible for criminal acts. In torts, a minor's alleged consent is admissible against an alleged tortfeasor in an action arising out of any consensual conduct between herself and the tortfeasor. *McNamee et al v. A.J.W., a minor, et al*, 238 Ga. App. 534, 519 S.E.2d 298 (1999).

**INLAND MARINE**

Historically, a contract of marine insurance was, in terms, classed as a contract of indemnity. *Exchange Bank v. Loh*, 104 Ga. 446, 31 S.E. 459 (1898). Marine and transportation insurance includes insurance against any and all kinds of loss or damage to vessels in connection with "risks or perils of navigation..." O.C.G.A.

§ 33-7-5. When navigation is partly by fresh water and partly by salt water and involves shipment of goods, proof of damage by water of any kind is prima facie proof of damage by the perils of navigation, even where wetting is caused by rains. *Underwriters' Agency v. Sutherlin*, 55 Ga. 266 (1875); see also *East Tenn. R.R. v. Wright*, 76 Ga. 532 (1886); compare *Dwyer v. Providence*, 95 Ga. App. 672, 98 S.E.2d 592 (1957) (distinguishing "perils of the sea" from "perils of navigation") and *Caribbean Lumber Co. v. Phoenix Assur. Co.*, 227 Ga. App. 236, 488 S.E.2d 718 (1997). Waves from ocean-going vessels do not constitute peril of the sea. *Kilpatrick Marine Piling v. Fireman's Fund Ins. Co.*, 795 F.2d 940 (11th Cir. 1986). The misrepresentation of any fact material to a risk invalidates a marine hull insurance policy. *Id.*

**LIABILITY INSURANCE**

**Contribution between Joint Tortfeasors.** Without necessity of suit or judgment, the right of contribution from another continues unabated and is not lost or prejudiced by dismissal, compromise or settlement of a claim or claims for injury to either person or property, or release therefrom. *Suggs v. Hail*, 278 Ga. App. 358, 629 S.E.2d 11, 15 (2006); *Marchman & Sons, Inc. v. Nelson*, 251 Ga. 475, 306 S.E.2d 290 (1983); O.C.G.A. § 51-12-32. However, the right of contribution may be limited in light of changes in statutory construction concerning apportionment among joint tortfeasors in tort cases. O.C.G.A. § 51-12-33. See e.g., *Murray v. Patel*, 304 Ga. App. 253, 696 S.E.2d 97 (2010), holding that the purposes of O.C.G.A. §§ 9-11-14 and 51-12-33 are not incompatible. The plain language of O.C.G.A. § 51-12-33(b) requires that the fact-finder apportion liability between the defendant and the third-party defendant, and neither has the right of contribution against the other. *Id.* at 6. Additionally, O.C.G.A. § 9-11-13(g) authorizes the bringing of a cross-claim for contribution in an underlying tort action. The cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant. The language of the statute, however, is permissive and in no way makes a cross-claim arising out of the same transaction or occurrence as the main claim compulsory. *Tenneco Oil Co., v. Templin*, 201 Ga. App. 30, 410 S.E.2d 154 (1991).

**Defense of Action.** A duty to defend under an insurance policy is determined, generally, by the face of a complaint. However, where allegations in a complaint support the exclusion of coverage, but facts known to the insurer at the time of the coverage decision would support coverage, an insurer must look beyond the face of a complaint to true facts. *Penn-America Ins. Co. v. Dis-*



abled *Am. Veterans*, 268 Ga. 564, 490 S.E.2d 374 (1997); *Loftin v. U.S. Fire Ins. Co.*, 106 Ga. App. 287, 127 S.E.2d 53 (1962). The correctness of an insurer's decision to defend or not cannot be determined by "later-revealed facts" of which the insurer had no knowledge or notice. *Great American Ins. Co. v. McKemie*, 244 Ga. 84, 259 S.E.2d 39 (1979).

**Endorsement of Policy.** Sufficient consideration is necessary for a valid modification of coverage provisions of a policy of insurance regardless of whether the effect is to extend or limit the risks afforded thereunder. *Patterson v. Cotton States*, 221 Ga. 878, 148 S.E.2d 320 (1966); *Miley v. Fireman's Fund Ins. Co. of Ga.*, 176 Ga. App. 527, 336 S.E.2d 583 (1985).

**Exclusion of Risks.** Exceptions, limitations and exclusions to insuring agreements require a narrow construction on the theory that the insurer, having affirmatively expressed coverage through broad promises, assumes a duty to define any limitations in clear and explicit terms. *Alley v. Great Am. Ins. Co.*, 160 Ga. App. 597, 287 S.E.2d 613 (1981); *Glens Falls Ins. Co. v. Donmac Golf Shaping*, 203 Ga. App. 508, 417 S.E.2d 197 (1992).

Generally, auto liability exclusions are void on grounds of public policy if they deny minimum financial responsibility coverage to an innocent victim. *See e.g.*, "avoiding arrest exclusion." *Cotton States v. Neese*, 254 Ga. 335, 329 S.E.2d 136 (1985); "intentional act exclusion," *Martin v. Chicago Ins. Co.*, 184 Ga. App. 472, 361 S.E.2d 835 (1987), *cert. denied*. *See also Direct General Ins. Co. v. Drawdy*, 258 Ga. App. 149, 572 S.E.2d 629 (2002) (applying rule in *Neese* that where an innocent injured party has no other recourse for recovery of his damages, certain exclusionary provisions in automobile insurance policies of the tortfeasor are unenforceable as a matter of public policy in view of Georgia's compulsory liability insurance law but only to the extent of insurance required by such law); *Woody v. Georgia Farm Bureau Mut. Ins. Co.*, 250 Ga. App. 454, 551 S.E.2d 836 (2001) (upholding public policy interests that compulsory insurance law was enacted to serve and concluding that exclusion may be directly contrary to the interests that accident victims have access to insurance funds to satisfy their judgments and recognizing that compulsory insurance law establishes a public policy that innocent persons who are injured should have an adequate recourse for the recovery of their damages).

"Automobile business" exclusion precludes coverage for a driver other than the named insured when such person is engaged in the business of selling, repairing, servicing, storing or parking automobiles. *USF&G v. Boyette*, 129 Ga. App. 843, 201 S.E.2d 660 (1973); *Metropolitan v. Mr. Pride*, 258 Ga. 770, 374 S.E.2d 82

(1988). A family exclusion clause will be enforced unless it leaves an innocent victim without liability insurance protection up to minimum statutory limits or exposes the insured to unanticipated liability. *Stepho v. Allstate*, 259 Ga. 475, 383 S.E.2d 887 (1989).

**Late Notice Defenses.** Georgia courts recognize the purpose of notice provisions in standard liability policies is to permit insurance companies to promptly investigate facts of an occurrence so as to make proper disposition of the matter as quickly as possible. *Hamm v. Lenasma*, 184 Ga. App. 237, 361 S.E.2d 205 (1987). An insurer claiming late notice of a claim need not necessarily show prejudice because under certain situations, the mere passage of time between the claim and the notice to the carrier will bar coverage, where such notice is explicitly made a condition precedent to coverage. *Aegis Sec. v. Hiers*, 211 Ga. App. 639, 440 S.E.2d 71 (1994). However, *see Ginn v. State Farm*, 196 Ga. App. 640, 396 S.E.2d 582 (1990), where at least as far as minimum financial responsibility coverage is concerned, the late or lack of notice defense is no longer available to insurers, unless the injured third-party has access to uninsured motorist coverage up to the statutory minimums. *State Farm v. Drawdy*, 217 Ga. App. 236, 456 S.E.2d 745 (1995).

*Leventhal v. American Bankers Ins. Co. of Fla.*, 159 Ga. App. 104, 283 S.E.2d 3 (1980), held that the failure of an employee to timely forward suit papers does not forfeit coverage where an insurer has in fact received actual notice of accident and pendency of suit from employer/named insured, employer/named insured's liability based on respondent superior, and insurer has shown no prejudice. The presence or absence of prejudice to an insurer is a factor considered in the determination of timeliness of notice of suit. *Id.* Any third-party may satisfy the "notice of suit" provision by sending copy of summons and complaint to the insurer by certified mail within ten days of filing or within thirty days of learning of the insurer or agent. O.C.G.A. § 33-7-15(c).

**Intentional Injury Exclusion.** It is not the intent to act but the intent to cause harm that triggers this exclusion. *Southern Guar. Ins. Co. of Ga. v. Saxon*, 190 Ga. App. 652, 379 S.E.2d 577 (1989). An intent to injure may be inferred from the nature of some specific intentional acts. *State Farm v. Carter*, 208 Ga. App. 873, 432 S.E.2d 614 (1993). An insured who injures another in self-defense expects and intends the injury. *Stein v. Massachusetts Bay Ins.*, 172 Ga. App. 811, 324 S.E.2d 510 (1984). A child molester is presumed to intend harm. *Roe v. State Farm Fire & Cas.*, 259 Ga. 42, 376 S.E.2d 876 (1989). Intoxication may create an issue of fact regarding intent. *State Farm Fire & Cas. v. Morgan*, 258 Ga. 276, 368 S.E.2d 509 (1988).

**Business Pursuits Exclusion.** This exclusion applies to an insured's "usual commercial or mercantile activity" and business in which the insured is customarily engaged. *Brown v. Peninsular Fire*, 171 Ga. App. 507, 320 S.E.2d 208 (1984). Child-care in a home for money is not a business pursuit. *USAA v. Lucas*, 200 Ga. App. 383, 408 S.E.2d 171 (1991).

**Rights of Injured Party.** In the absence of fraud and collusion, if an insurer who has a right to defend an action against the insured has timely notice of such action and elects not to defend, any judgment in such a case is binding on the insurer as to issues which were litigated therein, when the insurer is later sued by the injured person. *Canal Ins. Co. v. Cambron*, 240 Ga. 708, 242 S.E.2d 32 (1978).

The insurer or its representative must provide written notice to a claimant at the time payment of \$5,000 or more is made to a claimant's attorney or other representative in settlement of any third-party liability claim. O.C.G.A. § 33-24-41.2, effective July 1, 1993. This code section does not create a separate cause of action against the insurer based upon a failure to serve such notice on the claimant, other than enforcement by the Commissioner of Insurance only as to natural persons. *Id.*

An insurer which fails through negligence to accept a settlement demand within policy limits may be held liable for any jury verdict in excess of the policy limits. *Cotton States Mutual Insurance Company v. Brightman*, 276 Ga. 683, 580 S.E.2d 519 (2003). *Driskell v. Empire Fire & Marine Insurance Co.*, 249 Ga. App. 56, 547 S.E.2d 360 (2001) (citing *McCall v. Allstate Insurance Co.*, 251 Ga. 869, 310 S.E.2d 513 (1984)). Bad faith by the insurer is not required to create liability for a verdict in excess of policy limits. *Davis v. Cincinnati Insurance Co.*, 160 Ga. App. 813, 288 S.E.2d 233 (1982). An insurer in Georgia can be liable for failure to settle a claim against an insured if the failure to settle is motivated or caused by negligence or bad faith. *Alexander Underwriters General Agency v. Lovett*, 182 Ga. App. 769, 357 S.E.2d 256 (1987).

An improper refusal to defend can trigger "bad faith" penalties under O.C.G.A. § 33-4-6, which includes exposure not only for the policy holder's defense costs and attorney's fees, but also a penalty up to 50% of the insurer's liability for the loss. Bad faith for purposes of O.C.G.A. § 33-4-6 is any frivolous and unfounded refusal in law or in fact to pay according to the terms of the policy. *See King v. Atlanta Casualty Ins. Co.*, 279 Ga. App. 554, 631 S.E.2d 786 (2006); *see also Fortson v. Cotton States Mut. Ins. Co.*, 168 Ga. App. 155, 308 S.E.2d 382 (1983).

Generally, the wrongful refusal to defend a case results only in contract damages. *Southern Guar. Ins. Co. v. Dowse*, 278 Ga. 674, 605 S.E.2d 27 (2004) ("In Georgia, an insurer that denies coverage and refuses to defend an action against its insured, when it could have done so with a reservation of its rights as to coverage, 'waives the provisions of the policy against a settlement by the insured and becomes bound to pay the amount of any settlement [within a policy's limits] made in good faith[,] plus expenses and attorneys' fees.'").

In a case of a verdict in excess of the policy limits, however, Georgia courts look to all damages that flow from the insurer's refusal to defend the action including any bad faith conduct on the part of the insurer. *See Argonaut Ins. Co. v. Atlantic Wood*, 187 Ga. App. 471, 370 S.E.2d 765 (1988), *rev'd on other grounds*, 258 Ga. 800, 375 S.E.2d 221 (1989) (The measure of compensatory damages for the insurer's wrongful refusal to defend includes the following: (a) The policy limits as per the contract, and (b) damages directly caused by the failure to defend, such as, attorney fees and other costs of defense incurred by the insured, and that portion of the judgment exceeding the policy limits which, but for the failure to defend, would not have been awarded in the underlying action.); *see also Thomas v. Atlanta Cas. Co.*, 253 Ga. App. 199, 558 S.E.2d 432 (2001) (Where an insurance company fails to offer a defense, it may be liable to its insured beyond the policy limits to the full amount of the judgment.); *Atlanta Cas. Co. v. Gardenhire*, 248 Ga. App. 42, 545 S.E.2d 182 (2001); *Leader Nat. Ins. Co. v. Kemp & Son, Inc.*, 259 Ga. 329, 380 S.E.2d 458 (1989); *but see Lanier & Co. v. Southeastern Forge, Inc.* 630 S.E.2d 404 (Ga. 2006) (Insured sued insurance broker for negligent failure to procure insurance. Supreme Court held that an insurance is not liable for the entire amount of a judgment or verdict but only up to the limits of insurance it negligently failed to procure).

#### LIMITATION OF TIME FOR COMMENCEMENT OF ACTION

Actions for injuries to a person shall be brought within two years after the right of action accrues, except for claims involving loss of consortium, which must be brought within four years. Actions for injuries to reputation shall be brought within one year. O.C.G.A. § 9-3-33. Actions for injury to personalty (O.C.G.A. § 9-3-31), recovery of personal property, or for damages for conversion or destruction of property (O.C.G.A. § 9-3-32) shall be brought within four years. Actions for trespass or damage to realty also shall be brought within four years after the right of action accrues, O.C.G.A. § 9-3-



30(a). *Corporation of Mercer Univ. v. National Gypsum*, 258 Ga. 365, 368 S.E.2d 732 (1988) (right accrues upon substantial completion).

Under the Georgia “discovery rule,” a cause of action for personal injury does not accrue, and the statute of limitations does not commence to run, until the injured party knew or, through exercise of reasonable diligence, should have discovered not only the nature of the injury but also the causal connection between the injury and the negligent conduct. *King v. Seitzingers, Inc.*, 160 Ga. App. 318, 287 S.E.2d 252 (1981). See also, *Ambling Mgmt. Co. v. Purdy*, 283 Ga. App. 21, 640 S.E.2d 620 (2006) (holding that continuing tort theory operated to toll the statute of limitation within two years of date suit was filed). The discovery rule is confined to cases of bodily injury which develop over an extended period of time. *Corporation of Mercer Univ. v. National Gypsum*, 258 Ga. 365, 368 S.E.2d 732 (1988); *Hanna v. McWilliams*, 213 Ga. App. 648, 446 S.E.2d 741 (1994) (adoption J. Weltner’s dissent). The discovery rule does not apply to property damage claims. *Id.*

All actions for trespass upon or damage to realty shall be brought within four years after the right of action accrues. O.C.G.A. § 9-3-30(a). Damage to real property arising out of construction is generally considered to occur, and the statute of limitations begins to run, at the time of the defendant-contractor’s “substantial completion” of the project, because damages usually become immediately ascertainable to the plaintiff-owner at that time. *Colormatch Exteriors, Inc. v. Hickey*, 275 Ga. 249, 569 S.E.2d 495 (2002). Causes of action against product manufacturers for damage to realty accrue upon substantial completion of the project, even though the plaintiff-owner did not yet own the property, where the builder or some other party previously owned the property and could have brought a products-liability suit against the manufacturer. *Id.* Where a contractor makes improvements to his own real property for the express purpose of sale and the property actually is sold, the applicable period of limitations for claims of damage to realty does not begin to run until the initial sale of the improved property, regardless of the date of substantial completion. *Id.* The statute of repose for injury to real or personal property arising out of an alleged construction defect can commence to run against the purchaser of new construction even before he acquires legal title to the real property. *Id.* The causes of action for damage to realty in O.C.G.A. §§ 51-1-11 and 9-3-51(a) stemming from the manufacture of or the negligent design or installation of synthetic exterior siding shall accrue when the damage to the dwelling is discovered or, in the exercise of reasonable diligence, should have been discovered, whichever first occurs. Such a cause of action shall be brought within the time limits provided for in Code

Sections 51-1-11 and 9-3-51, respectively. O.C.G.A. § 9-3-30 (b)(1).

There is no specific statutory limitation for suits on insurance policies. Instead, those limitations affecting written contracts apply; six years for contracts not under seal, not including actions for the breach of contracts for the sale of goods under Article 2 of Title 11 or to negotiable instruments under Article 3 of Title 11, and twenty years for contracts under seal. O.C.G.A. §§ 9-3-23 and 9-3-24. Parties may contract for shorter periods for the commencement of action, provided the period fixed is not so unreasonable as to raise a presumption of imposition or undue advantage. *Rabey Elec. Co. v. Housing Auth.*, 190 Ga. App. 89, 378 S.E.2d 169 (1989). The possibility of a settlement of the plaintiff’s insurance claim for damage to his home did not discharge the plaintiff from his duty to file suit within one-year limitation period set forth in his homeowner’s policy. *Aaron v. Georgia Farm Bureau Mut. Ins. Co.*, 297 Ga. App. 403, 677 S.E.2d 419 (2009).

No products liability action shall be commenced for injury after 10 years from the date of first sale for the use or consumption of the product causing the injury. O.C.G.A. § 51-1-11(b)(2). The statute of repose for product liability cases begins running on the date the product is ultimately sold for its actual intended purpose. *Campbell v. Altec Indus.*, 288 Ga. 535, 707 S.E.2d 48 (2011). The statute of repose does not apply to a negligence action against a manufacturer of products which cause a disease or birth defect, or an action arising out of willful, reckless or wanton disregard for life or property. O.C.G.A. § 51-1-11(c). This section is applicable to manufacturers of any personal property and not to the distributor. *Hatcher v. Allied Prod.*, 256 Ga. 100, 344 S.E.2d 418 (1986).

Medical malpractice actions where object has been left in a patient’s body must be brought within one year after the negligent act or omission is discovered. O.C.G.A. § 9-3-72. Failure to inform a patient of the presence of a foreign object left by the physician merely tolls the one-year statute of limitation until the time at which the patient discovers the presence of the object and does not constitute a separate act of malpractice. *Hamrick v. Ray*, 171 Ga. App. 60, 318 S.E.2d 790 (1984). For all other medical malpractice actions, a two-year statute of limitations applies after the date on which the injury or death arising from the negligent or wrongful act or omission occurred. O.C.G.A. § 9-3-71(a). In no event may action for medical malpractice be brought more than five years after the date of the negligent or wrongful act or omission occurred. O.C.G.A. § 9-3-71(b).

Legal malpractice actions alleging unskillfulness may sound in tort and are subject to the one-year and/or two year limitation of O.C.G.A. § 9-3-33. *Coleman v. Hicks*, 209 Ga. App. 467, 433 S.E.2d 621 (1993). However, O.C.G.A. § 9-3-34 states clearly that the “Article shall not apply to actions for medical malpractice.” In addition, a legal malpractice action alleging negligence or unskillfulness sounds in contract (agency) and, in the case of an oral agreement, is subject to the four-year statute of limitations in O.C.G.A. § 9-3-25.

Any civil action for recovery of damages suffered as a result of childhood sexual abuse shall be commenced within five years of the date the plaintiff attains the age of majority, which in Georgia is 18 years old. O.C.G.A. §§ 9-3-33.1(b), 39-1-1.

The running of the period of limitations with respect to any cause of action in tort that may be brought by the victim of an alleged crime which arises out of the facts and circumstances relating to the commission of such alleged crime committed in this state shall be tolled from the date of the commission of the alleged crime or the act giving rise to such action in tort until the prosecution of such crime or act has become final or otherwise terminated, provided that such time does not exceed six years. O.C.G.A. § 9-3-99. This rule applies to tort suits involving the violation of Georgia’s traffic laws. *Beneke v. Parker*, 285 Ga. 733; 684 S.E.2d 243 (2009).

Unless otherwise provided by law, if a defendant removes from this state, the time of his absence from the state until he returns to reside shall not be counted or estimated in his favor. O.C.G.A. § 9-3-94.

Statutes of limitation are tolled when a cause of action accrues, or after accrual, when a person is involuntarily disabled due to minority or legal incompetency resulting from mental retardation or illness. O.C.G.A. §§ 9-3-90(a), 9-3-91. The tolling of limitations is also recognized if the defendant is guilty of fraud and that deters plaintiff from bringing action. O.C.G.A. § 9-3-96. Only actual fraud tolls the statute. *Hahne v. Wylly*, 199 Ga. App. 811, 406 S.E.2d 94 (1991).

**MALPRACTICE**

Legal. See “ATTORNEYS.”

Affidavit to accompany charge of professional malpractice. In any action for damages alleging professional malpractice, a plaintiff shall be required to file with the complaint an affidavit of an expert competent to testify, which sets forth specifically at least one negligent act or omission claimed to exist and the factual basis for each claim. O.C.G.A. § 9-11-9.1. The affidavit requirement applies only to those professions listed in O.C.G.A. § 9-11-9.1(g). The statute applies to any action

for professional malpractice by negligent act or omission, sounding in tort or by breach of contract for failure to perform professional services in accordance with the professional obligation of care. *Richmond Leasing Co. v. Cooper, Cooper, Majoriello & Stalnaker*, 207 Ga. App. 623, 428 S.E.2d 603 (1993).

A plaintiff’s expert affidavit is mandated by the statute in any action for damages alleging professional malpractice including acts of “clear and palpable” malfeasance so as to be reasonably ascertained by the jury without expert evidence. *Barr v. Johnson*, 189 Ga. App. 136, 375 S.E.2d 51 (1988) (holding that the mandate of O.C.G.A. § 9-11-9.1 requiring an affidavit necessarily preempted and superseded the judicially-created rule found in *Hughes v. Malone*, 146 Ga. App. 341, 247 S.E.2d 107 (1978) regarding “clear and palpable” malfeasance aforementioned).

In a negligence action against a physician and office staff, an affidavit of a medical expert was not required where the defendants’ alleged liability did not turn on a medical question and a jury would be capable of determining without help of expert evidence whether the physician’s medical assistant exercised due care. *Brown v. Durden*, 195 Ga. App. 340, 393 S.E.2d 450 (1990); see also *Edwards v. Vanstrom*, 206 Ga. App. 21, 424 S.E.2d 326 (1992) (citing *Brown, supra*).

The requirement of an affidavit applies only to actions alleging professional negligence; an affidavit is not required when claims are based on a professional’s intentional conduct or breach of fiduciary duty. See *Labovitz v. Hopkinson*, 271 Ga. 330, 519 S.E.2d 672 (1999) (allegations of fraud and misrepresentation during defendant attorney’s representation of plaintiff); see also *Johnson v. Rodier*, 242 Ga. App. 496, 529 S.E.2d 442 (2000) (invasion of privacy and tortious interference with employment); *Walker v. Wallis*, 289 Ga. App. 676, 658 S.E.2d 217 (2008) (citing *Labovitz, supra*).

O.C.G.A. § 9-11-9.1(a)(3) requires an affidavit be filed in any action alleging professional malpractice against “[a]ny licensed health care facility alleged to be liable based upon the action or inaction of a health care professional licensed by the State of Georgia and listed in Subsection (g) of this Code section.” Employers of professionals (who are not a licensed healthcare facility) are not encompassed by O.C.G.A. § 9-11-9.1. *Minnix v. Dept. of Transportation*, 272 Ga. 566, 533 S.E.2d 75 (2000); see also *Mountain Orthopedics v. Williams*, 284 Ga. App. 885, 644 S.E.2d 868 (2007). As such, an expert affidavit is not required when suing the employer of a professional listed in O.C.G.A. § 9-11-9.1 (g), unless the employer is a licensed healthcare facility.



## NEGLIGENCE

See Law Digest Tables.

See “AUTOMOBILES”; “PRODUCTS LIABILITY”; “WORKERS’ COMPENSATION.”

Age. O.C.G.A. § 51-11-6 provides immunity from any suit for tort committed by a minor under the age of criminal responsibility. *Horton v. Hinely*, 261 Ga. 863, 413 S.E.2d 199 (1992). A minor above the age of fourteen years is only presumptively chargeable with the same degree of care for his own safety as an adult. *Sheetz v. Welch*, 89 Ga. App. 749, 81 S.E.2d 319 (1954); *Hembree v. Spivey*, 281 Ga. App. 693, 637 S.E.2d 94 (2006). Where there is a question of capacity of a child between seven and fourteen years of age to be contributorily negligent, the question is an individual one and a jury must first find that the particular child had capacity required and must decide whether the child exercised it. *Brewer v. Gittings*, 102 Ga. App. 367, 116 S.E.2d 500 (1960). A plaintiff of “tender years” must exercise “due care,” which is such care as the child’s mental and physical capacities enable him to exercise in actual circumstances of the occasion and situation under investigation. O.C.G.A. § 51-1-5. Thus, doctrines of contributory negligence and assumption of risk apply to infant claimants. *Jackson v. Young*, 125 Ga. App. 342, 187 S.E.2d 564 (1972); *Fraley v. Lake Winnepesaukah*, 631 F. Supp. 160 (N.D. Ga. 1986); *Kent v. Callaway Gardens Resort, Inc.*, 2010 U.S. Dist. LEXIS 60613 (M.D. Ga. June 18, 2010). The question of a minor’s alleged negligence is for the jury. *Ashbaugh v. Trotter*, 237 Ga. 46, 226 S.E.2d 736 (1976); *Conner v. Norman Sosebee Funeral Home*, 303 Ga. App. 352, 693 S.E.2d 534 (2010).. The constitutionality of different treatment afforded to minor plaintiffs and minor defendants was upheld in *Barrett v. Carter*, 248 Ga. 389, 283 S.E.2d 609 (1981).

Attractive Nuisance. Georgia has adopted the Restatement rule, which sets forth five conditions which must exist to find a landowner liable for physical harm to trespassing children: 1) an owner must know or have reason to know that children are likely to trespass; 2) the condition is one that the landowner does or should realize will involve unreasonable risk of death or serious injury to children; 3) children, because of their youth, do not realize the risk involved; 4) usefulness to the owner and burden of eliminating danger is slight compared with the risk to children; and 5) an owner fails to exercise reasonable care to eliminate danger. *Gregory v. Johnson*, 249 Ga. 151, 289 S.E.2d 232 (1982). These elements are stated in conjunctive; all 5 must exist if a cause of action is to be sustained. *Adams v. Atlanta Faith Memorial Church*, 191 Ga. App. 215, 381 S.E.2d 397 (1989). Lakes, ponds, and similar bodies of water, either

natural or manmade, are open and obvious hazards, even to small children, and do not expose either a licensee or a trespasser to an unreasonable risk of harm. *Brazier v. Phoenix Group Mgmt.*, 280 Ga. App. 67, 633 S.E.2d 354 (2006).

Assumption of the Risk. The doctrine of assumption of the risk requires that a plaintiff have some actual knowledge of danger, and that he understand and appreciate the risk therefrom, and voluntarily expose himself to the risk. *Cagle v. Thorpe*, 193 Ga. App. 576, 388 S.E.2d 533 (1989). The standard to be applied in assessing an assumption of the risk defense is a subjective one, geared to the particular plaintiff and his situation, rather than that of a reasonable person of ordinary prudence. *Muldovan v. McEachern*, 271 Ga. 805, 523 S.E.2d 566 (Ga. 1999)

Comparative Negligence. Georgia follows the “Avoidance Doctrine,” which provides that if a plaintiff by ordinary care could have avoided the consequences caused by defendant’s negligence, he is not entitled to recover. O.C.G.A. § 51-11-7. Although cases continue to refer to the doctrine of “contributory negligence”, Georgia is a modified comparative negligence state. If a plaintiff is 50% negligent, there is no recovery. Where there is negligence by both parties which is concurrent and contributes to injury sued for, recovery by a plaintiff is not barred unless his fault is equal to or greater than that of a defendant. However, plaintiff’s damages shall be reduced by an amount in proportion to the negligence of plaintiff compared with that of defendant. *Underwood v. Atlanta & West Point R.R.*, 105 Ga. App. 340 (8), 124 S.E.2d 758 (1962) , *rev’d on other grounds*, 218 Ga. 193, 126 S.E.2d 785 (1962); *Little Ocmulgee Elec. Membership Corp. v. Lockhart*, 212 Ga. App. 282, 441 S.E.2d 796 (1994). A plaintiff’s negligence is to be compared to the aggregate negligence of all joint tortfeasors. *Union Camp Corp. v. Helmy*, 258 Ga. 263, 367 S.E.2d 796 (1988).

Contributory Negligence. Although cases continue to refer to the doctrine of contributory negligence, Georgia is a modified comparative negligence state. If a plaintiff is 50% negligent, there is no recovery. Georgia follows the “Avoidance Doctrine,” which provides that if a plaintiff by ordinary care could have avoided the consequences caused by defendant’s negligence, he is not entitled to recover. O.C.G.A. § 51-11-7.

Definition and Discussion of Negligence. The essential elements for causes of action based in negligence are: 1) a legal duty to conform to the standard of conduct provided by law for the protection of others against unreasonable risks of harm, 2) a breach of that standard, 3) a legally attributable causal connection between the conduct and the resulting injury, and 4) some loss or dam-



age flowing to plaintiff's legally-protected interest as result of the alleged breach of a legal duty. *Bradley Center, Inc. v. Wessner*, 250 Ga. 199, 296 S.E.2d 693 (1982).

**Imputed Negligence.** For the negligence of one person to be properly imputable to another, there must exist a principal and agent relationship. O.C.G.A. § 51-2-1(a); *McKinney v. Burke*, 108 Ga. App. 501, 133 S.E.2d 383 (1963). The relation of principal and agent arises whenever one person, expressly or by implication, authorizes another to act for him or subsequently ratifies the acts of another in his behalf. O.C.G.A. § 10-6-1. An employer generally is not responsible for torts committed by his employee when the employee exercises an independent business and in it is not subject to the immediate direction and control of the employer. O.C.G.A. § 51-2-4. In the absence of evidence of actual control, the test distinguishing an employee from an independent contractor is whether the employer assumed the right to control the time, manner and method of executing the work, as distinguished from the right merely to require certain definite results in conformity to the contract. *Dix v. Shadeed*, 261 Ga. App. 145, 581 S.E.2d 747 (2003). Parents are not liable for the torts of their minor children merely on the basis of the parent-child relationship. Rather, parental liability may be based on a principal-agent relationship where the child's negligence is imputed to the parent, or may be based on circumstances where the parent negligently allows the child to have unsupervised control of a dangerous instrumentality. *Jackson v. Moore*, 190 Ga. App. 329, 378 S.E.2d 726 (1989); *Kitchens v. Harris*, 305 Ga. App. 799, 701 S.E.2d 207 (2010).

**Apportionment of Liability and Damages.** Prior to the February 16, 2005, effective date of the Georgia Tort Reform Act., tortfeasors who acted in concert of action were jointly and severally liable for the full amount of the plaintiff's damage. *Clyde v. Peterson*, 232 Ga. App. 589, 502 S.E.2d 524 (1998); *Phillips v. Tellis*, 181 Ga. App. 449, 352 S.E.2d 630 (1987); *Gay v. Piggly Wiggly*, 183 Ga. App. 175, 358 S.E.2d 468 (1987). A plaintiff could elect to sue one, several or all joint tortfeasors in the same action and each tortfeasor was liable to the plaintiff for the full amount of the plaintiff's damages. *Posey v. Medical Center-West, Inc.*, 257 Ga. 55, 354 S.E.2d 417 (1987). Where one joint tortfeasor paid more than its share of the common burden that all should equally be bound to bear, contribution from the other tortfeasors could be enforced by a separate action at law after settlement or judgment with the plaintiff. *Eidson v. Maddox*, 195 Ga. 641, 24 S.E.2d 895 (1943). The tortfeasor who pays can do so by settlement without a judgment, and still retain a right of contribution from other joint tortfeasors. O.C.G.A. § 51-12-32(c); *Marchman & Sons, Inc. v. Nelson*, 251 Ga. 475, 306 S.E.2d

290 (1983); *Randall v. Norton*, 192 Ga. App. 734, 386 S.E.2d 518 (1989).

Under the Georgia Tort Reform Act, O.C.G.A. §§ 51-12-31 and 51-12-33. were amended to arguably require that damages be apportioned by jury among joint tortfeasors in every tort case.. O.C.G.A. § 51-12-33 requires that, in the case of multiple defendants, the jury, after a reduction of damages based upon plaintiff's negligence, if any, shall apportion its award of damages among persons who are liable according to the percentage of fault of each. Such damages shall be the liability of each person against whom they are awarded, shall not be a joint liability, and shall not be subject to any right of contribution. *Id.* Negligence or fault of a nonparty shall be considered if the plaintiff entered into a settlement agreement with the nonparty or if a defending party gives notice not later than 120 days prior to the date of trial that a nonparty was wholly or partially at fault. O.C.G.A. § 51-12-33(d)(1). However, the plaintiff shall not be entitled to receive any damages if the plaintiff is 50 percent or more responsible for the injury or damages claimed. O.C.G.A. § 51-12-33(g).

The issue of whether O.C.G.A. § 51-12-33 requires a trier of fact to apportion an award of damages among multiple defendants when the plaintiff is not at fault remains unsettled. That issue is currently before the Georgia Supreme Court. *McReynolds v. Krebs*, 307 Ga. App. 330, 705 S.E.2d 214 (2010), cert. granted, *McReynolds v. Krebs*, 2011 Ga. LEXIS 400 (Ga. May 16, 2011).

The last clear chance doctrine contains two elements: 1) plaintiff's negligence put him in a position of peril from which he could not extricate himself; 2) a defendant must have knowledge and appreciation of plaintiff's peril in time to avoid injury. *Harrison v. Feather*, 178 Ga. App. 35, 342 S.E.2d 1 (1986).

**Negligence Per Se.** Violation of statute or ordinance is negligence per se if 1) the injured person is within the class of persons the statute was intended to protect, and 2) the harm complained of was the harm the statute intended to guard against. even when negligence per se has been shown, proximate cause must still be proved. in order for a violation of a statute to be negligence per se, it is sufficient if the violation is capable of having a causal connection with the injury and damage inflicted. *CAA v. Worthy, supra*, 173 Ga. App. at 153. It is not essential that the injury inevitably flow from the violation. *Central Anesthesia Assoc. v. Worthy*, 173 Ga. App. 150, 325 S.E.2d 819 (1984). *affirmed*, 254 Ga. 728, 333 S.E.2d 829 (1985).

An owner of a vicious animal may be liable for injury caused by the animal which is allowed to freely roam or who is carelessly managed provided the person



injured did not provoke the injury by his own act. O.C.G.A. § 51-2-7. However, it must be shown not only that the animal is vicious, but also that owner knows of the animal's propensity to do the harm complained of. *Stanger v. Cato*, 182 Ga. App. 498, 356 S.E.2d 97 (1987). Owner's knowledge can be either actual or constructive knowledge. *Starling v. Davis*, 121 Ga. App. 428, 174 S.E.2d 214 (1970). It is sufficient for proving vicious propensity to show a violation of "leash ordinance," with the exceptions of "domesticated fowl" and "domesticated livestock." O.C.G.A. § 51-2-7.

**Professional Negligence.** "A professional malpractice action is merely a professional negligence action and calls into question the conduct of a professional in his area of expertise." *Moore v. Louis Smith Memorial Hosp., Inc.*, 216 Ga. App. 299, 454 Ga. App. 190 (1995), citing *Candler Gen. Hosp. v. McNorrill*, 182 Ga. App. 107, 109-110, 354 S.E.2d 872 (1987). Under O.C.G.A. § 9-11-9.1(a), "[i]n any action for damages alleging professional malpractice against a professional licensed by the State of Georgia and listed in subsection (g) of this Code section [or against] [a]ny licensed health care facility alleged to be liable based upon the action or inaction of a health care professional licensed by the State of Georgia and listed in subsection (g) of this Code section, the plaintiff shall be required to file with the complaint an affidavit of an expert competent to testify, which affidavit shall set forth specifically at least one negligent act or omission claimed to exist and the factual basis for each such claim." O.C.G.A. § 9-11-9.1(g) lists the 26 professions to which the code section applies. In *Walker v. Cromartie*, 287 Ga. 511, 696 S.E.2d 654 (2010), the statute was held to be constitutional. The expert affidavit requirement of the statute does not apply to malpractice actions against employers, other than licensed health care facilities. *Sempler Atlanta Development v. URS/Dames & Moore, Inc.*, 268 Ga. App. 7, 601 S.E.2d 397 (2004); *Minnix v. Dept. of Trans*, 272 Ga. 566, 533 S.E.2d 75 (2000).

Under O.C.G.A. § 9-11-9.2, plaintiffs asserting a cause of action for professional malpractice must also file a medical authorization form contemporaneously with the Complaint. The authorization shall allow defendant's attorneys to obtain plaintiff's medical records and discuss plaintiff's care and treatment with plaintiff's healthcare providers. If plaintiffs fail to do so, the Complaint shall be subject to dismissal. O.C.G.A. § 9-11-9.2 is preempted by the Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191 ("HIPAA"). *Northlake Med. Ctr., LLC v. Queen*, 280 Ga. App. 510, 634 S.E.2d 286 (2006).

Accountants may be professionally liable for negligence to foreseeable persons or the intended, either di-

rectly or indirectly. *First Nat'l Bank of Newton Co. v. Sparkmon*, 212 Ga. App. 558, 442 S.E.2d 804 (1994).

**Proximate Cause.** The act or omission is the proximate cause of such injury when injury was a natural and probable consequence under circumstances such that it ought to have been foreseen by wrongdoer as likely to ensue from act. "Damages which are the legal and natural result of the act done, though contingent to some extent, are not too remote to be recovered. However, damages traceable to the act, but which are not its legal and natural consequence, are too remote and contingent to be recovered." O.C.G.A. § 51-12-9; *Jacobs v. Taylor*, 190 Ga. App. 520, 379 S.E.2d 563 (1989); *Johnson v. Rice*, 211 Ga. App. 687, 440 S.E.2d 81 (1994). A plaintiff bears the burden of introducing evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of result. A mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, or probabilities are at best evenly balanced, it becomes the duty of the court to grant summary judgment for defendant. *Hobday v. Galardi*, 266 Ga. App. 780, 598 S.E.2d 350 (2004).

In a malpractice action, "[i]n order for the plaintiff to show that the defendant's alleged negligence was the proximate cause of the plaintiff's injury, the plaintiff must present expert medical testimony. An expert's opinion on the issue of whether the defendant's alleged negligence caused the plaintiff's injury cannot be based on speculation or possibility. It must be based on reasonable medical probability or reasonable medical certainty." *Zwiren v. Thompson*, 276 Ga. 498, 504, 578 S.E.2d 862, 867 (2003).

Under Georgia's Recreational Property Act, an owner of land owes no duty of care to keep the premises safe for entry or use by others for recreational purposes or to give warning of a dangerous condition, use, structure, or activity on the premises to persons entering for recreational purposes. A landowner does not incur liability for injuries on such property. The only exceptions to this exemption from liability are for "willful or malicious failure to guard or warn against" dangers, or for injuries suffered when the landowner charges a fee for recreational use of the property. O.C.G.A. §§ 51-3-20 through 51-3-26.

**Res Ipsa Loquitur.** Res ipsa loquitur means that the transaction speaks for itself. It is a rule of evidence which allows an inference of negligence to arise from the happening of an event causing an injury to another where it is shown that the defendant owned, operated, and maintained, or controlled and was responsible for the management and maintenance of the thing doing the damage and the accident was a kind which, in the ab-



sence of proof of some external cause, does not ordinarily happen without negligence and that the plaintiff was not contributorily negligent. *Evans v. Heard*, 264 Ga. 239, 442 S.E.2d 753 (1994); *Simonds v. Conair Corp.*, 185 Ga. App. 664, 365 S.E.2d 507 (1988). Res ipsa loquitur “‘should be applied with caution and only in extreme cases; ...it is not applicable when there is an intermediary cause which produced or could produce the injury, or where there is direct unambiguous testimony as to the absence of negligence by the defendant, or where there is no fair inference that the defendant was negligent.’” *Walter v. Orkin Exterminating Co.*, 192 Ga. App. 621, 385 S.E.2d 725 (1989) (citing *Housing Authority of Atlanta v. Famble*, 170 Ga. App. 509, 526, 317 S.E.2d 853 (1984)).

Sovereign immunity is waived, under certain circumstances, by statute. O.C.G.A. §§ 50-21-20 through 50-21-37 (The Georgia Tort Claims Act).

Sudden Emergency. One who is in a sudden emergency and who acts according to his best judgment or in a most judicious manner under the circumstances, is not chargeable with negligence. *Adams v. Finlayson*, 199 Ga. App. 821, 406 S.E.2d 227 (1991).

#### NO-FAULT

On April 17, 1991, the Georgia General Assembly struck O.C.G.A. §§ 33-34-1 through 33-34-7 (1991) in its entirety, inserting a new Chapter 34 in its place. This revision became effective on October 1, 1991. The effect of the new Chapter 34 is the repeal of the Georgia No-Fault provisions.

#### PENALTY AND ATTORNEY'S FEES

See O.C.G.A. §§ 13-6-11 and 51-12-5.1.

In the event of a loss which is covered by a policy of insurance, and the refusal of the insurance to pay the same within 60 days after a demand has been made by the holder of the policy, and a finding that such refusal was in bad faith, the insurer shall be liable to pay such holder, in addition to the loss, not more than 50% of the liability of the insurer for the loss or \$5,000, whichever is greater, and all reasonable attorney's fees for the prosecution of the action against the insurer. The action for bad faith shall not be abated by payment after the 60-day period, nor shall the testimony or opinion of an expert witness be the sole basis for a summary judgment or directed verdict on the issue of bad faith. O.C.G.A. § 33-4-6(a).

An action to recover benefits is not a prerequisite to maintaining an action for penalties or punitive damages under the statute allowing for such recovery for insurer's failure to timely pay benefits. *Lawson v. State Farm*

*Mut. Auto Ins. Co.*, 256 Ga. 285, 347 S.E.2d 565 (1986). The amount of attorney's fees to be allowed shall be determined by jury, subject to adjustment by the court when greatly excessive or inadequate. O.C.G.A. § 33-4-6(a). See *Hanover Ins. Co. v. Halford*, 127 Ga. App. 322, 193 S.E.2d 235 (1972).

When insurer's refusal to pay \$565 claim under hospital insurance was in bad faith, \$8,000 attorney's fee award was not excessive. *Reserve Life Ins. Co. v. Ayers*, 217 Ga. 206, 121 S.E.2d 649 (1961).

Automobile insurers alleged failure to pay medical bill of less than \$100 until more than 70 days after it was sent, even if not in bad faith, did not support award of \$1 million in punitive damages under Georgia statute prohibiting insurer from delaying payment of benefits for more than 60 days. *Jowers v. Nationwide Ins. Co.*, 832 F.2d 1246 (11th Cir. 1987).

Refusal of a company to investigate a loss can be evidence of bad faith. See *Central Mfg. Mut. v. Graham*, 24 Ga. App. 199, 99 S.E. 434 (1919); see *United Servs. Auto. Ass'n v. Carroll*, 226 Ga. App. 144, 486 S.E.2d 613 (1997). Failure to make a bona fide offer to adjust may constitute bad faith. *Travelers Indem. Co. v. Marks*, 111 Ga. App. 388, 141 S.E.2d 911 (1965). Failure to settle within policy limits on a time-limited settlement demand when liability is clear and special damages exceed policy limits gives an insured a cause of action for bad faith. *Southern General Ins. Co. v. Holt*, 262 Ga. 267, 416 S.E.2d 274 (1992).

An insured cannot request immediate payment and recover if the insurer has additional time remaining under the terms of the insurance policy in which to investigate or adjust the loss. *Stedman v. Cotton States Ins. Co.*, 254 Ga. App. 325, 562 S.E.2d 256 (2002); *Bay Rock Mtg. Corp. v. Chicago Title Ins. Co.*, 286 Ga. App. 18, 648 S.E.2d 433 (2007). An insured's lawsuit against an insurer does not comply with the statutory “demand for payment” which would require an insurer to pay a penalty and attorney fees for bad faith refusal to pay a covered claim within sixty (60) days after the demand. O.C.G.A. § 33-4-6; *Stedman, supra*. Neither an “acknowledgment” of a claim nor denial of a claim waives the insured's statutory requirement to submit a demand for payment. In the absence of the demand for payment, the insurer is not subject to attorney fees for bad faith payment of a claim in terms of its compliance with O.C.G.A. § 33-4-6. *Kilpatrick Marine Filing v. Fireman's Fund Ins. Co.*, 795 F.2d 940 (1986).

Good faith is determined by reasonableness of non-payment of an insurance claim. *International Ind. Co. v. Collins*, 258 Ga. 236, 367 S.E.2d 786 (1988); *Fla. Int'l Indem. Co. v. Osgood*, 233 Ga. App. 111, 503 S.E.2d



371 (1998). Penalty not awarded if any reasonable ground for resisting claim is shown at trial. *Progressive Cas. Ins. Co. v. Avery*, 165 Ga. App. 703, 302 S.E.2d 605 (1983). Bad faith cannot be imputed to an insurer as a matter of law when liability is questionable and facts are in dispute. *Hartford Fire Ins. Co. v. Lewis*, 112 Ga. App. 1, 143 S.E.2d 556 (1965), *overruled on other grounds*, *Cincinnati Ins. Co. v. Tire Master of Thomaston, Inc.*, 183 Ga. App. 64, 357 S.E.2d 812 (1987); *American Family Life Assur. Co. of Columbus, Ga. v. U.S. Fire Co.*, 885 F.2d 826, *reh'g denied*, 892 F.2d 89 (11th Cir. 1989). Bad faith penalties and attorney's fees are not recoverable when question involved is one of first impression and is not of easy solution. *Ramsden v. GEICO*, 123 Ga. App. 163, 179 S.E.2d 671 (1971); *Fireman's Fund Ins. Co. v. Dean*, 212 Ga. App. 262, 441 S.E.2d 436 (1994). In a case of first impression, the Court of Appeals held that when dealing with retrospective premium policies, the insurer not only has duty to act reasonably and in good faith, but also has the burden to prove it acted in good faith since the insurer possesses premium calculations and claim settlement documents. *Benton Express v. Royal Ins. Co. of Am.*, 217 Ga. App. 331, 457 S.E.2d 566 (1995).

The provision for penalties and attorney's fees is penal and this section will be strictly construed since penalties and forfeitures not favored. *Southern General Ins. Co. v. Kent*, 187 Ga. App. 496, 370 S.E.2d 663 (1988). In considering whether an insurer acts in good faith toward its insured in refusing to settle a case within policy limits after an adverse verdict and prior to appeal, the court will apply the rule that the insurer must accord the interest of its insured the same faithful consideration it gives its own interest. *USF&G v. Evans*, 116 Ga. App. 93, 156 S.E.2d 809 (1967), *aff'd*, 223 Ga. 789, 158 S.E.2d 243 (1967); *Southern General Ins. Co. v. Holt*, 267, 416 S.E.2d 274 (1992).

Damages and attorney's fees for bad faith failure to pay after a demand cannot be recovered when the amount of the verdict is substantially less than the amount claimed in proofs of loss and when the amount of damages is in dispute. *Georgia Farm Bureau Mut. Ins. Co. v. Boney*, 113 Ga. App. 459, 148 S.E.2d 457 (1966). However, if liability is denied, attorney's fees for bad faith refusal to pay can be recovered, although amount recovered is less than full amount claimed. *New York Life Ins. Co. v. Williamson*, 53 Ga. App. 28, 184 S.E. 755 (1936).

Damages and attorney's fees as would be recoverable by citizens of another state can be recovered by citizens of this state, when a contract sought to be enforced is to be performed in such other state. *Missouri State*

*Life Ins. Co. v. Lovelace*, 1 Ga. App. 446, 58 S.E. 93 (1907).

One not a party to an insurance contract may not complain of negligence, fraud, or bad faith of an insurer in refusing to pay a claim. *Owens v. Allstate Ins. Co.*, 216 Ga. App. 650, 455 S.E.2d 368 (1995). Thus, a third person injured by an insured may not hold the insurer liable for alleged bad faith, fraud, or negligence in failing to settle the third party's judgment against the insured unless that person first obtains an assignment from the insured. *Richards v. State Farm*, 252 Ga. App. 45, 555 S.E.2d 506 (2001).

Where the duties in question arose out of the insurance contract and there was a breach of contract on the part of the insurer by failing to pay the plaintiff the full amount of damages owed under the terms thereof, the damages sought to be recovered by an insured are limited to the "bad faith" provisions of this section and the insured does not have a cause of action in tort. *Tate v. Aetna Cas. & Sur. Co.*, 149 Ga. App. 123, 253 S.E.2d 775 (1979).

#### PRIVILEGED COMMUNICATIONS

In general, Georgia recognizes several types of privileged communications as a matter of law. In the context of litigation, there are certain admissions and communications excluded on grounds of public policy including: communications between husband and wife; communications between attorney and client; communications among grand jurors; secrets of state; communications between psychiatrist and patient; communications between licensed psychologist and patient; communications between patient and licensed social worker, clinical nurse specialist in psychiatric/mental health, licensed marriage and family therapist, or licensed professional counselor during the psychotherapeutic relationship; and, communications between or among any psychiatrist, psychologist, licensed clinical social worker, clinical nurse specialist in psychiatric/mental health, licensed marriage and family therapist, and licensed professional counselor who are rendering psychotherapy or have rendered psychotherapy to a patient, regarding that patient's communications which are otherwise privileged. O.C.G.A. § 24-9-21.

**Attorney/Client Privilege.** Communications to any attorney or his employee to be transmitted to attorney pending his employment or in anticipation thereof shall never be heard by court. Attorney shall not disclose advice or counsel he may give to his client, nor produce or deliver up title deeds or other papers except evidences of debt left in his' possession by his client. O.C.G.A. § 24-9-24. This privilege shall not exclude attorney as a witness to any facts which may transpire in connection with



his employment. O.C.G.A. § 24-9-24. The privileged communication may be a shield of defense as to crimes already committed, but cannot be used as a weapon of offense to enable persons to carry out contemplated crimes. *Marriott Corp. v. Am. Acad. of Psychotherapists, Inc.*, 157 Ga. App. 497, 277 S.E.2d 785 (1981). Under the “crime-fraud” exception to the attorney/client privilege, the privilege does not extend to communications which occur before the perpetration of a crime and which relate thereto. *In re: Fulton County Grand Jury Proceedings*, 244 Ga. App. 380, 535 S.E.2d 340 (2000). If two or more person jointly consult or retain an attorney, the communications which either makes to the attorney are not privileged in the event of any subsequent litigation between the parties. *Peterson v. Baumwell*, 202 Ga. App. 283, 414 S.E.2d 278 (1991). Attorney-client privilege does not cover the identity of documents a party reviews to prepare for a deposition. *McKinnon v. Smock*, 264 Ga. 375, 445 S.E.2d 526 (1994). However, an inadvertent disclosure to opposing counsel of a letter from the opposing party to its attorney did not waive the attorney-client privilege. *Lazar v. Mauney*, 192 F.R.D. 324 (N.D. Ga. 2000).

No attorney shall be competent or compellable to testify for or against his client to any matter or thing, the knowledge of which he may have acquired from his client by virtue of his employment as attorney or by reason of the anticipated employment of him as attorney. However, an attorney shall be both competent and compellable to testify for or against his client as to any matter or thing, the knowledge of which he may have acquired in any other manner. O.C.G.A. § 24-9-25.

Communications made by an attorney to a corporate entity must have remained confidential in order to be protected by the attorney-client privilege and, as such, must not have been disclosed to anyone outside the corporation or to anyone within the corporation who was not authorized to receive them. The attorney-client privilege extends only to confidential communications made for the purpose of facilitating the performance of legal services to the client. Therefore, when the attorney acts merely as a business adviser, the privilege is inapplicable. *Georgia Cash America v. Strong*, 286 Ga. App. 405, 649 S.E.2d 548 (2007).

Clergy/Penitent. Every communication made by any person professing religious faith, seeking spiritual comfort, or seeking counseling to any Protestant minister of the Gospel, any priest of the Roman Catholic faith, any priest of the Greek Orthodox faith, any Jewish rabbi, or to any Christian or Jewish minister, by whatever name called, shall be deemed privileged. No such minister, priest or rabbi shall disclose any communications made to him by any such person professing religious faith,

seeking spiritual guidance, or seeking counseling, nor shall such minister, priest, or rabbi be competent or compellable to testify with reference to any such communication in any court. O.C.G.A. § 24-9-22. This privilege is not waived by the presence of more than one person seeking spiritual comfort or counseling. *Alternative Health Care Sys. v. McCown*, 237 Ga. App. 355, 514 S.E.2d 691 (1999).

Criminal Proceedings. No person who is charged in any criminal proceeding with the commission of any indictable offense or any offense punishable on summary conviction shall be compellable to give evidence for or against himself. O.C.G.A. § 24-9-20(a); U.S. CONST. amend. 5. This right is not relevant to a probation revocation hearing since such a hearing is not a criminal trial. *Sellers v. State*, 107 Ga. App. 516, 130 S.E.2d 790 (1963).

Law Enforcement Official. Law enforcement officers testifying before any court in any criminal proceedings shall not be compelled to reveal their home address but may be required to divulge the business address of their employer, except that the court may require any officer to answer questions as to his home address whenever such fact may be material to the case. O.C.G.A. § 24-9-26.

Media. Any person, company or other entity engaged in the gathering and dissemination of news for the public through a newspaper, book, magazine, radio or television broadcast shall have a qualified privilege against disclosure of any information, document, or item obtained or prepared in the gathering or dissemination of news in any proceeding where the one asserting the privilege is not a party, unless it is shown that this privilege has been waived or that what is sought 1) is material and relevant; 2) cannot be reasonably obtained by alternative means; and 3) is necessary to the proper preparation of the case of a party seeking the information, document or item. O.C.G.A. § 24-9-30.

Physician/Patient. No physician licensed under Georgia law, and no hospital or health care facility, including those operated by an agency or bureau of the state or other governmental unit, shall be required to release any medical information concerning a patient except...where authorized or required or required by law, statute or lawful regulation; or on written authorization or other waiver by the patient, or by patient’s parents or duly appointed guardian ad litem in the case of a minor, or an appropriate court order or subpoena; provided, however that any physician, hospital or health club facility releasing information under written authorization or other waiver by the patient, or by his or her parents or guardian ad litem in the case of a minor, or pursuant to law, statute, or lawful regulation, or under court order or

subpoena shall not be liable to the patient or any other person; provided, further, that the privilege shall be waived to the extent that the patient places his care and treatment or the nature and extent of his injuries at issue in any civil or criminal proceeding. O.C.G.A. § 24-9-40. Physician shield law applies to physicians generally, but requires physicians to release information upon proper order, whereas confidentiality of communications to psychiatrists is protected by public policy and such communications are expressly excepted from shield statute. *Dynin v. Hall*, 207 Ga. App. 337, 428 S.E. 2d 89 (1993). The discoverability of medical information is also governed by federal law, including the HIPAA Act.

**Spousal Communications.** “Husband and wife shall be competent but shall not be compellable to give evidence in any criminal proceeding for or against each other.” O.C.G.A. § 24-9-23(a). The spousal privilege created by law “shall not apply in proceedings in which the husband or wife is charged with a crime against the person of a minor child, but such person shall be compellable to give evidence only on the specific act for which the defendant is charged.” O.C.G.A. § 24-9-23(b). The privilege of refusing to testify belongs to the witness, not the accused. *Biswas v. State*, 255 Ga. App. 339, 565 S.E.2d 531 (2002). The trial court is not obligated to inform defendant’s spouse of the marital privilege. If spouse testified voluntarily, it is presumed that spouse waived the marital privilege. *Ingram v. State*, 262 Ga. App. 304, 585 S.E.2d 211 (2003). However, defendant who called wife as a witness did not waive privilege regarding confidential marital communications because direct examination did not in any way touch on privileged matters. *White v. State*, 211 Ga. App. 694, 440 S.E.2d 68 (1994).

Despite the spousal privilege, financial documents either prepared or seen by third parties are not protected, confidential documents. *Dempsey v. Kaminski Jewelry, Inc.*, 278 Ga. App. 814, 630 S.E.2d 77 (2006).

**Veterinarians.** “No veterinarian licensed under [Georgia law] shall be required to disclose any information concerning the veterinarian’s care of an animal except on written authorization or other waiver by the veterinarian’s client or on appropriate court order or subpoena. Any veterinarian releasing information under written authorization or other waiver by the client or under court order or subpoena shall not be liable to the client or any other person. The privilege provided by this Code section shall be waived to the extent that the veterinarian’s client or the owner of the animal places the veterinarian’s care and treatment of the animal or the nature and extent of injuries to the animal at issue in any civil or criminal proceeding.” O.C.G.A. § 24-9-29.

**Insurer/Insured Privilege.** An insurance institution, agent, or insurance-support organization shall not disclose any personal or privileged information about an individual collected or received in connection with an insurance transaction unless the disclosure is:

(1) With the written authorization of the individual, provided: (a) If such authorization is submitted by another insurance institution, agent, or insurance-support organization, the authorization meets the requirement of Code Section 33-39-7; or (b) If such authorization is submitted by a person other than an insurance institution, agent, or insurance-support organization, the authorization is: (i) Dated; (ii) Signed by the individual; and (iii) Obtained one year or less prior to the date a disclosure is sought pursuant to this subsection; or

(2) To a person other than an insurance institution, agent, or insurance-support organization, provided such disclosure is reasonably necessary; (a) To enable such person to perform a business, professional, or insurance function for the disclosing insurance institution, agent, or insurance-support organization and such person agrees not to disclose the information further without the individual’s written authorization unless the further disclosure: (i) Would otherwise be permitted by this Code section if made by an insurance institution, agent, or insurance-support organization; or (ii) Is reasonably necessary for such person to perform its function for the disclosing insurance institution, agent, or insurance-support organization; or (b) To enable such person to provide information to the disclosing insurance institution, agent, or insurance-support organization for the purpose of: (i) Determining an individual’s eligibility for an insurance benefit or payment; or (ii) Detecting or preventing criminal activity, fraud, material misrepresentation, or material non-disclosure in connection with an insurance transaction; or

(3) To an insurance institution, agent, insurance-support organization, or self-insurer, provided the information disclosed is limited to that which is reasonably necessary: (a) To detect or prevent criminal activity, fraud, material misrepresentation, or material non-disclosure in connection with insurance transactions; or (b) For either the disclosing or receiving insurance institution, agent, or insurance-support organization to perform its function in connection with an insurance transaction involving the individual;

(4) To a medical-care institution or medical professional for the purpose of: (a) Verifying insurance coverage or benefits; (b) Informing an individual of a medical problem of which the individual may not be aware; or (c) Conducting an operations or services audit; provided only such information is disclosed as is reasonably necessary to accomplish the foregoing purposes;



- (5) To an insurance regulatory authority;
- (6) To a law enforcement or other governmental authority; (a) To protect the interests of the insurance institution, agent, or insurance-support organization in preventing or prosecuting the perpetration of fraud upon it; or (b) If the insurance institution, agent, or insurance-support organization reasonably believes that illegal activities have been conducted by the individual;
- (7) Otherwise permitted or required by law;
- (8) In response to a facially valid administrative or judicial order, including a search warrant or subpoena;
- (9) Made for the purpose of conducting actuarial or research studies, provided; (a) No individual may be identified in any actuarial or research report; (b) Materials allowing the individual to be identified are returned or destroyed as soon as they are no longer needed; and (c) The actuarial or research organization agrees not to disclose the information unless the disclosure would otherwise be permitted by this Code section if made by an insurance institution, agent, or insurance-support organization;
- (10) To a party or a representative of a party to a proposed or consummated sale, transfer, merger, or consolidation of all or part of the business of the insurance institution, agent, or insurance-support organization, provided; (a) Prior to the consummation of the sale, transfer, merger, or consolidation only such information is disclosed as is reasonably necessary to enable the recipient to make business decisions about the purchase, transfer, merger, or consolidation; and (b) The recipient agrees not to disclose the information unless the disclosure would otherwise be permitted by this Code section if made by an insurance institution, agent, or insurance-support organization;
- (11) To a person whose only use of such information will be in connection with the marketing of a product or service, provided: (a) No medical-record information, privileged information, or personal information relating to an individual's character, personal habits, mode of living, or general reputation is disclosed, and no classification derived from such information is disclosed; (b) The individual has been given an opportunity to indicate that he or she does not want personal information disclosed for marketing purposes and has given no indication that he or she does not want the information disclosed; and (c) The person receiving such information agrees not to use it except in connection with the marketing of a product or service;
- (12) To an affiliate whose only use of the information will be in connection with an audit of the insurance institution or agent or the marketing of an insurance

product or service, provided the affiliate agrees not to disclose the information for any other purpose or to unaffiliated persons;

(13) By a consumer reporting agency, provided the disclosure is to a person other than an insurance institution or agent;

(14) To a group policyholder for the purpose of reporting claims experience or conducting an audit of the insurance institution's or agent's operations or services, provided the information disclosed is reasonably necessary for the group policyholder to conduct the review or audit;

(15) To a professional peer review organization for the purpose of reviewing the service or conduct of a medical-care institution or medical professional;

(16) To a governmental authority for the purpose of determining the individual's eligibility for health benefits for which the governmental authority may be liable;

(17) To a certificate holder or policyholder for the purpose of providing information regarding the status of an insurance transaction; or

(18) To a lien holder, mortgagee, assignee, lessor, or other person shown on the records of an insurance institution or agent as having legal or beneficial interest in a policy of insurance, provided that: (a) No medical-record information is disclosed unless the disclosure would otherwise be permitted by this Code section; and (b) The information disclosed is limited to that which is reasonably necessary to permit such person to protect its interest in such policy." O.C.G.A. § 33-39-14.

In the absence of fraud or malice, no insurance company or person who furnishes information on its behalf to a state or local fire official shall be liable for damages in a civil action or subject to criminal prosecution for any oral or written statement made or any other action taken which is necessary to supply information. O.C.G.A. § 25-2-33.

Libel and Slander. O.C.G.A. § 51-5-7 establishes that the following communications are deemed privileged: "1) Statements made in good faith in the performance of a public duty; 2) Statements made in good faith in the performance of a legal or moral private duty; 3) Statements made with a good faith intent on the part of the speaker to protect his or her interest in a matter in which it is concerned; 4) Statements made in good faith as part of an act in furtherance of the right of free speech or the right to petition government for a redress of grievances under the Constitution of the United States or the Constitution of the State of Georgia in connection with an issue of public interest or concern, as defined in subsection (c) of Code Section 9-11-11.1; 5) Fair and honest



reports of the proceedings of legislative or judicial bodies; 6) Fair and honest reports of court proceedings; 7) Comments of counsel, fairly made, on the circumstances of a case in which he or she is involved and on the conduct of the parties in connection therewith; 8) Truthful reports of information received from any arresting officer or police authorities; and 9) Comments upon the acts of public men or public women in their public capacity and with reference thereto.” O.C.G.A. § 51-5-7 (2010).

## PRODUCTS LIABILITY

The manufacturer of any personal property sold as new directly or through a dealer or any other person shall be liable in tort to any natural person who uses, consumes or can reasonably be affected by the property where the property is not merchantable and reasonably suited to the use intended, and its condition when sold by the manufacturer is the proximate cause of the injury sustained. O.C.G.A. § 51-1-11(b)(1); *Davenport v. Cummins Alabama, Inc.*, 284 Ga. App. 666, 644 S.E.2d 503 (2007).

In addition, an injured party may maintain an action for professional negligence based on the conduct of an engineer or other statutorily covered professional who is involved in the design of the product. O.C.G.A. § 9-11-9.1 (affidavit required for complaints alleging professional negligence).

A product need not be “in use” for a manufacturer to be held liable in either negligence or strict liability for injuries proximately caused by the product. *Jones v. NordicTrack, Inc.*, 274 Ga. 115, 550 S.E.2d 101 (2001).

Because the statute is in derogation of the common law, it is to be strictly construed. O.C.G.A. § 51-1-11(b)(1); *Davenport v. Cummins Alabama, Inc.*, 284 Ga. App. 666, 644 S.E.2d 503 (2007). Thus, a corporation may not maintain an action under O.C.G.A. § 51-1-11(b)(1). *Baltimore Football Club, Inc. v. Lockheed Corp.*, 525 F. Supp. 1206 (1981). Likewise the act does not apply to product distributors or retailers. *Tyler v. Pepsico, Inc.*, 198 Ga. App. 223, 400 S.E.2d 673 (1990), cert. denied, 198 Ga. App. 899 (1991); *Holman Motor Co. v. Evans*, 169 Ga. App. 610, 314 S.E.2d 453 (1984).

Under either a negligence theory, or a strict liability theory, no recovery may be had for purely economic damages arising from the damage to the allegedly negligently designed product itself and unaccompanied by other property damage or personal injury from the use of the product. *Busbee v. Chrysler Corp.*, 240 Ga. App. 664, 524 S.E.2d 539 (1999).

Dates of Applicability. No action shall be commenced in either strict liability or negligence against a manufacturer with respect to injury after ten years from

date of first sale for use or consumption of the personal property causing or bringing about an injury. O.C.G.A. §§ 51-1-11(b)(2), 51-1-11(c). However, this limitation as to negligence actions does not apply to an action seeking to recover from a manufacturer for injuries arising out of negligence of manufacturer in manufacturing products which cause disease or birth defect, or arising out of conduct which manifests willful, reckless or wanton disregard for life or property. O.C.G.A. § 51-1-11(c). The statute of repose for products liability actions does not apply to failure to warn claims. *Vickery v. Waste Management of Ga., Inc.*, 249 Ga. App. 659, 549 S.E.2d 482 (2001).

In *Campbell, et al., v. Altec Industries, Inc., et al.*, 288 Ga. 535, 707 S.E.2d 48 (2011), the Supreme Court of Georgia held that the 10 year statute of repose found in O.C.G.A. § 51-1-11 (b)(2) for product liability actions begins to run when a finished product is sold as new to the intended customer who is to receive the product.

Defective Threshold. To recover under Georgia’s strict liability standard, a plaintiff must establish that there is a defect in the product. There are three general categories of product defects: manufacturing defects, design defects, and marketing/packaging defects. *Banks v. ICI Americas, Inc.*, 264 Ga. 732, 450 S.E.2d 671 (1994). In regard to only manufacturing and packaging defects, a product that is properly prepared, manufactured, packaged and accompanied with adequate warnings and instructions cannot be said to be defective. *Center Chemical Co. v. Parzini*, 234 Ga. 868, 218 S.E.2d 580 (1975); *Banks, supra*. A product is not in a defective condition when it is safe for normal handling and consumption. *Coast Catamaran Corp. v. Mann*, 254 Ga. 201, 326 S.E.2d 436 (1985), overruled on other grounds, *Banks v. ICI Americas*, 264 Ga. 732, 450 S.E.2d 671 (1994).

In determining whether a product’s design is defective, the fact finder is to weigh the risks inherent in the product design against the utility or benefit derived from the product (“risk-utility test”). *Banks v. ICI Americas*, 264 Ga. 732, 450 S.E.2d 671 (1994); *S.K. Handtool Corp. v. Lowman*, 223 Ga. App. 712, 479 S.E.2d 103 (1996). The risk-utility test is also applicable in a negligent design case. *Ogletree v. Navstar Int’l Transport*, 271 Ga. 644, 522 S.E.2d 467 (1999). In regard to a product-design case, only semantics distinguishes between a cause of action for negligence and liability under O.C.G.A. § 51-1-11. *Banks v. ICI Americas*, 264 Ga. 732, 735 n.3, 450 S.E.2d 671 (1994).

Duty to Warn. The common-law duty imposed upon sellers or other suppliers of chattels includes the duty to warn of foreseeable dangers arising from the reasonable use for which the product is intended. This duty

requires the exercise of reasonable care to inform third-persons of the dangerous condition or the facts which make the product likely to become dangerous. *Dozier Crane & Machinery, Inc. v. Gibson*, 284 Ga. App. 496, 644 S.E.2d 333 (2007). However, generally there is no duty on the part of the seller to warn the user or consumer of a patent defect or danger that the purchaser should recognize. *Boyce v. Gregory Poole Equip. Co.*, 269 Ga. App. 891, 605 S.E.2d 384 (2004). Under a negligence theory, neither the manufacturer nor the seller has a duty to warn of obvious common dangers connected with the use of a product. *Poppell v. Waters*, 126 Ga. App. 385, 190 S.E.2d 815 (1972). Where a plaintiff does not read an allegedly inadequate warning, the adequacy of the warning's contents cannot be a proximate cause of the plaintiff's injuries. *Camden Oil Co., LLC v. Jackson*, 270 Ga. App. 837, 609 S.E.2d 356 (2004). While an open and obvious danger may bar failure to warn cases, it is no longer sufficient, alone, to bar design defect claims. *Boyce v. Gregory Poole Equip. Co.*, 269 Ga. App. 891, 605 S.E.2d 384 (2004). Rather, it is but one factor to consider in the risk-utility analysis. *Ogletree v. Navistar Int'l Transport*, 269 Ga. 443, 500 S.E.2d 570 (1998), *overruled on other grounds*, *Ogletree v. Navistar Int'l Transport*, 271 Ga. 644, 522 S.E.2d 467 (1999).

Under the learned intermediary doctrine, a manufacturer is not normally required to directly warn the ultimate consumer of a known risk if there is a learned intermediary between the manufacturer and the ultimate consumer. *Dozier Crane & Machinery, Inc. v. Gibson*, 284 Ga. App. 496, 644 S.E.2d 333 (2007).

Assumption of the risk is applicable to product liability cases if the user or consumer discovers product's defect, and is aware of danger emanating from that defect, but nevertheless proceeds unreasonably to make use of the product. *Coast Catamaran Corp. v. Mann*, 171 Ga. App. 844, 321 S.E.2d 353 (1984), *aff'd*, *Mann v. Coast Catamaran Corp.*, 254 Ga. 201, 326 S.E.2d 436 (1985). *overruled on other grounds*, *Banks v. ICI Americas*, 264 Ga. 732, 450 S.E.2d 671 (1994).

Industry Standards. In a negligent failure to warn case, evidence of similarity in instructions on competing products is admissible to establish whether a defendant has met the standard of ordinary care required by law. *Evershine Products, Inc. v. Schmitt*, 130 Ga. App. 34, 202 S.E.2d 228 (1973). In a case alleging defects in manufacturing or design, evidence that at least 50,000 trucks were made with same fuel system for post collision fire and that there had never been any kind of recall or government action relating to the alleged defect in the fuel system was admissible to show that the design and manufacture were not defective. *Browning v. Paccar*,

*Inc.*, 214 Ga. App. 496, 448 S.E.2d 260 (1994). As a general rule, compliance with federal standards or regulations will not bar manufacturer liability for a design defect. Under the risk-utility analysis applied to claims of design defects, compliance with federal standards or regulations is only one factor that may be considered determining the question of reasonableness. *Duren v. Paccar, Inc.*, 249 Ga. App. 758, 549 S.E.2d 755 (2001).

Intended Use. The fact that the statute states that a manufacturer is liable when the property is not merchantable and reasonably suited to the use intended merely means that the plaintiff must show that the product is defective. *Stiltjes v. Ridco Exterminating Co. Inc.*, 256 Ga. 255, 347 S.E.2d 568 (1986). A product need not be "in use" for a manufacturer to be held liable in either negligence or strict liability for injuries proximately caused by the product. The plain language of the statute extends manufacturer liability not only to those who may use the property, but also to those persons who may "consume" the property or "reasonably be affected" by it. *Jones v. NordicTrac, Inc.*, 274 Ga. 115, 117, 550 S.E.2d 101, 102 (2001).

Warranties. The Uniform Commercial Code provides the statutory framework for breach of warranty actions against manufacturers and sellers. Privity is generally required for express and implied warranties by a seller. That is, if a defendant is not the seller to the plaintiff-purchaser, the plaintiff as the ultimate purchaser cannot recover on the implied or express warranty, if any, arising out of the prior sale by the defendant to the original purchaser, such as distributor or retailer from whom plaintiff purchased the product. *Gowen v. Cady*, 189 Ga. App. 473, 376 S.E.2d 390 (1988), *cert. denied*, 189 Ga. App. 912 (1988). Likewise the privity requirement serves to bar a warranty claim when the plaintiff has acquired the product in a used or second-hand condition from the original purchaser. *Davis v. Brunswick Corp.*, 854 F. Supp. 1574 (N.D. Ga. 1993).

## RELEASE

See Law Digest Tables.

Infants. A release is voidable at option of the infant unless settlement is made and the release is signed by a legal, as opposed to natural, guardian, and approved by Probate Court. *Lynn v. Wagstaff Motor Co.*, 126 Ga. App. 516, 191 S.E.2d 324 (1972).

Joint Tortfeasors. A covenant not to sue given by one plaintiff relating to one defendant to one claim will not act as release of all defendants or all claims. *Lackey v. McDowell*, 262 Ga. 185, 415 S.E.2d 902 (1992); *Allison v. Patel*, 211 Ga. App. 376, 438 S.E.2d 920 (1993); *Henderson v. Garbutt*, 121 Ga. App. 291, 173 S.E.2d



445 (1970). Release of one joint tortfeasor in full settlement of damages does not act as a release of all other tortfeasors unless it is agreed that it will discharge them. *Id.* A release under Georgia law releases only the parties actually named in the release. *Id. Posey v. Medical Center-West*, 257 Ga. 55, 354 S.E.2d 417 (1987).

**Fraud.** A release signed by an insured upon false representation by the company's general agent that the release was necessary to obtain payment under policy does not relieve the company of liability. *Gibbs v. Jefferson-Pilot Fire & Cas. Ins. Co.*, 178 Ga. App. 544, 343 S.E.2d 758 (1986). A release obtained through fraud is no bar to a subsequent action on a policy, if the amount paid for the release is tendered back. *Industrial Life & Health Ins. Co. v. Johnson*, 62 Ga. App. 630, 9 S.E.2d 121 (1940).

A release, which is an accord and satisfaction, cannot be set aside if the insurer has done nothing to prevent the insured from making a full investigation of his legal rights. *Wheat v. Montgomery*, 130 Ga. App. 202, 202 S.E.2d 664 (1973); *Conklin v. Liberty Mut. Ins. Co.*, 240 Ga. 58, 239 S.E.2d 381 (1977). Absent any artifice, trick or fraud used to prevent appellant from reading the entire release, and absent any fiduciary relationship existing between him and the insurance company, appellant is bound by the release. *Conklin v. Liberty Mut. Ins. Co.*, 240 Ga. 58, 239 S.E.2d 381 (1977).

**Gross Negligence and Willful Misconduct.** Although exculpatory clauses are valid and binding and not void against public policy, exculpatory clauses do not relieve a party from liability for acts of gross negligence or willful or wanton conduct. *Colonial Properties Realty v. Lowder Constr.*, 256 Ga. App. 106, 567 S.E.2d 389 (2002)

**Notice and Consent.** An insurer may compromise and settle claims of third persons against an insured. If a release is taken without the consent of an insured and without notice to a third-party that consent has not been obtained, then the release is void. If notice is given to a third-party that the insured's consent has not been obtained, then the release bars any action by the third-party and cannot be pled by the third-party in bar to an action by the insured against the third-party. O.C.G.A. § 33-7-12; *Roberts v. Goodwin*, 113 Ga. App. 656, 149 S.E.2d 420 (1966). An insurer has no right of subrogation for payments made without an insured's consent. *Carden v. Buckhalter*, 214 Ga. App. 487, 448 S.E.2d 251 (1994).

**REPRESENTATIONS AND WARRANTIES**

O.C.G.A. § 33-24-7 provides that information given in applications for insurance shall be representations and not warranties and that misrepresentations,

omissions, concealment of facts, and incorrect statements shall not prevent recovery unless: " 1) Fraudulent; 2) Material either to the acceptance of the risk, or to the hazard assumed by the insurer; or 3) The insurer in good faith would either not have issued the policy or contract or would not have issued a policy or contract in as large an amount, or at premium rate as applied for or would not have provided coverage with respect to the hazard resulting in the loss if true facts had been known to the insurer as required either by application for the policy or contract or otherwise." O.C.G.A. § 33-24-7(b). Material misrepresentation voids a policy, whether made in good faith or not. *Davis v. John Hancock*, 202 Ga. App. 3, 413 S.E.2d 224 (1991). Georgia courts do not require insurers to show the insured acted with intent to deceive; finding bad faith irrelevant. *Marchant v. Travelers Indemn. Co.*, 286 Ga. App. 370, 374, 650 S.E.2d 316 (2007). When facts are not in dispute, courts frequently determine whether the statement was objectively false as a matter of law. *Home Indem. Co. v. Toombs*, 910 F. Supp. 1569 (N.D. Ga. 1995). However, the issue of materiality is a question for the jury, unless the evidence excludes every reasonable inference except that it was material, in which case it becomes a question of law for the court. *Id.* at 1575; *Lively v. Southern Heritage Ins. Co.*, 256 Ga. App. 195, 196, 568 S.E.2d 98, 100 (2002). Courts will not find material misrepresentation where the application failed to ask for specific information and general information was correct. *JLM Enters., Inc. v. Houston Gen. Ins. Co.*, 196 F. Supp. 2d 1299 (S.D. Ga. 2002) (where failing to disclose sale of Freon was not misrepresentation when company listed "auto parts" as type of business). Changes to an insured business, if material in that it changes the nature, extent, or character of the insurance coverage risk, will be misrepresentations if not disclosed to the insurer upon renewal. *Marchant v. Travelers Indem. Co.*, *supra*. (clarifying O.C.G.A. § 33-24-7 extends to renewal documents; where insured listed "carpentry, interior trim-new construction" in application but later worked as general contractor for the construction of high-end custom homes, policy was void because during renewal he claimed his business did not change). To illustrate, whether conflicting expert affidavits concerning false statements on an application for a policy of insurance would be material misrepresentations to a prudent insurer is a question for the jury. *Lively*, 256 Ga. App. at 196.

A material representation is one that would influence a prudent insurer in determining whether or not to accept a risk or in fixing amount of premium in the event of acceptance. *Jackson Nat'l Life Ins. Co. v. Snead*, 231 Ga. App. 406, 499 S.E.2d 173 (1998); *Oakes v. Blue Cross Blue Shield*, 170 Ga. App. 335, 317 S.E.2d 315 (1984); *Nappier v. Allstate Ins. Co.*, 961 F.2d 168 (11th



Cir. 1992). The test for materiality is an objective standard of conduct of a prudent insurer, not the subjective standard about the actual conduct of a particular insurance company. *Am. Gen. Life Ins. Co. v. Schoenthal Family, LLC*, 555 F.3d 1331 (11<sup>th</sup> Cir. 2009). Material misrepresentations include false responses as to taking of medication, *Brown v. JMIC Life Ins. Co.*, 222 Ga. App. 670, 474 S.E.2d 645 (1996); use of alcohol and tobacco, *Bolin v. Massachusetts Indem.*, 203 Ga. App. 570, 417 S.E.2d 325 (1992); prior losses, cancellations, or refusals of insurance, *Brannon v. Allstate*, 120 Ga. App. 467, 171 S.E.2d 319 (1967); already existing medical condition, *Smith v. Integon Life*, 195 Ga. App. 481, 393 S.E.2d 741 (1990); existing insurance already covering property, *Washington v. Interstate Fire*, 163 Ga. App. 15, 293 S.E.2d 485 (1982); failure to disclose diagnosis of cancer, *Lee v. Chrysler Life Ins. Co.*, 204 Ga. App. 550, 419 S.E.2d 727 (1992); failure to disclose heart disease, *Taylor v. Georgia Int'l Life Ins. Co.*, 207 Ga. App. 341, 427 S.E.2d 833 (1993); drastic exaggeration of net worth and income, *Schoenthal Family, LLC, supra*; and failure to disclose a driving under the influence conviction for life insurance, *Dracz v. Am. Gen. Life Ins. Co.*, 427 F. Supp. 2d 1165 (M.D. Ga. 2006). Further, voiding coverage for misrepresentation is not limited to the physical application as any verbal or written statements of fact by the insured to induce the acceptance of the risk, if material, must be true. *Marchant v. Travelers Indem. Co., supra., Pope v. Mercury Indem. Co.*, 297 Ga. App. 535, 677 S.E.2d 693 (2009)(where insured sent picture showing requested change to reinstate coverage, misrepresenting its permanence). Fraud of an insured in obtaining a policy may be asserted without repaying or offering to repay the premium. *Columbian Nat'l Life Ins. Co. v. Mulkey*, 146 Ga. 267, 91 S.E. 106 (1916). Immediate tender of a premium is not required by the law of Georgia in order to rescind a policy. *Schoenthal Family, LLC, supra*. Sending a bill for the renewal premium of an insurance policy after breach by insured does not operate as waiver for the defense of misrepresentation when payment is refused by the insured. *Sales v. State Farm Fire & Cas. Co.*, 849 F.2d 1383 (11<sup>th</sup> Cir. 1988); *Sullivan v. Connecticut Indem. Assoc.*, 101 Ga. 809, 29 S.E. 41 (1897). Courts have clarified that the “to the best of my knowledge and belief” language on an application meant only that the insured were relying upon their own knowledge, not upon that of others such as agents. *White v. Am. Family Life Assur. Co.*, 284 Ga. App. 58, 643 S.E.2d 298 (2007). An insurer is estopped from asserting misrepresentations as a defense where its agent, given true information, writes down false answers. *Liberty Nat'l Life Ins. Co. v. Houk*, 157 Ga. App. 540, 278 S.E.2d 120 (1981), *aff'd, Liberty Nat'l Life Ins. Co.*, 248 Ga. 111, 281 S.E.2d 583 (1981).

To avoid an insurance company's reliance on misrepresentation as a defense where the insured represented on the application that he was in good health but where the agent knew that the insured was sick, the agent's knowledge of the medical problem must be specific rather than general. Thus, an insurance agent's knowledge that the insured was “very sick” did not constitute knowledge that he previously suffered both a heart attack and a stroke and was currently being treated for lung cancer. *Burkholder v. Ford Life Ins. Co.*, 207 Ga. App. 908, 429 S.E.2d 344 (1993). Agent must have actual knowledge of falsity. *Graphic Arts Mutual Ins. Co. v. Pritchett*, 220 Ga. App. 430, 469 S.E.2d 199 (1995).

Even application misrepresentations unrelated to the actual loss will support complete rescission of the policy. *Pope v. Mercury Indem. Co., supra* (where insured's policy was cancelled due to presence of a diving board, which insured the removed; even though policy was reinstated and loss was related to tornado damage, insured's replacement of diving board voided the policy).

Automobile liability and no-fault policies cannot be voided retrospectively under O.C.G.A. § 33-24-7 even if the applicant failed to fully disclose all information or made material misrepresentations. *Liberty Ins. Corp. v. Ferguson*, 263 Ga. App. 714, 589 S.E.2d 290 (2003); *Sentry Indem. Co. v. Sharif*, 248 Ga. 395, 282 S.E.2d 907 (1981). A commercial liability insurance policy which included motor vehicle coverage may be retrospectively voided as long as the cancellation does not leave an injured third party without available minimum statutory coverage. *FCCI Ins. Group v. Rodgers Metal Craft, Inc.*, 2008 U.S. Dist LEXIS 57649 (M.D. Ga. 2008).

Unlike material misrepresentations during the application process, which void the policy, material misrepresentation during a claim may only forfeit certain coverage, depending on the terms of the policy. *Scott v. Allstate Prop. & Cas. Co.*, 2010 U.S. Dist. LEXIS 30417 (S.D. Ga. 2010). Under concealment or fraud provisions, a willful and intentional misrepresentation of material facts made for the purpose of defrauding the insurer will void coverage. *Scott, supra*, (internal citation omitted).

## SERVICE OF PROCESS

Except for cases in which the defendant has waived service, the summons and complaint shall be served together. The plaintiff shall furnish the clerk of the court with such copies as are necessary. Service shall be made by delivering a copy of the summons attached to a copy of the complaint as follows:

Alien or Foreign Corporation. "If the action is against a foreign corporation or a non-resident individual, partnership, joint-stock company, or association, doing business and having a managing or other agent, cashier, or secretary within this state, to such agent, cashier, or secretary or to an agent designated for service of process." O.C.G.A. § 9-11-4(e)(2).

Alien or Foreign Insurers. "Each authorized alien or foreign insurer shall make the following appointments for service of process: 1) Each insurer shall file with the Commissioner a power of attorney appointing a person who is a resident of this state to receive service of legal process issued against it in this state upon any cause of action arising from its transactions of business in this state. The power of attorney shall be irrevocable and may only be terminated by the filing of a new appointment by the insurer; and 2) Each insurer shall appoint the Commissioner as its attorney to receive service of legal process issued against it in this state upon any cause of action arising from its transactions of business in this state. The appointment shall be irrevocable, shall bind any successor, and shall remain in effect as long as there is in force in this state any contract made by the insurer or obligations arising therefrom. Each insurer at time of application for a certificate of authority shall file with the Commissioner the designation of the name and address of the person to whom process against it served upon the Commissioner is to be forwarded. The insurer may change such designation by a new filing. Service of process upon the Commissioner, however, shall only be made when service cannot be effected in this state by serving the attorney in fact appointed by the insurer as provided under paragraph (1) of this Code section." O.C.G.A. § 33-4-3.

"In addition to other methods of service provided by law, a foreign or alien insurer may be served with legal process by service of duplicate copies of the legal process on the agent for service designated under Code Section 33-4-3 or upon the Commissioner. At the time of service the plaintiff shall pay a fee in an amount as provided in Code Section 33-8-1, taxable as cost in the action. Upon receiving such service the Commissioner shall promptly forward a copy of such service by registered or certified mail or statutory overnight delivery to the person last so designated by the insurer to receive the same." O.C.G.A. § 33-4-4(a). "Process served upon the Commissioner and a copy of such process forwarded as provided in this Code section shall constitute service of such legal process upon the insurer so long as the insurer shall have any obligations or liabilities outstanding, although the company may have withdrawn, have been excluded from, or have ceased to do business in this state." O.C.G.A. § 33-4-4(b).

Corporation. "If the action is against a corporation incorporated or domesticated under the laws of this state or a foreign corporation authorized to transact business in this state, to the president or other officer of the corporation, secretary, cashier, managing agent, or other agent thereof, provided that when for any reason service cannot be had in such manner, the Secretary of State shall be an agent of such corporation upon whom any process, notice, or demand may be served. Service on the Secretary of State of any such process, notice, or demand shall be made by delivering to and leaving with him or her or with any other person or persons designated by the Secretary of State to receive such service a copy of such process, notice, or demand, along with a copy of the affidavit to be submitted to the court pursuant to this Code section. The plaintiff or the plaintiff's attorney shall certify in writing to the Secretary of State that he or she has forwarded by registered mail or statutory overnight delivery such process, service, or demand to the last registered office or agent listed on the records of the Secretary of State, that service cannot be effected at such office, and that it therefore appears that the corporation has failed either to maintain a registered office or to appoint a registered agent in this state. Further, if it shall appear from such certification that there is a last known address of a known officer of the corporation outside the state, the plaintiff shall, in addition to and after such service upon the Secretary of State, mail or cause to be mailed to the known officer at the address by registered or certified mail or statutory overnight delivery a copy of the summons and a copy of the complaint. Any such service by certification to the Secretary of State shall be answerable not more than 30 days from the date the Secretary of State receives such certification." O.C.G.A. § 9-11-4(e)(1).

Domestic Insurers. "Service of process against a domestic insurer may be made upon the insurer corporation in the manner provided by laws applying to corporations generally or upon the insurer's attorney in fact if a reciprocal insurer or a Lloyd's association." O.C.G.A. § 33-4-2.

Governmental Entity. "If against a county, municipality, city, or town, to the chairman of the board of commissioners, president of the council of trustees, mayor or city manager of the city or to an agent authorized by appointment to receive service of process. If against any other public body or organization subject to an action, to the chief executive officer or clerk thereof." O.C.G.A. § 9-11-4(e)(5).

Incapacitated Person. "If against a person residing within this state who has been judicially declared to be of unsound mind or incapable of conducting his or her own affairs and for whom a guardian has been ap-



pointed, to the person and also to such person's guardian and, if there is no guardian appointed, then to his or her duly appointed guardian ad litem." O.C.G.A. § 9-11-4(e)(4).

Minor. "If against a minor, to the minor, personally, and also to such minor's father, mother, guardian, or duly appointed guardian ad litem unless the minor is married, in which case service shall not be made on the minor's father, mother, or guardian." O.C.G.A. § 9-11-4(e)(3).

Non-Resident Motorists. See "AUTOMOBILES."

Personal Service. In general, "to the defendant personally, or by leaving copies thereof at the defendant's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein, or by delivering a copy of the summons and complaint to an agent authorized by appointment or by law to receive service of process." O.C.G.A. § 9-11-4(e)(7).

"If the principal sum involved is less than \$200.00 and if reasonable efforts have been made to obtain personal service by attempting to find some person residing at the most notorious place of abode of the defendant, then by securely attaching the service copy of the complaint in a conspicuously marked and waterproof packet to the upper part of the door of the abode and on the same day mailing by certified or registered mail or statutory overnight delivery an additional copy to the defendant at his or her last known address, if any, and making an entry of this action on the return of service." O.C.G.A. § 9-11-4(e)(6).

Other Issues Involved In Service of Process.

Personal Service Outside the State. See, generally, O.C.G.A. § 9-11-4(f)(2).

Return of Service. "The person serving the process shall make proof of service thereof to the court promptly and, in any event, within the time during which the person served must respond to the process. Proof of service shall be as follows: 1) If served by a sheriff or marshal, or such official's deputy, the affidavit or certificate of the sheriff, marshal, or deputy; 2) If by any other proper person, such person's affidavit; 3) In case of publication, the certificate of the clerk of court certifying to the publication and mailing; or 4) The written admission or acknowledgment of service by the defendant. In the case of service otherwise than by publication, the certificate or affidavit shall state the date, place, and manner of service. Failure to make proof of service shall not affect the validity of the service." O.C.G.A. 9-11-4(h).

Summons.

(1) "Upon filing the complaint, the clerk shall forthwith issue a summons and deliver it for service. Upon request of the plaintiff, separate or additional summons shall issue against any defendants." O.C.G.A. § 9-11-4(a).

(2) The summons shall be signed by the clerk; contain the name of the court and county, and names of the parties; be directed to the defendant; state the name and address of plaintiff or plaintiff's attorney; state the time within which the defensive pleadings shall be filed; and shall notify the defendant that in case of the defendant's failure to do so, judgment by default will be rendered against him or her for the relief demanded in the complaint. O.C.G.A. § 9-11-4(b).

(3) Process shall be served by the sheriff of the county where the action is brought or where the defendant is found. Service by sheriff's deputy, marshal or sheriff of the court, or duly appointed process server may be proper. O.C.G.A. § 9-11-4(c). Personal service upon the named defendant in a lawsuit must be made by an authorized person. *Merck v. Saint Joseph's Hosp. of Atlanta, Inc.*, 251 Ga. App. 631, 555 S.E.2d 11 (2001).

Service By Publication. See, generally, O.C.G.A. § 9-11-4(f)(1).

Service Upon Persons In A Foreign Country. See, generally, O.C.G.A. § 9-11-4(f)(3).

Timeliness of Service. In general, service must be perfected within five days from the time of receiving the summons and complaint. O.C.G.A. § 9-11-4(c). Where a complaint is filed near the expiration of the applicable statute of limitations, and service is made after the five-day grace period, plaintiff bears the burden of showing that he excused due diligence in performing service. *Scott v. Taylor*, 234 Ga. App. 543, 507 S.E.2d 798 (1998).

Waiver. "A defendant who waives service of a summons does not thereby waive any objection to the venue or to the jurisdiction of the court over the person of the defendant." O.C.G.A. § 9-11-4(d)(1). A defendant who does not waive service after notice given and waiver requested may be liable for service costs. O.C.G.A. § 9-11-4(d)(2-7). The statute provides that the plaintiff may notify a defendant of the commencement of a lawsuit and request waiver of summons. *Id.* at (d)(3).

## SUBROGATION

Uninsured Motorist. An insurer paying a claim under the uninsured motorist coverage will be subrogated to the rights of the insured to whom the claim is paid against the tortfeasor to the extent that payment was

made, including the proceeds recoverable from an insolvent insurer. O.C.G.A. § 33-7-11(f).

**Workers' Compensation.** In the event an injured employee has a right of action against a tortfeasor and the employer's workers' compensation liability has been fully or partially paid, then the employer or the employer's insurer shall have a subrogation lien, not to exceed the actual amount of compensation paid, against such recovery. O.C.G.A. § 34-9-11.1 (b).

The employer or insurer may intervene in any action to protect and enforce such lien; however, their recovery shall be limited to the recovery of the amount of benefits paid under the workers' compensation code provisions, and shall only be recoverable if the injured employee has been fully and completely compensated, for all economic and non-economic losses incurred as a result of the injury. *Id.*

Georgia public policy strongly supports the rule that an insurer may not obtain benefits unless and until its insured (the injured worker) has been fully and completely compensated for his losses. The losses include both non-economic and economic losses. *Duncan v. Integon General Ins. Corp.*, 267 Ga. 646, 482 S.E.2d 325 (1997); *Hammond v. Lee*, 244 Ga. App. 865, 536 S.E.2d 231 (2000). No presumption of full or complete compensation arises merely because an award of the jury exceeds the amount of workers' compensation benefits or the amount of economic damages proven. Absent any other evidence of the jury's intent, a general verdict is insufficient to prove the amount needed to make the employee whole. The amount of damages claimed is merely a factor in determining the issue of full and complete compensation. Courts have suggested a special verdict form may be the most practical solution. *Bartow County Board of Education v. Ray*, 229 Ga. App. 333, 494 S.E.2d 29 (1997).

The employer/insurer bears the burden to prove the injured worker has been fully and completely compensated for injuries arising out of the third party claim in order to recover part or all of its subrogation interest. *GCU Insurance Co. v. Sabel Industries, Inc.*, 255 Ga. App. 236, 564 S.E.2d 836 (2002); *City of Warner Robins v. Baker*, 255 Ga. App. 601, 565 S.E.2d 919 (2002). Where a jury award results in the third party action, and the claimant's award is in the form of a general verdict, the court cannot determine which portion of the award is meant to cover non-economic losses and the employer/insurer subrogation lien becomes unenforceable. *Baker*, 255 Ga. App. at 604-05, 565 S.E.2d at 922-23. Although the money in the hands of the injured worker from a third party settlement is still subject to subrogation by the employer/insurer, the burden to prove full

and complete compensation and general verdicts may result in an unenforceable subrogation lien.

Any action by the injured employee against the alleged tortfeasor must be instituted in all cases within the applicable statute of limitations. O.C.G.A. § 34-9-11.1 (c). If the employee does not institute an action within one (1) year after the date of injury, the employer or its insurer may, but is not required to, assert the employee's cause of action in tort, either in its own name or in the name of the employee. *Id.*

If the employee institutes an action within the one year period the insurer or employer must intervene in the action brought by the employee in order to preserve their subrogation rights under O.C.G.A. § 34-9-11.1. The insurer and employer lack the standing to challenge the dismissal of the employee's suit against the tortfeasor where the insurer and employer fail to protect their subrogation rights by intervening in such an action. *Canal Ins. Co. v. Liberty Mutual Ins. Co.*, 256 Ga. App. 866, 570 S.E.2d 60 (2002).

Both O.C.G.A. § 34-9-11.1 and 9-11-24, the general intervention statute, grant a workers' compensation insurer the right to intervene in a personal injury case against third parties and their insurers brought by a claimant to whom the insurer had paid benefits. *Department of Admin. Svcs. v. Brown*, 219 Ga. App. 27, 464 S.E.2d 7 (1995).

Where an employee settles his personal injury claim against a tortfeasor without filing suit, and the tortfeasor had no knowledge of the workers' compensation claim, an employer has no right of action against the tortfeasor, but the loss of the right to bring the subrogation action did not extinguish the employer's lien on the recovery; that is, the money now in the hands of the injured employee. *Rowland v. Department of Admin. Svcs.*, 219 Ga. App. 899, 466 S.E.2d 923 (1996).

If no workers' compensation benefits have been paid, then no subrogation right has been acquired. A court will not impute constructive knowledge of such facts on a tortfeasor. Unless the tortfeasor has knowledge of both the subrogation lien and payment on the claim, then a settlement and release between the tortfeasor and the injured employee will extinguish subrogation rights asserted by the employer or insurer. *Georgia Star Plumbing, Inc. v. Bowen*, 225 Ga. App. 379, 484 S.E.2d 26 (1997).

## WAIVER AND ESTOPPEL

During the adjustment of a claim, an insurer may waive or be estopped from asserting a ground for the avoidance or forfeiture of an insurance policy. The rationale behind the two similar doctrines of waiver and

estoppel is to prevent an insurer from accepting payment for coverage that the insurer knows it will deny. *Chicago Ins. Co. v. Central Mut. Ins. Co.*, 229 Ga. App. 291, 494 S.E.2d 1 (1997). Although the doctrines of waiver and estoppel are similar in effect, they are not identical legal concepts.

Waiver requires: 1) the existence of a right, privilege, advantage or benefit which may be waived at the time of waiver; 2) the actual or constructive knowledge thereof; and 3) an intention to relinquish such right, privilege, advantage or benefit. *Wiley v. Rome Ins. Co.*, 12 Ga. App. 186, 76 S.E. 1067 (1913). Waiver may be express, or implied from conduct. *Ideal Mut. Ins. Co. v. Lucas*, 593 F. Supp. 466 (N.D. Ga. 1983). When waiver is implied, acts, conduct or circumstances relied upon must make out a clear case. The person against whom waiver is invoked must be in possession of all material facts. *Irvine v. Cargill Investor Services, Inc.*, 799 F.2d 1461, 1463-1464 (11th Cir. 1986).

O.C.G.A. § 33-24-40 provides that the following acts on the part of an insurer will not waive any provision of a policy or any defense: 1) acknowledgement of receipt of notice of loss or claim under policy; 2) furnishing forms for reporting loss or claim, for giving information relative thereto, or for making proof of loss, or receiving or acknowledging receipt of any such forms of proofs completed or uncompleted; 3) investigating any loss or claim under any policy or engaging in negotiations looking toward possible settlement of any such loss or claim. O.C.G.A. § 33-24-40 (2010); *Stone Mountain Collision Center v. General Casualty Co.*, 307 Ga. App. 394, 705 S.E.2d 163 (2010); *Southern Ins. Co. v. Martin*, 118 Ga. App. 608, 164 S.E.2d 887 (1968); *Progressive Mut. Ins. Co. v. Burrell Motors, Inc.*, 112 Ga. App. 88, 143 S.E.2d 757 (1965).

The doctrines of implied waiver and estoppel, based upon conduct or action of an insurer, are not available to bring risks not covered by policy's terms within its coverage or risks expressly excluded therefrom. *Rider v. Westinghouse Elec. Corp.*, 152 Ga. App. 805, 264 S.E.2d 276, *appeal after remand*, 168 Ga. App. 136, 308 S.E.2d 378 (1983).

Pursuant to O.C.G.A. § 33-24-40, evidence of an insurer's delay in asserting a defense that an insured's claim was untimely pending full and complete investigation of the claim is not material to the issue of the insurer's waiver of the defense. *Yeagley v. Allstate Ins. Co.*, 2009 U.S. Dist. LEXIS 70958 (August 12, 2009). What is material to waiver is evidence that, after the insurer finally received notice from insured, the insurer otherwise expressly or impliedly took a position indicative of its intent not to enforce satisfaction of the timely

notice requirement. *Brazil v. Government Employees Ins. Co.*, 199 Ga. App. 343, 404 S.E.2d 807 (1991).

Similarly, the doctrine of estoppel is applied with respect to representations of a party, to prevent their operating as a fraud upon one who has been led to rely upon them. *Ins. Co. v. Mowry*, 96 U.S. 544, 547-548 (1878). Risks not covered by the terms of an insurance policy, or risks excluded therefrom, while normally not subject to doctrine of waiver and estoppel, may be subject to the doctrine where the insurer, without reserving its rights, assumes the defense of an action or continues such defense with knowledge, actual or constructive, of noncoverage. *VFH Captive Ins. Co. v. Cielinski*, 260 Ga. App. 807 (2003); *Horne v. Exum*, 204 Ga. App. 337, 419 S.E.2d 147 (1992). The doctrine of estoppel is applied "with great caution." If the conduct is ambiguous, or susceptible of two constructions, one of which is inconsistent with the right asserted by the party sought to be estopped, there is no estoppel. *Irvine v. Cargill Investor Services, Inc.*, 799 F.2d 1461, 1463-1464 (11th Cir. 1986).

In absence of any policy provision to the contrary, a statement that an insurer refused to pay a loss, made by agent who represented the insurer by receiving an insurance application, collecting a premium and issuing a policy, amounts to waiver of a policy's proof of loss requirement. *Boston Ins. Co. v. Harmon*, 66 Ga. App. 383, 18 S.E.2d 84 (1941); *Williams v. Atlas Assur. Co., Ltd.*, 22 Ga. App. 661, 97 S.E. 91 (1918). Waiver cannot be based upon the insured's own unilateral assumption or expectation that a delay in the notice of a claim would not be enforced against him simply because an insurer did not undertake immediately to deny coverage. *Brazil v. Government Employees Ins. Co.*, 199 Ga. App. 343, *supra*. However, absolute refusal to pay by an insurer is waiver of the right to insist on proof of loss provisions. *Nationwide Mut. Fire Ins. Co. v. Wiley*, 220 Ga. App. 442, 469 S.E.2d 302 (1996); *Insurance Co. of West v. Dills*, 145 Ga. App. 183, 243 S.E.2d 549 (1978). For refusal by an insurer to pay an insurance claim to constitute waiver of the requirement that the proof of loss be filed within 60 days following a loss, refusal to pay must have been within the period of time that the proof of loss was required to be filed. *Worth v. Georgia Farm Bureau Mut. Ins. Co.*, 174 Ga. App. 194, 330 S.E.2d 1 (1985); *Pennington v. Aetna Ins. Co.*, 130 Ga. App. 95, 202 S.E.2d 199 (1973). An insurer should be sure to reject a proof of loss for deficiencies; otherwise the insurer will be deemed to have waived any deficiencies. *Pooser v. Norwich Union Fire Ins. Co.*, 51 Ga. App. 962, 182 S.E. 44 (1935). Suit on a fire policy may be commenced after expiration of the policy's suit limitation provision under the doctrine of waiver, *Hartford Fire Ins. Co., v. Amos*, 98 Ga. 533, 25 S.E. 575 (1896), or estoppel, *McDaniel v.*



*German-American Ins. Co.*, 134 Ga. 189, 67 S.E. 668 (1910). However, settlement negotiations with an insured that do not lull the insured into believing the insured would be paid without having to file suit within the contractual limitations period does not constitute waiver. *Stone Mountain Collision Center v. General Casualty Co.*, 307 Ga. App. 394, 705 S.E.2d 163 (2010). An insurer refusing to redeliver a policy, after loss, to an insured ignorant of the policy's suit limitation provision, is estopped from relying on such provision. *Sawtell Ptnrs, LLC v. Admiral Ins. Co.*, 2006 U.S. Dist. LEXIS 18104 (March 27, 2006); *Lanier v. Coastal States Life Ins. Co.*, 106 Ga. App. 802, 128 S.E.2d 550 (1962). *Union Fire v. Stone Ins. Co.*, 41 Ga. App. 49, 152 S.E. 146 (1930). An insurer, by requiring a proof of loss, is held not to have waived its right to set up a policy defense that the property burned or stolen was not covered by policy. *Buffalo Ins. Co. v. Star Photo Finishing Co.*, 120 Ga. App. 697, 172 S.E.2d 159 (1969).

During adjustment, an insurer should remember that the refusal to furnish blanks for proof of loss after a request is deemed a waiver of this policy condition. O.C.G.A. § 33-24-39 (2011); *Britt v. Independent Fire Ins. Co.*, 184 Ga. App. 225, 361 S.E.2d 226 (1987). In addition, an adjuster with limited authority could not bind an insurance company by requiring a proof of loss. *Fidelity & Cas. Co. v. Young Shoe Parlor*, 150 Ga. 402, 104 S.E. 429 (1920). The refusal to furnish blanks for proof of loss after a request is deemed a waiver of this policy condition. O.C.G.A. § 33-24-39. A policy proof requirement is waived by the denial of liability before expiration of the time within which a proof of loss must be furnished. *Harp v. Fireman's Fund*, 130 Ga. 726, 61 S.E. 704 (1908). A statement by an insurer to its insured that everything was in order, was sufficient for a jury to find waiver of the formal proof of loss filing. *Laughinghouse v. First of Georgia Ins. Co.*, 123 Ga. App. 189, 179 S.E.2d 675 (1971).

The mailing of a premium notice subsequent to an insurer's denial of a claim due to an insured's proof of loss misrepresentations operates as waiver of the defense that the entire contract is void as of date of misrepresentation, regardless of whether the premium is paid. *Lively v. S. Heritage Ins. Co.*, 256 Ga. App. 195, 568 S.E.2d 98 (2002); *State Farm Fire & Cas. Co. v. Jenkins*, 167 Ga. App. 4, 305 S.E.2d 801 (1983).

For refusal by an insurer to pay an insurance claim to constitute waiver of the requirement that the proof of loss be filed within 60 days following a loss, refusal to pay must have been within the period of time that the proof of loss was required to be filed. *Pennington v. Aetna Ins. Co.*, 130 Ga. App. 95, 202 S.E.2d 199 (1973); *Worth v. Georgia Farm Bureau Mut. Ins. Co.*, 174 Ga.

App. 194, 330 S.E.2d 1 (1985). See *Insurance Co. of West v. Dills*, 145 Ga. App. 183, 243 S.E.2d 549 (1978). Waiver must be based on actual, not constructive, knowledge of facts. *Wiley v. Rome Ins. Co.*, 12 Ga. App. 186, 76 S.E. 1067 (1913); *Shield Ins. Co. v. Kitt*, 143 Ga. App. 48, 237 S.E.2d 515 (1977), *rev'd on other grounds*, 240 Ga. 619, 241 S.E.2d 824 (1978). Waiver of concurrent insurance, encumbrance, and filing proofs of loss are questions for the jury. *Queen Ins. Co. v. Hartwell Ice & Laundry Co.*, 7 Ga. App. 787, 68 S.E. 310 (1910). Actual waiver of a breach estops an insurer from claiming forfeiture under the policy requiring an express waiver. *Metropolitan v. Busby Life Ins. Co.*, 42 Ga. App. 808, 157 S.E. 354 (1931).

Waiver or estoppel by an insurer is usually an issue of fact, and thus for a jury to decide. *VFH Captive Ins. Co. v. Cielinski*, 260 Ga. App. 807, 581 S.E.2d 335 (2003); *Appleby v. Merastar Ins. Co.*, 223 Ga. App. 463, 477 S.E.2d 887 (year). The two doctrines are not available to bring risks not covered by a policy's terms within its coverage or risks expressly excluded therefrom. *Danforth v. Government Employees Ins. Co.*, 638 S.E.2d 852 (2006); *Wilder v. Jefferson Ins. Co.*, 252 Ga. App. 563, 555 S.E.2d 771 (2001); *Rider v. Westinghouse Elec. Corp.*, 152 Ga. App. 805, 264 S.E.2d 276, *appeal after remand*, 168 Ga. App. 136, 308 S.E.2d 378 (1983). However, risks not covered by the terms of an insurance policy, or risks excluded therefrom, "may be" subject to the doctrines where the insurer, without reserving its rights, assumes the defense of an action or continues such defense with knowledge, actual or constructive, of noncoverage. *State Farm Fire and Cas. Co. v. Walnut Ave. Partners, LLC*, 296 Ga. App. 648, 675 S.E.2d 534 (2009); *World Harvest Church, Inc. v. Guideone Mutual Ins. Co.*, 586 F.3d 950 (11th Cir. 2009); *VFH Captive Ins. Co. v. Cielinski*, 260 Ga. App. 807 (2003).

Estoppel occurs by reason of an agent's failure to add endorsements. *Corporation of Royal Exch. Assur. v. Franklin*, 158 Ga. 644, 124 S.E. 172 (1924). An applicant for auto insurance is not chargeable with knowledge of all that is contained in an application signed in blank and afterwards completed by the company's agent, though the applicant had a copy of the completed application. *Tallent v. Safeco Ins. Co.*, 99 Ga. App. 11, 107 S.E.2d 331 (1959); see also *O'Kelly v. Southland Life Ins. Co.*, 167 Ga. App. 455, 305 S.E.2d 873 (1983).

Waivers by Agents. When the application itself (as opposed to the policy) does not contain a limitation on the agent's authority to waive provisions, agent's knowledge of misrepresentation in application is imputable to the company. *Reserve Life Ins. Co. v. Bearden*, 96 Ga. App. 549, 101 S.E.2d 120 (1957), *aff'd*, 213 Ga. 904, 102 S.E.2d 494 (1958). *Johnson v. Aetna*, 123 Ga. 404,



51 S.E. 339 (1905). See also *Peek v. Southern Guaranty Ins. Co.*, 240 Ga. 498, 241 S.E.2d 210 (1978).

Regardless of whether an application limits an agent's authority to waive policy provisions, an insurer is estopped from denying liability when the insured has given an agent correct answers but the agent has filled in the application incorrectly. *Mills v. Lloyds, London*, 201 Ga. App. 666, 411 S.E.2d 713 (1991); *Liberty Nat'l Life Ins. Co. v. Houk*, 248 Ga. 111, 281 S.E.2d 583 (1981). Similarly, when a company's agent inserts false answers into an application, the agent's knowledge is imputed to the company. *Browning v. Davis*, 167 Ga. App. 393, 306 S.E.2d 40 (1983); *National Life & Acc. Ins. Co. v. Goolsby*, 91 Ga. App. 361, 85 S.E.2d 611 (1955). Likewise, an agent's knowledge of other insurance estops such a defense by the insurer. *Superior Fire Ins. Co. v. Peters*, 62 Ga. App. 823, 10 S.E.2d 94 (1940). Where the agent knew the insured did not own property in fee simple at the time policy was written, the company cannot later set up such a defense. *Johnson v. Aetna*, 123 Ga. 404, 51 S.E. 339 (1905).

The execution of an agreement preserving all policy rights, and the execution of an agreement as to the amount of fire loss by an insured and agent, held not to waive proof of loss requirement. *Fireman's Ins. Co. v. Blount*, 182 Ga. 459, 185 S.E. 717 (1936).

Policy limitation imposed on authority of agent to waive forfeitures or receive overdue premiums is effective. *Rome Indust. Ins. Co. v. Eidson*, 138 Ga. 592, 75 S.E. 657 (1912).

**WORKERS' COMPENSATION**

See Law Digest Tables.

See generally, O.C.G.A. §§ 34-9-1 through 421. The Georgia Workers' Compensation Act is administered by the State Board of Workers' Compensation.

At the initial hearing level, if either party is not satisfied with the award of the Administrative Law Judge, they can appeal the award to the Appellate Division within 20 days after the date of the award. O.C.G.A. § 34-9-103(a). Subsequent appeals can be made under a heightened standard of review to the Superior Court of the county in which the injury occurred, or, if the injury occurred out of state, to the superior court of the county where the original hearing was held. O.C.G.A. § 34-9-105(b). After superior court judgment, appeal may be sought in the Court of Appeals. O.C.G.A. § 34-9-105(e).

Generally, in order to be entitled to workers' compensation benefits, an employee must suffer an injury by accident arising out of and in the course and scope of his employment. O.C.G.A. § 34-9-1, see, e.g. *Davis v.*

*Houston Gen. Ins. Co.*, 141 Ga. App. 385, 233 S.E.2d 479 (1977); *A&P Transp. v. Warren*, 213 Ga. App. 60; 443 S.E.2d 857 (1994); *McElreath v. McElreath*, 155 Ga. App. 826, 273 S.E.2d 205 (1980). Neither of these ingredients standing alone is sufficient. However, any injury need not be caused by an extraordinary event and no physical contact with an object or person is necessary except in psychological injury cases. *George v. Southwire Co.*, 217 Ga. App. 586, 458 S.E.2d 362 (1995), *aff'd*, 266 Ga. 739, 470 S.E.2d 865 (1996). There must be some actual physical injury resulting from an incident before a psychological injury can be compensable. *W. W. Fowler Oil Co. v. Hamby*, 192 Ga. App. 422, 385 S.E.2d 106 (1989). Georgia does not go so far as to hold a purely mental injury resulting from a purely mental trauma to be compensable. *Abernathy v. City of Albany*, 269 Ga. 88, 495 S.E.2d 13 (1998). In the same vein, claims involving only non-physical injuries, such as claims for slander and intentional infliction of emotional distress are not compensable under this Act. *Oliver v. Wal-Mart Stores, Inc.*, 209 Ga. App. 703, 434 S.E.2d 500 (1993). Injury may result from the gradual worsening (as in aggravation or acceleration) of a pre-existing condition absent acute accident. O.C.G.A. § 34-9-1(4); *St. Regis Flexible Packaging Corp. v. Helm*, 172 Ga. App. 251, 322 S.E.2d 549 (1984). The aggravation of a pre-existing condition constitutes a compensable injury only so long as the aggravation lasts. O.C.G.A. § 34-9-1(4). The opposite is not compensable, however. Aggravation of a prior work injury from an injury arising outside of the course and scope of employment is not compensable. *Shuman v. Engineered Fabrics*, 220 Ga. App. 636, 469 S.E.2d 847 (1996). The Act also provides compensation for occupational diseases that are caused by exposure to diseases that are characteristic and peculiar to a certain job and not ordinary diseases of life faced by the general public. O.C.G.A. §§ 34-9-280, 34-9-281.

Forms filed unilaterally with the State Board by the employer and insurance carrier reflect acceptance or controversion of a claim under a "direct payment system." Payment of income benefits on an accepted plan is due on the 21<sup>st</sup> day after an employer has knowledge of disability or death, on which day all income benefits then due shall be paid. Thereafter, income benefits are due on a weekly basis, unless in its discretion the Board authorizes payments in different installments that are beneficial to all parties concerned. O.C.G.A. § 34-9-221(b). If payments are not made promptly, O.C.G.A. § 34-9-221(e) and (f) provide certain penalties.

For non-catastrophic injuries, income benefits are payable throughout entire length of disability, but not longer than 400 weeks from the date of injury. O.C.G.A. § 34-9-261. In event of a catastrophic injury, the injured worker is potentially entitled to lifetime receipt of in-



come benefits. O.C.G.A. §§ 34-9-261, 34-9-200.1. Entitlement to medical benefits related to an injury runs for the life of the employee if not foreclosed by the statute of limitations. *General Ins. Co. of America v. Bradley*, 152 Ga. App. 600, 263 S.E.2d 446 (1979); *Bryan County Emergency. Med. Servs., et al. v. Gill*, 187 Ga. App. 125, 369 S.E.2d 495 (1988). An employer is required to pay any medical expenses resulting from an injury which are reasonable in amount and reasonably necessary to effect a cure or to give relief to an injury-resultant condition or to restore worker to suitable employment. O.C.G.A. § 34-9-200.

The rights and remedies of the employee against his employer for a job-related injury are exclusive and exclude all other rights and remedies of such employees, his heirs, or representatives at common law, or otherwise, on account of injury, loss of service, or death. O.C.G.A. § 34-9-11. However, a company physician is not considered a fellow employee under the Act and may be sued directly. *Davis v. Stover*, 258 Ga. 156, 366 S.E.2d 670 (1988). The exclusive remedy provision only applies to employers, and does not foreclose suits against third-party tortfeasors other than fellow employees. O.C.G.A. § 34-9-11(a). Where the only injury involved is a non-physical one, the injury is not compensable under the Georgia Workers' Compensation Act. As such, the exclusive remedy provision does not bar suits against the employer for a sole non-physical injury even though it arises out of the course and scope of employment. *Oliver v. Wal-Mart Stores*, 209 Ga. App. 703, 434 S.E.2d 500 (1993).

Substantive changes in the law in 1992 gave an employer or employer's insurer the right of subrogation under certain circumstances. See O.C.G.A. § 34-9-11.1, effective July 1, 1992. This section would not be applied retroactively to give an insurer the right of subrogation prior to July 1, 1992. *Maryland Cas. Ins. Co. v. Glomski*, 210 Ga. App. 759, 437 S.E.2d 616 (1993).

If the employee has not brought any action within one year of the date of injury, under O.C.G.A. § 34-9-11.1, the employer or employer's insurer may assert a direct cause of action against a third-party tortfeasor. In any event, the employer or insurer shall have a subrogation lien, not to exceed the amount of compensation paid, against the recovery in the hands of the employee. O.C.G.A. § 34-9-11.1(c); *Georgia Star Plumbing, Inc. v. Bowen*, 225 Ga. App. 379, 484 S.E.2d 26 (1997). If the insurer of a third-party tortfeasor settles the claim of the injured employee and obtains a release, such settlement will extinguish the rights of the employer or employer's insurer to recover against the third-party tortfeasor, unless the third party's insurer settled with actual knowledge of the employer's (or insurer's) payment of com-

pensation benefits pursuant to the Act. Settlement does not extinguish the lien or the recovery. *Rowland v. Dept. of Admin. Servs.*, 219 Ga. App. 899; 466 S.E.2d 923 (1996).

"Statutory employer" provisions of O.C.G.A. § 34-9-8 allow an injured employee to proceed up the "employment ladder" against a principal or intermediate contractor, or immediate employer for injuries suffered by the employee on the job. While the principal and intermediate contractors are obligated as statutory employers to provide workers' compensation benefits to the employee of a subcontractor, they are also afforded the corresponding benefit of the exclusive remedy doctrine. They are immune from being sued in tort by that employee even when the principal and intermediate contractors have not actually paid those workers' compensation benefits. *Wright Assocs., Inc. v. Rieder*, 247 Ga. 496, 277 S.E.2d 41 (1981). See also *Modlin v. Black & Decker Mfg. Co.*, 170 Ga. App. 477, 317 S.E.2d 255 (1984). Employees of a statutory employer, however, are not afforded immunity status under the exclusive remedy doctrine. *Long v. Marvin M. Black Co.*, 250 Ga. 621, 300 S.E.2d 150 (1983).

An important decision of the Georgia Supreme Court disapproved the theory behind the second-prong of the above test. In *Yoho v. Ringier of America, Inc.*, the State Supreme Court disapproved earlier cases that followed an "enterprise" theory whereby an "owner" who was not also a "contractor" might nevertheless be held liable for workers' compensation benefits and immune from tort liability. 263 Ga. 338, 434 S.E.2d 57 (1993). The Court held that to be liable for workers' compensation benefits, an owner must also be a principal contractor. Conversely, however, mere owners are not afforded tort immunity. *Dye v. Trussway, Inc.*, 211 Ga. App. 139, 438 S.E.2d 194 (1993).

The Subsequent Injury Trust Fund (SITF), intended to enhance employment opportunities for disabled or handicapped workers, provides partial reimbursement to employers and insurance carriers for portions of monies expended for weekly benefits and medical treatment to employees with pre-existing permanent impairment, of which employers had knowledge, which "merges" with a subsequent injury to produce a greater disability than would have resulted from the subsequent injury alone. Any claims to the Fund that are improperly denied are subject to attorney's fees. O.C.G.A. § 34-9-367. See O.C.G.A. § 34-9-350, *et seq.* On March 17, 2004, the Georgia General Assembly passed HB 1579 (codified at O.C.G.A. § 34-9-368 on July 1, 2004), which will effectively dissolve the SITF. The Act was amended in 2005 to provide that the SITF will not accept any more claims for reimbursement occurring after June 30, 2006.



The Georgia's Workers' Compensation Act is revised on an annual basis. As of July 1, 2007, the minimum weekly benefits for workers suffering total disability increased from \$45.00 to \$50.00 per week while the maximum weekly benefits for workers suffering total disability increased from \$450.00 to \$500.00. O.C.G.A. § 34-9-261. The maximum amount of weekly temporary partial disability benefits increased from \$300.00 to \$334.00 per week. O.C.G.A. § 34-9-262.

