Name of Preparer:

Adam L. Appel, Jefferson M. Starr and William K. Owens, Jr.
Carlock, Copeland & Stair, LLP

City and State of Firm:

Atlanta, Georgia

Overview of State of Georgia Court System

A. Trial Courts

Superior Courts – Trial court of general jurisdiction (every county has one)—all 159 counties. Superior Courts exercise both civil and criminal jurisdiction. Superior Court judges preside over all felony trials, have exclusive jurisdiction over divorces and may correct errors made by limited jurisdiction courts. The forty-nine Superior Court Circuits in Georgia are made up of one or more counties; each circuit has a Chief Superior Court Judge and a number of other judges as authorized by the General Assembly.

The entire state is divided into judicial circuits, in reference to the jurisdiction and sessions of the superior courts, as follows:

(1) Alapaha Judicial Circuit, composed of the Counties of Atkinson, Berrien, Clinch, Cook, and Lanier;
(2) Alcovy Judicial Circuit, composed of the Counties of Newton and Walton;
(2.1) Appalachian Judicial Circuit, composed of the Counties of Fannin, Gilmer, and Pickens;
(3) Atlanta Judicial Circuit, composed of the County of Fulton;
(4) Atlantic Judicial Circuit, composed of the Counties of Bryan, Liberty, McIntosh, Tattnall, Evans, and Long;
(5) Augusta Judicial Circuit, composed of the Counties of Burke, Columbia, and Richmond;
(5.1) Bell-Forsyth Judicial Circuit, composed of the County of Forsyth;
(6) Blue Ridge Judicial Circuit, composed of the County of Cherokee;
(7) Brunswick Judicial Circuit, composed of the Counties of Appling, Camden, Glynn, Wayne, and Jeff Davis;
(8) Chattahoochee Judicial Circuit, composed of the Counties of Chattahoochee, Harris, Marion, Muscogee, Talbot, and Taylor;
(9) Cherokee Judicial Circuit, composed of the Counties of Bartow and Gordon;
(10) Clayton Judicial Circuit, composed of the County of Clayton;
(11) Cobb Judicial Circuit, composed of the County of Cobb;
(12) Conasauga Judicial Circuit, composed of the Counties of Murray and Whitfield;
(13) Cordele Judicial Circuit, composed of the Counties of Dooly, Wilcox, Crisp, and Ben Hill;
(14) Coweta Judicial Circuit, composed of the Counties of Carroll, Coweta, Heard, Meriwether, and Troup;
(15) Dougherty Judicial Circuit, composed of the County of Dougherty;
(15.1) Douglas Judicial Circuit, composed of the County of Douglas;

(16) Dublin Judicial Circuit, composed of the Counties of Laurens, Johnson, Twiggs, and Treutlen;
(17) Eastern Judicial Circuit, composed of the County of Chatham;
(17.1) Enotah Judicial Circuit, composed of the Counties of Towns, Union, Lumpkin, and White;
(18) Flint Judicial Circuit, composed of the County of Henry;
(19) Griffin Judicial Circuit, composed of the Counties of Spalding, Pike, Upson, and Fayette;
(20) Gwinnett Judicial Circuit, composed of the County of Gwinnett;
(21) Houston Judicial Circuit, composed of the County of Houston;
(22) Lookout Mountain Judicial Circuit, composed of the Counties of Catoosa, Dade, Chattooga, and Walker;
(23) Macon Judicial Circuit, composed of the Counties of Bibb, Crawford, and Peach;
(24) Middle Judicial Circuit, composed of the Counties of Emanuel, Jefferson, Washington, Toombs, and Candler;
(25) Mountain Judicial Circuit, composed of the Counties of Habersham, Rabun, and Stephens;
(26) Northeastern Judicial Circuit, composed of the Counties of Hall and Dawson;
(27) Northern Judicial Circuit, composed of the Counties of Elbert, Hart, Madison, Oglethorpe, and Franklin;
(28) Ocmulgee Judicial Circuit, composed of the Counties of Baldwin, Greene, Jasper, Jones, Morgan, Putnam, Wilkinson, and Hancock;
(29) Oconee Judicial Circuit, composed of the Counties of Dodge, Montgomery, Pulaski, Telfair, Bleckley, and Wheeler;
(30) Ogeechee Judicial Circuit, composed of the Counties of Bulloch, Effingham, Jenkins, and Screven;
(31) Pataula Judicial Circuit, composed of the Counties of Clay, Early, Miller, Quitman, Randolph, Terrell, and Seminole;
(31.1) Paulding Judicial Circuit, composed of the County of Paulding;
(32) Piedmont Judicial Circuit, composed of the Counties of Barrow, Jackson, and Banks;
(32.1) Rockdale Judicial Circuit, composed of the County of Rockdale;
(33) Rome Judicial Circuit, composed of the County of Floyd;
(34) South Georgia Judicial Circuit, composed of the Counties of Baker, Calhoun, Decatur, Grady, and Mitchell;
(35) Southern Judicial Circuit, composed of the Counties of Brooks, Colquitt, Echols, Lowndes, and Thomas;
(36) Southwestern Judicial Circuit, composed of the Counties of Lee, Macon, Schley, Stewart, Sumter, and Webster;
(37) Stone Mountain Judicial Circuit, composed of the County of DeKalb. The judges of the Stone Mountain Judicial Circuit, when the business of the circuit does not require their attention, may aid in the disposition of the business of the Atlanta Judicial Circuit;
(38) Tallapoosa Judicial Circuit, composed of the Counties of Haralson and Polk;
(39) Tifton Judicial Circuit, composed of the Counties of Tift, Irwin, Worth, and Turner;
(40) Toombs Judicial Circuit, composed of the Counties of Glascock, Lincoln, McDuffie, Taliaferro, Warren, and Wilkes;
(40.1) Towaliga Judicial Circuit, composed of the Counties of Butts, Monroe, and Lamar;
(41) Waycross Judicial Circuit, composed of the Counties of Pierce, Coffee, Charlton, Ware, Bacon, and Brantley; and
(42) Western Judicial Circuit, composed of the Counties of Clarke and Oconee.

Superior court judges are constitutional officers who are elected to four-year terms in circuit-wide nonpartisan elections. Vacancies that occur in superior court may be filled by appointment of the

Governor. A candidate for superior court judge must be at least 30 years of age, a lawyer who has practiced for seven years, and a resident of the state for three years.

O.C.G.A. 15-6-1 *et seq*.

State Courts - State Courts exercise limited jurisdiction within one county. Slightly less than half of the counties in Georgia have a State Court. These judges hear misdemeanors including traffic violations, issue search and arrest warrants, hold preliminary hearings in criminal cases and try civil matters not reserved exclusively for the superior courts. A state court is established by local legislation introduced in the General Assembly. State Court judges are elected to four-year terms in county-wide nonpartisan elections. Vacancies in State Court may be filled by appointment of the Governor.

O.C.G.A. 15-7-1 *et seq*.

Magistrate Court/Small Claims Court - Magistrate Courts are county courts that issue warrants, hear minor criminal offenses and civil claims involving amounts of $15,000 or less. A Chief Magistrate is either elected or appointed in each county as determined by local legislation; other magistrates may be appointed by the Chief Magistrate. There is a Magistrate Court in each of Georgia's 159 counties.

Magistrate court is the court of first resort for many civil disputes including: county ordinance violations, dispossessories, landlord/tenant cases, and bad checks. In criminal matters magistrates hold preliminary hearings; issue search warrants to law enforcement and also warrants for the arrest of a particular person. In some criminal matters magistrates are authorized to set bail for defendants.

No jury trials are held in magistrate court; civil cases are often argued by the parties themselves, rather than by attorneys. Unlike in Superior and State Courts, a corporation is not required to be represented by a licensed attorney in Magistrate Court as Magistrate Courts are not courts of record. *See Eckles v. Atlanta Technology Group, Inc.*, 267 Ga. 801 (1997).

O.C.G.A. 15-10-1 *et seq*.

Municipal Court - Cities and towns in Georgia establish municipal courts to handle traffic offenses, local ordinance violations, conduct preliminary hearings, issue warrants, and in some instances hear misdemeanor shoplifting and possession of marijuana cases. Municipal court judges are often appointed by the mayor, some are elected. There are more than 350 municipal courts operating in Georgia. Municipal Courts are courts of record.

O.C.G.A. 15-8-1 *et seq*.

Probate Court - Original jurisdiction in the probate of wills and administration of decedents' estates is designated to the probate court of each county. All 159 counties in Georgia have a Probate Court. Probate judges are also authorized to order involuntary hospitalization of an incapacitated adult or other individual and to appoint a legal guardian to handle the affairs of certain specified individuals. Probate Courts issue marriage licenses and licenses to carry firearms.

In counties where no state court exists, probate judges may hear traffic violations, certain

misdemeanors, and citations involving the state game and fish laws. Many probate judges are authorized to serve as the county elections supervisor; they also administer oaths of office and make appointments to certain local public offices. In counties where the total population exceeds 90,000, the probate judge must have attained the age of 30 years and have been admitted to practice law for seven years preceding election.

O.C.G.A. 15-9-1 *et seq.*

Juvenile Court - Juvenile Courts handle all cases involving deprived and neglected children under 18 years of age; delinquent and unruly offenses committed by children under 17 years of age; and juvenile traffic offenses as defined in O.C.G.A. 15-11-73. The Juvenile Courts also hear cases involving consent to marriage for minors, enlistment of minors in the military, and procedures for return of a runaway child resident who is taken into custody in another state.

Juvenile Courts have concurrent jurisdiction with superior courts in child custody and child support matters arising from divorces cases, and in proceedings to terminate parental rights. Original jurisdiction over juveniles who commit certain serious violent felonies resides in the superior courts.

Juvenile Court judges are appointed by agreement of the superior court judges of the circuit to four-year terms of office.

O.C.G.A. 15-11-1 *et seq.*

B. Appellate Courts

Court of Appeals - The Court of Appeals is the court of first review for many civil and criminal cases heard by the trial courts. The purpose of such a review is to correct legal errors or errors of law made at the trial level, not to alter jury verdicts or the outcome of bench trials.

The Court of Appeals may exercise appellate and certiorari jurisdiction in all cases not reserved to the Supreme Court or conferred on other courts by law. The decisions of the Court of Appeals insofar as not in conflict with those of the Supreme Court bind all courts except the Supreme Court as precedents.

The Court of Appeals has twelve judges who are assigned to one of four panels made up of three judges each. Once a case is assigned to a panel, the judges review the trial transcript, relevant portions of the record, and briefs submitted by the attorneys for the parties. Panels also hear oral arguments in a small number of cases.

Panel decisions are final unless one judge dissents. If necessary, a case may be reviewed by a larger number of judges of the Court of Appeals for decision.

The Court of Appeal is intended to be a final court of review. However, the Supreme Court can review a decision of the Court of Appeals by granting *cert*.

GA CONST Art. 6, Section 5, Paragraph I *et seq*.

O.C.G.A. 15-3-1 *et seq*.

Supreme Court - The Supreme Court, the state's highest court, reviews decisions made in civil and criminal cases by a trial court judge or by the Court of Appeals. This court also rules on questions involving the constitutionality of state statutes and all criminal cases involving a sentence of death. No trials are held at the appellate level, nor do the parties appear before the court. If attorneys present oral arguments, these are heard by the entire court.

Generally cases are first appealed to the Court of Appeals and then to the Supreme Court with the grant of *cert*. GA CONST Art. 6, Section 6, Paragraph V. However, some cases will bypass the Court of Appeals and go directly to the Supreme Court. The Supreme Court has exclusive appellate court jurisdiction over (1) All cases involving the construction of a treaty or of the Constitution of the State of Georgia or of the United States and all cases in which the constitutionality of a law, ordinance, or constitutional provision has been drawn in question; and (2) All cases of election contest. GA CONST Art. 6, Section 6, Paragraph II. Unless otherwise provided by law, the Supreme Court has appellate jurisdiction over all cases involving title to land, all equity cases, all cases involving wills, all habeas corpus cases, all cases involving extraordinary remedies, all divorce and alimony cases, all cases certified to it by the Court of Appeals, and all cases involving the a sentence of death. GA CONST Art. 6, Section 6, Paragraph III. The Supreme Court also has jurisdiction and authority to answer any question of law from any state appellate or federal district or appellate court. GA CONST Art. 6, Section 6, Paragraph IV.

Each case accepted for review by the Supreme Court is assigned to one of the seven justices for preparation of a preliminary opinion (decision) for circulation to all other justices. The justices review trial transcripts, case records and the accompanying legal briefs prepared by attorneys. An opinion is adopted or rejected by the Court after thorough discussion by all the justices in conference.

The Chief Justice and the Presiding Justice serve as officers of the court for two-year terms. The Chief Justice presides at official sessions of the Supreme Court and conferences of the justices. The Supreme Court is assigned oversight of the legal profession and the judiciary as well as other designated duties.

GA CONST ART 6, Section 6, Paragraph I *et seq.*

See also OCGA 15-2-1 *et seq*.

Procedural

A. Venue

· **Resident-Defendants:**

Divorce Proceedings:

Divorce cases shall be tried in the county where the defendant resides, if a resident of this state; if the defendant is not a resident of this state, then in the county in which the plaintiff resides; provided, however, a divorce case may be tried in the county of residence of the plaintiff if the defendant has moved from that same county within six months from the date of the filing of the divorce action and said county was the site of the marital domicile at the time of the separation of the parties, and provided, further, that any person who has been a resident of any United States army post or military

reservation within the State of Georgia for one year next preceding the filing of the petition may bring an action for divorce in any county adjacent to said United States army post or military reservation.

GA. CONST Art. 6, Section 2, Paragraph I

Cases Concerning Title to Land:
Cases respecting titles to land shall be tried in the county where the land lies, except where a single tract is divided by a county line, in which case the superior court of either county shall have jurisdiction.

GA. CONST Art. 6, Section 2, Paragraph II

Equitable Proceedings:
Equity cases shall be tried in the county where a defendant resides against whom substantial relief is prayed.

GA CONST Art. 6, Section 2, Paragraph III

With multiple defendants, all actions seeking equitable relief shall be filed in the county of the residence of one of the defendants against whom substantial relief is prayed, except in cases of injunctions to stay pending proceedings, when the action may be filed in the county where the proceedings are pending, provided no relief is prayed as to matters not included in such litigation, and except in divorce cases, venue in which is governed as set forth *supra*.

O.C.G.A. 9-10-30

Suits against joint obligors, joint tort-feasors, joint promisors, copartners, or joint trespassers:

Suits against joint obligors, joint tort-feasors, joint promisors, copartners, or joint trespassers residing in different counties may be tried in either county.

GA CONST Art. 6, Section 2, Paragraph IV

Trial and entry of judgment against a resident of Georgia in a county other than the county of the defendant's residence is permitted only if the Georgia resident defendant is a joint obligor, joint tort-feasor, joint promisor, copartner, or joint trespasser.

Subject to forum non conveniens, joint tort-feasors, obligors, or promisors, or joint contractors or copartners, residing in different counties, may be subject to an action as such in the same action in any county in which one or more of the defendants reside.

If all defendants who reside in the county in which an action is pending are discharged from liability before or upon the return of a verdict by the jury or the court hearing the case without a jury, a nonresident defendant may require that the case be transferred to a county and court in which venue would otherwise be proper. If venue would be proper in more than one county, the plaintiff may elect from among the counties in which venue is proper the county and the court in which the action shall proceed.

O.C.G.A. 9-10-31; *See EHCA Cartersville, LLC v. Turner*, 280 Ga. 333, 626 S.E.2d 482 (2006) (declaring subsection OCGA 9-10-31(c), concerning transfer of venue in medical malpractice actions, unconstitutional in violation of GA CONST Art. 6, Section 2, Art. VI set forth *supra*).

Makers & Endorsers:

Suits against the maker and endorser of promissory notes, or drawer, acceptor, and endorser of foreign or inland bills of exchange, or like instruments, residing in different counties, shall be tried in the county where the maker or acceptor resides.

GA CONST Art. 6, Section 2, Paragraph V

Where the maker and endorser of a promissory note who reside in different counties are subjected to an action in the county where the maker resides, as provided by GA CONST Art. 6, Section 2, Paragraph V, service of a copy of the original pleading and process on the endorser, as provided in the case of joint obligors and promisors, shall be deemed sufficient.

O.C.G.A. 9-10-32

Action Against Unincorporated Associations:

An action against an unincorporated organization or association may be maintained in any county where the organization or association does business or has in existence a branch or local organization.

O.C.G.A. 9-2-25(c)

Actions Against Domestic Corporations & Foreign Corporations Authorized to Transact Business in Georgia

Each domestic corporation and each foreign corporation authorized to transact business in this state shall be deemed to reside and to be subject to venue as follows:

(1) In civil proceedings generally, in the county of this state where the corporation maintains its registered office; or if the corporation fails to maintain a registered office, it shall be deemed to reside in the county where its last named registered office or principal office, as shown by the records of the Secretary of State, was maintained;

(2) In actions based on contracts, in that county in this state where the contract to be enforced was made or is to be performed, if the corporation has an office and transacts business in that county;

(3) In actions for damages because of torts, wrong, or injury done, in the county where the cause of action originated, if the corporation has an office and transacts business in that county;

(4) In actions for damages because of torts, wrong, or injury done, in the county where the cause of action originated. If venue is based solely on this paragraph, the defendant shall have the right to remove the action to the county in Georgia where the defendant maintains its principal place of

business. A notice of removal shall be filed within 45 days of service of the summons. Upon motion by the plaintiff filed within 45 days of the removal, the court to which the case is removed may remand the case to the original court if it finds that removal is improper under the provisions of this paragraph. Upon the defendant's filing of a notice of removal, the 45 day time period for filing such notice shall be tolled until the remand, the entry of an order by the court determining that the removal is valid, or the expiration of the time period for the plaintiff to file a motion challenging the removal, whichever occurs first; and

(5) In garnishment proceedings, in the county of this state in which is located the corporate office or place of business where the employee who is the defendant in the main action is employed.

Any residences established by the preceding are in addition to, and not in limitation of, any other residence that any domestic or foreign corporation may have by reason of other laws.

Whenever current general corporate law either requires or permits a proceeding to be brought in the county where the registered office of the corporation is maintained, if the proceeding is against a corporation having a principal office as required under a prior general corporation law, the action or proceeding may be brought in the county where the principal office is located.

O.C.G.A. 14-2-510

All Other Civil Cases:

All other civil cases, except juvenile court cases as may otherwise be provided by the Juvenile Court Code of Georgia, shall be tried in the county where the defendant resides; venue as to corporations, foreign and domestic, shall be as provided by law; and all criminal cases shall be tried in the county where the crime was committed, except cases in the superior courts where the judge is satisfied that an impartial jury cannot be obtained in such county.

GA CONST Art. 6, Section 2, Paragraph VI

· **Non-Resident Individual-Defendants**:

Defendant Served in Georgia
A person who is not a citizen of the State of Georgia, passing through or sojourning temporarily in the State of Georgia, may be subject to an action in any county thereof in which he may be found at the time when the action is brought.

O.C.G.A. 9-10-33

Defendant Served Under Long Arm Statute

Venue in cases under the Georgia Long Arm Statute shall lie in any county wherein a substantial part of the business was transacted, the tortious act, omission, or injury occurred, or the real property is located. Where an action is brought against a resident of this state, any nonresident of this state who is involved in the same transaction or occurrence and who is suable under the provisions of this article may be joined as a defendant in the county where a resident defendant is suable. Under such

circumstances, jurisdiction and venue of the court of and over such nonresident defendant shall not be affected or lost if at trial a verdict or judgment is returned in favor of such resident defendant. If such resident defendant is dismissed from the action prior to commencement of the trial, the action against the nonresident defendant shall not abate but shall be transferred to a court in a county where venue is proper.

O.C.G.A. 9-10-93

Actions Under the Non-Resident Motorist Act

All actions brought under the Georgia Non-Resident Motorist Act relating to the use of the highways of this state by nonresident motorists shall be brought in the county in which the accident or injury occurred or the cause of action originated, or in the county of the residence of the plaintiff, as the plaintiff in such action may elect, if the plaintiff in such action is a resident of the State of Georgia; and, if the plaintiff in such action is a nonresident of the State of Georgia, the action shall be brought in the county in this state in which the accident or injury occurred or the cause of action originated; and the courts in such counties having jurisdiction of tort actions shall have jurisdiction of all such nonresident users in actions arising under this chapter.

Where an action for damages is brought against a resident of this state, any nonresident involved in the same accident or collision and who is suable under this chapter may be joined as a defendant in the county wherein the resident defendant is suable, and the jurisdiction of the court of and over such nonresident joint defendant shall not be affected or lost by reason of the fact that the jury returns a verdict in favor of such resident joint defendant although the accident, injury, or cause of action did not originate in the county wherein the action is brought.

O.C.G.A. 40-12-3

· **Non-resident Corporation Defendant**

Venue for Non-resident Corporate Defendants is governed by the Georgia Long Arm Statute. *Pratt & Whitney Canada, Inc. v. Sanders*, 218 Ga. App. 1, 460 S.E.2d 94 (1995); *see* O.C.G.A. 9-10-93, *supra*.

· **Change of Venue**

Whenever, by an examination voir dire of the persons whose names are on the jury list and who are compellable to serve on the jury, the presiding judge is satisfied that an impartial jury cannot be obtained in the county where any civil case is pending, the civil case may be transferred to any county that may be agreed upon by the parties or their counsel.

In the event the parties or their counsel fail or refuse to agree upon any county in which to try the case pending, the judge may select the county in which the same shall be tried and have the case transferred accordingly.

When any civil case has been once transferred, the judge may again change the venue from the county to which the transfer was first made to any other county, in the same manner as the venue was first changed from the county in which the civil case was originally commenced.

O.C.G.A. 9-10-50

In all actions brought by one county against another county in the defending county, the judge shall change the venue to a county adjoining the one in which the action is brought, on the motion of the plaintiff, supported by the oath of the chairman or presiding official of the county governing authority of the county bringing the action, that in his opinion a fair and impartial trial cannot be had in the county in which the action is brought.

O.C.G.A. 9-10-51

The clerk of the court from which a case has been transferred shall send a true transcript of the order for the change of venue, together with the original record in the case, including depositions and orders and all pleadings, to the court of the county to which the case has been transferred.

O.C.G.A. 9-10-52

After a case has been transferred, all further proceedings shall be conducted as if the case had been originally commenced in the court to which the same was transferred.

O.C.G.A. 9-10-53

All costs which have accrued at the time of the transfer of a case shall, at the termination of the case, be paid by the party or parties against whom the same are assessed to the proper officers of the county from which the case was transferred.

O.C.G.A. 9-10-54

Forum non conveniens

If a court of this state, on written motion of a party, finds that in the interest of justice and for the convenience of the parties and witnesses a claim or action would be more properly heard in a forum outside this state or in a different county of proper venue within this state, the court shall decline to adjudicate the matter under the doctrine of forum non conveniens. As to a claim or action that would be more properly heard in a forum outside this state, the court shall dismiss the claim or action. As to a claim or action that would be more properly heard in a different county of proper venue within this state, the venue shall be transferred to the appropriate county. In determining whether to grant a motion to dismiss an action or to transfer venue under the doctrine of forum non conveniens, the court shall give consideration to the following factors:

(1) Relative ease of access to sources of proof;
(2) Availability and cost of compulsory process for attendance of unwilling witnesses;
(3) Possibility of viewing of the premises, if viewing would be appropriate to the action;
(4) Unnecessary expense or trouble to the defendant not necessary to the plaintiff's own right to pursue his or her remedy;
(5) Administrative difficulties for the forum courts;
(6) Existence of local interests in deciding the case locally; and
(7) The traditional deference given to a plaintiff's choice of forum.

A court may not dismiss a claim under this Code section until the defendant files with the court or with the clerk of the court a written stipulation that, with respect to a new action on the claim commenced by the plaintiff, all the defendants waive the right to assert a statute of limitations defense in all other states of the United States in which the claim was not barred by limitations at the time the claim was filed in this state as necessary to effect a tolling of the limitations periods in those states beginning on the date the claim was filed in this state and ending on the date the claim is dismissed.

O.C.G.A. 9-10-31.1

Pendent Venue: Where a plaintiff brings suit in the same county on two claims arising from the same transaction and the Georgia Constitution designates that county as the venue for one of those claims, the trial court has the discretion to entertain both claims.

Naptar Corp. v. E.T. Kassinger, Inc., 258 Ga. 102, 365 S.E.2d 442 (1998)

***Practice Tips*:** Improper venue is a threshold defense that will be waived if not raised in the first defensive pleading. O.C.G.A. 9-11-12(b)(3).

Venue is based upon a defendant's residence at the time that the suit is filed. A change of residence by a defendant after that time will not result in a change of venue. *Viskup v. Viskup*, 291 GA 103, 727 S.E.2d 97 (2012).

B. Statute of Limitations

· **Personal Injury**

Actions for injuries to the person shall be brought within two years after the right of action accrues, except for injuries to the reputation, which shall be brought within one year after the right of action accrues, and except for actions for injuries to the person involving loss of consortium, which shall be brought within four years after the right of action accrues.

O.C.G.A. 9-3-33

· **Bad faith and other insurance contract claims** are subject to the same limitations as actions for personal injury described above (O.C.G.A. 9-3-33).

· **Contractual claims**

Written Contracts:

All actions upon simple contracts in writing shall be brought within six years after the same become due and payable. O.C.G.A. 9-3-24.

Open Account/Oral Contracts:

All actions upon open account, or for the breach of any contract not under the hand of the party sought to be charged, or upon any implied promise or undertaking shall be brought within four years after the right of action accrues. O.C.G.A. 9-3-25.

Contract for Sale of Goods
An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. O.C.G.A. 11-2-725.

All Other Contracts
All other actions upon contracts express or implied not otherwise provided for shall be brought within four years from the accrual of the right of action. O.C.G.A. 9-3-26.

Wrongful death claims

General two-year statute of limitation for personal injury claims applies to wrongful death claims that do not arise from medical malpractice. Wrongful death claims accrue at the time of the decedent's death. *DeKalb Medical Center, Inc. v. Hawkins*, 288 Ga. App. 840, 655 S.E.2d 823 (2007); O.C.G.A. 9-3-33, 51-4-1 *et seq*.

· **Medical Malpractice claims**
Subject to O.C.G.A. 9-3-72 and 9-3-73, an action for medical malpractice shall be brought within two years after the date on which an injury or death arising from a negligent or wrongful act or omission occurred. Notwithstanding the preceding, in no event may an action for medical malpractice be brought more than five years after the date on which the negligent or wrongful act or omission occurred. Accordingly, under Georgia law there is a two-year statute of limitations and a five-year statute of ultimate repose and abrogation.

O.C.G.A. 9-3-71

The limitations of O.C.G.A. 9-3-71 do not apply where a foreign object has been left in a patient's body, but in such a case an action shall be brought within one year after the negligent or wrongful act or omission is discovered. For the purposes of this Code section, the term "foreign object" shall not include a chemical compound, fixation device, or prosthetic aid or device.

O.C.G.A. 9-3-72

· **Legal Malpractice claim** - A legal malpractice action can sound in tort or contract, or both. A Plaintiff who alleges legal malpractice has two years to bring action for tort and four years to bring action for breach of contract. *Coleman v. Hicks et al.*, 209 Ga. App. 467, 433 S.E.2d 621 (1993); O.C.G.A. 9-3-25, 9-3-33.
· **Minors and Persons Under Disability -** All persons who are legally incompetent because of mental retardation or mental illness and all minors who have attained the age of five years shall be subject to the normal periods of limitation for actions for medical malpractice. A minor who has not attained the age of five years shall have two years from the date of such minor's fifth birthday within which to bring a medical malpractice action if the cause of action arose before such minor attained the age of five years. In no event may an action for medical malpractice be brought by or on behalf of: (1) A person who is legally incompetent because of mental retardation or mental illness more than five years after the date on which the negligent or wrongful act or omission occurred; or (2) a minor (A) After the tenth birthday of the minor if such minor was under the age of five years on the date on which the negligent or wrongful act or omission occurred; or (B) After five years from the date on which the negligent or wrongful act or omission occurred if such minor was age five or older on the

date of such act or omission. These exceptions do not apply where a foreign object has been left in a patient's body.

O.C.G.A. 9-3-73

· **Libel/Battery/Assault/False Imprisonment:**

Libel
One year. O.C.G.A. 9-3-33.

Battery
Two years. O.C.G.A. 9-3-33.

Assault
Two years. O.C.G.A. 9-3-33.

False Imprisonment
Two years. O.C.G.A. 9-3-33.

· **Statute of Repose for Construction claims/Defective or Unsafe Condition to Real Property:**

No action to recover damages:

(1) For any deficiency in the survey or plat, planning, design, specifications, supervision or observation of construction, or construction of an improvement to real property;
(2) For injury to property, real or personal, arising out of any such deficiency; or
(3) For injury to the person or for wrongful death arising out of any such deficiency

shall be brought against any person performing or furnishing the survey or plat, design, planning, supervision or observation of construction, or construction of such an improvement more than eight years after substantial completion of such an improvement.

Notwithstanding the preceding, in the case of such an injury to property or the person or such an injury causing wrongful death, which injury occurred during the seventh or eighth year after such substantial completion, an action in tort to recover damages for such an injury or wrongful death may be brought within two years after the date on which such injury occurred, irrespective of the date of death, but in no event may such an action be brought more than ten years after the substantial completion of construction of such an improvement.

O.C.G.A. 9-3-51

C. Time for Filing an Answer

Computation of Time
Except as otherwise provided by law, when a period of time measured in days, weeks, months, years, or other measurements of time except hours is prescribed for the exercise of any privilege or the discharge of any duty, the first day shall not be counted but the last day shall be counted; and, if the last day falls on Saturday or Sunday, the party having such privilege or duty shall have through the

following Monday to exercise the privilege or to discharge the duty. When the last day prescribed for such action falls on a public and legal holiday as set forth in O.C.G.A. 1-4-1, the party having the privilege or duty shall have through the next business day to exercise the privilege or to discharge the duty. When the period of time prescribed is less than seven days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation.

O.C.G.A. 1-3-1

Extension of time. When by law or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the parties, by written stipulation of counsel filed in the action, may extend the period, or the court for cause shown may at any time in its discretion (1) with or without motion or notice, order the period extended if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made after the expiration of the specified period, permit the act to be done where the failure to act was the result of excusable neglect; provided, however, that no extension of time shall be granted for the filing of motions for new trial or for judgment notwithstanding the verdict.

Unaffected by expiration of term. The period of time provided for the doing of any act or the taking of any proceeding is not affected or limited by the continued existence or expiration of a term of court, except as otherwise specifically provided by law. The continued existence or expiration of a term of court in no way affects the power of a court to do any act or take any proceeding in any civil action which has been pending before it, except as otherwise specifically provided by law.

For motions; for affidavits. A written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served not later than five days before the time specified for the hearing, unless a different period is fixed by this chapter or by order of the court. Such an order may for cause shown be made on ex parte application. When a motion is supported by affidavit, the affidavit shall be served with the motion. Opposing affidavits may be served not later than one day before the hearing, unless the court permits them to be served at some other time.

Additional time after service by mail or e-mail. Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper, other than process, upon him or her, and the notice or paper is served upon the party by mail or e-mail, three days shall be added to the prescribed period.

O.C.G.A. 9-11-6.

Time for Filing An Answer

A defendant shall serve his answer within 30 days after the service of the summons and complaint upon him, unless otherwise provided by statute. A cross-claim or counterclaim shall not require an answer, unless one is required by order of the court, and shall automatically stand denied.

O.C.G.A. 9-11-12.

D. Dismissal R-Filing of Suit

· Voluntary Dismissal/

By Plaintiff/Stipulation
Except as provided for in O.C.G.A. 9-11-23(e) and 9-11-66 (dealing with class actions and receivers), a plaintiff has the right to voluntarily dismiss a lawsuit once without order or permission of the court by filing written notice of dismissal at any time before the first witness is sworn or by filing a stipulation of dismissal signed by all parties who have appeared in the action.

By Court Order
Except as provided for above, an action shall not be dismissed upon the plaintiff's motion except upon order of the court and upon the terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him or her of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court.

Effect
A voluntary dismissal is without prejudice, except that the filing of a second notice of dismissal operates as an adjudication upon the merits.

O.C.G.A. 9-11-41.

Liability

A. Negligence

Negligence:
Comparative Negligence: If the plaintiff by ordinary care could have avoided the consequences to himself caused by the defendant's negligence, he is not entitled to recover. In other cases the defendant is not relieved, although the plaintiff may in some way have contributed to the injury sustained. O.C.G.A. 51-11-7. 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).

Contributory negligence: Contributory negligence is an affirmative defense. The plaintiff must at all times exercise ordinary care for his own safety must, by his own negligence, be the sole proximate cause of his own injury. *Whatley v. Henry*, 65 Ga. App. 668, 674 (1941). In addition, the plaintiff must exercise ordinary care to avoid the consequences of the defendant's negligence once such negligence becomes apparent to him. *Id.*

B. Negligence Defenses

· **Comparative negligence:** 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).

· **Assumption of the risk:** The plaintiff's action is completely barred where he (1) had actual knowledge of the danger (2) an understanding and appreciation of the risk associated with the danger and (3) a voluntary exposure to the risk. *Brown v. Sims*, 174 Ga. App. 243, 245 (1985)

· **Last clear chance:** The doctrine of last clear chance arises when the plaintiff, by his own

negligence, places himself in a position of peril from which he is unable to extricate himself. If the defendant then realizes the plaintiff's position of peril and has an opportunity to avoid an injury by the exercise of ordinary care, then the defendant may be liable when injury to the plaintiff results from the defendant's failure to exercise due care under the circumstances. *Harrison v. Feather*, 178 Ga. App. 35 (1986).

· **Unavoidable accident:** There is generally no liability where an accident could not have been prevented by the exercise of reasonable care. *Pirkle v. Triplett*, 155 Ga. App. 945, 946 (1980).

· **Sudden emergency:** A person in a sudden emergency may be deemed to be in the exercise of ordinary care, even though he may have chosen a dangerous course of conduct, if such conduct seemed safest under the circumstances at the time. *Gordon v. Gordon*, 133 Ga. App. 520, 524 (1970).

· **Act of God:** When the cause of an injury is a natural accident, it will serve to bar the plaintiff from recovery. *Baldwin Processing Co. v. Georgia Power Co.,* 112 Ga. App. 92 (1965).

· **Others**

C. Gross Negligence, Recklessness, Willful and Wanton Conduct

Gross negligence: Gross negligence is defined as the absence of 'slight diligence," or that degree of care which every man of common sense, however inattentive he may be, exercises under the same or similar circumstances. OCGA 51-1-4.

Recklessness, willfulness, and wantonness: Willful and wanton misconduct is so reckless or so charged with conscious indifference to the consequences of others, as to be deemed equivalent in spirit to an actual intent to inflict injury or to do harm. *Reliance Ins. Co. v. Walker County*, 208 Ga. App. 729, 731 (1993).

D. Negligent Hiring and Retention

Negligent Hiring: An employer has a duty to exercise reasonable ordinary care not to hire 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. *Munroe v. Universal Health Services, Inc.*, 277 Ga. 861 (2004).

Negligent retention: The elements of negligent retention are identical to that of negligent hiring, the only difference being that with negligent retention, the employer retains a dangerous employee.

E. Negligent Entrustment

The owner of a motor vehicle may be liable for injuries caused by the vehicle's operation by one whom the owner has permitted to operate the vehicle, with the knowledge that such person was incompetent to operate the vehicle safely, because of the operator's age, lack of experience, physical or mental condition, intoxication, or his habit of recklessness in operating a motor vehicle. *Clarke v. Cox*, 197 Ga. App. 83 (1990); *Wilson v. Ortiz*, 232 Ga. App. 191 (1998).

F. Dram Shop

A person who willfully knowingly, and unlawfully sells, furnishes, or serves alcoholic beverages to a

person who is not of lawful drinking age, or to a person who is in a state of intoxication, knowing that such person will soon be driving a motor vehicle, may become liable for injury or damage caused by or resulting from the intoxication of such minor or person when the sale, furnishing, or serving in the proximate cause of such injury or damage. O.C.G.A. 51-1-40.

G. Joint and Several Liability

Joint and Several has been abolished in Georgia. When an action is brought against multiple defendants and the plaintiff is to some degree responsible for the injury or damages claimed, the jury, in its determination of the total amount of damages to be awarded, if any, shall determine the percentage of fault to the plaintiff and the judge shall reduce the amount of damages otherwise awarded to the plaintiff in proportion to his or her percentage of the fault. O.C.G.A 51-12-33(a). Next, the jury shall apportion its award of damages among persons who are liable according to the percentage of fault of each person. Damages apportioned by the jury shall be the liability of each person against whom they are awarded, shall not be a joint liability among the persons liable, and shall not be subject to a right of any contribution.

H. Wrongful Death and/or Survival Actions

The surviving spouse or, if there is no surviving spouse, a child or children, either minor or sui juris, may recover for the homicide of the spouse or parent the full value of the life of the decedent, as shown by the evidence. O.C.G.A. 51-4-2(a). Georgia also provides wrongful death actions for the death of a child. O.C.G.A. 19-7-1.

I. Vicarious Liability

Vicarious Liability: Every person shall be liable for torts committed by his wife, his child, or his servant by his command or in the prosecution and within the scope of his business, whether the same are committed by negligence or voluntarily. O.C.G.A. 51-2-2.
Agency: To recover under a theory of apparent agency, the plaintiff must establish (1) that the alleged principal held out another as its agent (2) that the plaintiff justifiably relied on the alleged agent's or care based on the alleged principal's representation and (3) that this justifiable reliance led to the injury. *Caldwell Banker Real Estate Corp. v. Degraft-Hanson*, 266 Ga. App. 23, 26 (2004).

J. Exclusivity of Workers' Compensation

The Georgia Workers' Compensation Act provides that certain individuals, including an employee's employer, the employer's alter egos, and the employee's co-workers, are all immune from tort liability for any injury or disease on the employee's part to which the Act is applicable. O.C.G.A. 34-9-11(a). In order to enjoy such tort immunity, a party must have given some *quid pro quo*, such as liability for workers' compensation benefits. O.C.G.A. § 34-9-11 expressly provides for immunity from tort suit for "any person who, pursuant to a contract or agreement with an employer, provides workers' compensation benefits to an injured employee."

Damages

A. Statutory Caps on Damages

Tort Claims Act: In a tort action against the state, no person shall recover a sum exceeding $1 million because of loss arising from a single occurrence, and the state's aggregate liability per occurrence shall not exceed $3 million. O.C.G.A. 50-21-29.

Cap on Non-Economic Damages in Medical Malpractice Actions: O.C.G.A. 51-13-1, the statute limiting awards of noneconomic damages in medical malpractice cases to a predetermined amount violated, Georgia's constitutional right to jury trial. *Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt*, 286 Ga. 731 (2010).

B. Compensatory Damages for Bodily Injury

Damages may be either general or special, direct or consequential.

O.C.G.A. 51-12-1.

General damages are those which the law presumes to flow from any tortious act; they may be recovered without proof of any amount. Special damages are those which actually flow from a tortious act; they must be proved in order to be recovered. Direct damages are those which follow immediately upon the doing of a tortious act. Consequential damages are those which are the necessary and connected effect of a tortious act, even though they are to some extent dependent upon other circumstances.

O.C.G.A. 51-12-2, 51-12-3

Damages are given as compensation for injury; generally, such compensation is the measure of damages where an injury is of a character capable of being estimated in money. If an injury is small or the mitigating circumstances are strong, nominal damages only are given.

O.C.G.A. 51-12-4.

In a tort action in which there are aggravating circumstances, in either the act or the intention, the jury may give additional damages to deter the wrongdoer from repeating the trespass or as compensation for the wounded feelings of the plaintiff.

O.C.G.A. 51-12-5.

In a tort action in which the entire injury is to the peace, happiness, or feelings of the plaintiff, no measure of damages can be prescribed except the enlightened consciences of impartial jurors.

O.C.G.A. 51-12-6.

In all cases, necessary expenses consequent upon an injury are a legitimate item in the estimate of damages.

O.C.G.A. 51-12-7.

If the damage incurred by the plaintiff is only the imaginary or possible result of a tortious act or if other and contingent circumstances preponderate in causing the injury, such damage is too remote to be the basis of recovery against the wrongdoer.

O.C.G.A. 51-12-8.

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.

When a tort is committed, a contract is broken, or a duty is omitted with knowledge and for the

purpose of depriving the plaintiff of certain contemplated benefits, the remote damages occasioned thereby become a proper subject for the consideration of the jury.

O.C.G.A. 51-12-10.

When a person is injured by the negligence of another, he must mitigate his damages as far as is practicable by the use of ordinary care and diligence. However, this duty to mitigate does not apply in cases of positive and continuous torts.

O.C.G.A 51-12-11.

C. Collateral Source

A tortfeasor cannot diminish the amount of liability as the result of payments made to the plaintiff by a third party who is not a joint tortfeasor. *Bennett v. Haley*, 132 Ga. App. 512 (1974).

D. Pre-Judgment/Post-Judgment Interest

All liquidated demands, where by agreement or otherwise the sum to be paid is fixed or certain, bear interest from the time the party shall become liable and bound to pay them; if payable on demand, they shall bear interest from the time of the demand. O.C.G.A. 7-4-16. A demand is considered liquidated with the only issue contested by the insurer is the existence of coverage and not the amount of the claim. *Enfinger v. International Indem. Co.*, 257 Ga. 385 (1987).

Post-judgment interest is due from the date when the judgment is entered until the date when the judgment is paid. *St. Paul Reinsurance Company, Ltd. v. Ross*, 276 Ga. App. 135 (2005).

Interest on Unliquidated Damages is governed by O.C.G.A. 51-12-14.

E. Damages for Emotional Distress

Mental Anguish as an Element of Actual Damages

Where there is a physical injury or pecuniary loss, compensatory damages include recovery for accompanying mental pain and suffering.

Westview Cemetery, Inc. v. Blanchard, 234 Ga. 540, 216 S.E.2d 776 (1975).

Intentional Infliction of Emotional Distress:

For a plaintiff to prevail on a claim for intentional infliction of emotional distress, she must present evidence demonstrating that the alleged conduct was: (1) intentional or reckless, (2) extreme and outrageous, and (3) the cause of severe emotional distress.

The rule of thumb in determining whether a defendant's conduct is sufficiently extreme and outrageous, so as to support an intentional infliction of emotional distress claim, is whether the recitation of the facts to an average member of the community would arouse her resentment against the defendant so that she would exclaim, “Outrageous!”.

Wilcher v. Confederate Packaging, Inc., 287 Ga. App. 451, 651 S.E.2d 790 (2007).

In a tort action in which the entire injury is to the peace, happiness, or feelings of the plaintiff, no measure of damages can be prescribed except the enlightened consciences of impartial jurors. In such an action, punitive damages under O.C.G.A. 51-12-5 or O.C.G.A. 51-12-5.1 shall not be awarded.

O.C.G.A. 51-12-6

Negligent Infliction of Emotional Distress:

Georgia applies the impact rule to cases in which a party seeks to recover for emotional distress in a claim involving negligent conduct. The impact rule for recovery for negligent infliction of emotional distress has three elements: (1) a physical impact to the plaintiff; (2) the physical impact causes physical injury to the plaintiff; and (3) the physical injury to the plaintiff causes the plaintiff's mental suffering or emotional distress. A party claiming negligent infliction of emotional distress must show

a physical impact resulting in physical injury.

Clarke v. Freeman, 302 Ga. App. 831, 692 S.E.2d 80 (2010).

F. Wrongful Death and/or Survival Action Damages

The measure of damages in a wrongful death action is the full life of the decedent as shown by the decedent. O.C.G.A. 51-4-2(a). The economic element of wrongful death damages are those items having a proven monetary value, such as lost potential lifetime earnings, income, or services. *Consolidated Freightways Corp. of Delaware v. Futrell*, 201 Ga. App. 233 (1991). The intangible element of damages include those lost intangible items of life whose value cannot be precisely quantified, such as the value of the decedent's society, advice, and counsel as determined by the enlightened conscience of the jury. *Id.* There is no recovery for damages, including mental or emotional suffering, experienced by the decedent's survivors. *Carroll Fulmer Logistics Corp. v. Hines*, 309 Ga. App. 695 (2011).

G. Punitive Damages

Punitive damages may be awarded only in such tort actions in which it is proven by clear and convincing evidence that the defendant's actions showed willful misconduct, malice, fraud, wantonness, oppression, or that entire want of care which would raise the presumption of conscious indifference to consequences. O.C.G.A. 51-12-5.1(b).

H. Diminution in Value of Damaged Vehicle

One way to prove damages to a motor vehicle caused by a collision is by showing the difference between the fair market value of the vehicle before the collision as compared with the market value of the vehicle after the collision. *Myers v. Thornton*, 224 Ga. App. 326 (1997).

I. Loss of Use of Motor Vehicle

There are two ways to prove damages to a motor vehicle caused by a collision: (1) By showing the difference between the fair market value of the vehicle before and after the collision; and (2) Proof of necessary repairs that are the direct and proximate result of the collision and which represent the reasonable value of labor and material used for the repairs. Repair costs, however, are not recoverable to the extent that they exceed the market value of the property before the damage.

Chapman v. Hepburn, 191 Ga. App. 909, 383 S.E.2d 352, 353 (1989).

The purchase or invoice price of personal property does not alone establish its value. The jury also must consider the condition of the property at the time of the incident as well as changes in market value between the purchase date and incident date.

Portland Forest Products v. Garland Lumber Sales, Inc., 199 Ga. App. 479, 405 S.E.2d 307, 308 (1991).

When a plaintiff seeks recovery for damages to an automobile, he may claim the reasonable value of repairs made necessary by the collision, together with hire on the vehicle while rendered incapable of

use, and the value of any permanent impairment, provided the aggregate amount of these items does not exceed the fair market value of the automobile before the injury; in the alternative, plaintiff may prove the difference in fair market value of the property before the injury and afterwards.

Canal Ins. Co. v. Tullis, 237 Ga. App. 515, 515 S.E.2d 649 (1999).

Evidentiary Issues

A. Preventability Determination

A defendant company's internal report of a vehicular accident involving the defendant truck driver and a motorist was not inadmissible subsequent remedial-measures evidence to the extent that the evidence was submitted for some purpose other than showing negligence where the evidence might have been used to prove a fact such as the motorist signaled before merging into the truck driver's lane, the truck driver flashed his lights to give the motorist permission to merge, or the truck driver was guilty of aggressive driving. *Tyson v. Old Dominion Freight Line, Inc.*, 270 Ga. App. 897 (2004).

A trial court's prohibition against the use of a defendant company's internal report of a vehicular accident involving the defendant truck driver and the motorist specifically concluding that the collision was preventable was not an abuse of discretion because, with regard to the company's finding that the collision was preventable, the company's definition of "preventable" was different from the standard of liability. This ruling is based on the court's discretion to determine whether the evidence's prejudicial effect outweighs its probative value. *Tyson v. Old Dominion Freight Line, Inc.*, 270 Ga. App. 897 (2004).

B. Traffic Citation from Accident

It is well-settled that in a civil action for damages a plaintiff may not show that charges were brought against a defendant or that the defendant was required to make an appearance in traffic court for a violation of law alleged to have proximately resulted in the plaintiff's injuries. *Emory v. Dobson*, 206 Ga. App. 482, 483 (1992). However, a defendant's plea of guilty to a criminal charge arising out of the accident is admissible on the question of negligence. *Eubanks v. Waldron*, 263 Ga. App. 75 (2003).

C. Failure to Wear a Seat Belt

The failure of an occupant of a motor vehicle to wear a seat safety belt in any seat of a motor vehicle which has a seat safety belt or belts 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 any 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).

D. Failure of Motorcyclist to Wear a Helmet

No person shall operate or ride upon a motorcycle unless he or she is wearing protective headgear

which complies with standards established by the commissioner of public safety. O.C.G.A. 40-6-315. Motorcyclist's operation of motorcycle...without his wearing protective headgear would constitute violation of law, imposing liability on him for own injuries to extent that any such violation contributed proximately to claimed injuries. *Green v. Gaydon*, 174 Ga. App. 796, 331 S.E.2d 106 (1985).

E. Evidence of Alcohol or Drug Intoxication

Evidence of alcohol consumption is admissible as to the question of whether a motorist's consumption of alcohol impaired his driving capabilities and entered into the proximate cause of the collision. *Schwartz v. Brancheau*, 306 Ga. App. 463 (2010)

F. Testimony of Investigating Police Officer

Where investigating officer's opinion relating to automobile accident is based on his examination of physical evidence at scene, and not solely on statements of witnesses, and where he does not opine as to ultimate issue of a party's negligence, his opinion on cause of accident is admissible in a negligence action as an assessment of fact and not a legal conclusion or a conclusion constituting a mixture of law and fact.

Fortner v. Town of Register, 289 Ga. App. 543, 657 S.E.2d 620 (2008).

G. Expert Testimony

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise, if: (1) The testimony is based upon sufficient facts or data; (2) The testimony is the product of reliable principles and methods; and (3) The witness has applied the principles and methods reliably to the facts of the case which have been or will be admitted into evidence before the trier of fact. O.C.G.A. 24-7-703.

H. Collateral Source

Georgia follows the traditional rule that collateral source evidence is inadmissible. The collateral source rule precludes a tort defendant from introducing evidence that the plaintiff received benefits from a third party who is not a joint tortfeasor. *Glover v. Colbert*, 210 Ga. App. 666 (1993).

I. Recorded Statements

To establish proper foundation for admission of sound recording into evidence, it must be shown that the mechanical transcription device was capable of taking testimony, that the operator of the device was competent to operate the device, that changes, additions, or deletions have not been made, and that the testimony was elicited freely and voluntarily made, without any kind of duress; further, the authenticity and correctness of the recordings must be established, the manner of preservation of the record must be shown, and the speakers must be identified.

Russell v. Superior K-9 Serv., Inc., 242 Ga. App. 896, 531 S.E.2d 770 (2000).

J. Prior Convictions

Evidence of a prior conviction may be used to impeach a witness. Whether a prior conviction is impeachable depends on the type of conviction and whether it occurred within the past 10 years, as set forth in O.C.G.A. 24-6-609.

K. Driving History

Proof of a poor driving record or of a driver's general character for carelessness or recklessness in driving is not admissible to show negligence, and similarly, proof of a good driving record or of a driver's general character for carefulness in driving is inadmissible to show lack of negligence.

Purcell v. Kelley, 286 Ga. App. 117, 648 S.E.2d 454 (2007).

Evidence of a poor driving record is admissible to show that the owner knew of the driver's incompetency, or should have known in the exercise of the duty imposed upon it by law, in a negligent entrustment action where the owner of the entrusted vehicle is bound by law to check the driver's qualifications.

Smith v. Tommy Roberts Trucking Co., 209 Ga. App. 826, 830, 435 S.E.2d 54, 58 (1993).

L. Fatigue

Georgia has adopted the Federal Motor Carrier Regulations.

No driver shall operate a commercial motor vehicle, and a motor carrier shall not require or permit a driver to operate a commercial motor vehicle, while the driver's ability or alertness is so impaired, or so likely to become impaired, through fatigue, illness, or any other cause, as to make it unsafe for him/her to begin or continue to operate the commercial motor vehicle.

49 CFR § 392.3

M. Spoliation

Spoliation refers to the destruction or failure to preserve evidence that is necessary to contemplated or pending litigation. Proof of spoliation raises a rebuttable presumption against the spoliator that the evidence favored the spoliator's opponent. Where a party has destroyed or significantly altered evidence that is material to the litigation, the trial court has wide discretion to fashion sanctions on a case-by-case basis. *R & R Insulation Services, Inc. v. Royal Indem. Co.*, 307 Ga. App. 419, 436, (2010).

Georgia law permits a finding of spoliation based upon the loss of evidence which occurs at a time when there is contemplated or pending litigation. *Kitchens v. Brusman*, 303 Ga.App. 703, 707 (2010).

When a litigant is on notice that something is to be preserved, a litigant is not only under a duty to preserve but also under a duty to have procedures in place to be certain that preservation occurs. *R.A. Siegel Co. v. Bowen*, 246 Ga. App. 177, 181 (2000) (holding in a case where there was an order to preserve a car that the defendant was required to have a procedure in place to preserve it, that it was no excuse that within defendant "the left hand did not know what the right hand was doing" and that the defendant was "palpably remiss" in failing to make reasonable arrangements for preservation). The spoliation of critical evidence "may result in trial by ambush," *Chapman v. Auto Owners Ins. Co.,* 220 Ga.App. 539, 542-543 (1996), and "permitting parties to engage in such a tactic undermines the integrity of the judicial process." *Silvestri v. Gen. Motors Corp.,* 271 F.3d 583, 593 (4th Cir.2001).

The doctrine of spoliation can be applied against a party for the destruction of evidence by a second party where the second party was acting as an agent for the first party. *See*, *e.g.*, *Bouve & Mohr, LLC v. Banks,* 274 Ga.App. 758, 762 (2005) (off-duty officer "served as [apartment complex's] agent when he destroyed evidence in bad faith"); *R.A. Siegel Co.,* 246 Ga.App. at 181 (spoliation presumption allowed against defendant where defendant's insurance company allowed vehicle to be sold during pendency of suit despite an order to preserve it); *compare Boswell v. Overhead Door Corp.,* 292 Ga.App. 234, 235–236 (2008) (spoliation presumption cannot be used against a party who did not destroy the item where there was nothing to suggest that the destroyer was acting at the behest of the first party).

Where a party has destroyed evidence that is material to the litigation, the trial court has wide discretion to fashion sanctions. *AMLI Residential Properties, Inc. v. Georgia Power Co.*, 293 Ga. App. 358, 361 (2008). For example, a trial court may dismiss the case, limit testimony relating to the destroyed evidence, or charge the jury that the spoliation creates a rebuttable presumption that the evidence would have been harmful to the spoliator. *Id.* (discussion of spoliation remedies).

Settlement

A. Offer of Judgment

At any time more than 30 days after the service of a summons and complaint on a party but not less than 30 days (or 20 days if it is a counteroffer) before trial, either party may serve upon the other party, but shall not file with the court, a written offer, denominated as an offer under this Code section, to settle a tort claim for the money specified in the offer and to enter into an agreement dismissing the claim or to allow judgment to be entered accordingly. O.C.G.A. 9-11-68.

B. Liens

Medicaid Liens:

O.C.G.A. § 49-4-149 provides for liens, subrogation, and assignment of claims, in pertinent part, as follows:

(a) The Department of Community Health shall have a lien for the charges for medical care and treatment provided a medical assistance recipient upon any moneys *or other property accruing to the recipient* to whom such care was furnished or to his legal representatives as a result of sickness, injury, disease, disability, or death, due to the liability of a third party, which necessitated the medical care.

(b) The department may perfect and enforce any lien arising under subsection (a) of this Code section by following the procedures set forth for hospital liens in OC.G.A. 44-14-470 through 44-14-473; except that the department shall have one year from the date the last item of medical care was furnished to file its verified lien statement; and the statement shall be filed with the appropriate clerk of court in the county wherein the recipient resides and in Fulton County. *[Contents of lien omitted]* This Code section shall not affect the priority of any attorney's lien.

(c) [Subrogation to private health insurance proceeds only]

(d) A recipient of medical assistance who receives medical care for which the department may be obligated to pay shall *be deemed to have made assignment to the department of any rights of such person to any payments for such medical care from a third party, up to the amount of medical assistance actually paid by the department*. [emphasis supplied]

O.C.G.A. § 9-2-21(c) requires notice to the Department of Community Health at the beginning of representation of a Medicaid beneficiary in a tort action, as follows:

If the person whose legal right has been affected has received medical assistance benefits pursuant to Chapter 4 of Title 49, *prior to initiating recovery action*, the representative or attorney who has actual knowledge of the receipt of said benefits shall notify the Department of Community Health of the claim. Mailing and deposit in a United States post office or public mailbox of said notice addressed to the Department of Community Health with adequate postage affixed is adequate legal notice of the claim. Notice as provided in this subsection shall not be a condition precedent to the filing of any action for tort. *Initiating recovery action shall include any communication with a party who may be liable or someone financially responsible for that liability with regard to recovery of a claim including but not limited to the filing of an action in court.* [emphasis supplied]

The full compensation rule in O.C.G.A. § 33-24-56.1, which applies to first-party insurance benefits in Georgia, expressly does not apply to Medicaid. *Padgett v. Toal*, 261 Ga. App. 154, 581 S.E.2d 744 (2003). There is a pre-*Ahlborn* Georgia case holding that a Medicaid recipient who settles a personal injury tort claim is not entitled to a proportionate reduction in Medicaid lien amount by amount of attorney fees in the tort case where settlement amount was sufficient to satisfy both the Medicaid lien and attorney fees. *Padgett*, 261 Ga. App. at 154. However, "the commissioner of community health may compromise, settle, and execute a release of any such claim or waive, expressly, any such claim, in whole in part, for the convenience of the Department of Community Health." O.C.GA. 49-4-148(a).

Two years before the United States Supreme Court decided *Ahlborn*, the Supreme Court of Georgia came down heavily on the side of full Medicaid reimbursement in *Richards v. Georgia Department of Community Health*, 278 Ga. 757, 604 S.E.2d 815 (2004). In that case as in *Ahlborn,* an injured Medicaid beneficiary argued that the assignment of a right to recover tort damages applies to only that portion of a tort recovery specifically denominated as a recovery for medical expense. Finding

that was too narrow a reading of the applicable statutes, the Court held:

The lien created by O.C.G.A. § 49-4-149(a) is on "any moneys or other property" recovered in a tort action. This must be read as creating a lien on *any* funds recovered in a **tort** action. Only this reading is consistent with the federal legislative intent that a state fully recover the value of medical care it purchased for a Medicaid recipient when a tortfeasor is responsible for the need for that medical care.

To adopt Richards's preferred reading would allow a Medicaid recipient to negotiate a tort settlement structured in such a way so as to reflect no, or minimal, compensation for medical expenses, or to convince a jury to create such structures, and thereby gain a recovery that does not require any significant compensation to the taxpayers who funded his medical care. This would be blatantly unfair to those taxpayers, and is contrary to the intent of the federal statutes. Accordingly, under Georgia's statutes, GDCH's lien is applied to all of the funds in a tort recovery such as Richards's, and there is no conflict between the imposition of such a lien and the federal Medicaid statutes. *Id*. at 760.

There have been no post-*Ahlborn* decisions on Georgia Medicaid liens, and the Department of Community Health has not acknowledged applicability of the *Ahlborn* decision in Georgia. See generally Jenkins & Miller, Ga. Automobile Insurance Law § 55:10 (2012–2013), Medicaid Liens (2009–2010 ed.).

Workers' Compensation:

An insurer may recover the amount it has paid in medical, disability and death benefits against a third-party tortfeasor if the employee is first wholly and completely compensated.

O.C.G.A. § 34-9-11.1

C. Minor Settlement

Generally, if the gross settlement amount of a minor's claim is less than $15,000, the natural guardian of the minor may compromise the claim without becoming the conservator. If no legal action has been initiated and the proposed gross settlement of a minor's claim is more than $15,000, the settlement must be submitted for approval to the court. However, if legal action has been initiated and the proposed gross settlement of a minor's claim is more than $15,000, the settlement must be submitted for approval to the court in which the action is pending and without court approval. O.C.G.A. 29-3-3.

D. Negotiating Directly with Attorneys

A lawyer shall abide by a client's decision whether to accept an offer of settlement on a matter. Georgia Rule of Professional Conduct 1.2(a).

E. Confidentiality Agreements

The amount of a confidential settlement shall not be disclosed on civil case disposition form. O.C.G.A. 9-11-58. However, a provision that a party to a confidential settlement agreement may

nevertheless testify or otherwise comply with a subpoena, court order, or applicable law is an implicit term in such a confidential settlement agreement. *Barger v. Garden Way*, 231 Ga. App. 723 (1998).

F. Releases

General principles of Georgia contract law apply to releases. *See* O.C.G.A. 13-1-1 *et seq*.

Limited Liability Release - In any instance where a claim arising out of a motor vehicle accident is covered by two or more insurance carriers, one such carrier may tender, and the claimant may accept, the limits of such policy; and, in the event of multiple claimants, the settling carrier may tender, and the claimants may accept, the limits of the policy pursuant to a written agreement between or among the claimants. Such claimant or claimants may execute a limited release applicable to the settling carrier and its insured based on injuries to such claimants including, without limitation, claims for loss of consortium or loss of services asserted by any person. O.C.G.A. 33-24-41.1

G. Voidable Releases

In Georgia a release is binding on the party signing it whether based on adequate consideration or not, absent evidence of fraud and absent a fiduciary relationship between the parties. *Shoffner v. Fleet Fin., Inc.*, 212 Ga. App. 142, 144, 441 S.E.2d 455, 457 (1994).

Release of mentally incompetent person who has never been adjudicated to be mentally competent to the extent that he is incapable of managing his estate is not void, but merely voidable, and one who is mentally incapable of making a release may expressly ratify the release after being returned to mental competency or may ratify the release by implication through the lapse of time after restoration of mental capacity. *Norfolk S. Corp. v. Smith*, 262 Ga. 80, 414 S.E.2d 485 (1992).

Transportation Law

A. State DOT Regulatory Requirements

Motor Vehicles and Traffic are governed under O.C.G.A. 40-1-1 *et seq*. The Department of Driver's Services is provided for under O.C.G.A. 40-16-1 *et seq*.

B. State Speed Limits

No person shall drive a vehicle at a speed in excess of the following maximum limits:

(1) Thirty miles per hour in any urban or residential district;

(1.1) Thirty-five miles per hour on an unpaved county road unless designated otherwise by appropriate signs;

(2) Seventy miles per hour on a highway on the federal interstate system and on physically divided highways with full control of access which are outside of an urbanized area of 50,000 population or more, provided that such speed limit is designated by appropriate signs;

(3) Sixty-five miles per hour on a highway on the federal interstate system which is inside of an urbanized area of 50,000 population or more, provided that such speed limit is designated by appropriate signs.

(4) Sixty-five miles per hour on those sections of physically divided highways without full access control on the state highway system, provided that such speed limit is designated by appropriate signs; and

(5) Fifty-five miles per hour in other locations.

O.C.G.A. 40-6-181

C. Overview of State CDL Requirements

In general, no person may be issued a commercial driver's license unless that person is a resident of this state, is at least 18 years of age, has passed a knowledge and skills test for driving a commercial motor vehicle which complies with minimum federal standards established by federal regulations enumerated in 49 C.F.R. Part 383, subparts G and H, and has satisfied all other requirements of the Commercial Motor Vehicle Safety Act of 1986, Title XII of Public Law 99-570, in addition to any other requirements imposed by state law or federal regulation. The tests shall be prescribed and conducted by the department in English only. O.C.G.A. 40-5-147.

The department may issue a nonresident commercial driver's license to a resident of a foreign jurisdiction if the United States Secretary of Transportation has determined that the commercial motor vehicle testing and licensing standards of the foreign jurisdiction do not meet the testing standards established in 49 C.F.R. Part 383. The word "nonresident" must appear on the face of the nonresident commercial driver's license. An applicant must surrender any nonresident commercial driver's license issued by another state. O.C.G.A. 40-5-148.

Insurance Issues

A. State Minimum Limits of Financial Responsibility

No automobile liability policy or motor vehicle liability policy shall be issued with less than $25,000.00 because of bodily injury to or death of one person in any one accident, and, subject to such limit for one person, $50,000.00 because of bodily injury to or death of two or more persons in any one accident, and $25,000.00 because of injury to or destruction of property. O.C.G.A. 33-7-11.

B. Uninsured Motorist Coverage

UM/UIM coverage is not mandatory in Georgia. While O.C.G.A 33-7-11 requires automobile liability insurance policies to contain an endorsement or provisions to pay the insured for damages caused by an uninsured motor vehicle, the insured can waive or reject the uninsured motorist coverage. *Nolley v. Maryland Cas. Ins. Co.*, 222 Ga. Ct. App. 901, 903, 476 S.E.2d 622 (1996).

C. No Fault Insurance

In the 1991 general session, the Georgia General Assembly enacted legislation that repealed Georgia's automotive no-fault reparations scheme. Accordingly, No-Fault insurance is not mandatory in Georgia.
D. Disclosure of Limits and Layers of Coverage
Every insurer providing liability or casualty insurance coverage in this state and which is or may be liable to pay all or a part of any claim shall provide, within 60 days of receiving a written request from the claimant, a statement, under oath, of a corporate officer or the insurer's claims manager stating with regard to each known policy of insurance issued by it, including excess or umbrella insurance, the name of the insurer, the name of each insured, and the limits of coverage. O.C.G.A. 33-3-28.
E. Unfair Claims Practices
A citizen does not have a private right of action against an insurer or person committing an unfair claims settlement practice. O.C.G.A. 33-6-37
F. Bad Faith Claims
To prevail on a claim for an insurer's bad faith, the insured must prove: (1) that the claim is covered under the policy; (2) that a demand for payment was made against the insurer within 60 days prior to filing suit; and (3) that the insurer's failure to pay was motivated by bad faith. O.C.G.A. 33-4-6
G. Coverage – Duty of Insured
The insured has a duty to cooperate with the insurer in the defense of a claim. Breach of the duty to cooperate by the insured, if prejudicial to the insurer's interest in settling or defending a claim, relieves the insurer of its obligation to provide a defense or to pay any judgment which it is otherwise obligated to do under the terms of the liability policy. To defend withdrawal of coverage for failure to cooperate, an "insurer must show: (a) that it reasonably requested its insured's cooperation in defending against the plaintiff's claim, (b) that its insured willfully and intentionally failed to cooperate; and © that the insured's failure to cooperate prejudiced the insurer's defense of the claim." *Vaughan v. ACCC Ins. Co*, 314 Ga. App. 741, 725 S.E.2d 855 (2012).
H. Fellow Employee Exclusions
With the exception of railroad companies, an employer is not liable to one employee for injuries arising from the negligence or misconduct of other employees in the same business. O.C.G.A 34-7-21