

## PUNITIVE DAMAGES UPDATE

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## I. Introduction

As the title suggests, the purpose of this paper is to provide an update of the law regarding punitive damages in Georgia. Topics include a legislative update, litigating punitive damage awards in a post-*BMW* world, a new rule regarding cap avoidance and guidance from the Court of Appeals on bifurcation/trifurcation. This paper provides an overview of these topics, as well as notes regarding other, less significant, punitive damages cases in Georgia decided in 1997. The Institute of Continuing Legal Education addresses punitive damages in more detail at the Annual Punitive Damages Seminar.

## II. Georgia Legislative Update

### A. 1997 Session

The 1997 Session of the General Assembly of Georgia amended the punitive damages statute, O.C.G.A. § 51-12-5.1, in two significant respects. First, Ga. L. 1997, p. 837, § 1 removed the limitation on punitive damages where the defendant "acted or failed to act while under the influence of alcohol, drugs other than lawfully prescribed drugs administered in accordance with the prescription, or any intentionally consumed glue, aerosol, or other toxic vapor to that degree that his or her judgment is substantially impaired." See O.C.G.A. 51-12-5.1(f). Second, the General Assembly removed the language of subsection (f) which provided that a third party would be considered a joint tort-feasor where the defendant was the agent of the third party and the third party knew or should have known that the agent was under the influence. O.C.G.A. § 51-12-

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5.1(f) now provides there shall be no limitation regarding the amount which may be awarded as punitive damages "against an active tort-feasor but such damages shall not be the liability of any defendant other than an active tort-feasor." These changes apply only to causes of action arising on or after April 14, 1997. O.C.G.A. § 51-12-5.1(h).

B. 1998 Session

According to the Clerk of the House of the General Assembly and the Clerk of the Secretary of Senate of the General Assembly, there was no legislation passed at the 1998 Session amending O.C.G.A. § 51-12-5.1. You may contact the Clerk of the House (phone 404/656-5015) and the Clerk of the Secretary of Senate (phone 404/656-5040) for more information. The Legislative Services Committee, Office of Legislative Counsel is also a useful source of information regarding legislation. They may be contacted at (404)656-5000.

III. **Punitive Damages Awards Post-BMW<sup>1</sup>**

*BMW* involved BMW of North America's policy of selling vehicles as new without disclosure of pre-sale damage if BMW's cost of repairing said damage did not exceed 3% of the vehicles suggested retail price. An Alabama doctor who had purchased a car that had been refinished by BMW, but at a cost less than the 3% limit, sued BMW

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<sup>1</sup> The majority of the comments and research included in this section are derived from briefs filed in the case of Cheryl Maloof Johansen v. Combustion Engineering, Inc., presently pending in the United States Court of Appeals for the Eleventh Circuit, No. 97-8726.

alleging fraud. An Alabama jury awarded \$4,000 in compensatory damages and \$4 million in punitive damages. The Alabama Supreme Court reduced the punitive damages by \$2 million. The United States Supreme Court, in *BMW of North America, Inc. v. Gore*, 116 S.Ct. 1589 (1996) held the \$2 million award was unconstitutionally excessive.

A. The Guideposts

The Court began by noting that a punitive damages award violates the requirements of due process if it is excessive in relation to the governmental interest in retribution and deterrence that justified the imposition of punishment. *BMW*, 116 S.Ct. at 1595.

The Court identified three guideposts for assessing whether a punishment is excessive. The first and “[p]erhaps the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant’s conduct.” *BMW*, 116 S.Ct. at 599. “The second and perhaps most commonly cited indicium of an unreasonable or excessive punitive damages award is its ratio to the actual harm inflicted on the plaintiff.” *BMW* at 1601. The third factor is the size of civil and criminal penalties applicable to the same or comparable misconduct. *BMW* at 1603. Applying these guideposts, the Court concluded that the \$2 million punitive damages award was grossly excessive and remanded the case to the Alabama Supreme Court to determine a remedy. The Alabama Supreme Court subsequently ordered the punitive

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damages reduced to \$50,000. *BMW of North America, Inc. v. Gore*, 701 So.2d 507 (1997).

It is worth noting that three justices out of the five member majority wrote separately to emphasize that procedural weaknesses in Alabama's system of imposing punitive damages played a central role in their decision to hold the Alabama award unconstitutional. *BMW* at 1604-09 (Breyer, J., joined by O'Connor and Souter, J.J., concurring.) The Alabama procedure "provided no significant constraints or protection against arbitrary results." *BMW* at 1605.<sup>2</sup>

#### 1. Reprehensibility of Conduct

The Supreme Court explained in *BMW* that not every punishable act is "sufficiently reprehensible to justify a significant sanction in addition to compensatory damages." *BMW* at 1599. There is a spectrum of misconduct, and deeply entrenched concepts of fairness dictate that "punitive damages may not be grossly out of proportion to the severity of the offense." *BMW* at 1599. None of the aggravating factors associated with particularly reprehensible conduct was present in *BMW*. Compare *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993). The *BMW* record disclosed

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<sup>2</sup> Compare the Georgia procedure codified at O.C.G.A. 51-12-5.1. Plaintiffs in Georgia note the Georgia statute provides strong procedural safeguards governing the imposition of punitive damages. The petitioner in *BMW* cited Georgia as a jurisdiction that has demonstrated particular restraint in imposing punitive damages. See Certiorari Petition in *BMW*, No. 94-896, at 27. The Petition noted that the average punitive exaction in Georgia is 11 times less than in Alabama.

“no deliberate false statements, acts of affirmative misconduct, or concealment of evidence of improper motive. . .” *BMW* at 1601. The Court stated “that conduct is sufficiently reprehensible to give rise to tort liability, and even a modest award of exemplary damages, does not establish the high degree of culpability that warrants a substantial punitive damage award.” *BMW* at 1601. This is consistent with the approach taken by the Eighth Circuit. See *Pulla v. Amoco Oil Co.*, 72 F.3d 648, 660 n. (1995) (noting that punitive damages are not constitutionally permissible at all where the defendant’s tort was ‘the merely objectionable’ act of ‘undertak[ing] a less costly alternative to remedy a perceived problem before moving to a more expensive [solution]’).

## 2. Ratio of Award to Actual Harm Inflicted on Plaintiff

The second guidepost is the ratio of the punitive damages award to the actual harm inflicted on the plaintiff. The Supreme Court found that punitive damages must bear a reasonable relationship to compensatory damages. The Court compared this requirement with the double, triple and quadruple damages remedies that prevailed under early English law and that remain a standard of federal remedial statutes. *BMW* at 1601 n. 33. The Court made clear that it had “consistently rejected the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual *and potential* damages to the punitive award.” *BMW* at 1602. Punitive damages defendants will note that the Court reiterated that in *Pacific Mutual Life*

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*Insurance Co. v. Haslip*, 499 U.S. 1 (1991) (intentional fraud case) it had found a slightly more than 4:1 ratio to be "close to the line". *BMW* at 1602. In addition, it clarified that in *TXO* (case involving actual malice) the comparison was between punitive damages and potential harm and the relevant ratio therefore was "not more than 10:1".

*BMW* at 1602. On the other hand, the Court stated:

[L]ow awards of compensatory damages may properly support a higher ratio than high compensatory awards, if, for example, a particularly egregious act has resulted in only a small amount of economic damages. A higher ratio may also be justified in cases in which the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine.

*BMW* at 1602. In the post-*BMW* world, some courts have permitted high ratios between punitive damages and compensable harm, while others have not. For a sampling of cases in which courts have permitted high ratios between punitive damages and compensable harm, see, *Dean v. Olibas*, 129 F.3d 1001 (8th Cir. 1997) (14:1); *Lee v. Edwards*, 101 F.3d 805, 807 (2d Cir. 1996), cert. denied, 117 S.Ct. 754 (1997) (23:1); *McKnight v. Circuit City Stores*, 1997 U.S. Dist. LEXIS 5781, \*20-23 (E.D. Va. Mar. 12, 1997) (18:1 and 11:1); *Scribner v. Waffle House*, 976 F.Supp. 439 (N.D. Tex. 1997) (10:8:1); *Jonasson v. Lutheran Child & Family Servs.*, 1996 U.S. Dist. LEXIS 8088 (N.D. Ill. June 12, 1996), aff'd, 115 F.3d 436 (7th Cir. 1997) (10:1); *Cates Constr., Inc. v. Talbot Ptners.*, 53 Cal.App.4th 1420, 1457-58, 1460 (2d Dist. 1997), review granted, 941 P.2d 56 (Cal. 1997) (\$15 million punitive award upheld where bad faith damages

stipulated to be \$1, because economic gain and harm were much greater); *Stevens v. Owens-Corning Fiberglas Corp.*, 49 Cal.App.4th 1645, 1658 (1st Dist. 1996), *review denied*, 1997 Cal. LEXIS 61 (Cal. Jan. 15, 1997) (78:1); *Southeastern Sec. Ins. Co. v. Hotle*, 473 S.E.2d 256, 260-61 (Ga.App. 1996) (45,000:1); *Walston v. Monumental Life Ins. Co.*, 923 P.2d 456, 466 (Ida. 1996) (26:1); *Wilson v. IBP, Inc.*, 558 N.W.2d 132 (Iowa 1996), *cert. denied*, 118 S.Ct. 52 (1997) (500:1); *Schaffer v. Edward D. Jones & Co.*, 552 N.W.2d 801 (S.D. 1996) (30:1); *Jacque v. Steenberg Homes, Inc.*, 563 N.W.2d 154 (Wis. 1997) (100,000:1).

Likewise, a significant number of courts have not permitted high ratios between punitive damages and compensable harm. *See, Continental Trend Resources, Inc. v. OXY USA Inc.*, 101 F.3d 634, 639 (10th Cir. 1996) (reducing punitive award that was 15-30 times the potential and actual harm to an amount that was 3-6 times that aggregate harm), *cert. denied*. 117 S.Ct. 1846 (1997). *F.D.I.C. v. Hamilton*. 122 F.3d 854, 861 (10th Cir. 1997) (reducing 27:1 ratio to 6:1); *Groom v. Safeway, Inc.*, 973 F.Supp. 987, 995 (W.D. Wash. 1997) (noting that “[t]he Supreme Court has suggested that a ratio of 10-to-1 might be close to the limit” and ordering a 150:1 ratio reduced to 10:1); *Patterson v. P.H.P. Healthcare Corp.*, 90 F.3d 927, 943 (5th Cir. 1996), *cert. denied*. 117 S.Ct. 767 (1997); *see, e.g., EEOC v. HBE Corp.*, 1998 WL 25413 (8th Cir. Jan 27, 1998) (43:1 ratio reduced to just over 4:1); *Kim v. Nash Finch Co.*, 123 F.3d 1046, 1067-1068 (8th Cir. 1997) (70:1 ratio reduced to 3:1); *Kimzey v. Wal-Mart Stores, Inc.*, 107 F.3d

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568, 576-578 (8th Cir. 1997) (140:1 ratio reduced to 10:1); *Lawyer v. 84 Lumber Co.*  
1997 WL 827395 (N.D. Ill. Nov. 25, 1997) (5:1 ratio reduced to 3:1); *Kim v. Dial Serv.*  
*Int'l.* 1997 WL 458783, at \*15, \*16 (S.D.N.Y. Aug. 11, 1997) (30:1 ratio reduced to  
1:1); *Iannoe v. Federic R. Harris, Inc.*, 941 F.Supp. 403, 415 (S.D.N.Y. 1996 (10:1 ratio  
reduced to 2:1); *Florez v. Delbovo.* 939 F.Supp. 1341, 1348, 1349 (N.D. Ill. 1996) (15:1  
ratio reduced to 5:1); *Utah Foam Prods. Co. v. Upjohn Co.*, 930 F.Supp. 513, 527, 532 (D.  
Utah 1996) (18:1 ratio reduced to 2:1); *Rush v. Scott Specialty Gases, Inc.*, 930 F.Supp.  
194, 201-202 (E.D. pa. 1996) (10:1 ratio reduced to 1:1), *rev'd on other grounds.* 113  
F.3d 476 (3d Cir. 1997); *Schimizzi v. Illinois Farmers Ins. Co.*, 928 F.Supp. 760, 785-786,  
787 (N.D. Ind. 1996) (13:1 ratio reduced to 3:1); *Talent Tree Personnel Servs. v. Fleenor*,  
1997 WL 566228 (Ala. Sept. 13, 1997) (10:1 ratio reduced to 5:1); *American Pioneer Life*  
*Ins. Co. v. Williamson*, 1997 WL 545880, at \*7, \*8 (Ala. Sept. 5, 1997) (8:1 ratio  
reduced to 3:1); *Life Ins. Co. Of Georgia v. Johnson*, 701 So.2d 524 (Ala. 1997) (60:1 ratio  
reduced to 12:1 where conduct was highly reprehensible); *Grynberg v. Citation Oil & Gas*  
*Corp.*, 1997 WL 678172, at \*9, \*11 (S.D. Oct. 22, 1997) (13:1 ratio reduced to 3:1);  
*Apache Corp. v. Moore*, 1997 WL 428875, at \*3, \*4 (Tex. Ct. App. July 31, 1997) (185:1  
and 92:1 ratios reduced to 4:1); *Management Computer Servs., Inc. v. Hawkins, Ash, Baptie*  
*& Co.* 557 N.W.2d 67 (Wis. 1996) (27:1 ratio reduced to 10:1). *See also In re Taylor*,  
1997 Bankr. LEXIS 1322, at \*8 (Bankr. E.D. Cal. June 25, 1997) (emphasizing "the  
backdrop of a legal tradition that routinely authorizes treble damage awards" and

choosing a punitive award of four times compensatory damages); *In re Arnold*, 206 B.R. 560, 569 (Bankr. N.D. Ala. 1997) (observing that outer limits of either 4:1 or 10:1 may be appropriate depending on the circumstances, but imposing punitive award that was between two and three times the compensatory damages).

### 3. Size of Civil and Criminal Penalties Applicable to Comparable Misconduct

The third guidepost identified by the Supreme Court in *BMW* is the civil and criminal penalties applicable to comparable misconduct. *BMW* at 1603. This guidepost is significant for two reasons. First, it is significant due to the expertise and perspective that legislatures and administrative agencies have in setting punishments. *BMW* at 1603. Second, it is significant because the civil and criminal penalties for comparable misconduct shed light on whether the defendant had fair notice that it could be subject to a penalty in the amount of the punitive judgment. *BMW* at 1603.

#### B. Additional Guideposts for Plaintiffs - "Avoided Costs" and the Defendant's Financial Position

*BMW* specifically upheld the power of a state to impose punitive damages "to further a state's legitimate interest in punishing unlawful conduct and deterring its repetition" in order to "protect its own consumers and its own economy." *BMW* at 1595, 1597. In the post-*BMW* world, punitive damages plaintiffs emphasize that the United States Supreme Court, in *TXO* and *Haslip*, noted the financial gains and profits to the defendant resulting from the wrongful conduct. *Haslip* specifically noted the

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“desirability of removing that profit and of having the defendant also sustain a loss” as a factor in judging the reasonableness of an award. *Haslip* at 22. This argument has been discussed by numerous legal scholars. *See generally* Dan B. Dobbs, *Ending Punishing in “Punitive” Damages: Deterrence-Measured Remedies*, 40 Ala.L.Rev. 831, 850-851 (1989); Amelia J. Toy, Note, *Statutory Punitive Damages Caps and the Profit Motive: An Economic Perspective*, 40 Emory L.J. 303, 307-308 (1991); David D. Haddock, Fred S. McCesney and Menahem Spiegel, *An Ordinary Economic Rational for Extraordinary Legal Sanctions*, 78 Cal.L.Rev. 1, 18-19 (1990); Jane Mallor and Barry Roberts, *Punitive Damages: Toward a Principled Approach*, 31 Hastings L.J. 639, 667-668 (1980); David G. Owen, *Punitive Damages in Products Liability Litigation*, 74 Mich.L.Rev. 1257 (1976).

Another guidepost advocated by punitive damages plaintiffs is the wrongdoer’s size and financial position. Plaintiffs argue that the wrongdoer’s size and financial position is a “traditional guidepost” considered by the courts in the determining whether a punitive damages award is excessive. For a sampling of the authority for this position, *see TXO*, 509 U.S. at 462 n.28 (plurality opinion); *Haslip*, 499 U.S. at 21-22; *Browning-Ferris*, 492 U.S. at 300 (O’Connor, J., concurring in part and dissenting in part); *Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 270 (1981) (evidence of wealth “is traditionally admissible as a measure of the amount of punitive damages to be awarded”); *Continental Trend Resources, Inc. v OXY USA, Inc.*, 101 F.3d 634, 641-42 (10th Cir. 1996), *cert. denied*, 117 S.Ct. 1846 (1997) (concluding that wealth remains relevant under *BMW*);

*Deters v. Equifax Credit Info. Servs., Inc.*, 981 F.Supp. 1381 (D. Kan. 1997) (same); *Goshgarian v. George*, 161 Cal.App.3d 1214, 1228 (5th Dist. 1984); see e.g., *Sperry Rand Corp. v. A-T-O, Inc.*, 447 F.2d 1387, 1394 (4th Cir. 1971) (punitive award of 23.3% of net worth upheld), cert. denied, 405 U.S. 1017 (1972); *Vallbona v. Springer*, 43 Ca.App.4th 1525, 1539-41 (4th Dist. 1996) (23.1% of net worth upheld); *Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc.*, 155 Ca.App.3d 381, 391-92 (4th Dist. 1984) (17.5% of net worth upheld); *Hughes v. Box*, 814 F.2d 498, 504 (8th Cir. 1987) (15% of net worth upheld); *Zambrano v. Devanesan*, 484 So.2d 603, 609 (Fla. App. 1986) (14% of net worth upheld); *Black v. Gardner*, 320 N.W.2d 153, 161 (S.D. 1982) (13.3% of net worth upheld); *Storage Services v. Oosterbaan*, 214 Cal.App.3d 498, 514-17 (1st Dist. 1989) (remitting to 13.3% of net worth), review denied, Dec. 15, 1989; *Fuchs v. Kupper*, 125 N.W.2d 360, 363 (Wis. 1963) (12.5% of net worth upheld); *Schomer v. Smidt*, 113 Ca.App.3d 828, 836-37 (4th Dist. 1980) (10% of net worth upheld); *Vasbinder v. Scott*, 976 F.2d 118, 122 (2d Cir. 1992) (remitting to 8% of net worth); Restatement (Second) of Torts § 908(2) & comment e (1979); Annotation, *Punitive Damages: Relationship to Defendant's Wealth, As Factor in Determining Propriety of Award*, 87 A.L.R.4th 141, 151 (1995).

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#### IV. Significant Developments in Georgia Law

1997 was a relatively quiet year in Georgia law regarding punitive damages. There were, however, two significant developments. First (and most recently), the Georgia Supreme Court adopted a bright line rule requiring a party who seeks to avoid the \$250,000 punitive damages cap to request both a charge on specific intent to cause harm and a separate finding by the trier of fact of specific intent to cause harm. Second, the Georgia Court of Appeals strongly advocated trifurcation of punitive damages proceedings, as opposed to the traditional bifurcated procedure. These developments will be discussed below.

##### A. Cap Avoidance

In the case of *Elliott v. McDaniel*, \_\_\_ Ga. \_\_\_, S97G0929 (2-23-98), 98 FCDR 646, Jerry C. McDaniel, Jr. sued James D. Elliott, Jerry Ann Elliott, and J & J Landfill, Inc. for intentional fraud arising out of the operation of a landfill business. A Gwinnett County jury awarded plaintiff \$14,400 in actual damages and \$25,000 attorney's fees on the intentional fraud claim. It also awarded plaintiff \$650,000 in punitive damages on the intentional fraud claim. The Georgia Court of Appeals reversed, stating:

In order to authorize the application of subsection (f) and the removal of the \$250,000 cap on punitive damages in this non-products liability action, there must be a finding by the trier of fact that the defendant acted, or failed to act, with specific intent to cause harm. While such finding might be inferred where the evidence and the verdict would permit no other result, the finding of specific intent to harm in this case involves the weighing of evidence by the jury. The specific

intent to harm may not be inferred by the trial court based on the amount of the award inasmuch as the jury may not be informed of the cap on punitive damages. It is the trial court which must determine as a matter of law, whether subsection (f) or (g) applies, based upon the specific finding of the jury. The jury's resolution of the specific intent to harm issue could be determined by a special verdict form or by the use of special interrogatories. In this case, no finding of specific intent to harm was made by the jury or communicated to the trial court and is not demanded by the evidence and the verdict. No request for such finding was made by the plaintiff who stood to benefit by the removal of the subsection (g) cap and whose burden it was to seek such determination. In this case, absent a finding by the jury of a specific intent by the defendants to harm the plaintiff, the trial court would have no basis to apply subsection (f) and allow the capless punitive damages award to stand. Therefore, subsection (g) applies and the punitive damage award must be limited to the \$250,000 cap provided by O.C.G.A. § 51-12-5.1(g).

*Elliott v. McDaniel*, 224 Ga.App. 848, 855. The Court of Appeals remanded the case to the trial court and directed the trial court to amend its judgment to conform with the opinion.

McDaniel appealed to the Georgia Supreme Court. The Supreme Court concluded that the Georgia General Assembly did not intend to require the trier of fact to make a separate finding of specific intent to cause harm in order to lift the \$250,000 cap on punitive damages. *Elliott*, \_\_\_ Ga. at \_\_\_, 98 FCDR at 647. Under the facts of this intentional fraud case, a "separate finding of specific intent to cause harm was not required because the jury necessarily found such intent when it found the [defendants] committed fraud with the intention and purpose of deceiving and injuring [plaintiff]."

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*Elliott* at \_\_\_\_, 98 FCDR at 647. The Court noted that while a “specific intent to cause harm” pursuant to O.C.G.A. § 51-12-5.1(f) may not be identical to a finding that a representation was made with the intention and purpose of injuring another, “a finding of specific intent to cause harm is inherent in the essential elements of a fraud claim which requires the jury to find an intentional misrepresentation intended to deceive and made for the purpose of injuring another.” *Elliott* at \_\_\_\_, 98 FCDR at 647. The Court then held:

3. Although we hold that § 51-12-5.1(f) does not itself require a separate finding of specific intent to cause harm and no such finding was required in the case before us due to the unusual circumstances presented, it is apparent that in most cases a separate finding of specific intent will be necessary to avoid imposition of the \$250,000 cap. In recognition hereof, we take this opportunity to adopt henceforth a bright line rule requiring a party to request both a charge on specific intent to cause harm and a separate finding of specific intent to cause harm by the trier of fact in order to avoid the cap on punitive damages. Such a clear rule promotes judicial economy by eliminating the need for trial courts to determine whether a separate finding is required based on the peculiar allegations and facts of each case and eliminating the need for appellate courts to examine verdicts on a case-by-case basis, taking into account the same peculiar facts and allegations, to determine whether a specific intent to cause harm was necessarily encompassed in each tort alleged. This bright line rule also provides certainty and predictability to the verdicts rendered in this area of the law for the benefit of practitioners and the courts. Because the rule requiring both a charge on specific intent to cause harm by the trier of fact in order to avoid the \$250,000 cap shall apply only to those cases tried after the date this opinion is published in the official advance sheets, we reverse that portion of the Court

of Appeals' decision imposing the cap on punitive damages in this case.

*Elliott v. McDaniel* at \_\_\_\_\_, 98 FCDR at 647, 648.

B. Trifurcation

In 1997 the Georgia Court of Appeals took the opportunity to reaffirm the trifurcation procedure previously noted by the Court in *General Motors Corp. v. Moseley*, 213 Ga.App. 875 (1994). In the case of *Boyett v. Webster*, 224 Ga.App. 843 (1997), the Court considered the appeal of the grant of a defendant's motion in limine to exclude all evidence regarding his prior drunk driving incident during the first phase of a bifurcated personal injury and punitive damage trial.

The Court noted that in the "first phase of the bifurcated trial three issues must be resolved: (1) liability for damages incurred; (2) compensatory damages, if any, to be awarded; and (3) liability for punitive damages. If the trier of fact finds the defendant is liable for punitive damages, the amount of punitive damages is determined in the second phase of the trial." *Boyett*, 224 Ga.App. at 844. The common problem with the bifurcated procedure is that it leads to evidence being presented in phase one (for example, a defendant's prior DUI) that is relevant to the issue of whether punitive damages should be awarded, but is irrelevant (and prejudicial) on the issues of whether there is liability for damages incurred and the amount, if any, of compensatory damages. This problem is commonly "solved" by the jury being informed that this evidence goes only to liability for punitive damages and not to the underlying issues of liability or

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compensatory damages. The Court stated that "in circumstances, however, that bifurcated procedure may be inadequate to avoid confusing the jury in its determination of the issues of compensatory damages and punitive damages. That is, evidence appropriately admitted to show the propriety of punitive damages may influence the jury in deciding the issue of liability for compensatory damages." *Boyett* at 846. The Court then reaffirmed that in most cases trial courts should "employ a trifurcated procedure, wherein compensatory damages are litigated in the first phase of the trial; the propriety of punitive damages is litigated in the second phase; and the amount of punitive damages to be awarded is litigated in the third phase of the proceeding." *Boyett* at 846-847.

V. Also of Note

The following cases decided by the Georgia Court of Appeals in 1997 are also of note: *Jefferson Insurance Co. v. Dunn*, 224 Ga.App. 732 (1997) (affirming \$3 million punitive damages award in bad faith/fraudulent conveyance case); *Brown v. DeKalb Medical Center*, 225 Ga.App. 4 (1997) (affirming grant of directed verdict on issue of punitive damages, evidence sufficient to show defendant provided negligent care, but far from clear and convincing evidence of entire want of care required to support punitive damages verdict); *McLane v. Atlanta Market Center*, 225 Ga.App. 818 (1997) (reversing grant of summary judgment on punitive damages claim); *Harden v. Vertex Associates*, 226 Ga.App. 322 (1997) (affirming punitive damages award in fraud claim); *Cochran v. Lowe's Home Center*, 226 Ga.App. 416 (1997) (reversing grant of summary judgment on

punitive damages claim in premises liability case); *Smith v. Branch*, 226 Ga.App. 626 (1997) (reversing grant of summary judgment on punitive damages claim); *Roberts v. Forte Hotels, Inc.*, 227 Ga.App. 471 (1997) (affirming grant of partial summary judgment to defendant on punitive damages claim in premises liability case); *Drug Emporium, Inc. v. Peaks*, 227 Ga.App. 121 (1997) (reversing punitive damages award on numerous grounds); *Carlock v. Kmart Corp. d/b/a American Fare*, 227 Ga.App. 356 (1997) (affirming grant of summary judgment on punitive damages claim to Cub Foods in premises liability case, reversing summary judgment granted to Kmart on punitive damages claim); *Home Insurance Co. v. Wynn*, \_\_\_ Ga.App. \_\_\_, 1997 WL 688318, 97 FCDR 4203 (affirming punitive damages award); *Carter v. Spells*, \_\_\_ Ga.App. \_\_\_, 1997 WL 716806, 97 FCDR 4342 (affirming grant of summary judgment on punitive damages claim); *Greenway Capital Corp. v. Schneider*, \_\_\_ Ga.App. \_\_\_, 97 FCDR 4433; *Lunceford v. Peachtree Casualty Ins. Co.*, \_\_\_ Ga.App. \_\_\_, 97 FCDR 4486.