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Products Liability Law in Georgia Including Recent Developments

by Robert M. Travis* and Edward C. Brewer, III**

I. INTRODUCTION

This Article contains both a summary of products liability law in Georgia and a general overview of recent significant decisions in the products liability area. The authors' objective is to acquaint the reader with products liability law in Georgia and to review important new decisions which affect this rapidly evolving area.

II. THEORIES OF RECOVERY

A. Negligence

Negligence is defined in section 51-1-2 of the Official Code of Georgia Annotated ("O.C.G.A.") as the absence of "that degree of care which is exercised by ordinarily prudent persons under the same or similar circumstances." The duty imposed is one of reasonable care with respect to

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the product* and applies to used property as well as new.* An inherently
dangerous product is not subject to the higher standard of extraordinary
care as in some states, although more may be required to ensure its safety
and proper operation than in the case of ordinary products. Assuming
that the other criteria for a negligence claim are met,* a defendant's
breach of the standard of reasonable care will result in negligence liability
even in the absence of privity.*

A manufacturer must design and manufacture a product with due re-
gard for the circumstances in which the product will be used and the pur-
poses of its use. The manufacturer is not required to anticipate or to
design against remote or unusual possibilities,* nor must it employ the
best or most recent designs or safety equipment* or make a completely
safe product.* Similarly, the manufacturer is not an insurer of the prod-
uct's safety.* A manufacturer will escape liability when it has done every-
thing possible to design and manufacture a product that functions prop-
erly for its intended use, and when it gives an adequate warning of any
known or foreseeable dangers that may arise in the product's
use. In this regard, a court will judge the manufacturer's actions in light of what

2. Ward v. Hobart Mfg. Co., 450 F.2d 1176 (5th Cir. 1971); Honda Motor Co. v. Kim-
Pass v. Firestone Tire & Rubber Co., 242 F.2d 914 (6th Cir. 1957). See Coast Catamaran
(1985).

statute).

368 (1951); Simmons Co. v. Hardin, 75 Ga. App. 420, 43 S.E.2d 553 (1947).

5. For example, one of the criteria for proving a negligence claim is proximate cause.
Chapman v. American Cyanamid Co., 861 F.2d 1515 (11th Cir. 1988); Lowie v. Raymark

6. Hardin, 75 Ga. App. at 420, 43 S.E.2d at 553; Griffith v. Chevrolet Motor Div., 105
818 (1952); G. Bernd Co. v. Rahn, 94 Ga. App. 713, 96 S.E.2d 185 (1956); O.C.G.A. §§ 51-1-


11. Parzini, 234 Ga. at 869, 218 S.E.2d at 582; Coast Catamaran Corp. v. Mann, 171 Ga.
App. 844, 321 S.E.2d 353 (1984), aff'd, 254 Ga. 201, 326 S.E.2d 436 (1985); Hunt v. Harley-

410, 236 S.E.2d 147 (1977); Poppell v. Waters, 126 Ga. App. 355, 190 S.E.2d 815 (1972);
it knew or should have known at the time that the particular product in question was sold, and not what may later be learned about the product.\textsuperscript{18}

The failure to warn or instruct may be the most frequently raised claim in negligence cases. The manufacturer has a duty to warn of foreseeable dangers that may be involved in the ordinary and normal uses to which the product will be put.\textsuperscript{14} It also may have the duty to warn of dangers resulting from other foreseeable uses.\textsuperscript{16} This duty extends to foreseeable users as well as to those who may foreseeably be in the vicinity of the product and subject to injury while it is in use,\textsuperscript{16} at least as to products which are inherently dangerous\textsuperscript{17} or which the manufacturer knows or should know are reasonably certain to be dangerous to such persons.\textsuperscript{18}

An adequate warning by a manufacturer to a sophisticated user or to one in a trade or profession who would be expected to use the product may prevent its incurring liability to the user or to others who might be expected to be affected by its use.\textsuperscript{18} The manufacturer is not required, however, to warn of open or obvious dangers associated with the prod-

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\textsuperscript{17} J.C. Lewis Motor Co. v. Williams, 85 Ga. App. 538, 69 S.E.2d 816 (1952).


uct's use.\textsuperscript{20} The failure to read a warning will preclude a claim that the warning was inadequate when the plaintiff is an end user of the product\textsuperscript{21} and in some cases when the plaintiff is a bystander or other person affected by the product's use.\textsuperscript{22} A manufacturer may have a duty to undertake a recall if such a statutory duty is imposed,\textsuperscript{23} and if it does so, the manufacturer must conduct the recall in a proper manner.\textsuperscript{24}

A negligence claim may also proceed against a manufacturer on theories of defective operation,\textsuperscript{25} negligent construction,\textsuperscript{26} manufacture,\textsuperscript{27} or assembly;\textsuperscript{28} and negligent design,\textsuperscript{29} labelling,\textsuperscript{30} inspection,\textsuperscript{31} or testing.\textsuperscript{32} A


statutory or regulatory provision may provide the standard of conduct, and when the manufacturer violates such a provision, negligence exists as a matter of law. Conversely, compliance with accepted industry custom or a statutory or regulatory standard provides evidence of nondefectiveness or reasonableness that, if accepted by a jury, may protect the manufacturer from liability. A manufacturer who intentionally conceals or misrepresents a defect in the product may be held liable in deceit as well as negligence. Finally, in some cases federal law may preclude the assertion of a claim through the doctrine of preemption.

A dealer's responsibility is substantially less than that of a manufacturer, so long as the dealer does not make itself the "apparent" or "ostensible manufacturer" by selling the product under its own trade name. In general, Georgia has followed the principle set forth in section 402 of Re-*

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32. Whitaker, 418 F.2d at 1018 (duty to test is nondelegable).


- agricultural products (O.C.G.A. § 2-9-12 (1990));
- alcohol (dram shop act) (O.C.G.A. §§ 3-3-22, 23 (1990));
- alcohol and drugs (O.C.G.A. §§ 51-1-24 to -26 (1982));
- biological products (O.C.G.A. §§ 4-9-1 to -9 (1990));
- brake fluid (O.C.G.A. §§ 10-1-180 to -189 (1989));
- gasoline and kerosene (O.C.G.A. § 10-1-151 (1989));
- grain and bread (O.C.G.A. §§ 26-2-290 to -297 (1982));
- kosher foods (O.C.G.A. §§ 26-2-330 to -335 (1982));
- mobile homes (O.C.G.A. §§ 8-2-130 to -143 (1989));
- pesticides (O.C.G.A. §§ 2-7-53, -62 (1990)).

Whether any such provision creates a private right of action is beyond the scope of this article. Compare, e.g., Sutter v. Hutchings, 254 Ga. 194, 327 S.E.2d 716 (1986) (cause of action under common law based upon statute) with Calhoun v. Federal Nat'l Mortgage Ass'n, 823 F.2d 451 (11th Cir. 1987), cert. denied sub nom. 484 U.S. 1078 (1988).


statement (Second) of Torts, which provides that the retailer has no duty to test or inspect the product absent notice that the product is defective. A retailer has a duty to warn if it knows or should know of the defect, and thus may be subject to liability for reasonably discoverable defects in the product. Georgia cases further establish that the dealer is responsible for its own affirmative representations about a product's safety or function and has a duty to supply the products of a reliable manufacturer. Absent notice or actual knowledge of a defect, however, the dealer is entitled to assume that the manufacturer has not placed a dangerous or defective product on the market. A dealer does not have any of the manufacturer's duties with respect to the design, testing, manufacture, assembly, warnings, or instructions of a product. However, if the dealer undertakes to test or repair the product, it must do so in a proper manner, despite the absence of an affirmative duty to test for latent defects. Similarly, a dealer who undertakes to assist the manufacturer in a recall must do so without negligence.

38. Restatement (Second) of Torts § 402 (1965).
B. Express and Implied Warranty

The Georgia version of the Uniform Commercial Code ("U.C.C.") provides for both express and implied warranties in the sale of goods.\(^48\) Breach of either express or implied warranties, or both, can form the basis for a products liability action in Georgia.

An express warranty is "a representation or statement made by the seller at the time of the sale and as a part thereof . . . ."\(^49\) Actual use of the word "warranty" is not necessary; merely stating a fact or facts about the quality or character of, or title to, the goods can be sufficient to constitute an express warranty.\(^50\) The key requirement, though, is that the language state a fact or facts—as opposed to an opinion—upon which the seller expects the purchaser to rely and upon which a purchaser would ordinarily rely.\(^51\) An implied warranty is one which automatically accompanies the sale of goods by law and need not be expressed.\(^52\) Implied warranties take two forms: (1) merchantability; and, (2) fitness for a particular purpose.\(^53\)

The implied warranty that goods are merchantable "is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind."\(^54\) The implied warranty of merchantability means, in the products liability context, that the goods "[a]re fit for the ordinary purposes for which such goods are used."\(^55\) One Georgia federal court has held that the warranty does not extend beyond the product itself, and, therefore, the warranty does not cover alleged defects in the warnings in product manuals, although instructions on use may create an implied warranty of merchantability as to the use described.\(^56\) To recover under the implied warranty of merchantability, the purchaser must establish:

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53. Id. §§ 11-2-314 (merchantability), -315 (fitness for a particular purpose).

54. Id. § 11-2-314(1).

55. Id. § 11-2-314(2)(c).

that it purchased the goods;\(^5\) (2) that the seller was a merchant of goods of that type;\(^6\) (3) that the goods were not fit for their usual or ordinary purpose;\(^7\) and (4) that the purchaser suffered injury or damage as a result of this failing.\(^8\)

The implied warranty of fitness for a particular purpose is created "[w]here the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods . . . ."\(^9\) To recover under the implied warranty of fitness, the purchaser must establish: (1) at the time of sale, that the seller had reason to know that the goods were to be used for a particular purpose; (2) that the purchaser relied upon the seller's skill or judgment to find goods suitable for that purpose; (3) that the goods proved unsuitable; and (4) that injury or damage resulted from this failing.\(^{10}\)

A seller may attempt to disclaim any warranties. However, a seller may not disclaim any express warranties in the same writing in which the express warranties are contained.\(^{11}\) Implied warranties may be expressly disclaimed if the disclaimer is clear and conspicuous.\(^{12}\) In this regard, a disclaimer of the implied warranty of merchantability further requires that the word "merchantability" must appear.\(^{13}\) A disclaimer of the implied warranty of fitness for a particular purpose must be in writing.\(^{14}\) Language such as "with all faults," "as is," or other language alerting the ordinary purchaser to the exclusion of warranties can be an effective disclaimer of all warranties.\(^{15}\) Moreover, examination of the product by the purchaser before purchase or a particular course of dealing by the parties may effectively disclaim or modify implied warranties.\(^{16}\)

Warranties may also be expressly modified in scope by the seller, such as a limit on the types of remedies or damages available to the pur-

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57. For a discussion of the question of standing to assert a warranty claim, see infra text accompanying notes 121-25.
62. See id. § 11-2-315.
66. Id. § 11-2-316(2), (3).
67. Id. § 11-2-316(2), (3)(a).
68. Id. § 11-2-316(3)(b), (c).
The Georgia version of the U.C.C. restricts the seller's right to limit consequential damages, however, by providing that "[l]imitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not."\textsuperscript{70}

C. \textit{Strict Liability}

Strict liability in Georgia is created by O.C.G.A. section 51-1-11, which imposes liability upon the manufacturer of a product for any injury to person or property caused by a defect in the product.\textsuperscript{71} Specifically, subsection (b)(1) of the statute provides the following:

The manufacturer of any personal property sold as new property directly or through a dealer or any other person shall be liable in tort, irrespective of privity, to any natural person who may use, consume, or reasonably be affected by the property and who suffers injury to his person or property because the property when sold by the manufacturer was not merchantable and reasonably suited to the use intended, and its condition when sold is the proximate cause of the injury sustained.\textsuperscript{78}

Because the cause of action is in derogation of the common law, it has been strictly construed by the Georgia courts. However, the courts have applied the statute in a variety of circumstances since its enactment in 1968.\textsuperscript{78}

\begin{itemize}
\item \textsuperscript{72} O.C.G.A. § 51-1-11(b)(1) (1982).
\end{itemize}
Strict liability is imposed upon the "manufacturer" of a defective product that is "sold" as new property on or after April 9, 1968. The Georgia courts have refused to extend the statute to sales of real property or to the providing of services. Despite the express requirement of the sale of a product, however, the courts have applied the statute to a variety of other transactions, including leases and deliveries on a trial basis to potential purchasers.

A court will impose strict liability if the product "was not merchantable and reasonably suited to the use intended," or, as described by the Georgia courts, if the product is "defective" at the time that it leaves the manufacturer's hands. Although it uses U.C.C. warranty language,

the statute creates a type of tort liability\textsuperscript{88} in which the manufacturer need not have been negligent\textsuperscript{87} and the product need not be unreasonably dangerous.\textsuperscript{88} The manufacturer is not required to make a product safe if that task cannot reasonably be done,\textsuperscript{88} and it need not employ the best or most advanced technical or safety features.\textsuperscript{89} Similarly, the manufacturer is not an insurer of the product's safety\textsuperscript{90} and will not incur liability when it has done everything necessary to place a nondefective product on the market.\textsuperscript{91}

A product defect will not exist when a product has been properly designed, prepared, manufactured, packaged, and accompanied by adequate warnings and instructions.\textsuperscript{88} Defectiveness must be considered in the overall context of the product's design, function, and intended use.\textsuperscript{88} The defect must appear in connection with foreseeable uses of the product that the manufacturer could reasonably have contemplated and anticipated.\textsuperscript{88} Strict liability does not extend to unforeseeable misuse\textsuperscript{88} or ab-


88. Parzini, 234 Ga. at 870, 218 S.E.2d at 583.


normal use\textsuperscript{97} of the product. The defect must also be one that is latent;\textsuperscript{98} a defect that creates an obvious, common, or recognizable danger will not give rise to liability.\textsuperscript{99} The fact that the product has caused injury or death does not mean that it is defective,\textsuperscript{100} although its malfunction may be circumstantial evidence of a defect.\textsuperscript{101}

Georgia courts have upheld strict liability on a failure to warn theory.\textsuperscript{102} However, the duty to warn does not arise when the manufacturer has no actual or constructive knowledge of the danger.\textsuperscript{103} An adequate warning\textsuperscript{104} to a sophisticated user,\textsuperscript{105} or one in a trade or profession that would be expected to use the product, may prevent liability to others affected by its use.\textsuperscript{106} The failure to read a warning will preclude a claim that the warning was inadequate, at least when the plaintiff is an end user of the product.\textsuperscript{107}


D. Proximate Cause

In all products liability actions, regardless of whether the claim sounds in negligence, warranty, or strict liability, the product's defect must have proximately caused the plaintiff's injuries. The plaintiff carries the burden of proof on this issue.

There is no hard and fast rule that defines when a plaintiff has satisfied his burden and made a prima facie case of proximate cause. At a minimum, the plaintiff must establish that the defendant's product was the one that caused the injury at issue. Beyond that, the proximate cause issue is a fact-intensive inquiry governed by the circumstances of each case and is usually a question of fact to be resolved by the jury. Accordingly, most definitions of proximate cause depend upon the facts of the particular case.

In general, a defective product has proximately caused an injury when the defect directly and actively contributes to the resulting injury. A user can show proximate cause when the defective product itself causes the resulting injury, or when the product sets into motion other causal forces which are the direct, natural, and likely consequences of the defect or are caused by an intervening force that the manufacturer could have reasonably foreseen.

When an injury flows from misuse, alteration of the product, or negligence, and the misuse, alteration, or negligence is reasonably foreseeable, the failure to protect against the wrongful act of another is considered the proximate cause of the injury. Conversely, when the acts of a third party are an unforeseeable intervening cause of the injury or the prepon-

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108. The Georgia courts have traditionally lumped together "cause in fact" and "legal cause" or "responsible cause" under the heading of proximate cause. The distinctions between the two concepts are significant: the former is a factual determination, but the latter is a policy decision defining the limits of responsibility. These principles are beyond the scope of this article, but are discussed in D. Malinski, Proof of Causation in Private Tort Actions in Georgia (1986 & Supp. 1989).


derate' cause of the injury, the manufacturer is relieved from liability. Similarly, when there is no evidence that a component manufacturer produced the product for the purpose for which it was later modified and used by another manufacturer, the plaintiff cannot recover against the component manufacturer.

Proximate cause, particularly in products liability cases, often is not a burden which is easily established by facially obvious evidence or commonplace understanding. Expert medical, scientific, mathematical, technical, and engineering testimony is often necessary to demonstrate the causal link between the product defect and the injury.

III. PARTIES IN PRODUCTS LIABILITY ACTIONS

A. Parties Plaintiff

The issue concerning who is a proper plaintiff in a products liability action will depend upon the cause of action under which the action is pursued. Generally speaking, negligence claims are subject to fewer restrictions on potential plaintiffs, whereas a warranty or strict liability claim is subject to statutory restrictions on standing.

In an action based upon negligence for personal injuries, a proper plaintiff is one that is reasonably foreseeable by the defendant. In a wrongful death action, the proper parties are defined by the wrongful death statute.


117. Hall v. Scott USA, Ltd., 198 Ga. App. 197, 400 S.E.2d 700 (1990). The decision indicates, however, that the contractual relationship between the component manufacturer and the manufacturer that modified and sold the product was fully developed in the trial court. Id. at 201-02, 400 S.E.2d at 704.


120. O.C.G.A. §§ 51-4-1 to -5 (1982 & Supp. 1991). The wrongful death statute provides that, as appropriate, the surviving spouse, the child or children (both legitimate and illegitimate where the decedent is the mother), or the personal representative of the decedent's estate is the proper party plaintiff. When the decedent is a child, absent a spouse or child of the decedent, the proper plaintiff is the parent or parents, or the personal representative of the estate. Id. §§ 51-4-4 (1982), 19-7-1 (1991). The parent and child statute further provides for standing when the decedent's parents are divorced or separated, determines liability for fees and expenses and the allocation of any judgment, and provides for certain procedural rights for the parents. Id. § 19-7-1.

In Brown v. Liberty Oil & Ref. Corp., 261 Ga. 214, 403 S.E.2d 806 (1991), the Supreme Court of Georgia held that when the surviving spouse cannot be located, has abandoned the
Two classes of parties may bring an express or implied warranty claim: the plaintiff must either be the actual purchaser, or a family member, or a member of or a guest in the household of the purchaser of the product at issue. Generally, however, a claim for breach of warranty, whether express or implied, may only be maintained by a party in privity with the seller; privity of contract is usually considered an absolute requirement. Because Georgia has not adopted the broadest version of section 2-318 of the U.C.C., which extends warranty protection to any natural person who may be affected by the product, privity of contract does not extend to employees of the purchaser. This makes the breach of warranty claim effectively unavailable in most employees' suits against suppliers of products used in the workplace.

The strict liability statute provides that "any natural person who may use, consume, or reasonably be affected by" a defect in the product may be a plaintiff in a strict liability action. The statute is framed in the language of merchantability, but the privity requirements of the Georgia U.C.C. warranty provisions do not apply. Although the language of the statute states that suit may be brought by persons "reasonably . . . affected" by the product rather than those reasonably "foreseeably" af-

children, "and would not, in any event, pursue the claim for wrongful death," the trial court may exercise its equity powers under O.C.G.A. §§ 23-1-3 and 23-4-20 to permit the children's action for the deceased parent's wrongful death. 261 Ga. 214, 403 S.E.2d at 806; O.C.G.A. §§ 23-1-3, 23-4-20 (1982). Two judges, concurring in the judgment only, suggested that the rule should not apply when the surviving spouse has decided not to pursue the claim, but has not abandoned the children. 261 Ga. at 262, 403 S.E.2d at 808.


[a] seller's warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume, or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this Code section.


123. Best Canvas, 713 F.2d at 620.


ected, some showing of foreseeability is required, particularly in failure to warn cases.\textsuperscript{128} The strict liability statute extends to a spouse's action for loss of consortium\textsuperscript{128} and a personal representative's claim for wrongful death,\textsuperscript{130} but does not extend to an action for loss of the bargain\textsuperscript{131} or damage to the property itself.\textsuperscript{133}

B. Parties Defendant

The theory of recovery also determines who are proper defendants. As in the determination of proper plaintiffs, a negligence claim will lie against more defendants than will a claim for breach of warranty or strict liability.

A negligence claim may lie against the seller, distributor, or manufacturer of a product or, in appropriate circumstances, against others in the chain of production and sale.\textsuperscript{138} Makers of component parts that fall within the definition of a "manufacturer" may be subject to liability.\textsuperscript{134} As discussed above, a retailer's exposure generally is more restricted in the absence of specific facts subjecting it to liability.\textsuperscript{136}

The rule of privity, as extended to family and household plaintiffs, determines who may be sued in a warranty action. Notwithstanding the privity requirement, however, a manufacturer or remote seller who extends any express warranty concerning the product will be liable to the appropriate plaintiff for any breach of the warranty.\textsuperscript{136} Moreover, such an express warranty abrogates the requirements of privity with respect to certain implied warranties as well.\textsuperscript{137} However, absent an express warranty from the manufacturer or an agency relationship between the seller and the manufacturer, only the direct seller is subject to liability on the theory of implied warranty.\textsuperscript{138}

\textsuperscript{134} See supra text accompanying notes 71-107 and infra text accompanying notes 150-52.
\textsuperscript{135} See supra text accompanying notes 37-47.
\textsuperscript{138} Id. at 205-06, 312 S.E.2d at 192-93.
In Georgia, any seller of goods may make an express warranty, and the seller may be held liable for breach of an implied warranty of fitness for a particular purpose. Conversely, only a "merchant," as defined by statute, may be held liable for breach of the implied warranty of merchantability.

In a strict liability action, O.C.G.A. section 51-1-11 expressly limits liability to manufacturers. The manufacturers of the product’s component parts may be subject to strict liability if the product is expected to and does reach the user without substantial change in the condition of the component parts. Cases decided before the Tort Reform Act of 1987 applied the "ostensible manufacturer" doctrine to impose liability upon a seller who assembled or sold the product under its own trade name, whether or not that seller had, for example, fabricated components of or designed the product. Other cases rejected coverage of a mere owner, seller, distributor, or repairer of another entity's product.

The Georgia Court of Appeals has held that an assembler is a "manufacturer" only when that assembler sells the product under its own trade name. There may be more than one "manufacturer" of a product made

140. Id. § 11-2-104(1) (1982) (defining "merchant").
141. Id. § 11-2-314.
up of components, and when both are identified on the product or its packaging, it should not be assumed that both can be sued for injury caused by one component. Whether a distributor of a product (carpenter's brackets) could be held strictly liable as a manufacturer presented a question of fact for the jury, although the only alteration the distributor made to the product prior to sale was painting it a characteristic red, the seller's identifying color. Conversely, if a component manufacturer whose name or trademark appears on the product did not sell the final product or another component that allegedly caused the plaintiff's injury, the court has held that the first component manufacturer is not subject to strict liability.

The Tort Reform Act of 1987 amended the strict liability statute to distinguish between a "product seller," who is not subject to strict liability, and a "manufacturer," who is subject to strict liability. The amendment codifies and expands on several case-developed exceptions to manufacturer status. Further, the amendment appears to be intended both to restrict the potential defendants and to restrict the activities which will give rise to a strict liability claim. The exceptions fall into five general categories: (1) sale, lease, distribution, or marketing; (2) assembly, prepa-

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150. See Hall v. Scott USA, Ltd., 198 Ga. App. 197, 400 S.E.2d 700 (1990). In Hall plaintiff alleged that he was injured in February 1987 by a cleaning device called "Roll-offs by Smith" installed on a pair of "Scott" motocross goggles. The court reasoned that the installation of the Smith device was a modification that constituted an intervening proximate cause. Scott, which had manufactured the goggles and the lenses used in the goggles, was not liable for any injury due to the Smith device. Id. at 200-01, 400 S.E.2d at 703-04.


152. In Tyler v. Pepsico, Inc., 198 Ga. App. 223, 400 S.E.2d 673 (1990), it was alleged that plaintiff was injured when she tried to remove the aluminum cap from a bottle of Pepsi with a nutcracker. She brought claims for strict liability, negligence, and fraud against the retail seller, the bottler, the manufacturer of the cap, and Pepsi, the bottling franchisor and syrup manufacturer. The court held that Pepsi, as a component manufacturer, was not liable for any defect or malfunction of the cap. Id. Even though Pepsi had the right to approve bottles and caps and provided instructions for their use, its control over the production process and the bottling agreement (whose function was to protect the Pepsi trade name) did not make Pepsi a "manufacturer" under O.C.G.A. § 51-1-11(b) (1982 & Supp. 1991). 198 Ga. App. at 227, 400 S.E.2d at 675.

Tyler seems to put plaintiffs between the proverbial rock and a hard place. The court also dismissed plaintiff's negligence claims and permitted Pepsi to be exonerated entirely. Id., 400 S.E.2d at 676. The court did not consider whether the ostensible manufacturer rule of English v. Crenshaw Supply Co., 193 Ga. App. 354, 387 S.E.2d 628 (1989), could have supported a claim against Pepsi despite the lack of a sale by that defendant. Arguably, the public reliance rationale for the ostensible manufacturer doctrine would justify such a claim. Further, when faced with a defective cap claim, the bottler might rely on the rule of Benton v. David Allen Co., 193 Ga. App. 789, 388 S.E.2d 878 (1989), and similar cases, that it should not be subject to liability because the manufacturer was following the franchisor's instructions. Id. at 790-91, 400 S.E.2d at 879-80.

ration, or blending; (3) packaging or labeling; (4) installation, repair, or maintenance; and (5) other involvement "in placing the product in the stream of commerce." The amendment does not define the term manufacturer. However, the amendment suggests that an entity may be a manufacturer because of "certain activities," which are unspecified, and refers to "a manufacturer's plan, intention, design, specifications or formulation" for the product.

Future case law will determine how far post-Tort Reform Act strict liability will extend beyond claims involving product design to, for example, fabrication of a product or its components. The latter possibility is made problematic by the exceptions for "preparation" or "blending" of the product, which in many industries will be difficult to distinguish from fabrication. Further, the courts may be called upon to decide whether in a strict liability claim, the ostensible manufacturer doctrine, based upon a defendant's holding-out of the product as its own, will survive the Tort Reform Act. The Tort Reform Act appears to focus instead on the entity's actual role in the creation of the product. In any event, Georgia plaintiffs, prior to filing suit, should look more closely at potential strict liability defendants to determine their precise role in the creation of the product.

C. Other Theories of Liability

Georgia courts have rejected theories of recovery based on group liability in a variety of contexts. Courts have held that a manufacturer has "the absolute right" to have its liability determined upon the basis of its own product, not that of someone else. The United States District Court for the Southern District of Georgia has rejected both "market share" and "alternative liability" theories. Similarly, the Georgia courts

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154. Id. § 51-1-11.1(a). See also Benton, 193 Ga. App. at 789, 388 S.E.2d at 878 (contractor who follows employer's plans and directions is not liable; exception for inherently dangerous activity). Specifically, the amendment defines a "product seller" as follows:

[A] person who, in the course of a business conducted for the purpose leases or sells and distributes; installs; prepares; blends; packages; labels; markets; or assembles pursuant to a manufacturer's plan, intention, design, specifications, or formulation; or repairs; maintains; or otherwise is involved in placing a product in the stream of commerce.


have held that the plaintiff is not entitled to a presumption, under a theory such as res ipsa loquitur, that a defendant is liable because it was in the chain of production or distribution.18

One question arising frequently is the liability of successor corporations upon a sale or merger. The majority of jurisdictions hold that, where a sale or merger has dissolved the actual manufacturer of a product, the successor corporation does not succeed to the liability of the prior corporation.189 However, courts recognize four exceptions: (1) When the purchasing corporation expressly or impliedly agrees to assume the selling corporation's liabilities; (2) when the transaction amounts to a consolidation or merger of the purchasing and selling corporations; (3) when the purchaser is merely a continuation of the seller; and (4) when the transaction is entered into fraudulently to escape liability for such obligations.190 Georgia recognizes these four exceptions.191

IV. DEFENSES

A. Substantive Defenses

A negligence claim is subject to more defenses than a warranty or strict liability claim. Georgia law provides for a hybrid form of contributory and modified comparative negligence.192 As a rule of contributory negligence, a plaintiff is not entitled to recover if, in the exercise of ordinary care, he could have avoided injury.193 Similarly, the defense of assumption of the


risk will bar a plaintiff's negligence claim. As a rule of modified comparative negligence, the plaintiff, if equally or more negligent than the defendants, is not entitled to a recovery. If the plaintiff's negligence is less than the defendant's negligence, then the plaintiff is not denied a recovery entirely, but the damages must be reduced in proportion to the degree of fault attributable to him.

Before the Tort Reform Act of 1987, a jury was required to compare the plaintiff's negligence to that of all defendants taken together and could enter judgment against any defendant, whether the defendant was more or less at fault than the plaintiff. For claims arising on or after July 1, 1987, however, where the plaintiff "is himself to some degree responsible for the injury or damages claimed," the jury "may apportion its award of damages among the persons who are liable and whose degree of fault is greater than that of the injured party" and render its verdict severally according to the degree of fault of each person.

In a negligence case, a products liability defendant may be able to raise a number of product-related defenses to a plaintiff's claim. The defenses go beyond the traditional defenses of avoidance of consequences, assumption of the risk, and comparative negligence. As noted above, the manufacturer is not liable where the plaintiff confronts an open and obvious danger. The manufacturer may establish as an element of defense that the product equalled or exceeded applicable safety standards or that the manufacturer designed the product according to industry standards. Generally, a dealer's failure to discover a defect will not insulate the man-


166. Helmy, 258 Ga. at 267, 367 S.E.2d at 800.

167. Id. at 268, 367 S.E.2d at 800.


169. See supra text accompanying notes 1-47.


ufacturer from liability, but it may act as a concurrent proximate cause.\textsuperscript{172}

The statute itself establishes the primary defenses to a breach of warranty claim.\textsuperscript{173} The purchaser's or other plaintiff's conduct may be relevant to some warranty claims, however, since the implied warranty of merchantability does not apply to obvious defects or to discoverable or disclosed latent defects.\textsuperscript{174} The warranty of merchantability may also be relevant to the question of proximate cause under warranty theory.\textsuperscript{175}

A manufacturer may defend a strict liability claim based upon the plaintiff's failure to meet any requirement of the statute,\textsuperscript{176} merchantability of the product,\textsuperscript{177} alteration of the product,\textsuperscript{178} lack of causation,\textsuperscript{179} causation by the product's use rather than its design or condition,\textsuperscript{180} and other causes of the injury.\textsuperscript{181} The manufacturer may introduce evidence that the product meets or exceeds applicable safety standards,\textsuperscript{182} and that use of the product has been made over a period of time without

\begin{itemize}
\item \textsuperscript{173} See supra text accompanying notes 48-70.
\item \textsuperscript{176} Firestone Tire & Rubber Co. v. Pinyan, 155 Ga. App. 343, 270 S.E.2d 883 (1980).
\item \textsuperscript{177} \textit{Id.} at 345, 270 S.E.2d at 885. The plaintiff bears the burden of proof on the substantial alteration issue. Talley v. City Tank Corp., 158 Ga. App. 130, 134, 279 S.E.2d 264, 268 (1981).
\item \textsuperscript{179} Pinyan, 155 Ga. App. at 344, 270 S.E.2d at 885.
\item \textsuperscript{181} Collum, 176 Ga. App. at 63, 334 S.E.2d at 924.
\end{itemize}
injury,\textsuperscript{184} as evidence that it is merchantable and reasonably suited for the intended uses. Product misuse or abnormal use is a defense to liability,\textsuperscript{185} as is obvious danger.\textsuperscript{186}

The plaintiff's assumption of the risk is a defense to a strict liability action,\textsuperscript{187} but contributory negligence is not.\textsuperscript{188} Georgia courts reason that the user of a product is under no duty to inspect for defects.\textsuperscript{189} The fact that a plaintiff negligently fails to discover a defect or guard against the possibility of its existence is not a defense to strict liability.\textsuperscript{190} A finding of contributory negligence by the plaintiff in failing to carefully read a warning of product dangers may bar recovery in negligence, but on a strict liability claim such evidence simply raises a jury question about the adequacy of the warning.\textsuperscript{191} A plaintiff's failure to read a warning is a defense to an inadequate warning claim,\textsuperscript{192} but not to a claim of negligent

\textsuperscript{184} Jackson, 190 Ga. App. at 766-67, 380 S.E.2d at 309. The Georgia courts have not adopted the presumption that a product is safe when it is used continuously without injury or damage. See Lang v. Federated Dep't Stores, Inc., 161 Ga. App. 760, 762, 287 S.E.2d 729, 731 (1982).

\textsuperscript{185} See supra text accompanying notes 95-97.

\textsuperscript{186} Id.


\textsuperscript{188} Brooks, 250 Ga. at 519, 299 S.E.2d at 706. The Georgia Supreme Court has noted, in discussing co-defendant liability, that where one defendant is liable in strict liability and another in negligence, the two are joint tortfeasors and are subject to joint and several liability, because the doctrinal basis for strict liability is in tort. Colt Indus. Operating Corp. v. Coleman, 246 Ga. 559, 561, 272 S.E.2d 251, 253 (1980). It is submitted that the same principle should be applied as between a plaintiff who is guilty of contributory or comparative negligence and a defendant who is subject to strict liability, particularly since the Tort Reform Act of 1987 makes clear that a plaintiff's contributory or comparative negligence bears directly on his right to recover damages in tort against joint tortfeasors. See O.C.G.A. § 51-12-33 (Supp. 1991). Both this express public policy and basic fairness suggest that a manufacturer should not bear a full award of damages to a contributorily or comparatively negligent plaintiff simply because he is subject to a strict liability claim.

\textsuperscript{189} Hurlbut, 166 Ga. App. at 95, 303 S.E.2d at 284.

\textsuperscript{190} Brooks, 250 Ga. at 517, 299 S.E.2d at 704.

\textsuperscript{191} Stapleton v. Kawasaki Heavy Indus., Ltd., 608 F.2d 571 (5th Cir. 1979), rehearing denied and amended, 612 F.2d 905 (5th Cir. 1980).

communication of the warning. It may be that a warning is sufficient as a matter of law.

The defense of assumption of risk operates to bar an action when the plaintiff knowingly and voluntarily faced the risk of the injuries suffered. This defense is available when the dangerous aspect of the product is open and obvious, and when the user or consumer discovers the defect and is aware of the associated danger, but proceeds unreasonably to use the product. Assumption of the risk has further application in connection with the rule that "[a] product is not rendered 'defective' by the patent absence of a specific safety device which would serve to guard against a common danger connected with the limited use of a product, which danger the ultimate user can himself recognize and otherwise guard against."

Misuse or abnormal use of a product may also be a viable defense in a products liability action. Misuse includes abnormal handling of a product in light of known dangers. The substantial alteration of a product after it leaves the hands of the manufacturer also constitutes misuse and provides a potential defense to both negligence and strict liability claims. Although a manufacturer has a duty to warn of dangers in the use of a product in any manner reasonably contemplated or anticipated by the manufacturer, the manufacturer is under no obligation to warn about any unforeseeable misuse. A redesign or substantial alteration of a product may be unforeseeable. Further, a redesign may result in an essentially different product with different dangerous propensities for

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200. Barnes, 182 Ga. App. at 781, 357 S.E.2d at 130 (even assuming that motorcycle headlight was inadequate, plaintiff knew of the alleged inadequacy and drove too fast for the conditions, therefore manufacturer could not be liable for resulting injuries).
which the original manufacturer may not be held liable. When the alteration is minor or did not contribute to the alleged injury, the alteration may not be a defense to the strict liability claim. Whether this defense is available when the product is intended for incorporation into a second, finished product will probably depend upon the specific circumstances of the incorporation and the degree of change that the first product undergoes.

Finally, federal law may provide a complete or partial defense to a products liability action, on a variety of grounds. The government contractor defense, most recently interpreted by the United States Supreme Court in Boyle v. United Technologies Corp., provides that a government contractor may escape liability for design defects where the product conforms to reasonably precise specifications and the contractor has warned the government of any dangers known to the contractor but not to the government. The preemption defense arises under a variety of federal regulatory and safety statutes. The Georgia Court of Appeals addressed the defense in the context of automobile safety in Honda Motor Co. v. Kimbel, holding that the manufacturer was not liable for failing to install airbags. In a Florida case, Keys Jet Skis, Inc. v. Kays, the court held that the manufacturer of a jet ski was entitled to the damages limitation imposed by the federal Limitation of Liability Act, even though the product was a pleasure craft.

B. Limitation of Actions

Under Georgia law, the general statutes of limitation apply to products liability cases based upon negligence and strict liability. The Uniform Commercial Code contains its own statute of limitations applicable to warranty claims.

204. Talley, 158 Ga. App. at 130, 279 S.E.2d at 264.
207. The Eleventh Circuit cases addressing Boyle, to date, have arisen in the Florida district courts. See Dorse v. Eagle-Picher Indus., Inc., 898 F.2d 1487 (11th Cir. 1990), aff'g Dorse v. Armstrong World Indus., Inc., 716 F. Supp. 589 (S.D. Fla. 1989); Harduvel v. General Dynamics Corp., 878 F.2d 1311 (11th Cir. 1989).
209. 893 F.2d 1225 (11th Cir. 1990).
The statute of limitations is two years for a personal injury negligence or strict liability claim and four years for a loss of consortium claim.\(^2\) This period runs from the date of injury.\(^2\) However, under the "discovery rule" (for example, in the case of a latent disease), the period runs from the date the plaintiff knew or should have known of the injury and its cause.\(^2\) Georgia courts have recognized the theory of "continuing tort" in personal injury actions.\(^2\)

The plaintiff must commence an action for property damage within four years after the right of action accrues and the statute of limitations begins to run.\(^2\) Georgia briefly applied a "discovery rule" in determining when a cause of action for negligence or strict liability accrued for property damage.\(^2\) The discovery rule essentially provided that a cause of action would accrue when the plaintiff was aware of the injury and knew

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The new Georgia Business Corporation Code provides for a two five-year cutoff period for claims against a corporation undergoing voluntary dissolution. See O.C.G.A. § 14-2-1407 (1989). This provision was a legislative compromise intended to permit the presentation of claims that are contingent or latent at the time of dissolution. See William J. Carney, Changes in Corporate Practice Under Georgia's New Business Corporation Code, 40 Mercer L. Rev. 655, 695-97 n.255 (1989). It has been observed in this connection that "[t]ypically these claims arise in the context of product liabilities, when injuries have not yet occurred, or when their extent is unknown." Id. at 696. It may well be that an injury occurs long after a product exposure, and the court of appeals has held that, for a later injury different in nature from an earlier-recognized injury, the statute may run separately. See Anderson v. Sybron Corp., 165 Ga. App. 566, 567-68, 292 S.E.2d 470, 471 (1985). Absent such circumstances or concealing fraud by the defendant, however, knowledge of the extent of an injury that has been or should have been recognized does not affect the commencement or the running of the statute. See Cheney v. Syntex Labs., Inc., 277 F. Supp. 386, 388 (N.D. Ga. 1967); Dowling v. Lester, 74 Ga. App. 290, 294, 39 S.E.2d 576, 578 (1913); see also Gould v. Palmer, 96 Ga. 798, 94 S.E. 583 (1894).


\(^{216}\) O.C.G.A. § 9-3-30 (1982).

or reasonably should have known the cause of the injury. In *Corporation of Mercer University v. National Gypsum Co.*, however, the Georgia Supreme Court held that the discovery rule does not apply to tort actions for property damage. The court limited the application of the rule to cases involving bodily injuries that develop over an extended period of time. Applying *Mercer*, the Georgia Court of Appeals has held that a tort action for damage to realty accrues four years after the structure is completed. Similarly, the Georgia courts have refused to recognize the theory of "continuing tort" in property damage cases.

The strict liability statute itself was amended in 1978 to provide for a ten-year statute of repose "from the date of the first sale for use or consumption of the personal property causing or otherwise bringing about the injury." The statute of repose affects any claim arising under the statute, including those arising before 1978, but is tolled by the disability of the plaintiff's minority. There are no other express exceptions.

A provision added by the Tort Reform Act of 1987 that "[n]ething contained in this subsection [the statute of repose] shall relieve a manufacturer from the duty to warn of a danger arising from use of a product."


219. 258 Ga. at 365, 368 S.E.2d at 732.

220. Id. at 366, 368 S.E.2d at 733.

221. Id. While *Mercer* was pending before the Georgia Supreme Court, the Georgia legislature enacted O.C.G.A. section 9-3-30.1, which extended and revived the statute of limitations in actions for property damage against asbestos manufacturers and suppliers and rendered section 9-3-30 inapplicable to property damage arising from removal of asbestos or asbestos containing materials from buildings. O.C.G.A. § 9-3-30.1 (Supp. 1991). The Georgia Supreme Court subsequently found section 9-3-30.1 to be unconstitutional under art. 3, sec. 6, para. 4(a) of the Georgia Constitution of 1983, which prohibits "special laws" from being enacted "in any case for which provision has been made by an existing general law . . . ." *Celotex Corp. v. St. Joseph Hosp.*, 259 Ga. 108, 376 S.E.2d 880 (1989).


once that danger becomes known to the manufacturer," has not been interpreted.228

The Tort Reform Act of 1987 added a similar ten-year statute of repose for negligence-based personal injury claims arising on or after July 1, 1987.229 Although it is similar to the provision applicable to strict liability claims, exceptions to the negligence provision prevent repose of a claim for a product that has caused a disease or a birth defect, or for conduct that manifests "a willful, reckless or wanton disregard for life or property."230 The amendment may not be applied to causes of action arising prior to July 1, 1987.231

Products liability actions based upon allegations of breach of warranty are governed by the statute of limitation in the U.C.C.232 The statute provides that the action must be brought within four years of its accrual, or within one year or more if the parties so agree.233 Absent a contractual extension of the warranty, the cause of action accrues on the date of delivery or upon tender of the goods.234 If the parties contract to extend the warranty to future performance of the goods and discovery of any breach of the warranty must await such future performance, the cause of action accrues as of the time the breach was or should have been discovered.235

V. DAMAGES

A. Compensatory Damages

A plaintiff may recover in negligence for any personal injury or property damage suffered as a proximate result of the defendant's negligence.236 However, damage to the property itself is limited to a warranty claim.237 A spouse may seek damages for loss of consortium.238 A plaintiff

228. Id. § 51-1-11(c).
229. Id. See Hatcher, 256 Ga. at 100, 344 S.E.2d at 418, conformed to, 796 F.2d 1427 (11th Cir. 1986).
may sue for wrongful death of a person, but may not recover damages for emotional distress under a wrongful death theory. Generally, Georgia does not recognize a claim for negligent infliction of mental or emotional distress when such distress is not accompanied by physical injuries.

Damages under a warranty theory include loss or damage to the property itself. However, the parties' contract may provide for limitations upon the scope and availability of damages in the commercial context. A party may not base an action for wrongful death on a breach of warranty claim except for certain specified articles intended for human consumption or use. The Georgia Court of Appeals has held, however, that a product manufacturer may be impleaded on a warranty theory by a defendant's third-party complaint in a wrongful death action, even in the absence of a direct wrongful death action against that manufacturer.
A plaintiff may claim damages in a strict liability action for any "injury to person or property." A wrongful death action may be brought on the basis of strict liability, as may a claim for loss of consortium.

The Tort Reform Act of 1987 provided for an evidentiary rule by which juries might be permitted, but could not be directed, to reduce an award of damages by amounts received from "collateral sources" for personal injury, casualty or disability payments, or wage loss replacement. The Georgia Supreme Court declared the "collateral source" rule unconstitutional under the state equal protection clause in Denton v. Con-Way Express, Inc.


249. O.C.G.A. § 51-12-1(b) (Supp. 1991).


Whether the Denton majority's holding included a federal constitutional component is uncertain in light of its citation of the federal equal protection clause in footnote 3. U.S. Const. amend. XIV. Justice Fletcher expressly stated that the statute was void for vagueness under the state and federal due process clauses. Denton, 261 Ga. at 47, 402 S.E.2d at 273. The application or citation of federal constitutional provisions can create problems for state-court litigants, inasmuch as it creates the potential of a federal ground of decision that would permit review by the United States Supreme Court, thus adding to the expense of a matter that might properly have been laid to rest under the Georgia Constitution standing alone. 28 U.S.C. § 1257(a) (1982). See Ohio v. Gallagher, 425 U.S. 257, 259-60 (1976); see also United Air Lines, Inc. v. Mahin, 410 U.S. 623, 632 (1973). When the federal constitution is not cited in the first place, or the Georgia Supreme Court makes clear that it relies only on the state constitution and authorities for its decision, there arguably is no ground for a petition for writ of certiorari, and less likelihood that the losing party in the state courts will be able to extend the proceedings further. See Webb v. Webb, 451 U.S. 493, 501-02 (1981) (certiorari inappropriate where no federal question presented or decided by state court).
B. Economic Loss Rule

Georgia follows the majority rule barring recovery in tort for "economic loss" resulting from a defective product. Economic loss has been defined as the diminution in value of the defective product, the loss of use of the defective product, or the cost of repairing the defective product. The rationale behind the economic loss rule is that the purpose of products liability actions in tort is to redress physical injuries and not the losses of bargains by disgruntled customers, which are best addressed through contract and warranty law.

In Georgia, there are two exceptions to the economic loss rule. First, the economic loss rule is inapplicable in situations where the damage or injury is a result of an "accident." "Accident" is defined as "a sudden and calamitous event which, although it may only cause damage to the defective product itself, poses an unreasonable risk of injury to other persons or property." Damage resulting from gradual deterioration or breakdown is not considered accidental. Although the United States Supreme Court has criticized and rejected the accident exception in an admiralty case, it appears to be still applicable in Georgia.

Second, the economic loss rule is inapplicable where there is damage to property other than the defective product itself. There is no restriction on maintaining a tort action for "economic" damage done to property which

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252. Id. at 947.


is separate and distinct from the product that caused the injury.259 For purposes of determining what constitutes "other property," Georgia courts have generally treated a component part as indistinct from the overall product or that product's other component parts.260 However, in Mike Bajalia, Inc. v. Amos Construction Co.,261 which can best be viewed as an aberration, the Georgia Court of Appeals stated that a cause of action in negligence may be brought against a component manufacturer whose defective component damages other components made by a different manufacturer.262 Mike Bajalia "has been roundly criticized"263 and represents a minority position, as most jurisdictions have flatly refused to classify damage to component parts as damage to "other" property.264 Even under Mike Bajalia, the only damage recoverable in tort is that done to components made by a manufacturer other than the one whose product failed and caused the injury.265

There seems to be a conflict between the concept that economic losses such as the expenses of repair are not recoverable, and the exception that damages to "other" property caused by a defective product are recoverable in tort. For example, the expenses associated with reconstructing and refinishing the walls covering a defective electrical system once the repairs have been made to the system might be considered damage to "other" property. On the other hand, such damage might be considered attendant and incidental to repair and therefore nonrecoverable in tort. Georgia courts have been silent on the issue of whether such "repair" damage to "other" property is recoverable in tort. However, courts that have considered similar issues have ruled that such expenses are not recoverable in tort because they are incidental to repair.266


262. Id. at 226, 235 S.E.2d at 664.


266. See, e.g., 2000 Watermark Ass'n, Inc. v. Celotex Corp., 784 F.2d 1183, 1187-88 (4th Cir. 1986) (cost of replacing underlying felt when defective shingles were removed from roof
C. Punitive Damages

Punitive damages are available in Georgia for claims arising prior to July 1, 1987, where there are "aggravating circumstances," to "deter the wrongdoer from repeating the trespass or as compensation for the wounded feelings of the plaintiff."\textsuperscript{267} A plaintiff seeking a punitive award must pray for it in the complaint.\textsuperscript{268} The jury must make an award of actual damages before punitive damages are appropriate; nominal damages will not support such an award.\textsuperscript{269} A court may award punitive damages only to deter the defendant from repeating his conduct, and an instruction that punitive damages may be awarded to deter others from committing similar conduct in the future is improper.\textsuperscript{270}

Punitive damages are not available for negligent misconduct.\textsuperscript{271} Instead, punitive damages are available only when the defendant acts intentionally or with gross disregard for the plaintiff's rights.\textsuperscript{272} Such a claim is not available where the plaintiff's only claim is in warranty.\textsuperscript{273} Further, punitive damages are not available in a wrongful death action, but may be available regarding a survival claim.\textsuperscript{274}


\textsuperscript{268} O.C.G.A. § 51-12-5.1(d)(1) (Supp. 1991).


The Tort Reform Act provides limits on the award of punitive damages for all tort and product liability causes of actions arising on or after July 1, 1987. The Georgia Supreme Court upheld the constitutionality of the $250,000 cap on certain punitive damage awards against a state equal protection challenge in Bagley v. Shortt. While the statute does not provide a dollar limit on the amount of punitive damages that may be awarded in a products liability action, only one award of punitive damages may be recovered . . . from a defendant for any act or omission if the cause of action arises from product liability, regardless of the number of causes of action which may arise from such act or omission.

Punitive damages are available in a products liability case only where the plaintiff demonstrates by clear and convincing evidence that the defendant’s actions show “willful misconduct, malice, fraud, wantonness, oppression, or that entire want of care which would raise the presumption of conscious indifference to consequences.”

The trial of a products liability case is bifurcated when punitive damages are sought. In the first stage of trial, the jury determines whether the evidence adduced at trial justifies the imposition of any punitive damages. Evidence concerning the amount of punitive damages sought is not admissible, but counsel may argue that the case justifies a punitive award. If the jury makes a special finding that punitive damages are justified, the court reconvenes the trial to receive evidence regarding the amount of damages that will be sufficient to punish, penalize or deter similar conduct in the future. At the close of such evidence, counsel has the right to make a closing argument about the amount of punitive damages to be awarded.

278. Id. Compare Hospital Auth. of Gwinnett County v. Jones, 259 Ga. 759, 386 S.E.2d 120 (1989) (a $1.3 million award of punitive damages was not disproportionate and did not violate the excessive fines clause of the Georgia Constitution even though the jury awarded only $5,001 in actual damages) with Colonial Pipeline Co. v. Brown, 258 Ga. 115; 365 S.E.2d 827 (1988) ($5 million punitive damage award excessive where there was no bodily injury to plaintiff and award was 100 times the property damage award).
279. O.C.G.A. § 51-12-5.1(b) (Supp. 1991).
If punitive damages are awarded, seventy-five percent of the punitive award (less the plaintiff's costs of litigation, including reasonable attorney fees) must be paid to the State of Georgia.\textsuperscript{282} This provision is consistent with the underlying rationale for a punitive award: to "penalize, punish or deter a defendant," and not to unjustly enrich the plaintiff.\textsuperscript{283}

\textsuperscript{282} O.C.G.A. § 51-12-5.1 (Supp. 1991).
\textsuperscript{283} Id. § 51-12-5.1(c).