SUGGESTED PATTERN JURY INSTRUCTIONS

Fifth Edition

By the Council of Superior Court Judges of Georgia

Civil Cases

Volume I

Council of Superior Court Judges of Georgia

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July 2017

To All Recipients of *Suggested Pattern Jury Instructions*:

The Council of Superior Court Judges of Georgia is pleased to present the July 2017 update to the *Suggested Pattern Jury Instructions*, Vol. I: Civil Cases, 5th ed. (2007). The section provided contains the changes; please replace the original section in its entirety.

We encourage attorneys to submit pattern jury instructions to judges and to do so either by reproducing specific charges contained herein or by citing pages in these volumes.

The Council welcomes suggestions for revising or adding to the pattern instructions with regard to content, language, or format to promote the goal of providing pattern instructions that are accurate, understandable, and convenient. Please submit any suggestions to the Pattern Jury Instructions Committee of the Council at the above address.

List of Amended Charges

23.210 **Reliable Evidence; Failure to Produce (citation updated)**

23.450 **Verdict (citation corrected)**

23.701 **Modification or Initial Determination of Child Support—Parties Never Married; Preliminary Instruction (cross references updated)**

23.705 **Modification or Initial Determination of Child Support—Parties Never Married; Final Instruction (cross references updated)**

Suggested Pattern Jury Instructions

Volume I: Civil Cases
State of Georgia

Fifth Edition

By the Council of Superior Court Judges of Georgia

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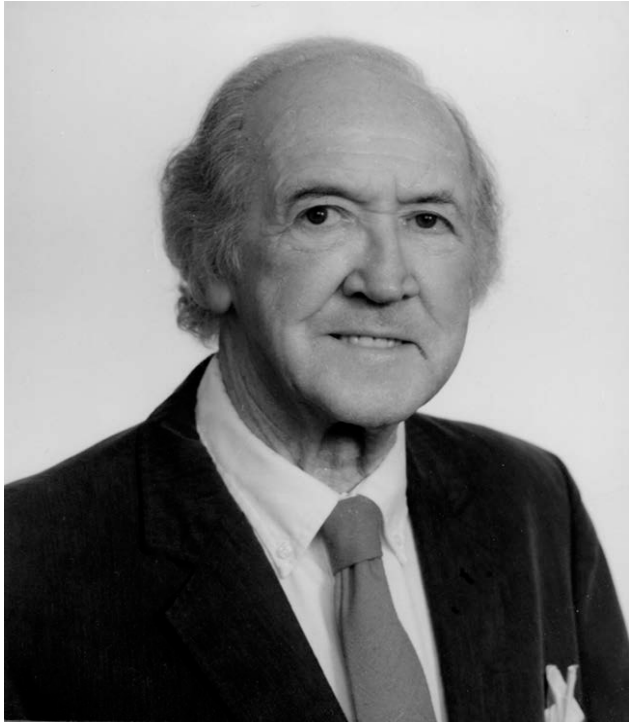


Dedication

Marcus B. Calhoun

Judge Marcus Calhoun was one of the moving forces in drafting and publishing standard, or "pattern," jury charges for use throughout Georgia. For many years, he was chair of the Pattern Jury Instructions Committee of the Council of Superior Court Judges of Georgia. The suggested pattern jury instructions have achieved widespread acceptance in large part because of the tireless efforts of Judge Calhoun.

Judge Marcus B. Calhoun was born on June 7, 1917, in Mt. Vernon, Georgia. His father, also named Marcus B. Calhoun, was an attorney in the private practice of law in Montgomery County, Georgia, until his death in 1934. His mother, the former Annie Griffith of Athens, Georgia, taught music at Brewton Parker College.

Judge Calhoun received an associate degree from Brewton Parker College in 1936. Further education was interrupted by the death of his father and the Great Depression, so he entered the Civilian Conservation Corps (CCC), where he worked clearing swamp land in southeastern Georgia. Upon leaving the CCC, he moved to Atlanta, where he secured employment as an investigator/adjuster for an insurance company while attending Atlanta Law School at night. Upon receiving his LL.B. from the Atlanta Law School, he was admitted to the practice of law in Georgia in 1939.

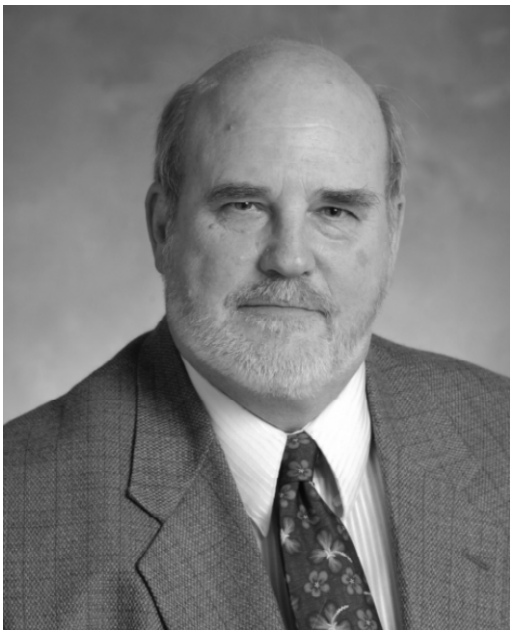
Judge Calhoun first used his law degree to join the Federal Bureau of Investigation (FBI), where he served from 1940 through 1945. During that time, he was assigned as a special agent in the Baltimore, New York, and Atlanta offices of the FBI. While he worked on all

types of matters handled by the Bureau, his primary focus during the war years was directed toward uncovering Nazi espionage.

In 1946, Judge Calhoun left the FBI and moved to Thomasville, Georgia, to join Frank L. Forester in what, for twenty-one years, would remain the two-man firm of Forester & Calhoun. Judge Calhoun was the trial lawyer in what was essentially a small-town general practice. During the 1950s, he was appointed solicitor for the City Court of Thomasville, a part-time position he retained until he was appointed district attorney of the Southern Judicial Circuit in 1967.

In April 1969, Judge Calhoun was appointed to the Superior Court Bench by Gov. Lester Maddox. He served in that capacity until accepting senior judge status on April 15, 1979. He continued to serve as a senior judge until his death in April 1998. During most of his tenure as a senior judge, he also remained active on the Pattern Jury Committee.

Judge Calhoun married the former Bernice Wolfe of Wilkes County, Georgia, on June 15, 1940. Mrs. Calhoun died in 1999. They had three sons and one daughter. All three sons are graduates of the University of Georgia School of Law: Marcus Benton Calhoun, Jr., is a practicing attorney with the Columbus, Georgia, firm of Page, Scrantom, Sprouse, Tucker & Ford; William M. Calhoun is a member of the faculty of the U.S. Navy War College, Providence, Rhode Island; and Samuel W. Calhoun is a professor of law at Washington and Lee University, Lexington, Virginia. Their daughter, Bernice Calhoun Freed, died in November 2000. She was a teacher, farmer, artist, and entrepreneur residing in Guatemala at the time. There are 12 Calhoun grandchildren and 2 great-grandchildren.



In Memory of

Rowland W. Barnes

On March 11, 2005, Judge Rowland W. Barnes lost his life while serving on the bench in the Superior Court of Fulton County, one of four people who were killed on that tragic day. The Judges of the Superior Court of Georgia wish to honor Judge Barnes as a respected peer, an admired jurist, and a good friend.

Judge Barnes was born in Cheyenne, Wyoming. A 1962 graduate of Lebanon Valley College in Annville, Pennsylvania, he played on the 1961 Middle Atlantic Conference championship football team. He attended law school at George Washington University and Emory University, graduating from Emory in 1972. He served in the U.S. Air Force from 1962 until 1970, working at bases in Pennsylvania, Texas, and Alabama and attaining the rank of first lieutenant. He was an attorney for the Department of Housing and Urban Development and worked in real estate, family law, and litigation, mostly as a sole practitioner.

His judicial career started in the early 1980s, when he served as a city court judge in College Park, Fairburn, and Hapeville, Georgia. In 1987, he began serving as a part-time Fulton County Magistrate. In 1998, Judge Barnes was selected by then-governor Zell Miller to become a superior court judge in the Atlanta Judicial Circuit. “I knew the judge well. It was one of my proudest appointments,” said Miller.

Judge Barnes was an active member of the Pattern Jury Instruction Committee, offering many suggestions that have been incorporated into the *Suggested Pattern Jury Instructions*, both civil and criminal cases, used by all judges throughout the state on a daily basis in charging juries. As such, he was selected to serve as chairman of the subcommittee to revise, update, and improve the instructions dealing with civil matters. He supervised the project and the many judges who worked on and completed what is

now the fourth edition of the civil case instructions, released in July 2004. The work has received favorable comments by trial and appellate judges and lawyers throughout the state.

Though blessed with great intellectual capacity, Judge Barnes was better known for his kindly and disarming demeanor. He will be sorely missed, not only in his home jurisdiction but by judges throughout Georgia. Judge Barnes is survived by his wife, Claudia, two daughters, four stepchildren, and fourteen grandchildren. This volume is dedicated to the memory of Rowland W. Barnes.

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PREFACE

> The art of charging a jury is one of the most refined duties of a trial judge. . . . [T]he trial judge in each case has the unique task of objectively and clearly explaining to the jury . . . the applicable law which governs the facts they find to be true. This must be done in such a manner that no harmful error is committed in stating or failing to state . . . the law, but more importantly, should be done in simple, straightforward, and understandable language for the layperson.
>
> Senior Judge James B. O'Connor,
> Oconee Judicial Circuit,
> Past Member, Pattern Jury Instructions Committee

The Pattern Jury Instructions Committee of the Council of Superior Court Judges of Georgia hopes these suggested jury instructions for civil cases will be useful and informative in dealing with most of the issues that confront judges daily in the trial courts by making available accurate instructions in modern, lay language.

These instructions are submitted as suggestions *only*. They have not been submitted to or approved by the appellate courts of Georgia, although many have been approved in principle in specific cases. There are two basic problems with relying on any standard, or pattern, instruction:

1) No suggested charges can cover every situation, and the task will ever belong to the trial judge to "tailor" or adapt the charge material to the case on trial. Each judge must carefully adjust these charges, removing all language not applicable and making changes and additions required to fit the case on trial when necessary. At times, minor adjustments will suffice, but a careful rewriting of an entire suggested charge may be required.
2) The law is constantly changing, and new, possibly unanticipated facts may render a standard charge—even an otherwise correct one—inappropriate in certain circumstances. Although the committee meets frequently and stays in touch by various means of communication, it is possible that a change may occur before the committee can adequately respond with a caveat or revised charge.

Both the committee and the council recognize that the responsibility of instructing the jury rests solely with the trial judge. There is much greater danger in overcharging than in undercharging a jury, and judges are encouraged to charge only on the principles required and no others.

The language contained in these instructions is intended to be gender neutral to the extent feasible. There will be instances in which the judge will need to make adjustments for singular versus plural pronouns for defendants or victims. In those instances in which there is an option, the judge should select the appropriate pronoun.

The committee has made some necessary changes for the sake of accuracy, clarity, and even safety; for the most part, however, there is little substantive change in the fifth edition. The main change is the addition of a new section on child support charges. As this section was created to assist in implementing the new child support guidelines, the committee invites your feedback on the charges to allow us to refine them.

The assistance of all Georgia judges is needed to keep these suggested instructions updated. It is requested that each trial judge carefully review this material and provide the committee with suggestions for additions or improvements to these instructions. Suggestions may be sent to Pattern Jury Instructions Committee, Council of Superior Court Judges, 18 Capitol Square, Suite 104, Atlanta, Georgia 30334, or to any member of the committee.

The judges listed below composed the Pattern Jury Instructions Committee for the fifth edition of *Suggested Pattern Jury Instructions, Volume I: Civil Cases*, State of Georgia.

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ACKNOWLEDGMENTS

Suggested Pattern Jury Instructions, by its nature, is and must be a work in progress. All members of the current Pattern Jury Instructions Committee contributed innumerable hours in reviewing, researching, revising, and editing. But to credit just the committee would be an egregious oversight. The current committee started with a product that was already highly "refined"; to paraphrase Sir Isaac Newton, we truly "stood on the shoulders of giants." In addition, many of the additions or corrections came not from the membership of the committee but from the many judges who have previously served on the committee or who have responded to our solicitation for input and assistance from the trial bench. In short, there are too many to adequately acknowledge.

Still, we would be remiss if we did not recognize the contributions of Judge Rowland Barnes of the Atlanta Judicial Circuit and Judge David Barrett of the Enotah Judicial Circuit. Revision of the civil instructions was a more voluminous task than the criminal revision in that there was simply a greater amount of and more diverse subject matter to review. Secondly, there was more need for change. Judge Barnes chaired this most recent revision of the civil pattern jury instructions and, through his personal effort in reviewing and consolidating the many submissions, is due much of the credit for the completion of this project. Judge Barrett is Vice Chairman of the Pattern Jury Instructions Committee of the Council of Superior Court Judges of Georgia. His contribution, not only to this effort but to the work of the committee as a whole for many years, has been invaluable. It is not too much to say that he is largely responsible for the quality of both the civil and criminal instructions.

Frank C. Mills III
Chief Judge, Blue Ridge Judicial Circuit, and
Chairman, Pattern Jury Instructions Committee

00.000 **Evidence; Note Regarding Changes Based upon New Evidence Code**

(*Introduction—Georgia Law 2011, p. 99, which adopted the new evidence code, (the Georgia version of the Federal Rules) included, in pertinent part, the following preamble:*

"It is the intent of the General Assembly in enacting this Act to adopt the Federal Rules of Evidence, as interpreted by the Supreme Court of the United States and the United States circuit courts of appeal as of January 1, 2013 to the extent that such interpretation is consistent with the Constitution of Georgia. Where conflicts were found to exist among the decisions of the various circuit courts of appeal interpreting the federal rules of evidence, the General Assembly considered the decisions of the 11th Circuit Court of Appeals. . . . The General Assembly is cognizant that there are many issues regarding evidence that are not covered by the Federal Rules of Evidence and in those situations the former provisions of Title 24 have been retained. Unless displaced by the particular provisions of this Act, the General Assembly intends that the substantive law of evidence in Georgia as it existed on December 31, 2012 be retained." [emphasis added]

Consistent with the foregoing, the Pattern Jury Instructions Committee has reviewed all old charges on evidence and made changes keeping in mind the new rules and added other refinements we felt were needed. Some old charges were retained even where underlying statutes have been repealed or replaced. In most such instances, it was felt the old charge could do no harm. The committee has also taken some charges from the 11th Circuit Pattern Jury Instructions we felt were clearer and complied with Georgia Law.

00.005 **Preliminary General Instructions (Civil): Before Introduction of Evidence**

(*Note: Preliminary instructions are optional and are included in this charge book for use by those judges who feel they would be helpful to jurors. Many judges use some form of preliminary instructions because they feel it assists jurors in understanding their responsibility and the order of trial proceedings.*

Care should be taken to ensure that all parties are present during these and all jury instructions unless the record shows a waiver. This practice has been approved by the

appellate courts in Bradham v. State*, 148 Ga. App. 89[6] [1978], even in the absence of the defendant,* Oliver v. State*, 168 Ga. App. 477[4] at 478 [1983].*)

00.010 **Generally**

Members of the jury, the case you are about to try is styled _____. Under our legal system, it is my duty as the trial judge to determine the law applicable to this case, and it is your duty, as the jury, to determine the facts of the case. It is also your duty to apply the law to those facts in reaching your verdict.

00.020 **Evidence**

You determine the facts from the evidence, which consists of two things: testimony and exhibits. Testimony is the statements that you will hear made under oath from the witness(es). Exhibits are documents, photos, or other items that will be admitted into evidence. You will then have those exhibits with you in the jury room for use during your deliberations.

I caution you that what the lawyers say during this trial is not evidence. Nothing they say in their opening statements or their arguments or at any other time during this trial is evidence. Nor is anything I might do or say evidence in this case.

I have no leanings in this case whatsoever. My interest in this case is to see that it is tried fairly for both parties and to see that it is tried according to the laws of the State of Georgia and according to the constitutions of this state and of the United States.

00.030 **Parties** (*Optional*)

You must consider this case as a lawsuit between persons of equal worth and equal standing in the community and between persons holding the same or similar positions in life. All persons stand equal before the law, and all persons are to be dealt with as equals in a court of justice.

(*Use the following when either the plaintiff or the defendant is a corporation.*)

A business entity such as a corporation, like _____, is regarded as a person in this instance.

O.C.G.A. 1-3-3(14)

00.040 **Burden of Proof**

In a civil case such as this, the plaintiff has the burden of proving his/her case. The plaintiff must prove this case by what is known as a "preponderance of the evidence."

The term "preponderance" means "greater weight," and as it is used here, "preponderance of the evidence" means "the greater weight of evidence upon the issues involved." The weight of evidence need not be enough to completely free the mind from a reasonable doubt. However, to be a preponderance, the weight of the evidence must be sufficient to incline a reasonable and impartial mind to one side of the issue rather than to the other.

(*Give the following portion of this charge if an affirmative defense is asserted:* The defendant has filed what is/are known as [an] affirmative defense[s] to the claim[s] of the plaintiff, specifically [*state the affirmative defense(s) asserted*]. As to that/those defense[s], the defendant bears the burden of proof by a preponderance of the evidence.)

If you find that the evidence is evenly balanced on any issue in the case, it would then be your duty to resolve that issue against the party having the burden of proving that issue.

(*Note: The preceding paragraph has been disapproved by* Dyer v. Souther, *274 Ga. 61 [2001].*)

00.050 **Credibility of Witnesses**

The jury must determine the credibility, or believability, of the witnesses. Therefore, you must determine which witness or witnesses you will believe and which you will not believe, if there are any whom you do not believe.

In determining where the preponderance of the evidence lies and the credibility of witnesses, you may consider all of the facts and circumstances of the case. You may consider

1) the witnesses' manner of testifying,
2) their intelligence,
3) their means and opportunity for knowing the facts about which they testify,
4) the nature of the facts about which they testify,
5) the probability or improbability of their testimony,

6) their interest or lack of interest in the outcome of the case, and
7) their personal credibility as it appears from the trial.

It is your duty to determine what testimony is worthy of belief and what testimony is not worthy of belief. You may believe or disbelieve all or any part of the testimony of any witness.

You may also consider the number of witnesses, but the preponderance of evidence does not necessarily lie with the party who has the greater number of witnesses.

O.C.G.A. §§24-14-4, 24-6-620

00.070 **Rules of Evidence**

The object of all legal investigation is the discovery of truth, and rules of evidence are designed with that one prominent purpose in mind. During the course of this trial there may be objections made by the lawyers and rulings made by the court. These objections and rulings will involve the technical rules of evidence, and you should draw no inferences and make no assumptions from either the lawyer's objections or the court's rulings. Evidence that is not admitted because of an objection or other reason shall not be considered by you.

00.080 **Trial Procedure**

The procedure used in a civil trial is generally as follows:

First, the attorney for each side has the opportunity to address you in what is called an opening statement. This opening statement itself is not evidence. Remember that what the lawyers say is not evidence but rather is a preview or outline of what they expect the evidence to be. Since the plaintiff has the burden of proof, the plaintiff goes first.

Following the opening statements, the plaintiff presents evidence; that is, the plaintiff calls witnesses and introduces any exhibits. The defendant has the right to cross-examine these witnesses. When the plaintiff has presented all of his/her evidence, the plaintiff will rest his/her case.

The defendant then has the opportunity to present his/her case, which means that the defendant then calls witnesses and introduces exhibits. The plaintiff has the right to cross-examine the defendant's witnesses.

After all of the evidence has been presented, the attorneys have the opportunity to make what is called a closing argument or a summation. At that time, the attorneys will attempt to point out to you certain parts of the evidence that they think are favorable to their position and try to persuade you to decide the case in their favor. Both sides have the opportunity to make this closing argument.

Following the closing arguments, I will charge you more specifically on the law directly applicable to this case. I will then ask you to retire to the jury room to deliberate and reach your verdict.

Please remember during the course of this trial to listen carefully to all of the evidence. Do not jump to conclusions before all of the evidence is presented. Also, please remember that during the course of this trial, it would be improper for you to discuss this case with anyone or to allow anyone to discuss the case with you or in your presence or hearing. You cannot discuss the case with each other in the jury room or elsewhere before actual deliberations begin, and then only in the presence of all twelve of you.

00.090 **Note Taking by Jurors**

Regarding juror note taking: I have asked the bailiff to provide you with pencils and note pads for your use during trial. You may take notes, but you are not required to do so. If you decide to take notes, please remember that note taking should not divert you from paying full attention to the evidence and evaluating witness credibility. Your observations of the witnesses during their testimony can be vital to your determination of the believability of their testimony. The notes that you take are for your use only and are not to be shared with anyone until you begin deliberation with your fellow jurors. Notes are not evidence, only memory aids, and should not take precedence over your recollection. It is the duty of each juror to recall the evidence, and while you may consider another juror's notes to refresh your memory, you should rely on your own recollection of the proceedings. Do not be influenced by the notes of other jurors, unless their notes help you in determining your own independent recollection. Notes are not entitled to any greater weight than the recollection or impression of each juror as to what the evidence may have been. After the trial is over, the notes will be collected and destroyed.

United States v. Rhodes, 631 F.2d 43 (5th Cir.) (1980)

United States v. D. R. McLean, 578 F.2d 64 (3rd Cir.) (1978)

Potts v. State, 259 Ga. 96 (1989)

00.100 **Concluding Remarks**

I instruct you, ladies and gentlemen, that you must decide this case for yourself solely on the testimony you hear from the witness stand and the exhibits admitted into evidence. You may not visit any scenes depicted by the evidence. You may not utilize any books or documents not in evidence during your deliberations. You may not read or listen to any accounts of the trial that might appear in the news media. You may not discuss this case with anyone, including your fellow jurors, until the court authorizes you to do so.

That concludes my preliminary instructions, and we are now ready for the lawyers to give their opening statements.

00.110 Juror Use of Electronic Technology to Conduct Research on or Communicate about a Case

(Before Trial:)

To preserve the integrity of the jury system, you as finders of facts must decide this case solely upon evidence presented in this courtroom. This means that during the trial, you must not conduct any independent research about this case, the matters in the case, and the individuals or corporations involved in the case. In other words, you should not consult dictionaries or reference materials; search the Internet, websites, or blogs; or use any other electronic tools to obtain information about this case or to help you decide the case. Please do not try to find out information from any source outside the confines of this courtroom—to include media of any sort or online legal research. Until you retire to deliberate, you may not discuss this case with anyone, even your fellow jurors. After you retire to deliberate, you may begin discussing the case with your fellow jurors, but you cannot discuss the case with anyone else until you have returned a verdict and the case is at an end. I hope that for all of you this case is interesting and noteworthy. I know that many of you use cell phones, Blackberries, the Internet, and other tools of technology. You also must not talk to anyone about this case or use these tools to communicate electronically with anyone about the case. This includes your family and friends. You may not communicate with anyone about the case on your cell phone, through e-mail, Blackberry, iPhone, text messaging, or on Twitter; through any blog or website; through any Internet chat room; or by way of any other social networking websites, including Facebook, My Space, LinkedIn, and YouTube.

(At the Close of the Case:)

During your deliberations, you must not communicate with or provide any information to anyone by any means about this case. You may not use any electronic device or media, such as a telephone, cell phone, smart phone, iPhone, Blackberry, or computer; the Internet, any Internet service, or any text or instant messaging service; or any Internet chat room, blog, or website such as Facebook, My Space, LinkedIn, YouTube, or Twitter to communicate to anyone any information about this case or to conduct any research about this case until I accept your verdict.

02.000 GENERAL INSTRUCTIONS

02.010 Pleadings

You have been considering the case of (*name of plaintiff*), as Plaintiff, v. (*name of defendant*), as Defendant, Civil Action No. _____. (*Name of plaintiff*) filed this action here in the Superior Court of _____ County, in which he/she contends (*briefly narrate contentions or read contentions from the pretrial order or, if pleadings are sent out with jury, you may state that contentions are set forth in petition*). (*Name of defendant*) filed an answer to the petition in which he/she (*handle in same manner as plaintiff's contentions*).

(*If pleadings are amended, add the following.*)

(*Name of defendant or plaintiff*) later amended or added to the pleading to contend _____. Under our law, (*name of plaintiff or defendant*) is not required to answer these contentions and by operation of law, they are automatically denied.

O.C.G.A. §9-11-15

I have outlined briefly the written contentions of the parties as set forth in the pleadings. The pleadings are not evidence; they are only claims or contentions of the parties.

(Use the following if applicable.)

You will have the pleadings with you when you go to the jury room to consider this case, and you may read them if you wish for a more specific account of the contentions of the parties.

02.020 Burden of Proof; Generally; Preponderance of Evidence, Defined

The plaintiff has the burden of proof, which means that the plaintiff must prove whatever it takes to make his/her case, except for any admissions (in pleadings) by the defendant. The plaintiff must prove his/her case by what is known as a preponderance of the evidence; that is, evidence upon the issues involved, while not enough to wholly free the mind from a reasonable doubt, is yet sufficient to incline a reasonable and impartial mind to one side of the issue rather than to the other.

O.C.G.A. §§24-14-1, 24-14-3, 24-8-821, 9-11-36(b)

Superior Paving Inc. et al. v. Citadel Cement Corporation, 145 Ga. App. 6 (1978)

Danforth v. Danforth, 156 Ga. App. 236, 239 (1980)

02.030 **Burden of Proof; Counterclaims; Clear and Convincing Evidence, Defined**

The defendant has filed what is known as a counterclaim; that is, the defendant claims that the plaintiff owes him/her for (*state nature and amount of defendant's claim*) instead of the defendant owing the plaintiff.

A counterclaim is covered by the same rules of law that govern the plaintiff's claim. The defendant must prove his/her case by a preponderance of the evidence as it has just been explained. If neither party proves his/her case by a preponderance of the evidence, your verdict would be in favor of the defendant but without any monetary recovery.

Gunn v. Harris, 88 Ga. 439 (1891)

Georgia, Florida & Alabama Railway Co. v. Summer, 133 Ga. 134 (1909) (*and other decisions to note "charge" following O.C.G.A. §§24-4-1, 24-4-2, 24-1-1[5]*)

Whitley Construction Co. v. O'Dell, 94 Ga. App. 426 (1956)

Cale v. Jones, 176 Ga. App. 865 (1985)

Gilbert v. Powell, 165 Ga. App. 504 (1983)

(*Note: In equity cases involving such issues as specific performance, accident and mistake, reformation, and others, a different and higher burden of proof is required. The language will have to be adjusted for each case, but the following charge may be helpful.*)

02.040 **Clear and Convincing Evidence**

As to the issue of _____, the (plaintiff) (defendant) must prove to a reasonable certainty by clear, convincing, and decisive evidence that the (plaintiff) (defendant) is entitled to relief. This is a different and higher burden of proof than a mere preponderance of the evidence.

Yablon v. Metropolitan Life Ins. Co., 200 Ga. 693 (1946)

Wall et al. v. Wood, 174 Ga. 508 (1931)

Liberty National Bank and Trust Co. et al. v. Diamond, 229 Ga. 677 (1972)

Freeman v. Saxton, 243 Ga. 571 (1979)

(*Note: For a criminal trial, the burden of proof requirement is "beyond a reasonable doubt."*)

Clear and convincing evidence is defined as evidence that will cause the jury to firmly believe each essential element of the claim to a high degree of probability. Proof by clear and convincing evidence requires a level of proof greater than a preponderance of the evidence (but less than beyond a reasonable doubt). (*Give definition of reasonable doubt if appropriate.*)

Clarke v. Cotton, 263 Ga. 861 (1994) (*The special concurrence to this decision contains a variety of definitions of clear and convincing evidence.*)

02.100 **Evidence, Generally**

Evidence is the means by which any fact that is put in question is established or disproved.

Evidence includes all of the testimony of the witnesses as well as the exhibits admitted during the trial. (It also includes any stipulations, which are facts agreed to by the attorneys.)

Evidence may be either direct or circumstantial or both.

In considering the evidence, you may use reasoning and common sense to make deductions and reach conclusions. "Direct evidence" is the testimony of a person who asserts that he or she has actual knowledge of a fact (such as an eyewitness) (such as by personally observing or otherwise witnessing that fact). "Circumstantial evidence" is proof of [a chain or set of] facts and/or circumstances that tend to prove or disprove another fact by inference (that is, by consistency with such fact or elimination of other facts). There is no legal difference in the weight you may give to either direct or circumstantial evidence. (Adapted from 11th Circuit PJI, p. 21)

02.110 **Evidence, Direct or Circumstantial**

(Use if appropriate.)

Direct evidence is evidence that immediately points to the question at issue.

Circumstantial (or indirect) evidence is evidence that only tends to establish a fact; it must be such as to reasonably establish that fact rather than anything else. The comparative weight of circumstantial and direct evidence on any given issue is a question of fact for you to decide.

Scott v. State, 57 Ga. App. 489 (1938)
O.C.G.A. §24-14-6

(*The following are alternative charges as to evidence.*)

Direct evidence is the testimony of a witness who has seen or heard the facts to which the witness testifies and that, if believed, is sufficient to prove or establish these facts.

Circumstantial evidence is the testimony of a witness who has seen or heard the facts to which the witness testifies, from which such facts, if believed, you may find other facts to exist, that are reasonable and believable to you in the light of your experience.

When circumstantial evidence is relied upon to establish a fact or theory, it must be such as to reasonably establish that fact or theory rather than anything else.

Scott v. State, 57 Ga. App. 489 (1938)
Southern Railway Co. v. Georgia Kraft Co., 258 Ga. 232 (1988)

02.112 **Stipulations**

The parties have entered into a stipulation that has been approved by the court about the following (facts) (testimony, documents, exhibits):
(specify _____)

Where parties stipulate facts with the approval of the court, this is in the nature of evidence. You must take that fact or those facts as a given without the necessity of further proof.

02.114 **Judicial Notice**

I have taken **judicial notice** of certain facts or events. When the Court declares that it has taken **judicial notice** of some fact or event, you must accept the Court's declaration as conclusive evidence and regard as proved the fact or event that has been **judicially noticed**.

O.C.G.A. §24-2-201(g)(2)

02.116 **Limiting Instructions**

Sometimes evidence is admitted (for a limited purpose) or (against some parties and not others). Such evidence may be considered by the jury for the sole issue or purpose (against that/those party(ies)) for which the evidence is limited and not for any other purpose.

(*Note*: "[A]lthough a trial judge is not required in the absence of a request to give a limiting instruction when . . . evidence [or related acts] is admitted, it would be better for the trial judge to do so." *State v. Belt*, 269 Ga. 763 (1998). The charge should be given prior to the admission of such evidence and repeated in the final charge. *Chisholm v. State*, 231 Ga. App. 835 (1998).)

Note: NEW code section requires the judge to give limiting instructions, when applicable, ON REQUEST. Probably better to give, if applicable, whether requested or not.

O.C.G.A. §24-1-105

EXAMPLES OF WHEN GIVEN: Similar Transactions; Convictions or "Bad Acts" to attack credibility; felony for possession of firearm offense.

02.118 **Limiting Instructions/ Conditional Admissibility**

Sometimes evidence is admitted conditionally; that is, although you have been permitted to hear the evidence, it is only admitted and you may only consider it if you also find certain required but disputed predicate facts which allow you to consider such evidence.

If you do not find the conditions necessary in order to allow you to consider the evidence, then you must disregard it completely even though you have heard the evidence.

O.C.G.A. §24-1-104(b)

02.120 **Expert Witnesses**

(Use only if applicable.)

Testimony has been given in this case by certain witnesses who are termed experts. Expert witnesses are those who because of their training and experience possess knowledge in a particular field that is not common knowledge or known to the average citizen. The law permits expert witnesses to give their opinions based upon that training and experience.

You are not required to accept the testimony of any witnesses, expert or otherwise. Testimony of an expert, like that of all witnesses, is to be given only such weight and credit as you think it is properly entitled to receive.

O.C.G.A. §§24-7-702–24-7-705

McCoy v. State, 237 Ga. 118 (1976)

Columbia County v. Doolittle, 270 Ga. 490 (1999)

OR substitute 11th Cir. PJI, p. 33, as follows:

When scientific, technical, or other specialized knowledge might be helpful, a person who has special training or experience in that field is allowed to state an opinion about the matter. But that does not mean you must accept the witness's opinion. As with any other witness's testimony, you must decide for yourself whether to rely upon the opinion.

O.C.G.A. §§24-7-702–24-7-705

02.121 **Expert Witness; Fair Market Value; Comparable Sales**

(*See 14.210* et seq., *Condemnation; Fair Market Value*.)

02.130 **Credibility of Witnesses**

**Note: The committee removed "Intelligence" as a credibility factor from the criminal charge on credibility of witnesses based on* McKenzie v. State*, 293 Ga. App. 350 (2) (2008); however, the Federal Rules re-codify it. O.C.G.A. §24-14-4. Query: What if the defense brings in a world-renowned DNA expert who is a certified genius to testify versus a seeming bureaucratic "expert for the state," and the defense requests the charge including intelligence? The cases prohibiting the use of "intelligence" in charge are a seeming egalitarian knee-jerk against correlating intelligence and honesty. But credibility also may depend on competency. The charge is neutrally drawn and can be adequately argued by either side.*

The jury must determine the credibility of the witnesses. In deciding this, you may consider all of the facts and circumstances of the case, including the witnesses' manner of testifying, their intelligence, their means and opportunity of knowing the facts about which they testify, the nature of the facts about which they testify, the probability or improbability

of their testimony, their interest or lack of interest in the outcome of the case, and their personal credibility as you observe it.

See O.C.G.A. §§24-14-4, 24-6-620

02.150 **Witness, Attacked (Old Impeached)**

In determining the credibility of witnesses and any testimony by them in court, you may consider, where applicable, evidence offered to [(attack) (cast doubt upon) (challenge) the credibility or believability of] [cause you to disbelieve] any such witness. This would include evidence of:

(Charge only those that apply)

- Character for untruthfulness. Shown by (opinion of other witnesses), (reputation) (O.C.G.A. §24-6-608 (a)); or "Bad Acts" *(cross-examination only)*—Specific instances of conduct of the witness (in question), brought out on cross-examination of (that) (another) witness that may relate to (that) witness's (in question's) character for untruthfulness. O.C.G.A. §24-6-608(b)(1) and (2)
- Bias toward a party. Shown by "Bad Acts" *(extrinsic evidence or cross-examination)*—Specific instances of conduct of the witness (in question) that may relate to the witness's (in question's) bias toward a party. O.C.G.A. §24-6-608(b)

Felony conviction—Proof that the (witness) (defendant) has been convicted of the offense of _____ . *[Admit and charge only those offenses punishable by one year or more of imprisonment and only where the judge finds "the probative value of admitting the evidence conviction outweighs prejudicial effect." O.C.G.A. §§24-6-609(a)(1), 24-4-403;* Quiroz v. State*, 291 App. 423]*

Crime of Dishonesty conviction—Proof that the witness has been convicted of a crime involving (dishonesty) or (making a false statement). O.C.G.A. §24-6-609(a)(2) *[Note: Does not include misdemeanor theft.* Adams v. State*, 284 Ga. App. 534 (2007).]*

Admissibility considerations*—(Considerations below are not hard and fast, and individual facts and circumstances MAY dictate a different result than that directed by this QUICK*

guide. In BALANCING, judge should make EXPRESS FINDINGS. Quiroz v. State, *291 Ga. App. 423. Subject to balancing probative value versus prejudicial effect, WHICH TRUMPS ALL OTHER CONSIDERATIONS BELOW (O.C.G.A. §24-4-403 for ALL evidence and specifically for FELONY convictions [see* Clay v. State, *290 Ga. 822 for FIVE BALANCING FACTORS] and "Bad Acts" O.C.G.A. §§24-9-608(b), 24-9-609 (a)(1).)*

Admissible—Convictions less than 10 years from conviction or actual release from confinement *(O.C.G.A. §24-6-609(a)(1) and (2)). Note:* Allen v. State, *286 Ga. 392(2). Calculating 10 years—probation does NOT equal "confinement"—and end date is date of testimony or date conviction offered.* Clay v. State, *290, Ga. 822.*

SOME juvenile "convictions" *(O.C.G.A. §24-6-609(d))*

Cases on appeal*, but the pendency of appeal is also admissible (O.C.G.A. §24-6-609(e))*

Inadmissible—Time Barred*—Over 10 years old from date of conviction or release from ACTUAL confinement, not probation (*Allen v. State, *286 Ga. 392(2)). Calculating 10 years—probation does NOT equal "confinement"—to time of testifying, not time of offense, unless JUDGE BALANCES AND FINDS INTERESTS OF JUSTICE permit longer.* Clay v. State, *290 Ga. 822 BALANCING FACTORS.*

First offender and conditional discharge unadjudicated and pardoned offenses *inadmissible (O.C.G.A. §§24-6-609(c), 24-6-622)*

Convictions based on pleas of nolo contendere and juvenile "convictions" *of defendant inadmissible (O.C.G.A. §24-6-609(d))*

02.154 **Witness, Supported**

(Evidence and charge authorized only where a witness has been attacked.)

In determining the credibility of any witness whose credibility has been (attacked) (cast doubt upon) (challenged) as I have described above and any testimony by him or her in

court, you may consider, where applicable, evidence offered to support the credibility or believability of any such witness. This would include:

(Charge only those that apply.)

- Character for truthfulness. Shown by (opinion of other witnesses) or (reputation) (O.C.G.A. §24-6-608(a)); or "Truthful conduct" *(cross-examination only).* Specific instances of conduct of the witness (in question), brought out on cross-examination of (that) (another) witness, that may relate to (that) witness's (in question's) character for truthfulness; O.C.G.A. §24-6-608(b)(1) and (2)
- Lack of bias toward a party. "Truthful conduct" *(extrinsic evidence or cross-examination).* Specific instances of conduct of the witness *(only after the witness has been attacked)* that may relate to the witness's (in question's) lack of bias toward a party. O.C.G.A. §24-6-608(b)

02.156 **Witness, Impeached, Credibility Attacked**

(Only "IMPEACHMENT" statute retained)

To impeach a witness is to show that the witness is unworthy of belief. A witness may be impeached by disproving the facts to which the witness testified (O.C.G.A. § 24-6-621);

OR

The credibility of a witness may be attacked by disproving the facts to which the witness testified.

02.158 **Prior Statements**

Your assessment of a trial witness's credibility may be affected by comparing or contrasting that testimony to statements or testimony of that same witness before the trial started. It is for you to decide whether there is a reasonable explanation for any inconsistency in a witness's pre-trial statements and testimony when compared to the same witness's trial testimony. As with all issues of witness credibility, you the jury must apply your common sense and reason to decide what testimony you believe or do not believe.

O.C.G.A. §24-6-613

02.160 **Failure to Produce Evidence**

When a party has evidence that rejects (or disproves) a claim or charge made against the party and he/she fails to produce it, or having more certain and satisfactory evidence, relies on that which is of a weaker and inferior nature, a presumption arises that the charge or claim is well founded. This presumption may be rebutted, however.

O.C.G.A. §24-14-22

02.161 **Failure to Produce Witnesses; Generally**

If a party fails to produce an available witness, the jury shall determine whether such a failure warrants the inference that the witness, if produced, would have testified to facts prejudicial to the party failing to produce the witness.

O.C.G.A. §24-14-22

Cotton v. Childs, 179, Ga. 23 (1934)

Southern R.R. Co. et al. v. Acree, 9 Ga. App. 104(2) (1911)

Oliver v. Fair Jewelers, 104 Ga. App. 392 (1961)

02.162 **Failure to Produce Witnesses; Mutual Accessibility**

Charge removed pursuant to O.C.G.A. §24-1-104(a). Give appropriate charge above.

02.163 **Failure to Produce Witnesses; Control by Party**

Charge removed pursuant to O.C.G.A. §24-1-104(a). Give appropriate charge above.

02.170 **Admissions**

Deleted due to changes in 2.020.

02.171 **Acquiescence or Silence**

Former O.C.G.A. §§24-3-15, 24-3-36, 24-3-53 have been repealed.

See O.C.G.A. §24-14-23 dealing with letter in course of business. Also possible conduct as an admission O.C.G.A. §24-8-801(a)(2).

02.500 **Verdict; Form of**

(*Note: The following verdict form will suffice in most cases. Cases involving multiple parties and special issues may require different verdict forms. These verdict forms and any stipulations should be discussed with attorneys at pretrial.*)

If you believe from (a preponderance of the evidence) (clear and convincing evidence) that the plaintiff is entitled to recover damages, you would find for the plaintiff and the form of your verdict would be, "We, the jury, find for the plaintiff in the sum of (blank) dollars." (Where I have used the word "blank," you would insert such sum in dollars and cents as you think the plaintiff is entitled to recover.)

If you do not think the plaintiff is entitled to recover damages based upon the evidence presented, you should find for the defendant, and the form of your verdict would be, "We, the jury, find for the defendant."

02.510 **Verdict; Quotient**

(*Give the following only if requested.*)

If you find for the plaintiff, then you must determine an amount to be awarded to the plaintiff. The law requires that your verdict be unanimous; that is, agreed to by all jury members after the amount is determined.

It is unlawful for you to agree in advance to be bound by the figure that is calculated by each of you writing down your own figure and then adding them together and dividing the sum by twelve. If you wish to use this method to arrive at an amount for discussion without binding yourself in advance to accept the result, you may do so. You are not prohibited from accepting that result and adopting it as your verdict after the amount is determined if you believe from a preponderance of the evidence that the figure arrived at by this method represents just and adequate damages. However, you must have first found in favor of the plaintiff, and you must all agree after the amount has been determined that the amount represents your verdict.

Department of Transportation v. Mendel, 237 Ga. App. 900 (1999)

Cromer & Thornton v. Underwood, 64 Ga. App. 519(3) (13 S.E. 2d 860) (1941)

02.520 **Verdict in Writing**

Whatever your verdict in the case, it must be agreed to by each juror; it must be in writing, dated, and signed by your foreperson; and it must be returned and read aloud in court. You may write your verdict on the back of the plaintiff's petition.

(Optional alternative instruction: The court has prepared a verdict form for your use. *[Then explain the form to the jury.])*

(*Note: The manner of returning a verdict herein set out is not required by law but is set by usage and custom [*Sullivan v. State*, 29 Ga. App. 377, 379 (1922)], except that it must be published in open court [O.C.G.A. §9-12-3]. A verdict does not have to be in writing or signed [*Knight v. Knight*, 209 Ga. 131 (1952) and* Sullivan v. State*, 29 Ga. App. 377 (1922), cited by note "verdict."].*)

02.530 **Court Has No Interest in Case**

I want to emphasize that anything the court did or said during the trial of this case was not intended to and did not intimate, hint, or suggest to you which of the parties should prevail in this case. Whichever of the parties is entitled to a verdict is a matter entirely for you to determine, and whatever your verdict, it must be agreed upon by all of you.

The court's interest in the matter is that the case be fairly presented according to law and that you—as honest, conscientious, impartial jurors—consider the case as the court has instructed you and return a verdict that speaks the truth as you find the truth of the case to be.

O.C.G.A. §9-10-7

Kimberly v. Reed, 79 Ga. App. 137, 146 (1949); *cited to note "saving language" thereunder (There is no legal requirement for this charge, but it is a sound, precautionary measure.*)

02.540 **Condemnation**

(*Note: For condemnation cases, see 14.000* et seq., *Condemnation.*)

02.550 **Sympathy**

Your verdict should be a true verdict based upon your opinion of the evidence according to the laws given you in this charge. You are not to show favor or sympathy to one party or the other. It is your duty to consider the facts objectively without favor, affection, or sympathy to either party.

O.C.G.A. §15-12-138

In deciding this case, you should not be influenced by sympathy or prejudice (because of race, creed, color, religion, national origin, sexual preference, local or remote residence, economic (or corporate) status) for or against either party.

O.C.G.A. §15-12-138

02.560 **Alternate Jurors**

(*Give appropriate instructions.*)

02.570 **Jury; Final Instructions**

Your verdict must be unanimous. One of your first duties in the jury room will be to select one of your number to act as foreperson, who will preside over your deliberations and who will sign the verdict to which all twelve of you freely and voluntarily agree.

You should start your deliberations with an open mind. You should carefully consider all of the evidence in the case and deliberate with an aim toward reaching a unanimous verdict consistent with your consciences and oaths as jurors. Avoid premature, fixed opinions. Consult with one another and consider each other's views. Each of you must decide this case for yourself, but you should do so only after discussion and consideration of the case with your fellow jurors. Do not hesitate to change an opinion if convinced that it is wrong. However, you should never surrender honest convictions or opinions in order to be congenial or to reach a verdict solely because of the opinions of the other jurors.

You may go now to the jury room, but do not begin your deliberations until I send you the pleadings, exhibits, and verdict form, which I will do shortly. Then you may begin your deliberations.

02.700 **Verdict (Hung Jury)**

Your verdict must be unanimous. You have been deliberating this case for a considerable length of time, and the court deems it proper to advise you further in regard to the desirability of agreement if possible.

The case has been exhaustively and carefully tried by both sides. It has been submitted to you for decision and verdict, if possible, rather than for disagreement. It is the law that a unanimous verdict is required. While this verdict must be the conclusion of each juror and not a mere acquiescence in order to reach an agreement, it is still necessary for all the jurors to examine the issues and questions submitted with candor and fairness and with a proper regard for, and deference to, the opinion of the others.

Each juror should listen to the arguments of other jurors with a disposition to be convinced by them. If you differ in your views of the evidence, such difference of opinion should cause you to scrutinize the evidence more closely and to reexamine the grounds of your opinions.

Your duty is to decide the issues of fact that have been submitted to you, if you can do so conscientiously. In conferring, you should lay aside all mere pride of opinion and should bear in mind that the jury room is no place to champion either side of a cause. As jurors, you should not be advocates. The aim to keep in mind is the truth as it appears from the evidence, examined in light of the court's instructions.

You will again retire to your jury room for a reasonable time and examine your differences in a spirit of fairness and try to arrive at a verdict.

Spaulding v. State, 232 Ga. 411 (1974)

Ratcliff v. Ratcliff, 219 Ga. 545 (1964)

Allen v. United States, 164 U.S. 492 (17 S.C. 154, 41 L. Ed. 528) (1896)

04.000 ACCORD AND SATISFACTION

04.010 Accord and Satisfaction; Definitions; Examples

When a new agreement takes the place of an old one, this ends the old agreement. The legal words for such an end to an old agreement are "accord and satisfaction," which occurs when (*use one or more of the following, depending on the facts of the case*)

a) the parties satisfy one agreement by making and carrying out a new one,
b) the parties expressly agree that the new one takes the place of the old, or
c) there is a new consideration for a new promise in place of the old one.

(*Note: This definition is a simplified restatement of O.C.G.A. §13-4-101*.)

04.020 Accord and Satisfaction; Disputed Amount; Settlement

When a party offers a certain sum to settle a claim, the amount of which is in bona fide dispute, with the condition that if the sum is taken at all, it must be accepted in full satisfaction of the claim, the party that takes the money takes it subject to the condition attached to it, and it will operate as an accord and satisfaction.

Pan-American Life Insurance Co. v. Carter, 57 Ga. App. 294(1) (1938)
Gay v. American Oil Co., 115 Ga. App. 18, 21 (1967)

04.030 Accord and Satisfaction; Acceptance of Less than Amount of Debt

An agreement by a creditor to receive less than the amount of a debt cannot be pleaded as an accord and satisfaction unless it is actually executed by the payment of the money, the giving of additional security, the substitution of another debtor, or some other new consideration.

O.C.G.A. §13-4-103(a)
Edwards Bottling Works v. Jarnagan & Wright, 11 Ga. App. 162(1) (1912)
Rivers v. Cole Corp., 209 Ga. 406 (1952)

04.040 **Accord and Satisfaction; Check Reciting Full Payment**

(*See 04.041–04.042*.)

04.041 **Accord and Satisfaction; Cashed Check**

When the amount of a debt is disputed and the debtor tenders a check for a lesser amount with the statement that it is in full payment of all demands against the maker and the creditor accepts the check, cashes it, and retains the money, there is a valid accord and satisfaction, even if the creditor, at the time of receiving the check, protests to the debtor that it is not accepted as full payment but only as a credit on the account.

04.042 **Accord and Satisfaction; Uncashed Check**

When a check is tendered and delivered to a creditor for a stated amount as full and complete satisfaction of a claim and the check is retained by the creditor, whether the amount of the claim is established or uncertain, the following rule of law applies: If the creditor does not cash or deposit the check, it does not amount to an accord and satisfaction of the claim as a matter of law, but it is a question of fact. This rule applies unless the creditor acknowledges receipt and retention of the check for the purpose tendered; in which case, it does amount to an accord and satisfaction.

Ryan v. Progressive Retailer Publishing Co., 16 Ga. App. 83 (1915)
Thompson v. Hecht, 110 Ga. App. 505, 506 (1964)
American Oil Co. v. Studstill, 230 Ga. 305 (1973)

06.000 AGENCY

06.010 Agency; Creation

The relationship of principal and agent arises whenever one person—the principal—expressly or implicitly authorizes another—the agent—to act for the principal or later approves the acts of another performed on the principal's behalf.

(*Use the following when either the plaintiff or the defendant is a corporation.*)

A business entity such as a corporation, like _____, is regarded as a person in this instance.

O.C.G.A. §10-6-1

O.C.G.A. 1-3-3(14)

National Bank of Athens v. Burt, 98 Ga. 380 (1896)

06.020 Agency; Responsibility of Principal; Extent

The principal shall be bound by all acts of an agent that are performed within the scope of the agent's authority. If the agent exceeds the authority given, the principal may not accept part of the agreement and reject the balance.

O.C.G.A. §10-6-51

06.030 Agency; Authority of Agent; Extent

The agent's authority includes all necessary and usual means of performing the agent's duties. Private instructions or limitations not known to persons dealing with a general agent shall not affect them. In specific agencies for a particular purpose, persons dealing with the agent should examine this authority.

O.C.G.A. §10-6-50

06.040 Agency; Proof of

Before one can be bound by the acts of another who assumes representation of him/her, proof of agency must be shown.

Agency, as well as authority of an agent, may be established by proof of contract creating agency or by the principal's conduct and course of dealings.

If one should hold out another as one's agent and by one's course of dealings reasonably indicate that such person has certain authority, the one dealing with the agent would be protected to the extent of the authority reasonably deducible from the conduct of the parties.

You must determine the issue of agency in the light of all the facts and circumstances of the case.

Scott v. Kelly-Springfield Tire Co., 33 Ga. App. 297 (1924) (*and other decisions cited to note "proof of agency" following O.C.G.A. §10-6-1*)

Patterson v. Southern Railway Co., 41 Ga. App. 94 (1930) (*and other decisions cited to note "course of dealing" following O.C.G.A. §10-6-50*)

Armour Fertilizer Works v. Abel, 15 Ga. App. 275 (1914)

Terry v. International Cotton Co., 138 Ga. 656 (1912)

King v. Towns, 102 Ga. App. 895 (1960)

06.050 **Agency; Ratification of Agent's Acts; Generally**

If the agent exceeds the authority given to him/her, the principal may not ratify (that is, confirm and approve) in part and reject in part; the principal must accept either all or none.

Ratification by the principal shall relate back to the act ratified and shall take effect as if the act was originally authorized. Ratification may be express or implied from the acts or silence of the principal. Once made, ratification may not be revoked.

O.C.G.A. §§10-6-51, 10-6-52

06.060 **Agency; Ratification; Burden of Proof**

The burden of proof of ratification is on the party asserting it.

DeVaughn v. McLeroy, 82 Ga. 687, 688(4)(d) (1889)

Griggs v. Dodson, 223 Ga. 164, 171 (1967)

Harris v. Millers Farm, 161 Ga. App. 377 (1982) (Harris *is a ratification case, but it does not have anything to do with burden of proof.*)

06.070 **Agency; Ratification; Knowledge of Principal**

When agency is sought to be proved by ratification, it must appear that the principal had full knowledge of all material facts in connection with the transaction in question and that, with that knowledge, he/she accepted or received the benefits of the allegedly unauthorized act.

Kephart v. Gulf Refining Co., 59 Ga. App. 432(2) (1939)

Griggs v. Dodson, 223 Ga. 164, 171 (1967) (*See also citations to note "knowledge" following O.C.G.A. §10-6-52.*)

06.080 **Agency; Constructive Notice**

Notice given to an agent of a fact connected with the agency is notice given to the principal.

O.C.G.A. §10-6-58

08.000 BAILMENTS

08.010 Bailments; Generally

A bailment is a delivery of goods or property upon a contract, express or implied, to carry out the execution of a special object beneficial to either the bailor or bailee or both and to dispose of the property in conformity with the purpose of the trust. The bailor is the delivering party, and the bailee is the receiving party.

O.C.G.A. §44-12-40

08.020 Bailments; Diligence Required; Generally

All bailees are required to exercise care and diligence to protect the bailed item and to keep it safe. Different degrees of diligence are required according to the nature of the bailments.

O.C.G.A. §44-12-43

08.030 Bailments; Burden of Proof

In all cases of bailment, after loss has been proved by the bailor, the burden of proof is on the bailee to show proper diligence. "Loss," as used in this rule of law, does not only mean the losing of the bailed item but also refers to damage or injury to the bailor's property.

O.C.G.A. §44-12-44

Hawkins v. Haynes, 71 Ga. 40 (1883)

Electro-Medical Devices Inc. v. Urban Medical Services Inc., 140 Ga. App. 776 (1976)

08.040 Bailor Obligations

The obligations of the bailor are to

1) not act to deprive the hirer of use and enjoyment of the property during the period of the bailment,
2) keep the bailed item in suitable order and repair for the purposes of the bailment, and
3) guarantee the right of possession and that the bailed item is free of any secret fault rendering it unfit for the purposes for which it is hired.

O.C.G.A. §44-12-63

08.050 **Bailments; Definitions**

(*See 08.051–08.053.*)

08.051 **Bailments; Deposit**

"Deposit" means the delivery by one person to another of property to keep for the bailor's use.

08.052 **Bailments; Depositary for Hire**

"Depositary for hire" means a depositary who receives or expects a reward or hire for agreeing to keep property for another.

08.053 **Bailments; Naked Deposit**

"Naked deposit" means an undertaking whereby a depositary keeps another's property free of charge.

O.C.G.A. §44-12-90

08.060 **Depositaries for Hire; Naked Depositaries; Diligence Required of Each**

(*See 08.061–08.062.*)

08.061 **Bailees; Voluntary or Involuntary Depositaries; Liability for Naked Deposit**

A person may become a depositary voluntarily or involuntarily, such as by finding property belonging to another. In the instance of a naked deposit, the depositary is liable only for gross negligence.

O.C.G.A. §44-12-91

08.062 **Liability of Depositaries for Hire**

Depositaries for hire are bound to exercise ordinary care (and are liable as in other cases of bailment for hire).

O.C.G.A. §44-12-92

08.070 **Bailments; Act of God; Definition**

In order for a bailee to use an act of God or an exception under the contract as a defense, the bailee must establish not only that the act of God or excepted fact ultimately caused (*the statute uses "occasioned"*) the loss but also that the bailee's own negligence did not contribute to the loss.

O.C.G.A. §44-12-45

"Act of God" means an accident caused by physical forces that are inevitable or beyond control, such as lightning, storms, perils of the sea, earthquakes, floods, sudden death, or illness. This expression excludes all idea of human agency.

O.C.G.A. §1-3-3(3)

Central of Georgia Railway Co. v. Hall, 124 Ga. 322, 331 (1905)

Charleston and Western Carolina Railway Co. v. Nixon Grocery Co., 142 Ga. 343(1) (1914)

08.080 **Bailments; Diligence as Affecting Liability**

If a claim is not based upon negligence but rather upon the absolute liability of the defendant, the question of negligence is not involved unless and until the defendant shows that the damage was brought about by an act of God. When such damage is shown, proof of proper care on the part of the bailee will relieve the bailee from liability.

Georgia Southern & Florida Railway Co. v. Standard Growers Exchange, 34 Ga. App. 534, 535(6) (1925)

Central of Georgia Railway Co. v. Hall, 124 Ga. 322 (1905)

10.000 CARRIERS

10.010 Carriers; Common Carriers; Definitions

A "carrier" is a person who undertakes the transporting of goods or passengers for compensation. A "common carrier" is a person who undertakes to carry, and holds himself/herself out as ready to receive for carriage, goods for hire which the person is accustomed to carry or passengers for hire without discrimination as long as there is room.

O.C.G.A. §46-1-1(1)
1957 Op. Att'y Gen. 110

10.020 Carriers; Distinction as Question of Fact

Whether a person is a common carrier or a private carrier depends upon the facts relating to whether

1) the carrier is a public business or employment, with the service to be rendered to all equally; and
2) the carrier has held himself/herself/itself out in such a manner that the carrier should be held liable for refusing to accept the employment offered.

McIntyre v. Harrison, 172 Ga. 65 (1931)
Georgia Public Service Comm. v. Taylor, 172 Ga. 100 (1931)

10.030 Carriers; Diligence Required of Each

Carriers are required to exercise ordinary care. However, common carriers are bound to exercise extraordinary care. In cases of loss, the presumption of law is against them, and they shall be liable unless the loss was caused (occasioned) by an act of God or the public enemies of the state.

O.C.G.A. §46-9-1
Western & Atlantic Railway Co. v. Waldrip, 18 Ga. App. 263, 264(2) (1916)
Empire Aluminum Corp. v. SS Korendijk, 391 F. Supp. 402 (1973)
Seaboard Air Line R. Co. v. Henry Chanin Corp., 84 Ga. App. 442 (1951)
Sheffield v. Lovering, 51 Ga. App. 353 (1935)

10.040 **Common Carriers to Transport and Deliver; Duty of**

A common carrier shall have the duty of transporting and delivering goods safely and without unreasonable delay.

O.C.G.A. §46-9-41

10.050 **Strike by Carrier's Employees**

A carrier who receives freight for shipment is bound to forward the freight within a reasonable time, even though the carrier's employees strike or otherwise refuse to work. However, if the strike is accompanied by violence and intimidation so as to render it unsafe to forward the freight, the carrier shall be relieved as to liability for delay in delivering the freight if the violence and armed resistance are of such character as could not be overcome by the carrier or controlled by the civil authorities when called upon by the carrier.

O.C.G.A. §46-9-42

10.060 **Carriers; Acts of God and Public Enemies**

The carrier has the burden to establish not only that an act of God ultimately caused the loss, but also that the carrier's own negligence (carelessness) did not contribute to it.
The carrier has the burden to establish by clear and convincing evidence that the loss of property delivered to the carrier for transportation was caused by the public enemies of the state.

Public enemy includes acts of violence and armed and organized resistance, whether by military force or strike, or acts otherwise of such character as could not be overcome by the carrier or controlled by the civil authorities when called upon.

(See 02.040 Clear and Convincing Evidence. Clarke v. Cotton, *263 Ga. 861 [1994].)*

O.C.G.A. §§46-9-1, 46-9-42

Central of Georgia Railway Co. v. Hall, 124 Ga. 322, 323 (9) (1905)

Payne v. West Point Wholesale Grocery Co., 151 Ga. 46, 52 (1921)

Campbell Wallace v. William Sanders, 50 Ga. 134 (1) (1873)

Haas v. The Kansas City, Fort Scott and Gulf Railroad Co., 81 Ga. 792 (1888)

10.070 **Carriers; Limitation of Liability by Contract**

A common carrier may not limit his/her/its legal liability by any notice given either by publication or by entry on receipts given or tickets sold, except

a) a common carrier may limit his/her/its liability by means of an express contract or
b) a motor common carrier for household goods and office furnishings may require a shipper to declare a lump sum value for the shipment prior to loading or accept the per pound released value as provided in the terms of the bill of lading contract for the purpose of limiting its liability.

O.C.G.A. §46-9-2; the statute uses "provided" rather than "except"; see O.C.G.A. §11-7-309, *Limitation of Carrier's Liability by Express Contract*, and §13-8-2(b), *Unenforceability of Indemnification Contracts Holding Indemnitee Harmless from Liability for Its Own Negligence.*

American Railway Express Co. v. Estroff, 159 Ga. 58 (1924)

10.080 **Carriers; Passenger; Definition**

"Passenger" means a person who travels in a public conveyance by virtue of a contract, either express or implied, with the carrier as to the payment of the fare or that which is accepted as an equivalent to the fare. The prepayment of fare is not necessary to establish the relationship of passenger and carrier, although a carrier may demand prepayment of fare if persons enter the carrier's vehicle by his/her/its permission with the intention of being carried. In the absence of such a demand, an obligation to pay fare is implied on the part of the passenger, and the reciprocal obligation of carriage of the carrier arises upon the entry of the passenger.

O.C.G.A. §46-1-1(10)

Matthews v. Central of Georgia Railway Co., 46 Ga. App. 699 (1933)

10.090 **Carriers; Diligence Required**

A carrier of passengers must exercise extraordinary care to protect the lives and persons of his/her/its passengers but is not liable for injuries to them after having used such care.

O.C.G.A. §46-9-132

Atlanta Transit System Inc. v. Hines, 138 Ga. App. 746 (1976)

10.100 **Carriers; When Duty of Carrier Ends**

When discharging or letting off a passenger, the carrier is under a duty to exercise extraordinary care for the passenger's safety. This duty continues until the passenger has been taken to a place where the passenger has freedom of movement and can look out for his/her own safety.

Georgia R.R. & Banking Company v. Brooks, 30 Ga. App. 692, 693(3) (1923)

Delta Air Lines Inc. v. Millirons, 87 Ga. App. 334, 342 (1952)

12.000 CLAIMS TO BE LEVIED UPON PROPERTY

12.010 Claims; Burden of Proof; Generally

When a claim to property is being tried, the burden of proof shall lie upon the plaintiff in execution in all cases in which the property levied on is not in possession of the defendant in execution at the time of the levy.

O.C.G.A. §9-13-102

Sealy v. Beeland, 183 Ga. 709(1) (1937)

Smith v. Hartrampf, 105 Ga. App. 40, 42 (1961)

The burden is upon the claimant when

a) the defendant in *fi fa* is in possession of the property levied upon,
b) the claimant admits title in the defendant prior to the judgment, or
c) there is evidence that the defendant was in possession prior to the judgment on which the execution is based.

Parker v. Boyd, 208 Ga. 829 (1952)

Sealy v. Beeland, 183 Ga. 709 (1937)

M. J. Morgan v. Sims & Nance, 26 Ga. 283 (1858)

12.020 Claims; Fraud; Generally

If the plaintiff attacks the claimant's title for fraud, the plaintiff has the burden of proving such fraud.

Johnson v. Sherrer, 185 Ga. 340(2) (1938)

12.030 Claims; Fraud; Husband and Wife; Generally

When a transaction between a husband and wife is attacked as being fraudulent by a creditor of either, the burden is on the husband and wife to show that the transaction was fair and not designed to hinder, delay, or defraud creditors.

O.C.G.A. §19-3-10

Parker v. Harling, 189 Ga. 224 (1939)

Cotton v. John W. Eshelman and Sons Inc., 137 Ga. App. 360 (1976)

Swanson v. Universal Promotions Inc., 144 Ga. App. 591 (1978)

12.040 **Claims; Spouse, Secret Equity of**

At times a situation may exist in which one spouse holds equitable title to land and the other holds legal title to the same land. If such a situation exists, and if the spouse holding equitable title permits the spouse holding legal title to use the property to obtain credit, such spouse would be prohibited from asserting the equitable interest as he/she would against a creditor who has no notice of such interest. This situation holds true even if the interest were originally created before the rendition of the judgment.

Ford v. Blackshear Mfg. Co., 140 Ga. 670(3) (1913)

Mathis v. Blanks, 212 Ga. 226, 227 (1956)

12.050 **Claims; Delay, Damages for; Burden of Proof**

(Give additional oath of jurors regarding reasonable and just damages.)

If you find that the claim was made for purposes of delay only, you shall give reasonable and just damages not less than 10 percent of the amount of the award of damages to the plaintiff against the claimant.

If you find against the claimant but that the claim was not filed for the purpose of delay only, no damages for delay should be awarded.

The burden is on the plaintiff to show by a preponderance of the evidence that the claim was filed for purposes of delay only in order to entitle the plaintiff to recover such damages.

O.C.G.A. §9-13-101 (additional oath of jurors); §9-13-102 (burden of proof)

William W. Clark v. Augustus H. Lee, 51 Ga. 284 (1874)

Dobbs Lumber Co. v. Appling, 97 Ga. 375 (1895)

14.000 CONDEMNATION

14.010 Condemnation; Preliminaries and the Pleadings

We have been trying what is known as a condemnation case between _____, Plaintiff (Condemnor), and _____, Defendant (Owner or Condemnee).

The lawsuit the plaintiff has filed for this purpose is called the complaint. It says in substance that plaintiff has taken (title to) (an easement for _____ purpose over) a described tract of defendant's land (and, if applicable, in a highway condemnation), together with slope and drainage easements.

14.020 Condemnation; Issue

Under the law and under the constitution of this state, plaintiff has the right to take (or damage) private property for a public purpose, provided that it pays just and adequate compensation for the property taken. The only question is, "What constitutes just and adequate compensation for the property taken?" By "property," I mean all property rights of any kind. Property rights are determined as of the date plaintiff condemned the rights, which is *(the date the condemning authority tenders or pays the money).*

Ga. Const. 1983, art. I, sec. III, para. 1

O.C.G.A. §22-1-6

Gate City Terminal Co. v. Thrower, 136 Ga. 456, 464 (1911)

14.030 Condemnation; Burden of Proof

The law puts the burden of proof upon the condemnor to prove by a preponderance of evidence what amount of money constitutes just and adequate compensation for the property taken. While the burden of proof is upon the condemning authority, the owner of the property is also allowed to offer evidence upon the issues involved, and you must determine the issues in the case by the preponderance of the evidence as you find it to be.

O.C.G.A. §24-4-1

Streyer v. Georgia Southern & Florida Railroad Co., 90 Ga. 56 (1892)

Andrus v. State Highway Department, 93 Ga. App. 827, 828 (1956)

State Highway Board of Ga. v. Shierling, 51 Ga. App. 935 (1935)

Georgia Power Co. v. McCrea, 46 Ga. App. 279 (1933)

Georgia Power Co. v. Smith, 94 Ga. App. 166 (1956); cited to note "burden of proof" following O.C.G.A. §22-2-80

14.031 **Condemnation; Burden of Proof; Defined**

Condemnor must prove its case by what is known as a preponderance of the evidence; that is, evidence upon the issues involved that, while not enough to wholly free the mind from a reasonable doubt, would be sufficient to incline a reasonable and impartial mind to one side of the issue rather than the other.

O.C.G.A. §24-4-1(5)

14.032 **Condemnation; Burden of Proof; Preponderance of Evidence**

Condemnor must prove its case by what is known as a preponderance of the evidence; that is, that superior weight of evidence upon the issues involved that, while not enough to wholly free the mind from a reasonable doubt, would be sufficient to incline a reasonable and impartial mind to one side of the issue rather than the other.

O.C.G.A. §24-1-1(5)

14.100 **Condemnation Damage; Direct**

(There are two kinds of damage to be considered in this condemnation.) The first pertains to the property actually taken or used by the condemnor and is called direct damages.

14.110 **Condemnation; Property, Defined**

Property that is taken refers to whatever interest in the property is being taken by the condemnor, whether it is the entire ownership of it or the right to use it for a special purpose, which is called an easement, or both, when both types of property are condemned in the same lawsuit.

14.120 **Condemnation Damage; Consequential**

The second kind of damage is called consequential damages and pertains to the property the owner has left after the part the condemnor takes or uses is subtracted.

14.130 **Condemnation; Direct Damages for Property Taken or Used**

Concerning direct damages for the property taken or used, the "just and adequate" compensation to which the defendant is entitled under the Georgia Constitution has been defined as the actual value of his/her/its loss. The amount of compensation for these direct damages shall never be less than actual value,

(Do not give the following charge in parentheses unless evidence supports it.)

(that is, the actual value for the direct damages shall never be reduced or offset by any alleged benefits to the remaining property of the defendant.)

Ordinarily, actual value is the same as fair market value.

Ga. Const. 1983, art. I, sec. III, para. 1

State Highway Dept. v. Robinson, 103 Ga. App. 12 (1961); and cases cited thereto

(Note: If there are no consequential damages, skip to 14.150 Condemnation; Fair Market Value.)

14.140 **Condemnation; Consequential Damages for Property Not Taken**

Consequential damage to the owner's property not taken is generally determined by figuring the difference between the value of the remaining property immediately before the taking and its value after the taking for a particular proposed improvement. This measure of consequential damages should be made as of the date of taking. Another way of stating the proper measure of consequential damages to the remainder of the owner's property is the decrease, if any, in the fair market value of this remainder in its circumstance just prior to the time of the taking compared with its fair market value in its new circumstance just after the time of the taking.

State Highway Dept. v. Howard, 124 Ga. App. 76 (1971)

Sumner v. State Highway Dept., 110 Ga. App. 646 (1964)

Wright v. MARTA, 248 Ga. 372 (1981)

14.141 **Condemnation; Consequential Damage; Offset for Consequential Benefits; When Applicable**

(Charge only when there is evidence of consequential benefits.)

In determining the amount of consequential damages, if any, you should consider whether the condemnation will benefit the land the owner has left and, if so, reduce the consequential damage by that amount. The reduced amount is the consequential damage. However, consequential benefits must be disregarded to the extent that they exceed consequential damages; that is, consequential benefits to the remaining property may be shown only as an offset against consequential damages, not as an offset against the value of land actually taken or used.

(Note: When there is no evidence of any consequential benefits that accrued to the condemnee's remaining property, an instruction that consequential benefits can be deducted from consequential damages is reversible error.)

Ball v. State Highway Dept., 108 Ga. App. 457 (1963)

Dept. of Transp. v. Knight, 143 Ga. App. 748 (1977)

Merritt v. Dept. of Transp., 147 Ga. App. 316 (1978); *Merritt* reversed, but on other grounds—attorney's fees

14.142 **Condemnation; Consequential Damage; Benefits, General and Special as Affecting; Definitions**

The benefits that can offset against or reduce consequential damage are what the law calls special benefits rather than general benefits. A special benefit would be something that adds to the convenience, accessibility, or usefulness of the property affected by the condemnation. It could benefit the properties of other individuals and still be a special benefit within the meaning of condemnation law. Examples of general benefits that you would not consider would be increased general prosperity, value, beautifying the neighborhood, or benefits to through traffic.

Williams v. State Highway Dept., 124 Ga. App. 645, 646, & 647 (1971)

14.143 **Condemnation; Consequential Damage; Inconvenience**

The defendant may not recover damages for mere inconvenience in the use of his/her/its property resulting from a condemnation unless such inconvenience may be shown by the evidence to affect the value of the defendant's remaining property as an item of consequential damage.

Southwell v. State Highway Dept., 104 Ga. App. 479 (1961) and citations

14.144 **Condemnation; Consequential Damage; Prudent and Proper Construction and Maintenance**

You are required to assume that the improvements made by the plaintiff will be made and maintained in a careful and proper manner. Any damage that may result from the plaintiff's failure to do so may be the basis of a suit for damages by the defendant against the plaintiff but forms no part of this condemnation proceeding.

McArthur v. State Highway Dept., 85 Ga. App. 500 (1952) and citations
DeKalb County v. Cowan, 151 Ga. App. 753 (1979)

14.145 **Condemnation; Consequential Damage; Business, Removal of**

When a person is required to move his/her/its business as a result of land condemnation, that person is entitled to recover loss of profits; loss, injury to, or decrease of business; and reasonable expenses of moving the business, in addition to damages of any sort pertaining to land value.

Bowers v. Fulton County, 221 Ga. 731 (1966)
D.O.T. v. Gibson, 251 Ga. 66 (1983)

14.146 **Condemnation; Consequential Damage; Business, Injury to**

The damage to a business by the taking of a part of the land where it is conducted may be considered in determining its effect upon the market value of the business property, but it is not a separate item of damage. The measure of damages for the injury of the business would be the difference in value of the business before and after the taking of the land, or any interest in it, resulting from such taking.

Williams v. State Highway Dept., 124 Ga. App. 645, 647 (1971)

D.O.T. v. Kendricks, 148 Ga. App. 242 (1978)

14.200 **Condemnation; Fair Market Value; Defined**

The fair market value is the price a seller who desires, but is not required, to sell, and a buyer who desires, but is not required to buy, would agree is a fair price, after due consideration of all elements reasonably affecting value.

Wright v. MARTA, 248 Ga. 372 (1981)

14.210 **Condemnation; Fair Market Value; Opinion Evidence**

Fair market value is a matter of opinion as to which you are entitled to consider both expert and nonexpert testimony.

O.C.G.A. §24-7-701(b)

(Note: You may want to use 02.120 Expert Witnesses.)

14.220 **Condemnation; Fair Market Value; Expert Witness**

In this case, you heard the testimony of expert witnesses who gave you their opinion of the value of the subject property taken in these proceedings. In giving this testimony, those expert witnesses referred to the sales of other properties that influenced them in reaching their opinions. Those other sales are not to be considered by you as direct evidence of the value of the subject property but may be considered by the jury to determine the credibility of the witnesses and the weight to be given to the experts' testimony.

White v. Georgia Power Co., 237 Ga. 341(5), 345-346 (1976)

Merritt v. Department of Transportation, 147 Ga. App. 316, 319 (1978)

14.230 **Condemnation; All Uses to Be Considered; Test of Adaptability**

(This charge should be used only when authorized by the evidence.)

In estimating the value of land when taken for public uses, you are not restricted to the land's agricultural or productive qualities, to the condition that the land is in, or to the

uses to which it is then applied by the owner. All of the capabilities of the property and all of the uses to which the land may be applied or for which it is adapted are to be considered.

O.C.G.A. §22-2-62

Hard v. Housing Authority of The City of Atlanta, 219 Ga. 74, 80 (1963)

14.240 **Condemnation; Fair Market Value Not Necessarily Same as Actual Value**

(This charge should be used only when authorized by the evidence.)

Although fair market value is ordinarily the same as actual value, there may be circumstances in which it may not be the same, and under those circumstances your measure of damage would be actual value. It is up to you to determine whether such circumstances exist.

State Highway Dept. v. Robinson, 103 Ga. App. 12 (1961) and numerous citations

State Highway Dept. v. Whitehurst, 106 Ga. App. 532 (1962)

14.250 **Condemnation; Peculiar Value to Owner; Sentimental or Speculative Value Forbidden**

(This charge should be used only when authorized by the evidence.)

You are entitled to consider the peculiar value of property to the owner under certain conditions, but before you consider the peculiar value of property to the owner, you must find that the relationship of the owner to it is peculiar, that its advantages to the owner are more or less exclusive and would not be likely to apply to another owner.

You are only entitled to consider matters involving money value and not speculative, sentimental, whimsical, or other value not capable of mathematical calculation.

City of Gainesville v. Chambers, 118 Ga. App. 25, 27 (1968)

State Highway Dept. v. Robinson, 103 Ga. App. 12, 14 (1961)

14.260 **Condemnation; Change in Value Resulting from Condemnation**

In determining the amount of compensation, you may consider any increase (decrease) in the value of the property affected as a result of the general knowledge of the condemnation

that was about to take place or the project that was to take place, if you find that there was such increase (decrease).

Gate City Terminal Co. v. Thrower, 136 Ga. 456 (1911)
Hard v. Housing Authority of the City of Atlanta, 219 Ga. 74 (1963)
Housing Authority of the City of Decatur v. Schroeder, 222 Ga. 417 (1966)

14.270 **Condemnation; Zoning; Effect of**

In determining the value of property, you are restricted to the uses that may be lawfully made of it at the time of the taking as set out in zoning ordinances then in effect, unless there is a possibility or a probability that a zoning ordinance will be repealed or amended so as to authorize a more valuable use in the immediate future sufficient to have an effect on the value. If you find that there is enough likelihood of change for you to consider it, you should not consider the change as an accomplished fact but only the effect that the probability would have on the value.

Civils v. Fulton County, 108 Ga. App. 793 (1963)
D.O.T. v. Sconyers, 151 Ga. App. 824 (1979)

14.280 **Condemnation; View of Premises**

(This charge should be used only when the jury has been allowed to view the condemned property.)

You have been permitted to view the condemned property and the remaining property of the defendant. Please remember that condemnation is fixed as of the date of the taking whether the property looks the same now or not. Your verdict must be based on sworn testimony. You may apply any information gained from viewing the premises to the sworn testimony, but you may not use your own conclusions from viewing the premises in place of sworn testimony.

State Highway Dept. of Ga. v. Andrus, 212 Ga. 737 (1956)
Weeks v. DeKalb County, 140 Ga. App. 15 (1976)

14.300 **Condemnation; Limited-Access Road; Definition**

A limited-access road is a public highway, road, or street for through traffic and over, from, or to which owners or occupants of adjacent land or other persons have no right to easement or only a limited right or easement of access, light, view, or air by reason of the fact that their property borders on such limited-access highway, road, or street, or for any other reason.

O.C.G.A. §32-1-3

14.310 **Condemnation; Limited-Access Road; Deprivation of Access Rights**

A limited-access highway is a special kind of highway provided for by law. A person ordinarily has the right of access to a public road or highway that goes through the person's property; that is, the right to go on or off the highway from or to the property, which is a property right and for which the person is entitled to be paid if a condemnation takes away that right. These rights do not pertain to limited-access highways, and the owner is not entitled to such payments for the lack or absence of access rights.

(The next provision refers to interference with access to an existing road or highway and should be charged only if applicable to the facts.)

If the construction of a limited-access highway interferes with the owner's access right, the owner's right of access to an existing road would have to be taken into account, condemned, and included in the owner's compensation for land actually taken.

14.400 **Condemnation; Leased Property**

In determining the damages for the condemnation of land that is being leased, you would need to determine both the amount of damages to the lessor (that is, the owner) and to the lessee (that is, the person it is being leased to). Ordinarily, the total amount of such damage would not exceed the total fair market value of the land. The measure of damages to the lessee (the person it is being leased to) would ordinarily be the market value of the lease to the lessee (the person leasing it), less the amount of rent payable under the lease. The remaining value of the lease to the lessor (owner) would ordinarily be its rental value to him/her/it for the period of the lease, plus the value of the reversion or the value of his/her/its future interest after the lease has ended.

If there are special damages, such as loss of profits and business or expenses for removal of business or other matters that would make the fair market value test inadequate, you would consider these matters in addition to the fair market value of the land in determining what is just and adequate compensation for the lessor and the lessee.

Business losses are recoverable as a separate item of damages only if you believe from the evidence that the property involved is unique.

MARTA v. Ply-Marts Inc., 144 Ga. App. 482 (1978)
D.O.T. v. Dixie Highway Bottle Shop Inc., 245 Ga. 314 (1980)

Unique property is property of a type not generally bought and sold on the open market. Unique property is property that must be valued by something other than the fair market value standard.

Unique property may be measured by a variety of non–fair market methods of valuation, including the cost and income methods.

Housing Authority of The City of Atlanta v. Southern Railway Co., 245 Ga. 229 (1980)

If the property is unique and the business belongs to the landowner, total destruction of the business or permanent business loss at the location condemned must be proved before business losses may be recovered as separate damages.

D.O.T. v. Dent, 142 Ga. App. 94 (1977)
D.O.T. v. Arnold, 243 Ga. App. 15 (2000)

If one person owns the property and leases it to another who operates a business on the leased property, which is unique, the lessee may recover for business losses as damages separate from the value of the leasehold whether the destruction of the lessee's business is total or partial, provided the loss is proved with reasonable certainty and is not speculative or remote.

D.O.T. v. Kendricks, 148 Ga. App. 242 (1978)
State Highway Dept. v. Thomas, 115 Ga. App. 372 (1967)
McGhee v. Floyd County, 95 Ga. App. 221, 223 (1957)
Housing Authority of Savannah v. Savannah Iron & Wire Works Inc., 91 Ga. App. 881 (1955)

14.500 **Verdict; Quotient**

(See 02.210 Verdict; Quotient.)

14.510 **Jury; Final Instructions**

(See 02.270 Jury; Final Instructions.)

14.520 **Condemnation; Verdict; Generally**

The form of your verdict can only be, "We, the jury, find in favor of defendant the sum of *(blank)* dollars." You should insert such sum in dollars as you find shall be sufficient as just and adequate compensation. You should add up all damages of every sort that the defendant is entitled to, and the total sum would be the amount of your verdict.

16.000 CONTRACTS

16.010 Contracts; Definition

A contract is an agreement between two or more parties for the doing or not doing of some specified thing.

O.C.G.A. §13-1-1

16.020 Contracts; Essentials

To constitute a lawful contract, there must be parties able to contract, a consideration for the contract, the agreement of the parties to the terms of the contract, and a lawful subject matter.

O.C.G.A. §13-3-1

A consideration is valid if any person who promised is entitled to a benefit or any harm is done to one who receives the promise.

(Considerations are distinguished as good and valuable. A good consideration is founded on natural duty and affection or on a strong moral obligation. A valuable consideration is founded on money or something convertible into money or has a value in money. Marriage is also a valuable consideration.)

O.C.G.A. §§13-3-41, 13-3-42

(See O.C.G.A. §13-3-44, Promissory Estoppel.)

16.030 Contracts; Assent; Generally

The consent of the parties is essential to the validity or enforcement of a contract, and until both parties have agreed to all its terms, there is no contract. Until the contract is agreed to, a party may withdraw an offer or bid or proposition.

O.C.G.A. §13-3-2

16.040 **Contracts; Assent; Letters and Replies**

If the offer is made by mail, the acceptance by written reply takes effect from the time it is mailed and not from the time it is received; the offeror cannot withdraw in the meantime. If the offer contains different terms, the party receiving the offer has the right to choose which terms will be accepted, and the sending party will be bound by such choice.

O.C.G.A. §13-3-3

16.050 **Contracts; Assent; Sales of Goods**

(For applicability of this charge, see definition of goods in O.C.G.A. §11-2-105.)

As to sales of goods, unless otherwise clearly indicated by the language or circumstances, an offer to make a contract shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances. A definite and reasonable expression of acceptance or a written confirmation that is sent within a reasonable time operates as an acceptance, even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional upon assent to the additional or different terms. The additional terms are to be construed as proposals for addition to the contract.

Conduct by both parties that recognizes the existence of a contract is sufficient to establish a contract for sale, but the writings of the parties do not otherwise establish a contract. In such case, the terms of the particular contract consist of those terms to which the writings of the parties agree, together with any supplementary provisions incorporated under any other terms of the Uniform Commercial Code.

O.C.G.A. §§11-2-206, 11-2-207

16.060 **Contracts; Novation**

A new contract as to the same matter and with no new consideration does not destroy the original contract between the same parties. However, if new parties are introduced by novation so as to change the person to whom the obligation is due, the original contract is at an end.

A novation has four essential elements:

1) previous valid obligation,
2) agreement of all parties to new contract,
3) cancellation of old contract, and
4) validity of new contract.

O.C.G.A. §13-4-5

Collier Estate v. Murray, 145 Ga. 851 (1916)

Williams v. Rowe, 205 Ga. 770 (1949)

16.100 **Contracts; Temporary Departure; Generally**

When parties in the performance of a contract depart from its terms and pay or receive money under such departure before either party can recover for failure to carry out the exact terms of the agreement, reasonable notice must be given to the other party of intention to rely on the exact terms of the agreement. The original contract will be suspended by the departure until such notice.

In order for this rule to have application, it is necessary that the circumstances be such as will in law imply a mutual new agreement whereby new, distinct, and definite terms are supplied in lieu of those provided for by the original contract. The departure from the terms of the contract must have been substantial and such as to make it inequitable for the creditor to demand without previous notice all past-due payments or to proceed to collect by suit. Evidence of the buyer's repeated, late, irregular payments, which were accepted by the person to whom payment was due, is a factor for your consideration in determining whether a new mutual agreement is to be implied.

O.C.G.A. §13-4-4

Ball v. Foundation Co., 25 Ga. App. 126(1) (1920)

Ford v. Prudential Investment Co., 174 Ga. 163 (1932)

Kennesaw Guano Co. v. Miles & Co., 132 Ga. 763 (1909)

MacGuire v. Ivey, 212 Ga. 151, 154 (1956)

Commercial Trust Co. Inc. v. Mathis, 100 Ga. App. 620, 622 (1959)

Smith v. General Finance Corp., 243 Ga. 500, 501 (1979)

Wright Carriage Co. v. The Business Development Corp. of Georgia, 221 Ga. App. 49 (1996)

(See O.C.G.A. §11-2-209 for retraction of waiver or modification of contract terms.)

16.110 **Contracts; Temporary Departure; Sales of Goods**

(For applicability of this charge, see definition of goods in O.C.G.A. §11-2-105.)

An agreement modifying a contract for the sale of goods needs no consideration to be binding.

O.C.G.A. §11-2-20

16.200 **Contracts; Good Faith Performance, Duty of**

As a general rule, there is implied in every contract for work or services a duty to perform it skillfully and carefully. The law requires persons undertaking to perform services requiring skill the duty to use that reasonable degree of care, skill, and ability that would be used under similar conditions and circumstances by others of the same business or profession.

Howell v. Ayers, 129 Ga. App. 899 (1973)

(See 62.740, Negligent Construction.)

16.210 **Contracts; Economic Impossibility of Performance**

O.C.G.A. §§13-4-21, 11-2-615

16.220 **Contracts; Accident and Mistake**

(See 16.221–16.510.)

16.221 **Contracts; Accident; Definition**

In some circumstances, a party to a contract may be relieved from the duties and responsibilities of the contract upon the happening of an accident. The accident, to be a sufficient occurrence, must meet the following three requirements:

1) It must not be the result of the negligence or misconduct of the party seeking relief;
2) It must not have been anticipated by the parties at the time the contract was entered into; and
3) The result of the accident must be that one of the parties has gained an undue advantage over the other in a court of law.

O.C.G.A. §23-2-20

16.300 **Contracts; Mistake; Definition; Degree of Proof**

A mistake, in order to be worthy of relief, should be some unintentional act, omission, or error arising from ignorance, surprise, imposition, or misplaced confidence.

Mistake may be either of law or of fact.

The power to relieve mistakes shall be exercised with caution; to justify it, the evidence shall be clear, unequivocal, and decisive as to the mistake.

A relievable mistake must be in reference to a material present or past fact.

O.C.G.A. §23-2-21

Newberry v. McCook, 146 Ga. 679(1) (1917)

Cantrell v. Kaylor, 203 Ga. 157, 166 (1947)

Callan v. Citizens, etc., 184 Ga. 87(3) (1937)

Lewis v. Williford, 235 Ga. 558 (1975)

Whipple v. Houston, 214 Ga. 532 (1958)

16.310 **Contracts; Mistake of Law**

An honest mistake of the law as to the effect of an instrument on the part of both contracting parties, when such mistake operates as a great injustice to one and gives an unconscionable advantage to the owner, may be relieved.

A mutual mistake of law is a good defense against an action to recover money under a contract when there is full knowledge of all the facts but the parties have acted under a misapprehension of the law as applied to those facts, provided the mistake is clearly proved and the plaintiff could not in good conscience have received the money sued for. This principle applies to reformation of documents.

O.C.G.A. §23-2-22

Holmes v. Holmes, 140 Ga. 217(1) (1913)

(Charge the following only if applicable.)

A mistake of law by the person who drafted the contract or other agent by which the contract, as executed, does not fulfill or violates the obvious intention of the parties to the agreement may (also) be relieved in equity.

O.C.G.A. §23-2-23

If the form of a conveyance is, by accident or mistake, contrary to the intention of the parties in their contract, equity shall interfere to make it conform to that intention.

O.C.G.A. §23-2-25

16.320 **Contracts; Mistake of Fact**

In all cases of a mistake of fact material to the contract or other matter affected by it, if the party complaining applies within a reasonable time, relief may be granted.

O.C.G.A. §23-2-24

16.330 **Contracts; Reformation; Mutual Mistake**

A court of equity will reform a contract when there is mutual mistake (that is, a mistake common to both parties) or when there is ignorance or mistake on one side and fraud or inequitable conduct on the other side. These conditions apply to mistakes of both law and fact.

O.C.G.A. §23-2-31 and annotations under fraud

Hunnicutt v. Archer, 163 Ga. 868(2) (1927)

Jackson v. Brown, 209 Ga. 78, 79 (1952)

Blanchard & Calhoun Realty Co. v. Comer, 185 Ga. 448, 453(1) (1938)

Helton v. Shellnut, 186 Ga. 185 (1938)

DeLong v. Cobb, 215 Ga. 500 (1959)

Lewis v. Williford, 235 Ga. 558 (1975)

16.400 **Contracts; Diligence; Negligence**

Upon reasonable application and under proper circumstances, a party may be relieved from the injurious consequences of an act done under a mistake of fact. However, relief will not be granted to a party who could have used reasonable care to determine the truth of the matter.

The negligence of the complaining party, preventing relief, is that lack of reasonable care, the absence of which would be a violation of legal duty. Relief may be granted even in cases of negligence by the complainant if it appears that the other party has not been prejudiced.

O.C.G.A. §§23-2-29, 23-2-32

Keith v. Brewster, 114 Ga. 176 (1901)

Williams v. Lockhart, 221 Ga. 343, 344 (1965)

J.C. Penney v. West, 140 Ga. App. 110 (1976)

16.410 **Contracts; Duty to Ascertain Facts**

In the absence of misrepresentation or fraud, ignorance of a fact known to the opposite party will not justify relief, unless there is some reason why the injured party should have relied on the opposite party for information and, in so relying, was deceived either by conduct or words.

Ignorance by both parties of a fact shall not justify the interference of the court, nor shall a mistake in judgment or opinion merely as to the value of property authorize such interference.

O.C.G.A. §23-2-28

Langston v. Langston, 147 Ga. 318 (1917)

James v. Tarpley, 209 Ga. 421, 423 (1952)

Cline v. Schuster, 221 Ga. 653 (1966)

16.420 **Contracts; Misrepresentation; Fraud**

A written contract will not be reformed in the absence of fiduciary or confidential relations between the parties because of mistakes as to the contents of the writing on the part of the

complaining party who was able to read and fraud of the other party consisting of false representation as to the contents of the writing on which the complaining party relied as true because of confidence in the party making them.

If a party, by reasonable care, could have discovered the truth, relief will not be granted, nor shall ignorance of a fact known to the opposite party justify relief if there has been no misplaced confidence, misrepresentation, or other fraudulent act.

When a contract has been made but, because of a mistake on the part of one of the parties and accompanied by fraud on the part of the other, the instrument as executed does not express the true intent, you may reform the instrument and make it conform to the intent of the parties. But the complaining party must act within a reasonable time. The evidence to justify the reformation must be clear and convincing.

(See 02.040, Clear and Convincing Evidence. Clarke v. Cotton, *263 Ga. 861 [1994].)*

O.C.G.A. §23-2-29
Weaver v. Roberson, 134 Ga. 149(1) (1910)
Sheldon v. Hargrose, 213 Ga. 672, 175 (1957)
Quiggle v. Vining, 125 Ga. 98 (1906)
Davis v. United American, etc., 215 Ga. 521, 525 (1959)

16.500 **Contracts; Rescission or Cancellation; Unilateral Mistake**

A written contract will not be reformed, unless the mistake is shown to be the mistake of both parties, but it may be rescinded and cancelled upon the mistake of fact of one party only material to the contract.

When, because of a mistake, a contract does not really represent the truth of the agreement as understood by one of the parties, it may be rescinded.

O.C.G.A. §23-2-31
Quiggle v. Vining, 125 Ga. 98 (1906)
Davis v. United American, etc., 215 Ga. 521, 525 (1959)

16.510 **Contracts; Execution of Contract; Unilateral Mistake**

A distinction exists between reforming a contract and executing a contract in case of mistake. To authorize reforming a contract, the court shall be satisfied by the evidence that the mistake was mutual, but the court may refuse to act in the latter case if the mistake is confined to the party refusing to execute.

O.C.G.A. §23-2-30

16.600 **Contracts; Account**

(See 16.610–16.650.)

16.610 **Contracts; Account; Definition**

An account is a business relation in which goods (and/or services) are furnished upon credit by one party at the request of another party.

16.620 **Contracts; Account; Defendant Must Authorize Account**

In order to recover upon account, the plaintiff must prove that the goods (services) were furnished for the defendant's account at the request of the defendant or by someone authorized by the defendant to make such a request.

If goods (services) were furnished at the request of someone other than the defendant, and it was not intended that a credit relationship exist between the plaintiff and the defendant, you would find against the plaintiff and for the defendant.

16.630 **Contracts; Account; Plaintiff Must Prove Correctness**

In order to recover damages, the plaintiff must prove the correct amount due and unpaid on the account.

16.640 **Contracts; Account Stated**

An account stated is an agreement by which persons who have had previous transactions with each other fix the amount due in respect to such transactions by mutual agreement and the one indebted promises payment of the balance.

Moore v. Hendrix & Hodges, 144 Ga. 646, 648 (1916)

In order to convert an open account into an account stated, an oral agreement as to the amount and an oral promise to pay are sufficient.

Martin v. Mayer, 63 Ga. App. 387, 399 (1940)

16.650 **Contracts; Account Stated by Implication**

An account may become stated even without express agreement. If a statement of an account is rendered to the debtor and the debtor fails to object to it, the jury may be authorized to infer that the failure to raise any objections was an implied agreement that the account was correct, but this inference is not demanded as a matter of law.

A promise to pay may be either express or implied, but a failure to object to an account rendered does not require the jury to infer a promise to pay from mere acquiescence in the correctness of the amount.

Shores-Mueller Company v. Bell, 21 Ga. App. 194, 195 (1917)

While such a failure to object may be considered by the jury, it is not to be regarded as final proof but only a means of proof having evidentiary value, and it is subject to explanation and denial by other evidence.

Elliott v. National Union Radio Corporation, 68 Ga. App. 873, 876 (1943)

Whether any explanation or denial is sufficient is a matter for the jury to determine, keeping in mind that the burden of proof is on the plaintiff. The jury may find that the failure of the defendant to object within a reasonable time to a statement of account shifts to the defendant the burden of going forward with the evidence or an unfavorable inference may be made regarding the defendant's testimony. No inference would be drawn from the rendering of a statement of account by the plaintiff if the defendant gave timely objections to any inaccuracies found in the statement or if the defendant has satisfactorily explained the failure to so object.

If you find that there has been no acknowledgment and oral promise to pay, either expressed or implied, the rules relating to an account stated simply would not apply, and you

would then resolve the issue based upon the rule that in order to recover, the plaintiff must prove the correctness of the account and the liability of the defendant to pay it.

Lawson v. Dixie Feed and Seed Company Inc., 112 Ga. App. 562 (1965)

(Note: For rules concerning Statute of Limitation on Open Accounts, see O.C.G.A. §9-3-25; for special rule on Limitations Concerning Mutual Accounts, see O.C.G.A. §9-3-7.)

16.700 **Contracts; *Quantum Meruit***

(See 16.710–16.760.)

16.710 **Contracts; *Quantum Meruit*; Statutory Provision**

Ordinarily, when one renders services or transfers property valuable to another that the other accepts, a promise is implied to pay the reasonable value of the services or property (but this presumption does not usually arise in cases between very near relatives).

O.C.G.A. §9-2-7

(See O.C.G.A. §10-6-37, Suit for Breach of Contract of Agency; §53-12-90, Trusts Implied, When; and §53-12-92, Gift Presumed Between Near Relatives; Rebuttal of Presumption.)

16.720 **Contracts; *Quantum Meruit*; Definition**

Quantum meruit, meaning "as much as a person deserves," is an action for work and labor founded on an implied promise on the part of the defendant to pay the plaintiff as much as is reasonably deserved for labor performed. It refers to obligations imposed by law without regard to intention or assent of the parties dictated by reason and justice.

16.730 **Contracts; *Quantum Meruit*; Amount of Recovery**

The amount of recovery is determined by the jury based upon the reasonable value of the services rendered to the opposite party despite of the absence of a specific agreement as to value.

16.740 **Contracts; *Quantum Meruit*; Not Applicable Where Express Contract Exists**

When an express contract between the parties exists, then the value of such services and other terms will be set by it, and the plaintiff would not be authorized to recover on *quantum meruit*, unless you find that the plaintiff performed services not contemplated by the parties in the original written contract.

Venture Construction Company v. Great American Mortgage Investors, 134 Ga. App. 440, 444 (1975)

Rushing v. Jones, 68 Ga. App. 300 (1942)

Recovery may be authorized in *quantum meruit* when a party receives benefits in part performance that exceed damages incurred by failure of full performance.

Southern Railway Company v. Branil, 9 Ga. App. 310, 312 (1911)

16.750 **Contracts; *Quantum Meruit*; Essential Requisites for Recovery**

In order for the plaintiff to recover, the plaintiff must show that he/she had such a relationship with the defendant as to authorize the plaintiff to render the services alleged, that valuable services were rendered, that such services were accepted, that they benefited the defendant, and that they had a reasonable value. The value of the services must be proved by a preponderance of the evidence.

Davis v. Glenville Haldi, P.C., 148 Ga. App. 842 (1979)

Parker and Company Inc. v. Glenn, 90 Ga. App. 500, 506 (1954)

16.760 **Contracts; *Quantum Meruit*; Circumstances between Near Relatives for Jury to Determine**

In order for a party to recover for services from a near relative such as are usually given because of a natural sense of duty and affection arising out of relation, it must affirmatively appear that such services were performed under an express contract, or the surrounding circumstances must plainly indicate that it was the intention of both parties that compensation would be made.

It is a question for the jury to determine what circumstances are sufficient to support the usual implication of a promise to pay for services or to repeal a counterinference that the performance was prompted by affection and that the services were rendered without expectation of payment.

Edwards v. Smith, 42 Ga. App. 730 (1931)

(Note: The theory of recovery involved in quantum meruit *should be distinguished from actions for money or property that in equity and good conscience there is no right to retain against another with a legitimate interest therein.)*

Whitehead v. Peck, 1 Ga. 140 (1846)
Carmichael Tile Company v. Bayley and Company, 42 Ga. App. 408 (1930)
Fain v. Neal, 97 Ga. App. 497, 498 (1958)

(Note: The charges on quantum meruit *can be modified and used in* quantum valebant *situations for goods sold and delivered.)*

16.800 **Contracts; Rescission**

(See 16.810–16.830.)

16.810 **Contracts; Rescission; by Consent**

After a contract is made, neither party to such contract can rescind it merely by giving notice to the other party of the intention to do so without the agreement or consent of the other, but it may be rescinded with the consent of both parties.

Warren v. Gray, 90 Ga. App. 398, 404 (1954)

16.820 **Contracts; Rescission; for Nonperformance**

In some cases, a party may rescind without the consent of the opposite party for nonperformance of covenants but only when both parties can be restored to the condition they were in before the contract was made.

16.830 **Contracts; Rescission; *Status Quo Ante* Required**

When a contract is rescinded, the parties shall be restored to their original status.

Brown v. Techdata Corp., 238 Ga. 622 (1977)

18.000 CONTRACT DAMAGES

18.010 Contract Damages

Damages are given as compensation for injury sustained.

Damages recoverable for a breach of contract are such as arise naturally and according to the usual course of things from the breach and such as the parties contemplated when the contract was made as the probable result of the breach.

O.C.G.A. §§13-6-1, 13-6-2, 13-6-7

18.011 Contract Damages; Agreement

If the parties agree in their contract on the damages for a breach, they are said to be liquidated, and unless the agreement violates some principle of law, the parties are bound by it.

O.C.G.A. §13-6-7

18.012 Contract Damages; Nominal Damages

In every case of breach of contract, the party not breaching it has a right to damages. But, if there has been no actual damage, the plaintiff can recover nominal damages that will carry expenses of litigation.

O.C.G.A. §§13-6-6, 13-6-12

18.020 Contract Damages; Attorney's Fees (Expenses of Litigation); Generally

The expenses of litigation are not generally allowed as a part of the damages. But, if the defendant has acted in bad faith or has been stubbornly litigious or has caused the plaintiff unnecessary trouble and expense, you may allow them. You should determine from the evidence the attorney's fees (or other expense), if any, as will be allowed.

O.C.G.A. §13-6-11

18.021 **Attorney's Fees (Expenses of Litigation); Notes, Provisions in**

(See O.C.G.A. §13-1-11. Because liability or nonliability will usually be a matter of law, the same is omitted as a jury charge.)

18.022 **Attorney's Fees (Expenses of Litigation); Exemplary Damages**

Unless otherwise provided by law, exemplary damages can never be allowed in cases arising on contracts.

O.C.G.A. §13-6-10

18.030 **Contract Damages; Remote or Consequential**

Remote or consequential damages are not allowed whenever they cannot be traced solely to the breach of the contract, unless they may be computed exactly, such as the profits that are the immediate fruit of the contract and are independent of any collateral enterprises entered into in contemplation of the contract.

O.C.G.A. §13-6-8

18.040 **Contract Damages; Interest**

The amount of damages at the date of breach of contract may be increased by the addition of legal interest from that time until the time of recovery.

All liquidated demands, whether by agreement or otherwise the sum to be paid is fixed and certain, bear interest from the time the party shall become liable and bound to pay them; if payable on demand, they bear interest from the time of the demand. In case of promissory notes payable on demand, the law presumes a demand instantly and gives interest from date.

O.C.G.A. §§13-6-13, 7-4-15

18.050 Contract Damages; Warranty, Breach of; Land; Personalty

(See 18.051–18.052.)

18.051 Warranty, Breach of; Land

Upon a breach of covenant of warranty of title to land, the damages should be the purchase money with interest from the time of sale, unless the jury should think, under the circumstances of the case, that the use of the premises was equal to the interest on the money and that an equitable setoff should be allowed. If valuable improvements have been made, the interest should be allowed.

O.C.G.A. §44-5-66

18.052 Warranty, Breach of; Personalty

If the buyer has accepted goods and given notification (O.C.G.A. §11-2-607(3)), the buyer may recover as damages for any nonconformity of tender the loss resulting in the ordinary course of events from the seller's breach as determined in any manner that is reasonable.

The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value the goods would have been if they had been as warranted, unless special circumstances show proximate damages of a different amount.

In a proper case, any incidental and consequential damages under the next section may also be recovered.

O.C.G.A. §11-2-714

The buyer on notifying the seller of the intention to do so may deduct all or any part of the damages resulting from any breach of the contract from any part of the price still due under the same contract.

O.C.G.A. §11-2-717

18.060 Contract Damages; Expenses

Any necessary expense that one of two contracting parties incur in complying with the contract may be recovered as damages.

O.C.G.A. §13-6-9

18.070 **Contract Damages; Lessen Damages, Duty to**

When by a breach of contract one is injured, one is bound to lessen the damages as far as is practicable by the use of ordinary care.

O.C.G.A. §13-6-5

20.000 DEBTOR AND CREDITOR

(For cases occurring on or after 7/1/2002, please see O.C.G.A. §18-2-70 et seq.)

20.010 Debtor and Creditor; Acts Void as Against Creditors; Examples

The following acts by debtors shall be fraudulent in law against creditors and others, and as to them null and void:

1) every assignment or transfer by a debtor, insolvent at the time, of real or personal property or chooses in action of any description to any person, either in trust or for the benefit of or on behalf of creditors, where any trust or benefit is reserved to the assignor or any person for him;
2) every conveyance of real or personal estate, by writing or otherwise, and every bond, suit, judgment, and execution or contract of any description had or made with intention to delay or defraud creditors and such intention known to the party taking shall be fraudulent in law as to creditors, and as to them null and void. A bona fide transaction on a valuable consideration and without notice or ground for reasonable suspicion shall be valid; and
3) every voluntary deed or conveyance, not for valuable consideration, made by a debtor who is insolvent at the time of the conveyance.

O.C.G.A. §18-2-22 *(acts before 7/1/2002)*

20.020 Debtor and Creditor; Good Faith, Test of

When the issue is the good faith of a sale by a debtor, if the jury should find that the sale was made with the intention on the part of the seller to hinder, delay, or defraud a creditor or creditors and such intention was known to the party taking at the time of the sale or could have been known by the party by the exercise of ordinary and reasonable care, the jury should find in favor of the creditor.

If the jury should find that the sale was not made for the purpose of hindering, delaying, or defrauding a creditor or creditors of the seller or if the jury should find that the sale was made for the purpose of hindering, delaying, and defrauding, and the purchaser had

no knowledge of it and could not acquire such knowledge through the exercise of ordinary and reasonable care, the jury would be authorized to find in favor of the purchaser.

Spence v. Morrow, 128 Ga. 722(4) (1907)
Cunningham v. Avakian, 187 Ga. 575 (1939)

20.030 **Debtor and Creditor; Credit on Faith of Title of Spouse**

If the legal title to land is in a spouse, and credit is extended to that spouse on the faith of such apparent ownership and without knowledge of a secret equity in the other spouse, the rights of the creditor will be superior to and enforced against the secret equity of the other spouse.

(Note: Relating subject matter pertaining to transactions between spouses is set out under that topic.)

Parker v. Harling, 187 Ga. 419(2) (1939)

20.040 **Debtor and Creditor; Right of Debtor to Prefer Creditors**

A debtor may pay one creditor before another, and in that regard, the debtor may in good faith give a creditor a lien by mortgage or other legal means, or the debtor may sell the creditor something in payment of the debt or may transfer a cause of action as security for the debt when the surplus is not reserved for the debtor's own benefit.

O.C.G.A. §18-2-40

22.000 DIVORCE, EQUITABLE DIVISION OF PROPERTY, AND ALIMONY

(Last updated January 2015 – insert other applicable general civil charges.)

This preliminary charge 22.001 and the general charge 22.005 et al. are specifically adapted for use in domestic cases. We have included cross-references to the civil charge book to facilitate incorporation of other standard charges as appropriate.

For cases that do not involve child support, charge the appropriate parts of Sections 22.000 only. For cases involving child support, charge the appropriate charges of Section 22.000 et al. and then charge the appropriate charges from Section 23.000 et al. Consider a jury trial procedure where assets and alimony are decided first because those verdicts will impact the jury's decision on child support issues. A suggested trial procedure is listed below.

Phase 1

a. *Preliminary domestic instructions (22.001)*
b. *Presentation of all evidence for case and arguments.*
c. *Charge of court on all issues except child support (22.005 et al.)*
d. *Verdict on divorce, alimony, and equitable division*

Phase 2

a. *Argument of counsel*
b. *Charge Child Support 23.000 et seq.*
c. *Verdict on gross monthly income of each parent*
d. *Computation by court of child support using the child support worksheet*

Phase 3 (if deviations are at issue)

a. *Court advises the jury as to decision on custody (and visitation)*
b. *Argument on deviations*
c. *Charge on deviations*
d. *Verdict on deviations*
e. *Computation by court of child support if deviations are awarded using the child support worksheet*

Note: Phases 2 and 3 are for argument, charge, deliberation, and verdict only; there is no further presentation of evidence. For simple cases, it may be possible to combine Phase 1 and Phase 2, but the sequence of decision making by the jury would still apply.

22.001 **Divorce (Child Support); Preliminary Instructions**

(Read before commencement of trial.)

Members of the jury, you are about to try the case of _____v._____. You will be deciding whether_____(is/are) entitled to a divorce (note: this may not be an issue if both parties agree to the divorce in the complaint and counterclaim). You will (also) be deciding issues incidental to divorce such as equitable division of property (and alimony) (and child support). Under Georgia law, it is my duty as the trial judge to determine the law applicable to this case, and it is your duty, as the jury, to determine the facts of the case. It is also your duty to apply the law to those facts in reaching your verdict.

The facts are determined by you from the evidence. The evidence consists of two things: testimony and exhibits. Testimony is evidence which you will hear under oath from the witness(es). Exhibits are documents or photos or other items that have been admitted into evidence. You will have those exhibits with you in the jury room for your use during your deliberations.

I caution you that nothing the lawyers or I say during this trial is evidence. Nothing the attorneys say in their opening statements, closing arguments, or during the trial is evidence, nor is anything I do or say evidence. I have no leanings in this case whatsoever.

(At the beginning of the trial, you will be given various forms such as financial affidavits and child support calculation schedules of either or both parties. I instruct you that these forms are not evidence but are the contentions of the parties in the format required by law. These forms are not to be considered by you as evidence until and unless and to the extent they are supported by admissible evidence, such as by testimony or by other admitted exhibits [or unless the figures of both parties coincide, which you may regard as a stipulation of fact]).

My interest in this case is to see that the case is tried fairly as to both parties and to see that it is tried according to the laws of the State of Georgia and according to the Constitutions of this State and of the United States.

00.030 Parties (Optional)

In a divorce case such as this, each party has a claim against the other. Each party has the burden of proving entitlement to that which he/she seeks. Each party must prove his/her respective case by what is known as a preponderance of the evidence.

The term preponderance means greater weight, and as it is used here, preponderance of the evidence means the greater weight of evidence upon the issues involved. The weight of evidence need not be enough to completely free the mind from a reasonable doubt, but to be a preponderance of the evidence, the weight of the evidence must be sufficient to incline a reasonable and impartial mind to one side of the issue rather than to the other.

If you find that the evidence is evenly balanced on any issue in the case, it is your duty to resolve that issue against the party having the burden of proving that issue.

The procedure followed in a divorce trial is generally as follows: First, the attorneys for both sides have the opportunity to make an opening statement to you. This opening statement is not evidence. Remember that what the lawyers say is not evidence. An opening statement is a preview or an outline of what they expect the evidence to show. Following the opening statements, one party presents evidence; that is, one party calls witnesses and introduces any exhibits they may have. The other party has the right to cross-examine these witnesses. When the first party has presented all his/her evidence, that party will rest his/her case. The other party then has the opportunity to present his/her case, which means they then call witnesses and introduce any exhibits. The first party has the right to cross-examine the second party's witnesses.

After the presentation of all the evidence, the attorneys have the opportunity to make a closing argument to you. At this time, the attorneys will point to certain evidence and law they consider favorable to their position and argue persuasively to you to decide the case in their favor. Both sides have the opportunity to make this closing argument. The closing arguments are not evidence.

Following the closing arguments, I will charge you on the law applicable to this case. I will then ask you to retire to the jury room to deliberate and reach your verdict as to the issue(s) of (equitable division) (alimony). (You will decide child support in a second phase of the trial.)

Please remember during the course of this trial to listen carefully to all of the evidence. Keep an open mind until all of the evidence has been presented to you. I instruct that it is improper for you to discuss this case with anyone or to allow anyone to discuss the case with you or in your presence or hearing. You cannot discuss the case with each other in the jury room or elsewhere before actual deliberations begin, and then only in the presence of all 12 of you. (After you have returned your verdict on the issue(s) of (equitable division of property) (alimony), I will charge you further on the law pertaining to child support.) Have no contact with the attorneys, parties, or witnesses to this case. Do not go on or about any areas described by the witnesses to this case.

00.090 Note Taking by Jurors

00.110 Juror Use of Electronic Technology

END OF PRELIMINARY CHARGE

22.005 **Divorce; Introduction**

You have been considering the case of *(enter name of plaintiff)* as Plaintiff v. *(enter name of defendant)* as Defendant, Civil Action No. *(enter number).* (One of the issues that you must decide in this case is whether or not_____is entitled to a divorce.) (The divorce is agreed to by the parties and will be granted by the court upon the conclusion of the trial.) You will (also) be deciding issues incidental to divorce. Each party is seeking an equitable division of property (and Plaintiff/Defendant is/are seeking alimony). Each party has the burden of proof as to what he/she seeks. The party who has the burden of proof must prove his/her case by what is known as a preponderance of the evidence.

The term preponderance means greater weight, and as it is used here, preponderance of the evidence means the greater weight of evidence upon the issues involved. The weight of evidence need not be enough to completely free the mind from a reasonable doubt, but to be a preponderance of the evidence, the weight of the evidence must be sufficient to incline a reasonable and impartial mind to one side of the issue rather than to the other.

If you find that the evidence is evenly balanced on any issue in the case, it is your duty to resolve that issue against the party having the burden of proving that issue.
(Refer to the following charges from General Instructions as appropriate.)

02.100 Evidence, Generally

02.110 Evidence, Direct or Circumstantial

02.120 Expert Witnesses

02.121 Expert Witness; Fair Market Value; Comparable Sales (see 14.210 et seq., Condemnation; Fair Market Value)

02.130 Credibility of Witnesses

02.150 Witness, Attacked (Old Impeached)

02.154 Witness, Supported

02.156 Witness, Impeached, Credibility Attacked

02.160 Failure to Produce Evidence

02.161 Failure to Produce Witnesses; Generally

If the divorce is contested, give the portions of 22.010–22.070 that are applicable. If the divorce is agreed between the parties, go to 22.090.

22.010 **Divorce; How Granted (if contested)**

Under our law, total divorces may be granted in proper cases.

O.C.G.A. §19-5-1

You should decide the issue of divorce first, because if the divorce is not granted, there is no need to decide any other issue.

22.020 General Charge (Grounds)

The plaintiff in this case is seeking a divorce upon the grounds of_____, which is a legal ground for divorce in Georgia.

O.C.G.A. §19-5-3 (note that all grounds for divorce are listed in O.C.G.A. § 19-5-3 but only selected portions of the code have been included in the pattern jury instructions because they represent the most often cited grounds; refer to the code for other grounds as the facts of the case may indicate).

22.025 Adultery

Adultery after marriage by either party is a legal ground for divorce in Georgia. A married person commits adultery when he/she voluntarily has sexual intercourse with someone other than his/her spouse.

O.C.G.A. 19-5-3 (6)

22.030 Cruel Treatment

Cruel treatment is a legal ground for divorce in Georgia. Cruel treatment is the willful infliction of pain, bodily or mental, upon the complaining party such as reasonably justifies apprehension of danger to life, limb, or health.

O.C.G.A. §19-5-3(10)

Morris v. Morris, 202 Ga. 431 (1947)

22.040 Cruel Treatment; Single Act

Ordinarily, a single act of personal violence is not considered cruel treatment, but one act may be sufficient to justify divorce on the ground of cruel treatment in a severe and atrocious case.

Phinizy v. Phinizy, 154 Ga. 199 (1922)

Reynolds v. Reynolds, 217 Ga. 234, 268 (1961)

22.050 **Cruel Treatment; Mental Cruelty**

Mental anguish and wounded feelings, constantly aggravated by repeated insults and neglect, are as bad as actual bruises, and that which produces one is not more cruel than that which causes the other.

Cohen v. Cohen, 194 Ga. 573 (1942)

Twilley v. Twilley, 195 Ga. 291 (1943)

22.060 **Condonation**

The plaintiff/defendant claims that any fault or misconduct on his/her part has been condoned or forgiven by the defendant/plaintiff. Condonation is forgiveness, either express or implied by a spouse, of a breach of marital duty on the part of the other spouse, with the implied condition that the offense shall not be repeated. New acts constituting grounds for divorce after condonation will revive the grounds for divorce that took place before the condonation.

(Note: Charges 22.020 through 22.060 do not apply in irretrievably broken cases if irretrievably broken is the only ground for divorce, O.C.G.A. §19-5-3[13] and cases cited.)

Odom v. Odom, 36 Ga. 286 (1867)

Phinizy v. Phinizy, 154 Ga. 199 (1922)

Morris v. Morris, 202 Ga. 431 (1947)

22.070 **Irretrievably Broken Marriage**

One of the issues that you must decide is whether or not the plaintiff/defendant is entitled to a divorce. The plaintiff has claimed in the pleadings that he/she is entitled to a divorce on the ground that the marriage is irretrievably broken, and this allegation has been denied by the defendant.

With regard to this issue, a marriage is irretrievably broken if either or both parties are unable or refuse to cohabit, and there are no prospects for a reconciliation between the parties. It is not necessary to show that either party is at fault in any way. The only question to be determined is whether or not there are prospects for reconciliation.

O.C.G.A. §19-5-3 (13)

Harwell v. Harwell, 233 Ga. 89 (1974)

McCoy v. McCoy, 281 Ga. 604 (2007)

The fact that one party has hope for reconciliation is not sufficient evidence to sustain a finding that there are genuine prospects for reconciliation. If you find from the evidence that there are no genuine prospects for reconciliation and that the marriage is irretrievably broken, then you would be authorized to grant a divorce to the parties. If you find that there are prospects for reconciliation and that the marriage is not irretrievably broken, then you would not be authorized to return a verdict granting a divorce.

McCoy v. McCoy, 236 Ga. 633 (1976)

22.090 **Divorce; Issues Incidental**

(If you find that the divorce is to be granted) You must decide issues incidental to divorce. I will charge you first on equitable division of property/alimony. (The issue of child support must be decided in a separate phase of the trial after you have decided [equitable division/alimony], and I will charge you on that issue at that time.)

22.100 **Equitable Division of Property**

22.110 **General**

In this case, the plaintiff/defendant is/are asking for an equitable division of property. The purpose behind the doctrine of equitable division of property is to be sure that property accumulated during the marriage is fairly distributed between the parties.

Payson v. Payson, 274 Ga. 231 (2001)

22.120 **Classification of Property**

In making an equitable division of property, first classify the property as nonmarital or marital.

22.121 **Nonmarital Property**

Nonmarital property is property that was acquired before the marriage by any means or property that was acquired during the marriage by gift from a third party (that is, someone other than the other spouse) or by inheritance or by bequest in a will. Nonmarital property can be converted to marital property by an action of the property owner spouse. Whether nonmarital property is converted is a question of fact for you to decide. You should assign to each spouse his or her nonmarital property.

Rooks v. Rooks, 252 Ga. 11 (1984)

McArthur v. McArthur, 256 Ga. 762 (1987)

Sparks v. Sparks, 256 Ga. 788 (1987)

Lerch v. Lerch, 278 Ga. 885 (2005)

Coe v. Coe, 285 Ga. 863 (2009)

Armour v. Holcomb, 288 Ga. 50 (2010)

Miller v. Miller, 288 Ga. 274 (2010)

Shaw v. Shaw, 290 Ga. 354 (2012)

22.122 **Source of Funds**

(Note: Give the following only when funds derived from sale, exchange, or use of nonmarital property must be traced by the jury.)

Property that is acquired during the marriage from funds obtained from the sale, exchange, or use of separate property shall remain the separate property of the person who contributed the funds. This separate property remains the separate property of the individual who acquired it, "the property owning spouse." This separate property may be subject to equitable division only if you find that it has appreciated (that is, increased in value) due to marital efforts or has been converted to marital property by an action of the owning spouse. I will give you instructions on how to deal with such appreciation later.

Bailey v. Bailey, 250 Ga. 15 (1982)

Thomas v. Thomas, 259 Ga. 73 (1989)

Horsley v. Horsley, 268 Ga, 460 (1997)

Lerch v. Lerch, 278 Ga. 885 (2005)

Coe v. Coe, 285 Ga. 863 (2009)

Miller v. Miller, 288 Ga. 274 (2010)

Shaw v. Shaw, 290 Ga. 354 (2012)

22.123 **Marital Property**

All other property that was acquired during the marriage and that was not purchased from sale or exchange of separate property is marital property that shall be subject to equitable division. Marital property is property that is acquired as a direct result of the labor and investments of the husband and/or the wife during the course of the marriage or separate property that has been converted to marital property by an action of the property owning spouse. To determine if property purchased or otherwise acquired during the marriage is marital property and therefore subject to being divided between the spouses or if it is the separate property of either the husband or the wife and is not subject to division of property, you must determine what was the source of the funds to purchase or acquire the property and/or if the property was separate but due to the action of the property owning spouse, it is converted to marital property. The last day on which assets may be acquired so as to be considered marital assets is the day of the final decree of divorce.

Campbell v. Campbell, 255 Ga. 461 (1986)

Thomas v. Thomas, 259 Ga. 73 (1989)

Janelle v. Janelle, 265 Ga. 116 (1995)

Friedman v. Friedman, 259 Ga. 530(2) (1989); overruled on other grounds, 268 Ga. 566 (1997)

(Note: If there is an award from personal injury or workers' compensation, note the ruling of Dees v. Dees, *259 Ga. 177 [1989]*, Johnson v. Johnson, *259 Ga. 658 [1989].)*

Lerch v. Lerch, 278 Ga. 885 (2005)

Coe v. Coe, 285 Ga. 863 (2009)

Miller v. Miller, 288 Ga. 274 (2010)

Shaw v. Shaw, 290 Ga. 354 (2012)

22.124 **Appreciation in Value of Nonmarital Property**

If you find that any nonmarital property has increased in value as a result of the efforts of either or both parties during the marriage, then the increase in value is subject to an equitable division. However, if you find that any nonmarital property has increased in value but the increase in value is not as a result of the efforts of either party or both parties, then this increase would not be subject to an equitable division.

Halpern v. Halpern, 256 Ga. 639 (1987)

Bass v. Bass, 264 Ga. 506 (1994)

Janelle v. Janelle, 265 Ga. 116 (1995)

Payson v. Payson, 274 Ga. 231 (2001)

22.130 **Property Title**

The fact that the property is titled in the name of one party or in the name of both parties is not the determining factor. (Furthermore, gifts of property between a husband and a wife during the marriage do not vest such title in the other spouse to exclude that property from being divided in an equitable division of marital property.)

Stokes v. Stokes, 246 Ga. 765 (1980)

While property may be initially obtained as separate property, that property may be converted into a marital asset by the actions of the separate property owner spouse, such as transferring full, partial, or joint ownership in the property to his/her spouse.

Lerch v. Lerch, 278 Ga. 885 (2005)

Miller v. Miller, 288 Ga. 274 (2010)

Shaw v. Shaw, 290 Ga. 354 (2012**)**

22.150 **Factors in Equitable Division**

Equitable division of marital property may or may not be an equal division of property, and this is a matter for the jury to determine. (After you have determined what property is nonmarital property and what property is marital property) In order to make an equitable division of marital property, you should consider the duration of the marriage; any prior marriage of either party; the age, health, occupation, and vocational skills and employability

of each party; and the contribution or services of each spouse to the family unit. You should also consider the amount and sources of income, the estate, debts, liabilities, and needs of the parties, as well as debts against the property, and the opportunity of each party for future acquisition of assets by employment or otherwise. Furthermore, the conduct of the parties, both during the marriage and with reference to the cause of the divorce, is relevant and may be considered in your determination of an equitable division of marital property.

Peters v. Peters, 248 Ga. 490 (1981)

Bloomfield v. Bloomfield, 282 Ga. 108 (2007)

22.170 **Methods of Equitable Division**

In making an equitable division of property in this case, you should bear in mind that the law permits you to make an equitable division of property in several different ways:

1) You may make an equitable division of specific personal property or real property.

   That is, you may designate a specific property (such as so many shares of stock in a named company or a certain house or tract of land) to be awarded as equitable division of property.

2) You may make an equitable division of property in cash. That is, you may designate a certain sum of money to be awarded as an equitable division of property, even though that sum of money is not presently in the form of cash.
3) You may make an equitable division of property by awarding specific items of property and also awarding an amount in cash.
4) You may award percentages of property to spouses or require the parties to sell property and award the proceeds equitably to the parties.

Clements v. Clements, 255 Ga. 714 (1986)

22.180 **Resulting Trust; Equitable Division**

The plaintiff/defendant is claiming an entitlement to certain property, not as part of an equitable division, but rather because of a resulting trust set up by the parties. The defendant/plaintiff is denying that any resulting trust in the property was ever established and that the defendant/plaintiff holds title to the property and owns the property by right.

When a party purchases property (in whole or in part) to be placed in a spouse's name and there is a delivery and acceptance of the title to the property by the other spouse, then it is presumed under law that the property is a gift. That presumption may be rebutted if it is shown that a resulting trust was established. In order to show that a resulting trust was established, the party claiming that the trust was established must prove, by clear and convincing evidence, that the property was purchased with the party's own funds and for the party's own benefit, and that the title to such property (in whole or in part) was placed in the other spouse as a matter of convenience or as an agreement for some other purpose and that the spouse was holding title to the property merely as trustee for the benefit of the other spouse.

The presumption of a gift may be rebutted by evidence showing that the party who made the purchase thereafter exercised ownership over the property in such a manner as was inconsistent with ownership by the other spouse. In determining this issue, you may consider evidence of any acts by the spouse holding title whereby that spouse appeared to recognize that actual ownership was in the other spouse.

If you find by clear and convincing evidence that the plaintiff's/defendant's own funds were used to purchase *(specify property in dispute)* and that the plaintiff/defendant put the title to all or part of it in the name of the other spouse, and if you further find that, at the time the plaintiff/defendant did so, the parties recognized and agreed that the spouse holding the title was doing so as the trustee for the spouse who purchased the property, then you should find that a resulting trust was created and you should award the title to the property back to the defendant/plaintiff. If you find that there was no such recognition and agreement between the parties, then the plaintiff's/defendant's placement of the title in the name of the other spouse would be considered a gift of (_interest in) the property, and you should not find a resulting trust but should leave the title as is.

O.C.G.A. §53-12-1 *et seq.*; 53-12-91

Hargrett v. Hargrett, 242 Ga. 725, 727 (1978); overruled on other grounds

Harrell v. Harrell, 249 Ga. 170 (1982)

(See 02.040, Clear and Convincing Evidence. Clarke v. Cotton, *263 Ga. 861 [1994].)*

(If alimony or child support is also in issue, include the following.)

After you have decided this issue and which party will have the actual ownership of the_____property, then the property should be considered by you as being in that party's estate upon your consideration of the issue(s) of alimony and/or child support. You should decide the issue of the alleged resulting trust before considering the issue(s) of alimony and/or child support.

As I have instructed you, the plaintiff/defendant (both parties) is (are) seeking an award of alimony from the other party. Alimony may (or may not) be awarded based upon the evidence presented as to entitlement, need, and ability to pay; it may be denied for adultery/desertion/misconduct. In determining whether a resulting trust as to certain property was set up by these parties, you are not to concern yourselves with the elements of entitlement to alimony, financial need, or the ability to pay. (Nor should you concern yourselves with any evidence as to adultery/desertion/misconduct that may have caused the separation of the parties).

22.182 **Inceptive Fraud (Constructive Trust); Equitable Division**

The plaintiff/defendant is claiming an entitlement to certain property, namely, not as part of an equitable division, but rather because of an alleged inceptive fraud by the other spouse. The defendant/plaintiff denies any inceptive fraud. The defendant/plaintiff claims to hold the title to the property and to own it legally and by right. This claim presents another issue for you to determine.

Parks v. Parks, 240 Ga. 1 (1977)

Hargrett v. Hargrett, 242 Ga. 725, 728 fn. 2 (1978); overruled on other grounds

If a person purchases property with their own funds but causes the title to (an interest in) the property to be placed in their spouse's name and there is a delivery and acceptance of the (title to the) property, then it is presumed under law to be a gift. However, that presumption may be rebutted if it is shown that inceptive fraud occurred. To show inceptive fraud, it must be established that the spouse receiving (title to) the property made a promise to the purchasing spouse to induce the purchasing spouse to execute the deed (make the transfer, etc.) and the promise was fraudulently made with no intent to comply.

Hargrett v. Hargrett, 242 Ga. 725, 728 (1978); overruled on other grounds

If you find that the plaintiff/defendant transferred (executed) the deed to certain property (or an interest in certain property) to his/her spouse, in return for and because of a promise made by that spouse, but that the promise was fraudulently made by the defendant/plaintiff with the intention not to comply, then you may find that the defendant/plaintiff committed inceptive fraud in obtaining the title (property) (interest in the property), and the deed (transfer) may be set aside and the property awarded to the spouse who originally purchased (owned) it.

If you find that there was no inceptive fraud on the part of the defendant/plaintiff, then the plaintiff's/defendant's placement of the title in the name of his/her spouse would be considered a gift (a_____interest in the property), and you should not find any inceptive fraud but should leave the property as presently titled.

(If alimony or child support is also in issue, include the following.)

After you have decided this issue and determined which person will have actual ownership of the property, then you should consider the property as being in that person's estate upon your consideration of the issue(s) of alimony/child support. You should decide the issue of inceptive fraud before considering the issue(s) of alimony/child support.

As I have instructed you, the plaintiff/defendant (both parties) is (are) seeking an award of alimony from the other party. (Alimony may or may not be awarded based upon the evidence presented as to entitlement, need, and ability to pay, and may be denied for adultery/desertion/misconduct.) In determining whether or not the plaintiff/defendant committed inceptive fraud, you are not to concern yourselves with the question of entitlement to alimony, financial need, or the ability to pay.

22.184 **Partitioning; Equitable Division**

The plaintiff/defendant/both parties is/are claiming that certain property should be divided or partitioned between them. Any property owned either in whole or in part by the other spouse may be divided between them on an equitable basis. This is not an award of alimony but an equitable division of property.

Stokes v. Stokes, 246 Ga. 765, 771 (1980)

Daniel v. Daniel, 277 Ga. 871 (2004)

22.190 **Coordination of Equitable Division with Nonmarital/Separate Property**

Nonmarital property that belongs to one of the parties may be taken into account in deciding the equities of the division of marital property between the parties. However, nonmarital property may not be awarded to the other party as an equitable division of property. Nonmarital property must be awarded to the party who you find owns it according to the instructions I have given you.

22.200 **Introduction to Alimony**

(Give the following portion of the charge only if alimony is requested.)

I have just given you instructions about equitable division of property. Next, I am going to instruct you about alimony.

_____(name the party) is asking for an award of alimony.

You can only make an equitable division of property from marital property (as I have just instructed you), but you can make an alimony award from anything that a person owns or is awarded to them as their equitable division of property or from future earnings.

The order of these instructions does not mean that you have to make a decision about equitable division of property before deciding alimony. You may decide equitable division before deciding alimony, or you may decide alimony before deciding equitable division of property. You may grant alimony and no equitable division of property, or you may grant equitable division of property and no alimony, or you may grant both, or you may grant neither.

22.210 **Alimony**

Ladies and gentlemen of the jury, alimony is defined as an award from one party for the support of the other when the parties are living separate and apart.

O.C.G.A. §19-6-1(a)

You are authorized, but not required, to award alimony to the party claiming a right to alimony in accordance with that party's needs and the other party's ability to pay.

O.C.G.A. §19-6-1(c)

(The following should be used if the charge on equitable division of property has been given.)

If you decide to make an award of alimony in this case, then you should take into consideration whether such award is in place of or in addition to an award of equitable division of property. Additionally, you should bear in mind that assets assigned as nonmarital property that were not subject to an equitable division may be awarded as alimony.

Before considering the amount of alimony to be awarded, you must first decide whether the party (parties) requesting alimony should receive alimony at all.

A spouse is not entitled to alimony as a matter of right solely because the parties have been married. In determining whether or not to grant alimony, you should consider evidence, if any, of the factual cause of the separation between parties. You may also consider evidence, if any, of each party's conduct toward the other.

O.C.G.A. §19-6-1

Odom v. Odom, 239 Ga. 830 (1977)

Duncan v. Duncan, 262 Ga. 872 (1993)

Weir v. Weir, 287 Ga. 443 (2010)

22.220 **Adultery**

You shall not award alimony to a party claiming alimony if the preponderance of the evidence shows that the party claiming alimony committed adultery and this adultery caused the parties to separate. A married person commits adultery when he or she voluntarily has sexual intercourse with someone other than his or her spouse.

O.C.G.A. 19-6-1 (b)

22.230 **Desertion**

You shall not award alimony to a party claiming alimony if the preponderance of the evidence shows that the party claiming alimony deserted his/her spouse and that desertion caused the parties to separate. To find desertion, you must find that the spouse left

1) intentionally and willfully, without just cause;

2) without the consent of the other spouse; and

3) with an intention never to return to the marriage relationship.

Rogers v. Rogers, 202 Ga. 329 (1947)

However, it is not desertion if you find that the party claiming alimony was driven off by the other spouse.

22.240 **Amount of Alimony**

If, based on all the evidence, you determine that the party claiming alimony is entitled to alimony, then you must decide the amount, type, or kind of alimony to be awarded.

Walton v. Walton, 219 Ga. 729 (1964)

McNally v. McNally, 223 Ga. 246 (1967)

Farrish v. Farrish, 279 Ga. 551 (2005)

Rieffel v. Rieffel, 281 Ga. 891 (2007)

In determining the amount of alimony, if any, to be awarded, you should consider the following:

1) the standard of living established during the marriage;

2) the duration of the marriage;

3) the age and the physical and emotional condition of each party;

4) the financial resources of each party;

5) if applicable, the time necessary for either party to acquire sufficient education or training to enable him/her to find appropriate employment;

6) the contribution of each party to the marriage, including, but not limited to, services rendered in homemaking, child care, education, and career building of the other party;

7) the condition of each party, including their separate estate, earning capacity, and fixed liabilities; and

8) such other relevant factors as you deem equitable and proper.

O.C.G.A. § 19-6-5 (a)(1-8)

22.250 **Types of Alimony Awards; Method of Payment**

If you decide to make an award of alimony, you should bear in mind that the law permits alimony to be awarded in several ways:

a) You may make a lump sum cash award to be paid out of the estate or assets of the other spouse, and you may require that such a lump sum be paid in one payment or in periodic installments for a specific period of time. If you find that the evidence warrants the payment of a lump sum of alimony in periodic installments, you should bear in mind that this award is considered a property award and will not terminate upon the death of either party and that such payments will be payable to or by the estate of a deceased party.

b) You may make an award of alimony in kind, which means an award of designated property, including personal property and real estate, or an award of a designated interest in real or personal property. Property as used here includes not only personal property (such as automobiles, household furnishings, insurance policies) but also real property (such as ownership of an interest in land). The property may be sold and may be divided in whatever manner you decide as justified by the evidence. You should bear in mind that this award is considered a property award and will not terminate upon the death of either party and that such payments will be payable to or by the estate of a deceased party.

c) You may make an award of periodic alimony payments to be paid in the future; for instance weekly, monthly, or quarterly payments. This award of periodic alimony payments will terminate upon the death of either party and is not chargeable to the estate of a deceased party.

Awards of lump sum alimony or a property award payable in installments will not end upon the spouse's remarriage or death.

However, all obligations for permanent alimony, however created, where the time for performance has not arrived, end upon the remarriage of the party to whom the obligations are owed unless otherwise specified.

O.C.G.A. §19-6-5(b)

You may make an award of alimony by using any one of these three methods or by combining any two of these three methods or by using all three of these methods, if you find the evidence justifies you in doing so.

(The following should be used if the charge on equitable division of property has been given.)

Any award you make for alimony should take into consideration whether such award is in place of or in addition to an award of equitable division of property.

22.260 **Resulting Trust; Alimony**

The plaintiff/defendant is claiming an entitlement to certain property, not as an award of alimony, but rather because of resulting trust set up by the parties. The defendant/plaintiff is denying that any resulting trust in the property was ever established and that the defendant/plaintiff holds title to the property and owns the property by right.

When a party purchases property (in whole or in part) to be placed in a spouse's name, and there is a delivery and acceptance of the title to the property by the other spouse, then it is presumed under law that the property is a gift. That presumption may be rebutted if it is shown that a resulting trust was established. In order to show that a resulting trust was established, the party claiming that the trust was established must prove, by clear and convincing evidence, that the property was purchased with the party's own funds and for the party's own benefit, and that the title to such property (in whole or in part) was placed in the other spouse as a matter of convenience or as an agreement for some other purpose and that the spouse was holding title to the property merely as trustee for the benefit of the other spouse.

The presumption of a gift may be rebutted by evidence showing that the party who made the purchase thereafter exercised ownership over the property in such a manner as was

inconsistent with ownership by the other spouse. In determining this issue, you may consider evidence of any acts by the spouse holding title whereby that spouse appeared to recognize that actual ownership was in the other spouse.

If you find by clear and convincing evidence that the plaintiff's/defendant's own funds were used to purchase *(specify property in dispute)* and that the plaintiff/defendant put the title to all or part of it in the name of the other spouse, and if you further find that, at the time the plaintiff/defendant did so, the parties recognized and agreed that the spouse holding the title was doing so as the trustee for the spouse who purchased the property, then you should find that a resulting trust was created and you should award the title to the property back to the defendant/plaintiff. If you find that there was no such recognition and agreement between the parties, then the plaintiff's/defendant's placement of the title in the name of the other spouse would be considered a gift of (_interest in) the property, and you should not find a resulting trust but should leave the title as is.

O.C.G.A. §53-12-1 *et seq.*; 53-12-91

Hargrett v. Hargrett, 242 Ga. 725, 727 (1978); overruled on other grounds

Harrell v. Harrell, 249 Ga. 170 (1982)

(See 02.040, Clear and Convincing Evidence. Clarke v. Cotton, *263 Ga. 861 [1994].)*

(If alimony or child support is also in issue, include the following.)

After you have decided this issue and which party will have the actual ownership of the_____property, then the property should be considered by you as being in that party's estate upon your consideration of the issue(s) of alimony and/or child support. You should decide the issue of the alleged resulting trust before considering the issue(s) of alimony and/or child support.

As I have instructed you, the plaintiff/defendant (both parties) is (are) seeking an award of alimony from the other party. Alimony may (or may not) be awarded based upon the evidence presented as to entitlement, need, and ability to pay; it may be denied for adultery/desertion/misconduct. In determining whether a resulting trust as to certain property was set up by these parties, you are not to concern yourselves with the elements of entitlement to alimony, financial need, or the ability to pay. (Nor should you concern

yourselves with any evidence as to adultery/desertion/misconduct that may have caused the separation of the parties).

22.270 **Inceptive Fraud (Constructive Trust); Alimony**

The plaintiff/defendant is claiming an entitlement to certain property, namely _____, not as an award of alimony, but rather because of an alleged inceptive fraud by the other spouse. The defendant/plaintiff denies any inceptive fraud. The defendant/plaintiff claims to hold the title to the property and to own it legally and by right. This claim presents another issue for you to determine.

Parks v. Parks, 240 Ga. 1 (1977)

Hargrett v. Hargrett, 242 Ga. 725, 728 fn. 2 (1978); overruled on other grounds

If a person purchases property with their own funds but causes the title to (an interest in) the property to be placed in their spouse's name and there is a delivery and acceptance of the (title to the) property, then it is presumed under law to be a gift. However, that presumption may be rebutted if it is shown that inceptive fraud occurred. To show inceptive fraud, it must be established that the spouse receiving (title to) the property made a promise to the purchasing spouse to induce the purchasing spouse to execute the deed (make the transfer, etc.) and the promise was fraudulently made with no intent to comply.

Hargrett v. Hargrett, 242 Ga. 725, 728 (1978); overruled on other grounds

If you find that the plaintiff/defendant transferred (executed) the deed to certain property (or an interest in certain property) to his/her spouse in return for and because of a promise made by that spouse but that the promise was fraudulently made by the defendant/plaintiff with the intention not to comply, then you may find that the defendant/plaintiff committed inceptive fraud in obtaining the title (property) (interest in the property), and the deed (transfer) may be set aside and the property awarded to the spouse who originally purchased (owned) it.

If you find that there was no inceptive fraud on the part of the defendant/plaintiff, then the plaintiff's/defendant's placement of the title in the name of his/her spouse would be considered a gift (a_____interest in the property), and you should not find any inceptive fraud but should leave the property as presently titled.

(If alimony or child support is also in issue, include the following.)

After you have decided this issue and determined which person will have actual ownership of the property, then you should consider the property as being in that person's estate upon your consideration of the issue(s) of alimony/ child support. You should decide the issue of inceptive fraud before considering the issue(s) of alimony/child support.

As I have instructed you, the plaintiff/defendant (both parties) is (are) seeking an award for alimony from the other party. (Alimony may or may not be awarded based upon the evidence presented as to entitlement, need, and ability to pay, and may be denied for adultery/desertion/misconduct.) In determining whether or not the plaintiff/defendant committed inceptive fraud, you are not to concern yourselves with the question of entitlement to alimony, financial need, or the ability to pay.

22.280 **Partitioning; Alimony**

The plaintiff/defendant/both parties is/are claiming that certain property should be divided or partitioned between them. Any property owned either in whole or in part by the other spouse may be divided between them on an equitable basis. This is not an award of alimony but an equitable division of property.

Stokes v. Stokes, 246 Ga. 765, 771 (1980)

Daniel v. Daniel, 277 Ga. 871 (2004)

22.290 **Coordination of Alimony and Nonmarital/Separate Property**

Nonmarital property that belongs to one of the parties may be taken into account in deciding questions of alimony.

22.300 **Child Support; Determined Later**

(Charge only if child support is at issue).

After you make your determinations about (divorce/equitable division of property/alimony) and have returned your verdict, you will be called upon to decide issues of child support. While you have heard the evidence relevant to child support, you have not yet heard the law applicable to that issue. You should not speculate on possible child support issues in arriving at your verdict on the issues of (divorce/equitable division/alimony).

However, the awards you make for (equitable division/alimony) may affect your award of child support, and I will instruct you further on how these issues relate in the child support phase of the trial after you have returned your initial verdict.

(Conclusion charges)

02.520 *Verdict in Writing*

02.530 *Court Has No Interest in Case*

02.550 *Sympathy*

02.560 *Alternate Jurors*

02.700 *Verdict (Hung Jury)*

(For second phase or child support instructions, see section 23.000.)

22.640 **Form of Verdict**

I will now instruct you as to the form of your verdict, that is, the language you should use in preparing your verdict on the issue(s) that you are to decide in this case. (I have prepared a verdict form to assist you in reducing your verdict to writing, and you will have that form with you in the jury room.)

22.641 **Form of Verdict; Divorce (if at issue)**

As to the issue of divorce, your verdict should read, "We, the jury, find that the parties are (are not) entitled to a divorce." If you find that they are not entitled to a divorce, that will end your deliberations and you shall at that point return your verdict without deciding any other issues in the case. If you do award a divorce, then you will go on to decide all other issues. (Note: If the parties agree and have properly pleaded their case and/or presented proper evidence, the trial court can grant a judgment of divorce on the pleadings and this is no longer a jury issue).

22.642 **Form of Verdict; Nonmarital Property**

As to the determination of nonmarital property, your verdict should read, "We, the jury, find the following property to be the separate property of the plaintiff/defendant." Your verdict should state specifically what property is the nonmarital/separate property of each party.

22.643 **Form of Verdict; Equitable Division of Marital Property**

As to equitable division of property, your verdict should read, "We, the jury, find the following property is subject to equitable division." Your verdict should state specifically what property and what interest in that property you are awarding and to whom.

22.644 **Form of Verdict; Alimony**

As to the issue of alimony, your verdict should read, "We, the jury, find that the plaintiff/defendant is (is not) entitled to alimony." If you find that plaintiff/defendant is/are entitled to alimony, you would continue and say what type, kind, or amount of alimony you find.

If you find for a lump sum award, your verdict should read, "We award a lump sum of alimony to be paid as follows," and then set out the amount and the date of the payment or, if you find it is to be paid in installments, set out the dates or times when the installments are to be made and the amount of each installment.

If you find for alimony in kind (that is, an award of designated property or interest in property), your verdict should read, "We award alimony in kind as follows," and then state specifically what property or interest in property you are awarding.

If you find for periodic payments of alimony, your verdict should read, "We award (_____) dollars alimony," and you would fill in the amount you find, and then continue, "to be paid weekly, monthly," or whatever other period you determine and for however long you may determine.

If you find that any obligation for permanent alimony, however created, should or should not be terminated at any particular time in the future or suspended for any period of time in the future or terminated or continued upon any particular event in the future, you should set out in your verdict your exact findings.

If the evidence authorizes it, you may provide for changes in the amount of alimony to be paid in the future. You should specify the changed amount and the particular time or date or event that will cause the change to take effect.

If you find payments should be made to third parties for specific goods or services, your verdict should read, "We award alimony and require the defendant/plaintiff to make all, or some specified part, of _____ payments as they become due and owing" or upon some schedule or upon the happening of some event.

22.645 **Form of Verdict; Resulting Trust**

As to the issue of whether there is or is not a resulting trust of certain property, your verdict should read, "We, the jury, find that the plaintiff/defendant is (is not) holding _____property in trust for the defendant/plaintiff."

22.646 **Form of Verdict; Inceptive Fraud**

As to the issue of whether there was or was not inceptive fraud by the defendant/plaintiff in obtaining (title to)_____property, your verdict should read, "We, the jury, find that the defendant/plaintiff did (did not) commit inceptive fraud in obtaining title to _____ property."

22.700 **Verdict Form**

IN THE SUPERIOR COURT OF_____COUNTY

STATE OF GEORGIA

PLAINTIFF	*	
	*	CIVIL ACTION NO.
	*	
V.		_____
DEFENDANT	*	

VERDICT

We, the jury, find as follows:
(Use the two paragraphs below only if divorce is contested.)

We, the jury, find that the parties are /are not entitled to a divorce.

(If you find that the parties are not entitled to a divorce, that ends your deliberations.)

I. DETERMINATION OF SEPARATE/NONMARITAL PROPERTY

A. Wife's separate/nonmarital property is:

_____

_____

_____

_____.

B. Husband's separate/nonmarital property is:

_____

_____

_____

_____.

II. EQUITABLE DIVISION OF MARITAL PROPERTY

A. Wife is awarded the following marital property:

_____

_____

_____

_____ .

B. Husband is awarded the following marital property:

_____

_____

_____

_____ .

C. Wife shall pay the following marital debts:

_____

_____

_____

_____ .

D. Husband shall pay the following marital debts:

_____

_____

_____

_____ .

E. Other:

_____

_____

_____

_____ .

III. ALIMONY

A. Is the plaintiff/defendant entitled to alimony? Yes No

If your answer is no, stop.

If your answer is yes, answer questions B and C below.

B. Is the plaintiff/defendant entitled to periodic alimony for her/his support? Yes No

If your answer is no, stop and go to C below.

If your answer is yes, $_____is to be paid (weekly/monthly/other designated period)_____

_____.

This award of alimony will: (choose and circle one or two, and edit appropriately).

1. Continue until (the plaintiff/defendant dies)(the plaintiff/defendant dies or remarries, whichever first occurs).

2. Continue until _____date.

C. Is the plaintiff/defendant entitled to lump sum alimony? Yes No

If your answer is no, stop and then complete the verdict by dating it and have the foreperson sign it.

If your answer is yes, the plaintiff/defendant is awarded as lump sum alimony (complete one or both of the following):

1. The plaintiff/defendant is awarded as lump sum alimony the amount of $_____to be paid as follows:

_____

_____

_____ .

2. The plaintiff/defendant is awarded as lump sum alimony in-kind the following designated property:

_____

_____

_____ .

This _____day of _____, _____.

_____

(Signature)

Foreperson, _____

(Printed Name)

23.000 CHILD SUPPORT

(The following charges [23.000 et al.] are suggested for use in conjunction with the new child support guidelines, effective January 1, 2007.)

23.001 Child Support; Obligation

Parents must support their minor children (whether the children are legitimate or illegitimate) *(use parentheticals only when appropriate).* It is the duty of each parent to provide for the maintenance, protection, and education of his or her child(ren).

O.C.G.A. § 19-7-2

23.050 Child Support; Number of Children

The number of children for whom you will be calculating child support is _____, and such support will continue for the child until that child(ren) (reach[es] age 18, die[s], marr[y]ies, or become[s] emancipated, whichever occurs first. This support will continue so long as the child(ren) (is/are) enrolled in and attending high school, but not after the child(ren) reach(es) age 20.

(Note: The judge must decide number of children to be supported and duration.)

O.C.G.A. § § 19-6-15(e), 19-6-15(a)(8)

23.100 Gross Income

In order to determine the amount of child support required in this case, you must first determine and make a written finding of each parent's gross monthly income.

O.C.G.A. § 19-6-15(b)

23.110 Gross Income; Defined

Gross income includes all income from any source, whether earned or unearned. The calculations should be made before deductions for taxes and other deductions (such as

preexisting orders for child support and credits for other qualified children). Gross income includes, but is not limited to, the following possible sources of income:

(Charge only those that apply.)

1) salaries;
2) commissions, fees, and tips;
3) income from self-employment *(See 23.120, Income from Self-Employment [amplified].)*;
4) bonuses;
5) overtime payments;
6) severance pay;
7) recurring income from pensions or retirement plans, including, but not limited to, Veterans' Administration, Railroad Retirement Board, Keoghs, and individual retirement accounts;
8) interest income;
9) dividend income;
10) trust income;
11) income from annuities;
12) capital gains;
13) disability or retirement benefits that are received from the Social Security Administration pursuant to Title II of the federal Social Security Act *(See 23.200, Exclusions from Income [2].)*;
14) worker's compensation benefits, whether temporary or permanent;
15) unemployment insurance benefits;
16) judgments recovered for personal injuries and awards from other civil actions;
17) gifts that consist of cash or other liquid instruments or that can be converted into cash;
18) prizes or lottery winnings *(See 23.310, Irregular or One-Time Income, and O.C.G.A. § 19-6-15(f)(1)(d)*;
19) alimony or maintenance received from persons other than parties to the proceeding before the court;
20) assets that are used for the support of the family;

21) fringe benefits; and

22) other income supported by the evidence.

(Note: Imputed income may be included in gross monthly income. See 23.200–23.217.)

O.C.G.A. § 19-6-15(f)(1)(A) and (C)

(Note: Give as appropriate in original divorce cases in which equitable division is also decided.)

Income for purposes of child support may include gift, inheritance, or premarital property.

23.120 **Income from Self-Employment (amplified)**

(Charge the following only if it applies.)

If there is evidence of self-employment for, you must compute the income on a monthly basis.

Income from self-employment includes, but is not limited to, income from *(give as applicable)*

1) business operations;
2) work as an independent contractor or consultant;
3) sales of goods or services;
4) rental properties;
5) royalties;
6) proprietorship of a business; and
7) joint ownership of a partnership, limited liability company, or closely held corporation.

In order to calculate self-employment income, you should total gross receipts from self employment and then subtract ordinary and reasonable expenses necessary to self-employment to produce self-employment income. Ordinary and reasonable expenses of self-employment necessary to produce income do not include, and you should not subtract from gross receipts

a) excessive promotional, travel, vehicle, or personal living expenses; depreciation on equipment; or costs of operation of home offices; or
b) amounts allowable by the Internal Revenue Service for the accelerated component of depreciation expenses, investment tax credits, or any other business expenses determined by you, the jury, to be inappropriate for determining gross income.

Self-employment income and expenses may differ from a determination of business income for tax purposes. Income and expenses from self-employment should be carefully reviewed by you, the jury, so you may determine the appropriate level of gross income available to the parent to satisfy a child support obligation.

O.C.G.A. § 19-6-15(f)(1)(B)

23.130 **Fringe Benefits (amplified)**

You should count and include as income any fringe benefits or "in kind" payment received by a parent in the course of employment or operation of a trade or business if the benefits significantly reduce personal living expenses. Such fringe benefits might include, but are not limited to, use of a company car, housing, or room and board.

(Basic allowance for housing and subsistence and variable housing allowances for members of the armed services shall be considered income for the purposes of determining child support.) Fringe benefits do not include employee benefits that are already included in the salary, wage, or other compensation that a parent may receive as a standard added benefit, including, but not limited to, employer paid portions of health insurance premiums or employer contributions to a retirement or pension plan.

23.200 **Imputed Income**

In making your determination of income and expenses, you should consider all evidence submitted to you, including evidence submitted by each parent as to the other parent's income, expenses, standard of living, or anything that you find proves the income or income potential of each parent.

(***Please note that Exclusions from Income is now found at 23.400.***)

23.210 **Reliable Evidence; Failure to Produce**

Should you find that a parent failed to produce reliable evidence of income, then you should decide that parent's income on the basis of any reliable evidence of that parent's income or income potential.

(See 02.160, Failure to Produce Evidence.)

O.C.G.A. § 24-14-22

23.217 **Reliable Evidence; Imputed Minimum Wage**

After considering all the evidence, including that of each party as to the other's income, if you have no other reliable evidence of income or income potential, you shall determine that party's monthly gross (salary) (other income) to be _____ *(you must provide a figure that must reflect the current minimum wage)* which is minimum wage for a 40-hour work week computed on a monthly basis. Any figure for imputed income should be inserted in the category referred to as "other income" on line 22 of Schedule A).

(Note: To calculate 40 hours per week at minimum wage for one month, use 174 [the multiplier approved by Uniform Superior Court Rule 24.1] multiplied by the current minimum wage [please visit http://www.dol.gov/dol/topic/wages/minimumwage.htm for updated information on federal and state minimum wage for the appropriate state of the person for whom the calculation is made].)

O.C.G.A. § 19-6-15(f)(4)(A)

23.250 **Underemployment**

(Charge the following only if it applies; tailor to facts at hand.)

You should consider whether or not a party is willfully or voluntarily (unemployed) (underemployed).

If you determine that a party is willfully or voluntarily (unemployed) (underemployed), you should calculate child support by determining earning capacity as evidenced by educational level or previous work experience.

A determination of willful or voluntary unemployment or underemployment shall not be limited to occupational choices motivated only by an intent to avoid or reduce the payment of child support.

In considering the issue of underemployment, you shall determine the reason for the party's occupational choices and assess the reasonableness of these choices in light of the party's responsibility to support his or her child and assess whether such choices benefit the child. The determination may be based on any intentional choice or act that affects a party's income. In determining willful or voluntary unemployment or underemployment, you may examine whether there is a substantial likelihood that the party could, with reasonable effort, apply his or her education, skills, or training to produce income.

O.C.G.A. § 19-6-15(f)(4)(D)

23.252 **Underemployment; Factors**

Specific factors for you to consider include, but are not limited to,

1) the party's past and present employment;
2) the party's education and training;
3) whether unemployment or underemployment for the purpose of pursuing additional training or education is reasonable in light of the party's responsibility to support his or her child and, to this end, whether the training or education may ultimately benefit the child by increasing the party's level of support for that child in the future;
4) a party's ownership of valuable assets and resources, such as an expensive home or automobile, that appear inappropriate or unreasonable for the income claimed by the party;
5) the party's own health and ability to work outside the home; and
6) the party's role as caretaker of a child of that party, a disabled or seriously ill child of that party, a disabled or seriously ill adult child of that party, or any other disabled or seriously ill relative for whom that party has assumed the role of caretaker, which eliminates or substantially reduces the party's ability to work outside the home, and the need for the party to continue the role of caretaker in the future. *(See 23.255, Caretaker; Explained.)*

23.255 **Caretaker; Explained**

When considering the income potential of a party whose work experience is limited due to the caretaker role of that party, you shall consider all the facts and circumstances of the case, including but not limited to the following factors:

1) whether the party acted as a full-time caretaker immediately prior to separation by the parties to this action (or prior to the divorce or annulment of the marriage or dissolution of another relationship in which the party was a full-time caretaker);
2) the length of time the party staying at home has remained out of the workforce for this purpose;
3) the party's education, training, and ability to work; and
4) whether the party is caring for a child who is four years of age or younger.

O.C.G.A. § 19-6-15(f)(4)(D)

23.257 **Underemployment; Imputed Minimum Wage**

In the absence of any other reliable evidence, you may impute income to the party to be (_____) *(you must provide a figure that must reflect the current minimum wage).* Any figure for imputed income should be inserted in the category referred to as "other income" (on line 22 of Schedule A).

(Note: To calculate 40 hours per week at minimum wage for one month, use 174 [the multiplier approved by Uniform Superior Court Rule 24.1] multiplied by the current minimum wage [please visit http://www.dol.gov/dol/topic/wages/minimumwage.htm for updated information of federal and state minimum wage for the appropriate state of the person for whom the calculation is made].)

O.C.G.A. § 19-6-15(f)(4)(D)

23.259 **Underemployment; Not for Armed Services**

You may not make a determination of willful and voluntary unemployment or underemployment when an individual is activated from the National Guard or other armed forces unit or enlists or is drafted for full-time service in the armed forces of the United States.

O.C.G.A. § 19-6-15(f)(4)(D)

23.300 **Variable Income**

Any finding you make as to income of either or both parties should be made on a monthly basis. Therefore, you should average any variable income such as commissions, bonuses, overtime pay, and dividends over a reasonable period of time, which you must determine consistent with the circumstances of the case. You should add this amount to a parent's fixed salary or wages to determine gross income.

O.C.G.A. § 19-6-15(f)(1)(D)

23.310 **Irregular or One-Time Income**

(If this applies, the court must provide a separate verdict form for nonaveraged income in this case.)

When income is received on an irregular, nonrecurring, or one-time basis, you may, but are not required to, average or prorate the income over a reasonable specified period of time or require the parent to pay as a one-time support amount a percentage of his or her nonrecurring income, taking into consideration the percentage of recurring income of that parent.

O.C.G.A. § 19-6-15(f)(1)(D)

23.400 **Exclusions from Income**

(Cite only those supported by evidence.)

In your computation of income, do not include any of the following:

a) child support payments received by either parent for the benefit of a child of another relationship;
b) benefits received from means-tested public assistance programs such as, but not limited to:
    1) PeachCare for Kids program, Temporary Assistance for Needy Families (TANF), or similar programs in other states or territories under Title IV-A of the federal Social Security Act;
    2) food stamps or the value of food assistance provided by way of electronic benefits transfer procedures by the Department of Human Resources;

3) supplemental security income received under Title XVI of the federal Social Security Act;
4) benefits received under Section 402(d) of the federal Social Security Act for disabled adult children of deceased disabled workers; and
5) low-income heating and energy assistance program payments.

c) a nonparent custodian's gross income. A nonparent custodian is an individual who has been granted legal custody of a child or an individual who has a legal right to seek, modify, or enforce a child support order.

23.450 **Verdict**

Whatever your verdict is as to gross income, it should be unanimous and entered in writing in the place (places) provided on the verdict form that has (have) been provided to you.

(The jury determines by verdict form each parent's gross monthly income.)

(Based upon the jury's verdict as to gross income, the court shall then determine the presumptive amount of child support in accordance with the provisions of Title 19, taking into account any adjustments to gross income per O.C.G.A. § 19-6-15(c)(5). The judge must then report the presumptive amount of child support to the jury and identify the custodial parent and the noncustodial parent to the jury along with each party's pro rata share of the child support obligation.)

(In final instructions to the jury, the court shall charge the jury concerning the law as it relates to deviations. The jury shall be required to return a special interrogatory as to deviations and as to the final award of child support.)

23.500 **Deviation**

I have provided you with the presumptive amount of child support required to support this (these) child(ren) and the amount due (_____) to the custodial parent. However, the presumptive amount is rebuttable, and you may deviate from the presumptive amount of child support only if, and to the extent, authorized by the provisions that follow.

23.510 **Deviation; Defined**

A deviation is an increase or decrease from the presumptive amount of child support if the presumed obligation is rebutted by evidence.

O.C.G.A. § 19-6-15(a)(10)

23.515 **Deviation; When Authorized/Prohibited**

You must bear in mind that the primary consideration for you shall be the best interest of the child(ren) for whom support is being determined. It is the policy of this state to afford to children of unmarried parents, to the extent possible, the same economic standard of living enjoyed by children living in intact families consisting of parents with similar financial means.

O.C.G.A. § 19-6-15(c)(1)

Therefore, you may only deviate from the amount of child support calculated if you find such deviation is reasonably necessary to provide for the needs of the child(ren) for whom child support is being determined.

O.C.G.A. § 19-6-15(i)(1)(A)
O.C.G.A. § 19-6-15(i)(B)(iii)(II)

You may not deviate in the presumptive amount of child support if, and to an extent, such deviation will seriously impair the ability of the custodial parent to maintain minimally adequate housing, food, and clothing for the child(ren) being supported by the child support order and to provide other basic necessities as you may determine.

O.C.G.A. § 19-6-15(i)(1)(C)

If you determine that a deviation from the presumptive amount of child support is appropriate, you shall consider all available income of the parents.

(Note: The judge must decide whether or not "all available income" is the same as "attributable income," which has been calculated previously.)

In determining the appropriateness of a deviation from the presumptive amount of support, you must make a written finding of the appropriate deviation and the amount of child support due in this case. I will provide you with a verdict form to record your written findings. In order to assist you in determining whether a deviation is appropriate and in what

amount, if any, I will provide you with child support schedule E, which you must complete. You must then attach the completed schedule E to the verdict form.

O.C.G.A. § 19-6-15(i)(1)(B)

Under Georgia law, there are several categories that qualify as specific deviations from the presumptive amount of child support. Depending on the evidence presented, you may find that more than one specific deviation applies, or you may find that no deviations apply.

Alternatively, you may find that a deviation from the presumptive amount of child support is appropriate for reasons in addition to the specific deviations; this would be a nonspecific deviation. You may apply nonspecific deviations from the presumptive amount if you find it to be in the best interest of the child.

O.C.G.A. § 19-6-15(i)(3)

(Note: Charge only those that apply.)

23.520 **Deviation; Nonparent Custodian's Income**

A nonparent custodian's expenses may be the basis for a deviation.

23.530 **High Income**

Georgia law allows a deviation for parents who qualify as having a high income. Parents are considered to be high-income parents if their combined adjusted income exceeds $30,000 per month. For high-income parents, I have set the basic support obligation at the highest amount allowed by the child support guidelines, but you may consider an upward deviation to attain an appropriate award of child support for high-income parents that is consistent with the best interests of the child.

O.C.G.A. § 19-6-15(i)(2)(A)

23.535 **Low Income**

Georgia law allows a deviation for parents who qualify as having a low income. For your purposes, a low-income person means a parent whose annual gross income is at or below $1,850 per month.

If the noncustodial parent is a low-income person and requests a deviation on that basis, you, the jury, shall determine if the noncustodial parent will be financially able to pay the child support ordered and maintain at least a minimum standard of living. You may determine the paying parent's minimum standard of living by calculating a self-support reserve, about which I will instruct you momentarily. You, the jury, shall take into account all sources of income available to each parent that are not excluded from consideration by law. *(See 23.400, Exclusions from Income.)*

You must also consider all reasonable expenses of each parent. You should be sure that any expenses you consider are only such expenses as are actually paid by the parent and are clearly justified expenses. You shall also consider the financial impact that a reduction in the amount of child support paid to the custodial parent would have on the custodial parent's household. Under no circumstances shall the amount of child support awarded to the custodial parent impair the ability of the custodial parent to maintain minimally adequate housing, food, and clothing and provide for other basic necessities for the child being supported by the court order.

To calculate the self-support reserve for the noncustodial parent, you shall deduct $900 from the noncustodial parent's adjusted income. If the resulting amount is less than ((_____), the noncustodial parent's pro rata responsibility of the presumptive amount of child support), you may deviate from the presumptive amount of child support that I have provided to you to the resulting amount. If the child support award amount would be less than $75, then the minimum child support order amount shall be $75.

If the custodial parent is a low-income person, you shall subtract $900 from the custodial parent's adjusted income. If the resulting amount is less than ((_____), the custodial parent's *pro rata* responsibility of the presumptive amount of child support that I have provided to you), you shall not deviate downward from the amount of support required to be paid by the noncustodial parent.

If you so find, you, the jury, must include the finding on your verdict form that the low-income deviation from the presumptive amount of child support is justified based upon the considerations and calculations described previously.

O.C.G.A. § 19-6-15 (i)(2)(B)

23.540 **Health Insurance**

Georgia law allows deviations for other health-related insurance. If you find that either parent has vision or dental insurance available at a reasonable cost for the child, you should make such a finding in writing in the place provided.

(Note: The Court may deviate from the presumptive amount of child support for the cost of such insurance.)

O.C.G.A. § 19-6-15(i)(2)(C)

23.545 **Life Insurance**

Georgia law allows a deviation for life insurance. If you find that either parent has purchased life insurance on the life of either parent or the lives of both parents for the benefit of the child, you should make such a finding in writing in the place provided.

(Note: The Court may deviate from the presumptive amount of child support for the cost of such insurance by either adding or subtracting the amount of the premium.)

O.C.G.A. § § 19-6-15(i)(2)(D), 19-6-34

23.550 **Tax Credit Qualification**

If you find that one of the parents is entitled to the Child and Dependent Care Tax Credit, you may deviate from the presumptive amount of child support in consideration of such credit.

O.C.G.A. § 19-6-15(i)(2)(E)

(Note: Try to narrow and define the issue in the pretrial order.)

(Note: The Child and Dependent Care Tax Credit is not the same as the Child Tax Credit.)

23.555 **Travel Expense**

Georgia law allows a deviation when travel expenses related to court-ordered visitation are substantial because of the distance between parents. If you determine that travel expenses related to visitation are substantial, you may allocate such costs by deviation from the presumptive amount of child support, taking into consideration the circumstances of the respective parents as well as which parent moved and the reason for such move.

O.C.G.A. § 19-6-15(i)(2)(F)

23.560 **Alimony**

(Note: The judge must decide if use of the term "actual" restricts consideration of alimony to that with a track record similar to prior child support orders. The judge must decide if this means all alimony, even between the same parties, or not. The judge must also decide if the "payment of alimony" referred to includes income between the same parties. The committee thinks that it does, but notes that usually only in a modification would there be a history of "actual payment of alimony" between the same parties.)

Georgia law provides that actual payment of alimony shall not be considered as a deduction from gross income but may be considered as a deviation from the presumptive amount of child support. You may consider the actual payment of alimony as a basis for deviation as long as you make a written finding of such consideration on your verdict form.

O.C.G.A. § 19-6-15(i)(2)(G)

23.565 **Shelter; Mortgage by Noncustodial Parent**

Georgia law provides that in cases in which the noncustodial parent is providing shelter, such as paying the mortgage of the home or has provided a home at no cost to the custodial parent in which the child resides, and you have authorized or required such payments in your equitable division, you may allocate such costs or an amount equivalent to such costs by deviation from the presumptive amount of child support, taking into consideration the circumstances of the respective parents and the best interests of the child.

O.C.G.A. § 19-6-15(i)(2)(H)

23.570 **DFCS Permanency Plan**

Under Georgia law, in cases in which the child is in the legal custody of the Department of Human Resources, the child protection or foster-care agency of another state or territory, or any other child-caring entity, public or private, you may consider a deviation from the presumptive amount of child support if the deviation will assist in accomplishing a permanency plan or foster-care plan for the child that has a goal of returning the child to the parent or parents and the parent's need to establish an adequate household or to otherwise adequately prepare herself or himself for the return of the child clearly justifies a deviation for this purpose.

O.C.G.A. § 19-6-15(i)(2)(I)

23.575 **Extraordinary Expense; Generally**

The presumptive amount of child support that I have provided to you is based upon average child-rearing expenditures for families given the parents' combined adjusted income and the number of children. Georgia law allows you to deviate from this amount in recognition of extraordinary expenses. Extraordinary expenses are expenses in excess of average amounts used to arrive at the presumptive child support amount and are highly variable among families. Extraordinary expenses shall be considered on a case-by-case basis in the calculation of support and may form the basis for deviation from the presumptive amount of child support so that the actual amount of the expense is considered in the calculation of the final child support order for those families actually incurring the expense. Extraordinary expenses shall be prorated between the parents.

There are several instances in which you may find that an extraordinary expense occurs or applies.

23.577 **Extraordinary Expense; Education**

You may consider extraordinary educational expenses as a basis for deviation from the presumptive amount of child support. Extraordinary educational expenses include, but are not limited to, tuition, room and board, lab fees, books, fees, and other reasonable and necessary expenses associated with special-needs education or private elementary and secondary schooling that are appropriate to the parent's financial abilities and to the lifestyle

of the child if the parents and the child were living together. In determining the amount of deviation for extraordinary educational expenses, scholarships, grants, stipends, and other cost-reducing programs received by or on behalf of the child shall be considered. If a deviation is allowed for extraordinary educational expenses, a monthly average of the expenses shall be based on the evidence of prior or anticipated expenses and entered on Schedule E—Deviations.

O.C.G.A. § 19-6-15(i)(2)(J)(i)

23.578 **Extraordinary Expense; Activities**

You may find special expenses incurred for child rearing to be the basis for deviation from the presumptive child support amount. Special expenses incurred for child rearing include, but are not limited to, quantifiable expense variations related to the food, clothing, and hygiene costs of children at different age levels. Examples of such expenses include, but are not limited to, summer camp; music or art lessons; travel; school-sponsored extracurricular activities, such as band, clubs, and athletics; and other activities intended to enhance the athletic, social, or cultural development of a child but not otherwise required to be used in calculating the presumptive amount of child support. A portion of the basic child support obligation is intended to cover average amounts of special expenses incurred in the rearing of a child. In order to determine if a deviation for special expenses is warranted, you shall consider the full amount of the special expenses and when these special expenses exceed 7 percent of the basic child support obligation, then the additional amount of special expenses shall be considered a deviation to cover the full amount of the special expenses.

O.C.G.A. § 19-6-15(i)(2)(J)(ii)

23.579 **Extraordinary Expense; Medical**

In instances of extreme economic hardship involving extraordinary medical expenses not covered by insurance, you may consider a deviation from the presumptive amount of child support for extraordinary medical expenses. Such expenses may include, but are not limited to, extraordinary medical expenses of the child, a parent, or a child of a parent’s current

family, provided, however, that any such deviation shall not leave a child unsupported and may be ordered for a specific period of time measured in months.

When extraordinary medical expenses are claimed, you shall consider the resources available for meeting such needs, including sources available from agencies and other adults.

O.C.G.A. § 19-6-15(i)(2)(J)(iii)

23.580 **Extended Parenting Time**

The Child Support Obligation Table is based upon expenditures for a child in intact households. You may find a deviation from the presumptive amount of child support when special circumstances make the presumptive amount of child support excessive or inadequate due to extended parenting time or when the child resides with both parents equally.

If you determine that a parenting-time deviation is applicable, then such deviation shall be applied to the noncustodial parent's basic child-support obligation.

O.C.G.A. § 19-6-15(i)(2)(K)

23.585 **Nonspecific Deviations**

If you find that it is appropriate to grant a deviation from the presumptive amount of child support for a reason or reasons other than those previously charged and if you find that such deviation is in the best interest of the child(ren), you may grant such deviation. You must state the reason for any such deviation and the amount thereof in the appropriate place on the verdict form.

O.C.G.A. §19-6-15(i)(3)

23.590 **Verdict; Deviation**

Whatever your verdict is as to deviation, it should be unanimous and entered in writing in the place(s) provided on the deviation verdict form that I have provided to you. The deviation verdict form provided to you will include a finding as to the presumptive amount

of child support. You may only return a verdict of deviation from that amount if you find that the evidence is sufficient to rebut that amount. You should then give in the space provided the reason(s) you, the jury, deviated and state how the application of the guideline's presumptive amount would be unjust or inappropriate considering the relative ability of each parent to provide support. You must further state how the best interest of the child(ren) subject to this child support determination is (are) served by the deviation from the presumptive amount of child support.

O.C.G.A. § 19-6-15(c)(1)(E)

23.591 **Verdict; Calculation**

You may enter the amount of deviation shown by the evidence, if any, in each category in the respective spaces on the Schedule E of the Deviation Verdict form. However, I caution you that when you total any deviations found for entry in the appropriate space on the Verdict Form (Line 14, Schedule E) you should strike and not include in your total any amount of deviation for either party or both which you do not find justified in answering the three required questions.

23.595 **Verdict; Form**

IN THE SUPERIOR COURT OF _____ COUNTY
STATE OF GEORGIA

_____
Plaintiff

v. Case No. _____

_____
Defendant

SPECIAL VERDICT FORM
CHILD SUPPORT—GROSS INCOME

We, the jury in the above-styled case, find as follows:

1) The plaintiff's gross monthly income is $_____.
2) The defendant's gross monthly income is $_____.

We, the jury, hereby adopt and make a part of this verdict "Child Support Schedule A, Gross Income," as promulgated by the Child Support Commission, which has been completed by the jury and marked "J–A," which has been attached hereto and signed this date by the foreperson. We have made the entries in same and find the facts recorded herein to be the facts of this case.

This _____ day of _____, 20__

_____
Foreperson (Signature)

_____
Foreperson (Print Name)

IN THE SUPERIOR COURT OF _____ COUNTY
STATE OF GEORGIA

_____
Plaintiff

v. Case No. _____

_____
Defendant

SPECIAL VERDICT FORM
CHILD SUPPORT—
DEVIATION FROM THE PRESUMPTIVE AMOUNT OF CHILD SUPPORT

Having been informed by the Court that the custodial parent is _____ and the noncustodial parent is _____ and that the presumptive amount of child support is _____, we, the jury in the above-styled case, hereby adopt and make a part of this verdict "Child Support Schedule E, Deviations," as promulgated by the Child Support Commission, completed by the jury and marked "J–E," which has been attached hereto and signed this date by the foreperson. We have made the entries in same and find the facts recorded herein to be the facts of the case.

_____ We find that the deviations found (should) (should not) be made to the custodial parent's obligation.

_____ We find that the deviations found (should) (should not) be made to the noncustodial parent's obligation.

We have made the appropriate findings about deviations on Schedule E and hereby adopt the same, and they are made a part of this verdict. The Child Support Worksheet, completed by the Court using the above verdict, concerning deviations is likewise incorporated into and made part of the verdict of this case.

This _____ day of _____, 20__

_____
Foreperson (Signature)

_____
Foreperson (Print Name)

23.700 **Modification or Initial Determination of Child Support—Parties Never Married**

(Note: O.C.G.A. § 19-6-15[k][1] provides that a parent may not " . . . petition for modification of the child support award . . . unless there is a substantial change in either ***parent's*** *income and financial status or the needs of the* ***child****" [emphasis added]. There are other time-period provisions. O.C.G.A. § 19-6-15[k][4] provides that when a petition for modification comes before a jury, the members " . . . shall only be responsible for determining a* ***parent's gross income*** *and any* ***deviations****. . . ." [emphasis added]. Thus, it appears that the issue of comparison to prior awards and determining the issue of "substantial change" and the issues from O.C.G.A. § 19-6-15[k][2] are left as court decisions after the jury has determined new income and deviations. The court may want to encourage pretrial practice, including, but not limited to, motions for summary judgment on some of these issues before the lengthy and intricate process of jury determination of income is undertaken.)*

23.701 **Modification or Initial Determination of Child Support—Parties Never Married; Preliminary Instruction**

Members of the jury, the case you are about to try is styled _____v._____. You will be deciding the income and financial status of the parties and the needs of the child(ren). Under our system, it is my duty as the trial judge to determine the law applicable to this case, and it is your duty, as the jury, to determine the facts of the case. It is also your duty to apply the law to those facts in reaching your verdict.

The facts are determined by you from the evidence. The evidence consists of two things: testimony and exhibits. The testimony is that testimony that you will hear under oath from the witness(es). Exhibits are documents or photos or other items that have been admitted into evidence. You will then have those exhibits with you in the jury room for your use during your deliberations.

I caution you that what the lawyers say during this trial is not evidence. Nothing they say in their opening statements or their arguments or at any time during this trial is evidence, nor is anything I might do or say evidence in this case. I have no leanings in this case whatsoever.

(At the beginning of the trial, you will also be given various forms such as financial affidavits and child support calculation schedules of either or both parties. I further instruct you that these forms are not evidence but are the contentions of the parties in the format required by law. These forms are not to be considered by you as evidence until, and unless and to the extent that, they are supported by admissible evidence, such as by testimony or by other admitted exhibits [or unless the figures of both parties coincide, in which case you may choose to take it as a stipulation of fact]. You will later be required to fill out similar blank forms that will be used to calculate child support.)

My interest in this case is to see that the case is tried fairly as to both parties and to see that it is tried according to the laws of the State of Georgia and according to the constitutions of this state and of the United States.

(Refer to the following charges from Preliminary General Instructions as appropriate.)

00.030	*Parties (Optional)*
00.050	*Credibility of Witnesses*
00.070	*Rules of Evidence*
00.090	*Note-Taking by Jurors*

23.705 Modification or Initial Determination of Child Support—Parties Never Married; Final Instruction

(Instructions to be given at conclusion of Child Support Modification Trial:)

You have been considering the case of *(enter name of plaintiff)*, as plaintiff, v. *(enter name of defendant)*, as defendant, Civil Action No. *(enter number)*. You will be deciding issues of the income and financial status of _____ *(the parties)* and the needs of the child(ren). Each party has the burden of proof as to their contentions as to their own and the other's income and financial status (and the financial needs of the child[ren]). The party (parties) with the burden of proof must prove his or her (their) case by a preponderance of the evidence.

(Refer to the following charges from General Civil Instructions as appropriate:)

02.100 *Evidence, Generally*

02.110 *Evidence, Direct or Circumstantial*

02.120 *Expert Witnesses*

02.121 *Expert Witness; Fair Market Value; Comparable Sales (See 14.200 et seq., Condemnation; Fair Market Value.)*

02.130 *Credibility of Witnesses*

02.150 *Witness, Attacked (Old Impeached)*

02.160 *Failure to Produce Evidence*

02.161 *Failure to Produce Witnesses; Generally*

(Recommence with 23.000 et seq.*, Child Support.)*

(Conclusion charges for first and second phases:)

02.520 *Verdict in Writing*

02.530 *Court Has No Interest in Case*

02.550 *Sympathy*

02.560 *Alternate Jurors*

02.700 *Verdict (Hung Jury)*

24.000 EMPLOYER AND EMPLOYEE

24.010 Employer, Duties of; Generally

(Charge only such parts of this section as apply to the facts before the court.)

The employer is bound to exercise ordinary care in the selection of employees and not to retain them after knowledge of incompetency. The employer shall use like care in furnishing machinery equal to that in general use and reasonably safe for all persons who operate it with ordinary care. If there are hidden defects in machinery or dangers involved with an employment unknown to the employee of which the employer knows or ought to know, the employer shall give the employee warning.

O.C.G.A. §34-7-20

Central of Georgia Railway Co. v. Ray, 129 Ga. 349 (1907)

24.020 Employer, Selection and Retention of Employees

To entitle the employee to recover on the ground that the employer negligently employed an incompetent fellow employee, it must be shown not only that the fellow employee was in fact incompetent but that the employer knew or, in the exercise of due care, should have known this at the time of the employment, or else that the employer negligently retained the fellow employee under circumstances that would warrant a finding that the employer knew or should have known of such incompetency. The degree of care required of the employer in these respects is ordinary care.

Gunn v. Willingham, 111 Ga. 427 (1900); distinguished at 124 Ga. 576 (1906)

Strickland v. Foughner, 63 Ga. App. 805, 808 (1940)

24.030 Employer, Place to Work; Generally

An employer is bound to exercise ordinary care in furnishing a reasonably safe place for employees to work. If there are hidden dangers involved with an employment unknown to the employee or that the employer knows or, in the exercise of ordinary care, should know, the employee must be warned about them. But if there are hidden defects involved with the employment of which the employer does not know and could not know by the exercise of

ordinary care, the employer will be excused for a failure to discover them and will not be liable because of them.

Holland v. McRae Oil and Fertilizer Co., 134 Ga. 678(8) (1910)

24.040 **Employer, Place to Work; Changing Conditions**

The general rule of law declaring the duty of an employer in regard to furnishing an employee a safe place to work is usually applied to a permanent place. It does not apply to places that are constantly shifting and being transformed as a direct result of the employee's labor and where the work's progress necessarily changes the character of safety of the place in which it is performed.

Holland v. Durham Coal & Coke Co., 131 Ga. 715(1) (1908)
Norris v. American Railway Express Co., 156 Ga. 150, 154 (1923)

24.050 **Employer, Presumption of Ordinary Care**

The presumption exists that the employer exercised ordinary care in the selection of employees. One who complains of injuries that one alleges resulted from the incompetency of a fellow employee must overcome this presumption by direct proof and cannot successfully rebut the presumption by inferences drawn from facts that fail to disclose that the employer knew, or should have known, of the incompetency of the fellow employee.

Kilgo v. Rome Soil Pipe Mfg. Co., 16 Ga. App. 737(3) (1915)
Atlanta, Birmingham and Atlantic Ry. Co. v. Smith, 23 Ga. App. 198 (1919)

24.060 **Employer, Duty to Warn Employee**

If there are dangers involved in an employment unknown to the employee of which the employer knows or, in the exercise of ordinary care should have known, the employer must warn the employee of such dangers.

Southern Cotton Oil Co. v. Horton, 22 Ga. App. 155(4) (1918)

24.070 **Employee, Duty of; Fellow Employees**

If an employee should have equal opportunity of discovering incompetency on the part of a fellow employee or, in the exercise of ordinary care, should have known it, the employee cannot recover for injuries resulting from such incompetency.

O.C.G.A. §34-7-23

24.080 **Employee, Machinery**

In order for an employee to recover damages from an employer for injuries received from the employer's machinery, it must be shown by the evidence that the employer knew of the defect or danger in the machinery or could have discovered it by the exercise of ordinary care and that the employee did not know of the defect or danger and did not have equal means with the employer of discovering the danger.

O.C.G.A. §34-7-23

Barrow County Cotton Mills v. Farr, 33 Ga. App. 730 (1925)

Abercrombie v. Ivey, 59 Ga. App. 296 (1938)

24.090 **Employee, Place to Work**

If there are hidden defects at the place of employment of which the employer does not know and the employee has equal means with the employer of knowing the condition and circumstances of the place of employment, the employee cannot recover for injuries suffered on account of such defects in the place of employment.

City Council of Augusta v. Owens, 111 Ga. 464(5) (1900); distinguished at 41 Ga. App. 746 (1930)

Southern Bauxite Co. v. Fuller, 116 Ga. 695, 698 (1902)

24.100 **Employee, Assumption of Risk**

An employee assumes the ordinary risks of employment and is bound to exercise skill and care to protect against these risks. The assumed risks are those usually and reasonably involved in the work.

O.C.G.A. §34-7-23

East Tennessee Railway Co. v. Perkins, 88 Ga. 1 (1891)

Williams v. Garbutt Lumber Co., 132 Ga. 221, 232 (1909)

24.110 **Employee, Children, Diligence Required of**

Due care by a child of tender years is such as the child's mental and physical capacities enable him/her to exercise in the actual circumstances of the occasion and situation under investigation. Therefore, the duty of a child with respect to risk involved in employment is to exercise due care according to the child's age and actual capacity.

O.C.G.A. §51-1-5

Moore v. Ross, 41 Ga. App. 509(3) (1930)

Gordon v. Batayias, 53 Ga. App. 538, 539 (1936)

24.200 **Employee, Railroad Employees; Generally**

The employee assumes such risks as are normally and reasonably involved in the occupation and is not held to have assumed such risks as are unusual and not necessarily involved in the employment of which the employee did not know and by the exercise of ordinary care for his/her own safety could not have known and concerning which the employee did not have equal means with the employer of knowing.

Emanuel v. Georgia and Florida Ry. Co., 142 Ga. 543, 547 (1914)

24.210 **Employee, Railroad Employees; Federal Employer's Liability Act**

If a suit should be brought under the Federal Employer's Liability Act, and it should not be shown that injury or death resulted from a violation of a federal statute for the protection of the employees, the doctrine of assumed risk would apply. No presumption of negligence against the employer would exist, since under those circumstances the employee would be held to have assumed the usual and ordinary risks incident to employment.

Gray v. Garrison, 49 Ga. App. 472 (1934); distinguished at 57 Ga. App. 350 (1938)

24.220 **Employee, Railroad Employees; Statutory Violations by Railroad**

If an action should be brought against a common carrier railroad that is to recover damages for injuries to or the death of an employee, such employee shall not be held to have assumed risks of employment in any case in which the violation by the common carrier of any statute enacted for the safety of the employees contributed to the injury or death of the employee.

O.C.G.A. §34-7-43

Southern Railway Co. v. Perkins, 33 Ga. App. 504(2) (1925)

24.230 **Employee, Railroad Employees; Comparative Negligence Rule Applies**

In an action brought against a common carrier, which is a railroad, to recover damages for personal injuries to, or the death of, an employee, the fact that the employee may have been guilty of contributory negligence will not bar a recovery, unless the contributory negligence of the employee amounted to a failure to exercise ordinary care for his/her own safety. If it amounted to such failure or was equal to or greater than the negligence of the employer, no recovery can be had. If it did not amount to such failure and was less than the negligence of the employer, a recovery may be had, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to the employee, provided no such injured employee shall be held contributorily negligent in any case in which a violation by the common carrier of any statute enacted for the safety of employees contributed to the death or injury of such employee.

O.C.G.A. §34-7-42

24.240 **Employee, Railroad Employees; Care for Own Safety**

The rule of law that an employee assumes the ordinary risks of employment makes it the employee's duty to exercise the skill and care to protect against such risks. This rule applies to a common carrier, which is a railroad, as well as to other employers. To recover because of alleged act of negligence on the part of the employer it must appear that

1) the employer was negligent,
2) the employee did not know of the negligence,

3) the employee did not have equal means with the employer of knowing of the negligence, and
4) by the exercise of ordinary care, the employee could not have known of the negligence.

Hightower v. Southern Railway Co., 146 Ga. 279 (1916)

Brady v. Bugg, 38 Ga. App. 48, 49 (1928)

26.000 FRAUD AND DECEIT

26.010 Fraud and Deceit; Definitions; Presumption and Proof

(*Note: Constructive fraud is an equitable doctrine only and will not support an action for money damages. In order to support an action for damages, a misrepresentation must be made either knowingly or with reckless disregard for the consequences. See* Nalley Northside Chevrolet v. Herring*, 215 Ga. App. 185 (1994). See* Consolidated American Insurance Company v. Spears*, 218 Ga. App. 478 (1995).*)

A person commits fraud when that person makes a misrepresentation that is intended to deceive and that does deceive.

Thompson v. Wilkins, 143 Ga. App. 739 (1977)

[Fraud may be actual or constructive. Actual fraud consists of any method by which another is deceived. Constructive fraud consists of any act done (or not done that should have been done) contrary to legal or equitable duty, trust, or confidence upon which another person relies to the injury of that person. Actual fraud implies moral guilt, while constructive fraud may be consistent with innocence.] *(Give bracketed paragraph only when constructive fraud is alleged.)*

Fraud may not be presumed, but slight circumstances may be enough to prove its existence. To prove fraud, the following elements are required:

1) a false representation,
2) intent to deceive,
3) an intention to induce the plaintiff to act or refrain from acting in reliance on the false representation,
4) justifiable reliance by the plaintiff on the false representation, and
5) damage to the plaintiff.

O.C.G.A. §§23-2-51, 23-2-57

Marriott Corp. v. American Academy of Psychotherapists Inc., 157 Ga. App. 497, 499 (1981)

City Dodge v. Gardner, 232 Ga. 766, 769-770, fn.1 (1974)

Kodadek v. Lieberman, 247 Ga. App. 606 (2001)

26.020 **Fraud and Deceit; Contracts, Effect on**

Fraud renders contracts voidable at the choice of the injured party.

O.C.G.A. §13-5-5

26.030 **Fraud and Deceit; Diligence Required of Plaintiff**

Before a person is entitled to relief on the ground of fraud, deceit, or misrepresentation, it must appear that the person used ordinary care to find out the facts and protect against loss, unless a confidential relationship existed between the parties.

(The remainder of the charge should only be given if applicable to the facts.)

When one person is placed in such relationship to another that they both become interested in any subject or property, they are prohibited from acquiring rights in that subject or property in conflict with each other.

Any relations shall be considered confidential when one party is so situated as to exercise a controlling influence over the will, conduct, or interest of another or when from such relation of mutual confidence the law requires utmost good faith.

O.C.G.A. §§23-2-58, 23-2-59

Skinner v. Melton, 84 Ga. App. 98 (1951)

Scott v. Fulton National Bank, 92 Ga. App. 741 (1955); and other cases cited to note "diligence" following O.C.G.A. §51-6-2

26.040 **Fraud and Deceit; Misrepresentation and Concealment**

Misrepresentation of a material fact, if acted on by the opposite party, constitutes legal fraud, whether the misrepresentation was intentional or not.

(*Do not give the above without researching this issue. See* Lawyers Title Insurance Corporation v. New Freedom Mortgage Corporation, *285 Ga. App. 22, 645 S.E. 2d 536 (2007).*)

If there is a willful misrepresentation of a material fact, which was made to induce another person to act and causes that person to act and the person is injured, then the person who is injured has a right of action. Mere concealment of a fact, unless done in a manner to deceive and mislead, will not support an action.

In all cases of deceit, knowledge of the falsehood constitutes an essential element. However, fraudulent or reckless misrepresentation of facts as true, which the party may not know to be false, if intended to deceive, is equivalent to a knowledge of the falsehood.

O.C.G.A. §23-2-52

Jordan v. Belvin, 57 Ga. App. 719, 723 (1938)

First of Georgia Co. v. Maddox, 217 Ga. 416, 417 (1961)

Kodadek v. Leiberman, 247 Ga. App. 606 (2001)

26.050 **Fraud and Deceit; Rescission and Restitution; Generally**

A contract may be rescinded at the instance of the party defrauded, but in order to rescind, the person seeking to rescind must promptly, upon discovery of the fraud, return whatever that person has received by virtue of the contract, if it is of any value.

Exceptions to the requirement of return exist when the party is entitled to keep the consideration because of damages already sustained because of the fraud, the defrauding party has made restoration impossible, or when restoration would be unreasonable. Reasonableness is a question for you, the jury, to decide.

O.C.G.A. §13-4-60

Hooper v. Weathers, 175 Ga. 133 (1932)

Cohron v. Woodland Hills Co., 164 Ga. 581 (1927)

Farnell v. Brady, 159 Ga. 209 (1924)

Orion Capital Partners LP v. Westinghouse Elec. Corp., 223 Ga. App. 539 (1996)

26.100 **Fraud and Deceit; Goods, Sale of; Generally**

When a buyer of personal property makes a material representation that is false and the seller relies upon the misrepresentation and delivers possession of goods, such a misrepresentation amounts to a fraud in law and voids the sale. Equity may then rescind the contract and restore the parties to their original positions, even though the party making such misrepresentation was not aware that the statement was false.

Newman v. Claflin, 107 Ga. 89 (1899)

26.110 **Fraud and Deceit; Goods, Sale of; Trover**

In a contract of sale of personalty, if there was a simple warranty, title would pass. If there was a fraudulent representation that induced the plaintiff to act to the injury, title would not pass. The injured party could then treat the contract as rescinded and proceed to recover the property.

Johnson v. Harley, 121 Ga. 83 (1904)
Barnett v. Spier, 93 Ga. 762 (1894)

26.200 **Fraud and Deceit; Releases**

If a release is obtained by fraud, it is void and has no effect. However, a person, who for a valuable consideration has released another from all further liability cannot obtain a rescission of such contract of release and recover upon the original cause of action without first restoring or offering to restore what was received for such release.

Harley v. Riverside Mills, 129 Ga. 214 (1907)
Western & Atlantic Railroad Co. v. Atkins, 141 Ga. 743 (1914)
Mack v. Shearer, 222 Ga. 33 (1966)

26.300 **Fraud and Deceit; Lands, Sale of**

In a sale of lands, when the quantity is specified as "more or less," it is your duty to determine whether the deficiency is so gross as to justify the suspicion of willful deception or mistake amounting to fraud. If you find that fraud does exist, you would find in favor of (depending on the relief sought by plaintiff) either a rescission of the sale or an apportionment of the price according to relative value.

Fraud that avoids a sale of lands may be legal as well as moral. Misrepresentations made by one party with the intent to deceive the other or that actually deceive the other party, however innocent, may constitute fraud. Such misrepresentations may be by acts as well as words.

O.C.G.A. §44-5-35
James v. Elliott, 44 Ga. 237 (1871)
Powell v. Fowler, 138 Ga. 397 (1912)

Johnson v. Dooly, 72 Ga. 297 (1884)

26.400 **Fraud and Deceit; Goods, Sale of; Generally (Commercial Code)**

(For applicability of this charge, see definition of goods in O.C.G.A. §11-2-105.)

When there is a claim of material misrepresentation of fraud about a sale of goods, the defrauded party is entitled to an appropriate remedy. The right of the defrauded party to void the contract of sale or return the goods does not prevent the defrauded party from making a claim for damages or pursuing other remedies under the law.

O.C.G.A. §11-2-721

(Note: The entire Part 7 [O.C.G.A. §11-2-701 et seq.*] of the article on sales [O.C.G.A. §11-2101 et seq.] deals with remedies of parties in cases involving sales of goods, and it will be necessary to apply whatever part of the law applies to the factual situation in any given case. The most likely code sections to be used will be those relating to incidental or consequential damages to the buyer [O.C.G.A. §11-2-715] or seller [O.C.G.A. §11-2-710], which are set out as the following two charges. For certain equitable relief in cases of misrepresentation or fraud, see 16.220 Contracts; Accident and Mistake.)*

26.500 **Fraud and Deceit; Damages; Generally (Commercial Code)**

Fraud ordinarily gives the injured party the right to rescind (that is, void the contract) or to affirm the contract and sue for damages, provided that the buyer has notified the seller within a reasonable time after discovering the fraud. You would determine whether the plaintiff gave the defendant proper legal notice, and if so, you would then determine if there should be a recovery and what the amount of the recovery should be.

O.C.G.A. §§11-2-607, 11-2-714

Barfield v. Farkas, 40 Ga. App. 559 (1929)

Wright v. Ziegler, 70 Ga. 501(5) (1883)

26.510 **Fraud and Deceit; Buyer's Incidental and Consequential Damages (Commercial Code)**

(See 26.511–26.520.)

26.511 **Fraud and Deceit; Buyer's Incidental Damages**

Incidental damages resulting from the seller's breach include expenses reasonably incurred in inspection, receipt, transportation, and care and custody of goods rightfully rejected and commercially reasonable charges, expenses, or commissions in connection with effecting cover and any other reasonable expense incident to the delay or other breach.

26.512 **Fraud and Deceit; Buyer's Consequential Damages**

Consequential damages resulting from the seller's breach include

1) any loss resulting from general or particular requirements and needs of which the seller at the time of the contracting had reason to know and which could not reasonably be prevented by cover or otherwise, and
2) injury to person or property proximately resulting from any breach of warranty.

"Cover," for the purpose of this lawsuit, means the right of the buyer, in good faith and without unreasonable delay, to buy or contract to buy goods that are a reasonable substitute for those claimed to be due from the seller. The measure of damages is the difference between the cost of the substitution purchase and the contract price, together with any incidental or consequential damages as they have been defined to you.

O.C.G.A. §§11-2-712, 11-2-715

26.520 **Fraud and Deceit; Seller's Incidental Damages (Commercial Code)**

Incidental damages to a seller include any commercially reasonable charges, expenses, or commissions incurred in stopping delivery; in the transportation, care, and custody of goods after the buyer's breach; in connection with return or resale of the goods; or otherwise resulting from the breach.

O.C.G.A. §11-2-710

28.000 GIFTS

28.010 Gifts; Essentials; Acceptance

To constitute a valid gift, there shall be the intention to give by the donor, acceptance by the donee, and delivery of the article or some act accepted by the law in place of delivery.

If the gift is of substantial benefit, the law will presume the acceptance, unless the contrary is shown. A parent, guardian, or friend may accept for an infant. The officers of a corporation may accept for the corporation.

O.C.G.A. §§44-5-80, 44-5-81

28.020 Gifts; Personal Property; Delivery; Generally

Actual manual delivery of personal property is not essential to the validity of a gift. Any act that indicates a renunciation of possession by the donor, and the transfer of control to the donee, shall be a constructive delivery.

All kinds of personal property that are capable of manual delivery and of which the title, either legal or equitable, can be transferred by delivery may be the subject matter of a valid gift, whether delivery be actual or constructive.

O.C.G.A. §44-5-82

Underwood v. Underwood, 43 Ga. App. 643 (1931)

Brooks v. Brooks, 54 Ga. App. 276 (1936)

28.030 Gifts; Delivery of Personal Property to Third Person; Recovery

Delivery, actual or constructive, being essential to a valid gift, if the owner of personal property should deposit it with another who is directed by the owner to deliver it to a third person as a gift from the owner, the owner could at any time before actual delivery to the intended donee and acceptance of the gift by the donee recover the property from the person with whom it had been deposited for delivery.

Smith v. Peacock, 114 Ga. 691 (1902)

Knight v. Jackson, 156 Ga. 165 (1923)

28.040 **Gifts; Realty; Gifts from Parent to Child**

The exclusive possession by a child of lands which originally belonged to the parent or parents, without payment of rent, for the space of seven years, creates a rebuttable presumption of a gift and conveys title to the child. The presumption may be rebutted by evidence of a loan, of a claim of dominion by the parent or parents acknowledged by the child, of a disclaimer of title by the child, or similar evidence.

O.C.G.A. §44-5-85

28.050 **Gifts; Realty Plus Valuable Improvements**

Specific performance of a voluntary agreement or gratuitous promise should not be awarded. If possession of lands has been given under such agreement, upon a valuable consideration and valuable improvement made upon the faith of it, equity will decree the performance of the agreement.

O.C.G.A. §§23-2-131, 23-2-132

Howell v. Ellsberry, 79 Ga. 475 (1888)

30.000 IMPLIED OBLIGATIONS TO PAY

30.010 Implied Obligations; Generally

Ordinarily, when one renders services or transfers property valuable to another, which the other accepts, a promise is implied to pay the reasonable value of it.

(Omit balance of charge unless close family relationship is involved.)

This presumption does not arise in cases between very near relatives.

O.C.G.A. §9-2-7

30.100 Implied Obligations; Usual Practice

When one person performs useful services for another with the other's knowledge for which a charge is usually made, and the other expresses no objection or accepts the service, then a promise to pay the reasonable value of the service is implied.

Mitcham v. Singleton, 50 Ga. App. 457 (1935)
Conway v. Housing Authority, 102 Ga. App. 333, 335 (1960)
Puritan Mills Inc. v. Pickering, 152 Ga. App. 309, 310 (1979)

30.200 Implied Obligations; Family Transactions; Generally

The particular facts of each case will determine whether the usual implication of a promise to pay for services accepted is rebutted by the fact of close relationship between the parties. In determining what circumstances are sufficient to imply a promise to pay for services rendered in cases of close relationship, the nature and value of the services rendered and the physical and financial conditions of the parties should be taken into account.

Wall v. Wall, 15 Ga. App. 156 (1914)
Cowsert v. Nunnally, 113 Ga. App. 200, 201 (1966)
McRae v. Britton, 144 Ga. App. 340 (1977)

30.210 Implied Obligations; Parent and Child

In order to entitle a child to recover against a parent for services rendered in the nature of care and attention such as are usually bestowed because of a natural sense of duty and

affection arising out of the relationship, it must affirmatively appear that the services rendered were performed under an express contract that the party would pay for the same, or the surrounding circumstances must clearly indicate that it was the intention of both parties that compensation should be made. What circumstances would be sufficient to support an implication of a promise to pay for such services is a question for the jury to determine.

Edwards v. Smith, 42 Ga. App. 730 (1931)
Matthews v. McCorkle, 111 Ga. App. 310, 312 (1965)

30.300 **Implied Obligations; Property, Transfer of**

If one should transfer valuable property to another and the other person should accept the property, the law would imply a promise on the part of the other person to pay the reasonable value of the property.

Stafford Lumber Co. v. Gordon, 29 Ga. App. 588 (1923)
Cary v. Simpson et al., 15 Ga. App. 280(7) (1914)

30.400 **Implied Obligations; Money Had and Received**

An action for money had and received exists in all cases in which another has received money that the plaintiff in equity and good conscience is entitled to recover and that the defendant is not entitled in good conscience to keep.

Carmichael v. Bayley, 42 Ga. App. 408, 410 (1930)
Empire Oil Co. v. Lynch, 106 Ga. App. 42, 43 (1962)

32.000 INSURANCE

32.010 Insurance; Misrepresentation; Generally

All statements and descriptions in any application for an insurance policy or annuity contract or in negotiations for them by or in behalf of the insured or annuitant shall be deemed to be representations and not warranties. Misrepresentations, omissions, concealment of facts, and incorrect statements shall not prevent a recovery under the policy of contract unless

1) it is fraudulent,
2) it is material either to the acceptance of the risk or to the hazard assumed by the insurer,
3) the insurer in good faith would either not have issued the policy or contract or would not have issued a policy or contract in as large an amount or at the premium rate as applied for or would not have provided coverage with respect to the hazard resulting in the loss, if the true facts had been known to the insurer as required either by the application for the policy or contract or otherwise.

O.C.G.A. §33-24-7

32.020 Insurance; Misrepresentations, Innocent

When there is not clear and unequivocal limitation on the authority of the agent of the insurance company and no fraud or collusion between the agent and the prospective insured, the company is presumed to know any facts that the agent knows amounting to innocent misrepresentations and cannot claim lack of knowledge as a defense.

If there was a misrepresentation in the application for insurance and it was attached to the policy and made a part of it and it was material in that it changed the nature, extent, and character of the risk, it would void the policy even though it was made innocently and in good faith.

Allstate Insurance Co. v. Anderson, 121 Ga. App. 582 (1970)
Public Savings Life Insurance Co. v. Wilder, 123 Ga. App. 754 (1971)

32.030 **Insurance; Concealment**

The willful concealment in the application for insurance will void a policy.

Prudential Insurance Co. v. Perry, 121 Ga. App. 618 (1970)

32.100 **Insurance; Failure to Pay Claim; Bad Faith**

If you find that the insurer has exercised bad faith in refusing to pay a claim within sixty days after demand, the insurer shall be liable, in addition to the loss, for a penalty up to 50 percent of the amount of the loss or $5,000, whichever is greater, and all reasonable attorney's fees. You must determine, first, how much the loss was and, second, how much penalty the plaintiff is entitled to receive. The penalty may be any amount as determined by the jury up to but not exceeding 50 percent of the loss or $5,000, whichever is greater. You must then determine how much the attorney's fees shall be on the basis of evidence brought before you as to the reasonable value of the services, based on time spent and legal and factual issues involved in accordance with prevailing fees. Your verdict should fix the amount of the loss first and then, if you find that bad faith existed, make separate findings as to penalty (not over 50 percent of the loss or $5,000, whichever is greater) and attorney's fees.

(Note: Penalty changed effective 7/1/2001.)

O.C.G.A. §33-4-6

United States Fire Insurance Co. v. Tuck., 115 Ga. App. 562 (1967)

32.200 **Insurance; Suicide, Presumption Against**

The policy provides that suicide, sane or insane, shall be a bar to recovery. Suicide is intentional, not accidental, self-destruction. There is a presumption against suicide that must be overcome by a preponderance of the evidence.

Belch v. Gulf Life Insurance Co., 219 Ga. 823, 825 (1964)

Templeton v. Kennesaw Life Insurance Co., 216 Ga. 770, 773 (1961)

32.300 **Insurable Interest; Life**

"Insurable interest" with reference to personal insurance is an interest based upon a reasonable expectation of monetary advantage through the continued life, health, or bodily safety of a person and consequent loss by reason of that person's death or disability or a substantial interest produced by love and affection in the case of individuals closely related by blood or by law.

Individuals have an unlimited insurable interest in their own life, health, and bodily safety and may lawfully take out a policy of insurance on their own life, health, or bodily safety and have the policy made payable to whomever they please, regardless of whether the designated beneficiary has an insurable interest.

(Use if applicable.)

A corporation has an insurable interest in

a) the life or physical or mental ability of
    1) its directors, officers, or employees, or those of its subsidiaries, or any other person whose death or disability might cause it financial loss; or
    2) a shareholder, pursuant to a contractual arrangement concerning the reacquisition of shares owned by the shareholder at the time of death or disability or
b) the life of the principal obligor pursuant to
    1) a contract obligating the corporation as part of compensation arrangements or
    2) a contract obligating the corporation as guarantor or surety.

(Use if applicable.)

The trustee of a trust established by a corporation providing life, health, disability, retirement, or similar benefits to employees of the corporation or its affiliates and acting in a fiduciary capacity with respect to such employees, retired employees, or their dependants or beneficiaries has an insurable interest in the lives of employees for whom such benefits are to be provided.

(Use if applicable.)

The insurable interest of a corporation or trustee shall be conveyed automatically to another corporation or to the trustee of a trust established by such other corporation for its

sole benefit that has acquired by purchase, merger, or otherwise all or part of the first corporation's business.

A corporation or the trustee of a trust may exchange any policy of insurance issued to itself or to another corporation or the trustee of a trust established by such other corporation for its sole benefit from which the exchanging corporation has acquired by purchase, merger, or otherwise all or part of such other corporation's business for a new policy of insurance issued to itself without establishing a new insurable interest at the time of such exchange.

O.C.G.A. §33-24-3(c), (c.1)

(Give in all cases.)

An insurable interest must exist at the time the contract of personal insurance becomes effective, but this requirement need not exist at the time the loss occurs.

Any personal insurance contract procured (caused to be procured) upon another is void unless the benefits are payable to the individual insured or that person's representative or to a person having, at the time the contract was made, an insurable interest in the individual insured. When a contract is void, the insurer shall not be liable on the contract but shall be liable to repay to the person(s) who have paid the premiums, without interest.

O.C.G.A. §33-24-3

32.400 **Insurable Interest; Property**

No insurance contract on property or of any interest in it or arising from it shall be enforceable except for the benefit of persons having, at the time of the loss, an insurable interest in the things insured.

"Insurable interest" as used in this section means any actual, lawful, and substantial economic interest in the safety or preservation of the subject of the insurance free from loss, destruction, or monetary damage or impairment.

The measure of an insurable interest in property is the extent to which the insured might be damaged by loss, injury, or impairment of it.

O.C.G.A. §33-24-4

34.000 INTEREST AND USURY

34.010 Usury; Definition

Usury is the reserving and taking or contracting to reserve and take, either directly or indirectly, a greater sum for the use of money than the interest allowed by law.

O.C.G.A. §7-4-1

34.020 Usury; Intention; Indirect Means

To constitute usury, it is essential that there be, at the time the contract is executed, an intent on the part of the lender to take or charge for the use of money a higher rate of interest than that allowed by law.

If such intent existed at the time the contract was executed, the fact that it was accomplished indirectly, as by way of commission for advances, discount, exchange, or by any contract or scheme or contrivance or device whatever, would not excuse it.

In determining whether such intent existed, you would inspect and analyze the transaction critically and carefully and consider all of its facts and circumstances.

O.C.G.A. §7-4-2

Bellerby v. Goodwyn, 112 Ga. 306 (1900)

Loganville Banking Co. v. Forrester, 143 Ga. 302 (1915)

Bank of Lumpkin v. Farmers State Bank, 161 Ga. 801 (1926)

Harrison v. Arrendale, 113 Ga. App. 118, 121, 123 (1966); 117 Ga. App. 463 (1968); on retrial

36.000 LANDLORD AND TENANT

36.010 Landlord and Tenant; Duty of Landlord; Generally

The landlord must keep the premises in repair and shall be liable for all substantial improvements made to them by the landlord's consent.

O.C.G.A. §44-7-13

36.020 Landlord and Tenant; Duty of Landlord at Time of Rental

It is ordinarily the duty of a landlord to turn over rented property to the tenant in a condition reasonably safe and suited for the tenant's intended use and free of hidden defects, as the exercise of ordinary care on the part of the landlord might have disclosed. A landlord is liable for injuries resulting to a tenant from defects that were hidden from the tenant and of which the landlord knew or could have discovered by the exercise of ordinary care.

Elijah A. Brown Co. v. Wilson, 191 Ga. 750 (1941)

36.030 Landlord and Tenant; Duty of Landlord during Rental

A landlord is under no duty to inspect the rented premises in order to keep informed about their condition and cannot be held liable for damages caused from defects in the rented premises occurring after having parted with the possession, unless the landlord has been notified of the defects and has had a reasonable time in which to make repairs.

Zaban v. Coleman, 27 Ga. App. 376 (1921)
Nunnally v. Wheeler, 38 Ga. App. 517 (1928)

36.200 Landlord and Tenant; Liability of Landlord; Generally

The landlord is responsible to others for damages arising from

a) defective construction or
b) failure to keep the premises in repair after having notice of a defect and an opportunity to repair.

However, once the landlord has fully parted with possession and the right of possession, the landlord is not responsible to third persons for damages resulting from negligence or illegal use of the premise by the tenant.

O.C.G.A. §44-7-14

Colquit v. Rowland, 265 Ga. 905 (1995)

36.210 **Landlord and Tenant; Liability of Landlord; Patent Defects; Liability to Tenant**

A landlord is not liable for injuries to the tenant arising from a visible or obvious defect in the premises existing at the time of the lease and of which the tenant knew or had some means of knowing equal to those of the landlord, unless the rent contract states otherwise.

Subsequent notice by the tenant of the existence of such a defect would not place upon the landlord any duty of inspection or repair.

Henley v. Bookman, 124 Ga. 1059(5) (1906)

McGee v. Hardacre, 27 Ga. App. 106 (1921)

Chamberlain v. Nash, 54 Ga. App. 508, 509 (1936)

36.220 **Landlord and Tenant; Liability of Landlord during Rental; Possession (Partial) by Landlord**

If a landlord should retain a qualified possession of the rented premises and attends to the supervision of the building, collecting rents, and personally or by an agent makes repairs, the landlord will be liable for an injury resulting from a defective condition of the building if the landlord had actual notice of the defect, or in the exercise of ordinary and reasonable care, the landlord ought to have known it.

Marr v. Dieter, 27 Ga. App. 711(2) (1921)

White v. Thacker, 89 Ga. App. 656, 659 (1954); see also 65 A.L.R. 3d 14 §9 (1975)

36.230 **Landlord and Tenant; Liability of Landlord; Latent Defects**

A landlord is not liable for injuries to the tenant arising from hidden defects unknown to the tenant existing at the time of the lease, unless the landlord actually knew or by the exercise of ordinary care might have known of their previous existence.

McGee v. Hardacre, 27 Ga. App. 106 (1921); distinguished at 49 Ga. App. 128 (1934)
Howell Ga. Co. of Athens Inc. v. Coile, 112 Ga. App. 732, 738 (1965)

36.240 **Landlord and Tenant; Liability of Landlord; Repairs during Tenancy**

If a landlord should undertake to repair the premises, the landlord would be liable to the tenant for their improper repair, unless the tenant knew about the defect in the repairs or, in the exercise of ordinary care for the tenant's own safety, could have discovered them.

A landlord may be liable for damages resulting from defects of which the landlord had no actual notice if, while making repairs, the landlord could, by the use of ordinary care, have discovered the defects.

Hill v. Liebman Inc., 53 Ga. App. 462 (1936)
Bradshaw v. Crawford, 77 Ga. App. 441, 443 (1948)
Zaban v. Coleman, 27 Ga. App. 376 (1921)

36.300 **Landlord and Tenant; Duty of Tenant; Notice to Landlord**

When rented premises become out of repair, it is the duty of the tenant to notify the landlord and to stop using any part of the premises that would be dangerous to use.

After notice to the landlord, the tenant has a right to use those parts of the premises that are apparently in good condition if there is nothing to call attention to what may be a hidden defect. The failure of the landlord to repair in such a case would give the tenant a right of action for any damages sustained by reason of the tenant's use of that part of the premises that was in apparently sound condition, even though the tenant had knowledge that there were other parts of the premises in a defective condition.

Miller v. Jones, 31 Ga. App. 318 (1923); distinguished at 49 Ga. App. 128 (1934) and 39 Ga. App. 621 (1929)
Beckmann v. Rakoske, 106 Ga. App. 203, 204 (1962)

36.310 **Landlord and Tenant; Duty of Tenant; Avoidance of Danger**

If the tenant has knowledge of the defective condition of the rented premises, and the defect is such that an ordinarily careful person would know that it would be dangerous to use that area, it is the tenant's duty to stop using that portion of the premises or dangerous area. If the tenant should voluntarily use a portion of the premises known to be defective and dangerous and should be injured, the tenant would be guilty of such contributory negligence as would bar a recovery.

In the use of rented premises, a tenant is required to use ordinary care for his/her own safety, and if in doing so the tenant could have discovered a dangerous condition of the premises, if such dangerous condition existed, and prevented injury, the tenant could not recover, whether or not the landlord knew of the dangerous condition of the premises.

Finley v. Williams, 45 Ga. App. 863, 864 (1932)

Mullinax v. Cook, 115 Ga. App. 201, 205 (1967); distinguished at 152 Ga. App. 782 (1979)

36.400 **Landlord and Tenant; Tenants; Privies**

Members of a tenant's family, guests, servants, employees, or others present by express or implied invitation are controlled by the rules governing the tenant as to the right of recovery for injuries arising from failure to keep the premises in repair.

Crossgrove v. Atlantic Coast Line Railroad Co., 30 Ga. App. 462, 464(2) (1923)

Rogers v. Columbus Bank and Trust Co., 111 Ga. App. 792 (1965)

36.500 **Landlord and Tenant; Tenant, Duty of; Repairs; Setoff against Rent; Damages**

The landlord, in the absence of an agreement to the contrary, is bound to keep the premises in repair. When repairs to the premises are necessary, and the necessity for repairs was not caused by the negligence of the tenant (or those for whose conduct the tenant is responsible), and if, after notice that the premises are out of repair, the landlord neglects to repair within a reasonable time, the tenant has the option of making or not making necessary repairs.

If the tenant chooses to make the repairs, the tenant may recover from the landlord the reasonable expense incurred or may set off the expense (that is, subtract the expense from the rent).

If the tenant chooses to omit to make the repairs, the tenant may then seek compensation in an action for damages.

(Here, instruct on allowable damages.)

Shehane v. Eberhart, 30 Ga. App. 265(3) (1923)

Big Apple, etc., Market v. W. J. Milner & Co., 111 Ga. App. 282, 284 (1965)

36.600 **Landlord and Tenant; Dispossessory Warrants (Tenants Holding Over)**

In this proceeding, a property owner is trying to recover possession of rented property and rent from an alleged tenant.

It is your duty to determine whether the property owner is entitled to recover possession of the property under the facts of this case and, if so, the amount of rent, if any, to which the owner is entitled.

(Here, also specify any other claim plaintiff may have.)

If you find that the relationship of landlord/tenant existed between the plaintiff and defendant, that the plaintiff has made proper demand of the defendant to vacate the premises, and that the defendant has refused to vacate the premises after plaintiff's demand to vacate, you would be authorized to find in favor of the plaintiff if you also find that the defendant, as tenant,

(Choose among the following situations applicable to the facts.)

a) holds the property after the tenancy has ended,
b) has failed to pay the rent,
c) is a tenant at will (that is, a person who is renting property from a landlord by their mutual consent, without any period of time of occupation being agreed on),
d) is a tenant at sufferance (that is, a person who comes into possession lawfully but remains in possession without any rights at all).

In the event you should find in favor of the plaintiff, you should include in your verdict any amount of rent that you find to be due.

(Use the following charge only when a tenant claims a setoff or recoupment.)

A “setoff” is an opposing claim arising from the rental contract. A “recoupment” is an opposing claim arising from some other cause. Should you find in favor of the plaintiff for monetary damages for rent or otherwise, your verdict should be reduced by any amount that you find the defendant may “set off” or “recoup” against plaintiff’s claim.

Should you find in favor of the defendant, as tenant, then the plaintiff, as landlord, shall be liable for all foreseeable damages resulting from the landlord’s wrongful conduct (and for any rights the tenant may have by setoff or recoupment as I have detailed them or otherwise).

38.000 LIMITATION OF ACTIONS

38.010 Statute of Limitations; Explanation

Lawsuits upon claims must be filed within specified periods of time after the claims arise, and if not filed within that time, they are barred by the statute of limitations and no recovery shall be allowed.

(See appropriate section of O.C.G.A. Title 9.)

38.100 Statute of Limitations; Fraud as Affecting Limitations; Generally

If the defendant or those it is claimed are guilty of a fraud that prevented or delayed the plaintiff from filing this action, the period of limitation shall run only from the time of the plaintiff's discovery of the fraud.

O.C.G.A. §9-3-96

38.110 Statute of Limitations; Fraud as Affecting Limitations; Diligence of Plaintiff

In the absence of any confidential relation, fraud that prevents one from maintaining a plea of the statute of limitations must be actual fraud involving moral turpitude, which could not have been discovered by the exercise of ordinary care and must have the effect of depriving or delaying the plaintiff from filing the cause of action.

Carnes v. Bank of Jonesboro, 58 Ga. App. 193(2) (1938); distinguished at 193 Ga. 477 (1942)

Fidelity and Casualty Co. v. Bishop, 108 Ga. App. 422, 423 (1963); distinguished at 243 Ga. 701 (1979)

38.200 **Statute of Limitations; New Promise; Generally**

A new promise to renew a right of action already barred or to constitute a point from which the limitation shall commence running on a right of action not yet barred, must be in writing and must be in the party's own handwriting or signed by the party or someone authorized by the party. A new promise shall revive or extend the original liability; it does not create a new one.

O.C.G.A. §§9-3-110, 9-3-113

Carnes v. Bank of Jonesboro, 58 Ga. App. 193 (1938); distinguished at 193 Ga. 477 (1942)

Collier v. Georgia Securities, 57 Ga. App. 485 (1938)

38.210 **Statute of Limitations; New Promise; Letters (Correspondence)**

When letters are relied upon to create a new promise to pay, the letters must, with reasonable certainty, connect the debt with the promise and clearly identify the debt by its words. In order to extend the statute of limitations, the letters must acknowledge the particular debt as an existing liability.

Duke v. Lynch, 56 Ga. App. 331 (1937)

Williams v. American Surety Co., 86 Ga. App. 533, 534 (1952)

38.300 **Limitation of Actions; Bankruptcy Cases; New Promise; Generally**

No promise made after discharge in bankruptcy to pay a debt provable in bankruptcy, and from which debt the debtor has been discharged, shall be binding unless the promise to pay is in writing and signed by the party who owed the debt or by someone authorized by the party.

O.C.G.A. §9-3-111

38.310 **Limitation of Actions; Bankruptcy Cases; Promise between Adjudication and Discharge**

A promise by a debtor to pay a previously existing debt to a creditor made after the debtor's adjudication as a bankrupt but before discharge will not be impaired by the subsequent

discharge. The discharge of the bankrupt relates back to the adjudication of bankruptcy, and a new promise to pay may be made any time after adjudication of bankruptcy, before or after discharge.

Moore v. Trounstine, 126 Ga. 116 (1906)

Kilburn v. Mechanics' Loan and Savings Co., 175 Ga. 146, 148 (1932)

Peppers v. Siefferman, 153 Ga. App. 206 (1980); distinguished at 245 Ga. App. 198 (2000)

38.400 **Limitation of Actions; Laches**

Equity gives no relief to one whose long delay renders the discovery of the truth difficult, though no legal limitations bar the rights. Equity may impose an equitable bar whenever, from the lapse of time and undue delay of the complainant, it would be inequitable to allow the complainant to enforce his/her legal rights.

O.C.G.A. §§23-1-25, 9-3-3

40.000 MENTAL CAPACITY

40.010 Mental Capacity; Insane Persons; Definition; Generally

The words "lunatics" or "insane persons" or *"non compos mentis"* all mean persons of unsound mind.

O.C.G.A. §1-3-3(9)

40.020 Mental Capacity; Insane Persons; Guardianship and Civil Rights; Generally

All persons of unsound mind or who are incapable of managing their affairs may have their persons and/or property placed in the control of guardians.

40.030 Mental Capacity; Insane Persons; Contractual Power; Generally; Guardianship as Affecting Necessaries, Liability for

The contract of a person who has never been adjudicated to be mentally incompetent but who is, in fact, mentally incompetent to the extent that the person is incapable of managing his/her estate is not absolutely void but only voidable. However, a contract made by such persons during a lucid interval is valid. After a court has adjudicated a person to be mentally incompetent and the affairs of such person are vested in a guardian, the power of such person to contract even though he/she is restored to sanity is entirely removed. Any contracts made by such person shall be void until the guardianship is dissolved. One may, however, recover for necessaries provided to a mentally incompetent person upon the same proof as for minors.

O.C.G.A. §13-3-24

Norman v. Georgia Loan and Trust Co., 92 Ga. 295, 297 (1893)

Fields v. Union Central Life Ins. Co., 170 Ga. 239 (1930); distinguished at 59 Ga. App. 608 (1939); criticized in *Atlanta Banking & Savings Co. v. Johnson,* 179 Ga. 313 (1934)

40.040 **Mental Capacity; Insane Persons; Tort Liability of**

An insane person, the same as any person, is liable for compensatory damages (that is, actual damages). An insane person is not liable for vindictive or punitive damages or for any damages for torts when intent is a necessary part.

Sauers v. Sack, 34 Ga. App. 748 (1925)

40.050 **Mental Incapacity at Time of Marriage; Incurable Mental Illness; Divorce**

The following grounds shall be sufficient to authorize the granting of a total divorce

a) mental incapacity at the time of the marriage or
b) incurable mental illness.

However, no divorce shall be granted upon this ground unless the mentally ill party shall have been adjudged mentally ill by a court of competent jurisdiction or certified to be mentally ill by two physicians who have personally examined the party; and the party has been confined in an institution for the mentally ill or has been under continuous treatment for the mental illness for a period of at least two years immediately preceding the commencement of the action; and until the superintendent or other chief executive officer of the institution and one competent physician appointed by the court shall, after a thorough examination, make a certified statement under oath that it is their opinion that the party evidences such a want of reason, memory, and intelligence as to prevent the party from comprehending the nature, duties, and consequences of the marriage relationship; and that in the light of present day medical knowledge, recovery of the party's mental health cannot be expected at any time during his/her life.

Notice of the action shall and must be served upon the guardian of the person of such mentally ill person and the superintendent or other chief executive officer of the institution in which the person is confined. In the event there is no guardian of the person, then notice of the action shall be served upon a guardian *ad litem* appointed by the court in which such divorce action is filed, and the superintendent or the chief executive officer of the institution in which the person is confined shall also be served notice. Such guardian and superintendent shall be entitled to appear and be heard upon the issues. The status of the

parties as to the support and maintenance of the mentally ill person shall not be altered in any way by the granting of the divorce.

O.C.G.A. §19-5-3(11)

40.060 **Mental Capacity; Testamentary Capacity, Test of**

Incapacity to contract may coexist with a capacity to make a will. The amount of intellect necessary to constitute testamentary capacity or the ability to make a valid will is that which is necessary to enable the party to have a decided and rational desire about the disposition of property. "The desire must be decided, as distinguished from the wavering, vacillating fancies of a demented intellect. It must be rational, as distinguished from the ravings of a madman, the silly chatter of an idiot, the childish whims of imbecility, or the unpredictable actions of a drunkard."

O.C.G.A. §53-2-21

40.070 **Mental Capacity; Contractual Capacity, Test of**

The degree of mentality necessary for a party to execute a valid contract is that the party must be possessed of mind and reason (equal to) (capable of) a clear and full understanding of the nature and consequences of his/her act in making the contract.

Ison v. Geiger, 179 Ga. 798 (1934)

Pace v. Pace, 220 Ga. 66, 68 (1964)

Watkins et al. v. Davis, 152 Ga. App. 735 (1979)

42.000 MOTOR VEHICLES

(The judge should carefully determine which of the following charges should be given under negligence per se and which should be given under ordinary care.)

42.010 Motor Vehicles; Speed and Control; Generally

(Note: Only the parts of the second sentence of O.C.G.A. §40-6-180 that are applicable to the particular facts of the case on trial should be given.)

No person shall drive a vehicle at a speed greater than is reasonable and careful under the conditions and having regard for the actual and potential hazards then existing. Consistent with the foregoing, every person shall drive at a reasonable and prudent speed when approaching and crossing an intersection or railroad grade crossing, when approaching and going around a curve, when approaching and traversing a hillcrest, when traveling upon any narrow or winding roadway, and when special hazards exist with respect to pedestrians or other traffic or by reason of weather or highway conditions.

O.C.G.A. §40-6-180

42.100 Motor Vehicles; Definitions

(See 42.110–42.150.)

42.110 Motor Vehicles; Definitions; Intersection

An intersection is the area between the

a) curb lines,
b) outside boundaries of the roadways,
c) curb lines and outside boundaries of the roadways of two highways that join or cross each other. The junction of street and alley is not an intersection.

O.C.G.A. §40-1-1(22)

42.120 Motor Vehicles; Definitions; Roadway

A roadway is that part of a highway ordinarily used for travel, not counting the shoulder.

O.C.G.A. §40-1-1(53)

42.130 **Motor Vehicles; Definitions; Highway**

A highway is the entire width of every publicly maintained way or road when any part of it is open to the public for travel by vehicles.

O.C.G.A. §40-1-1(19)

42.140 **Motor Vehicles; Definitions; Through Highway**

A through highway is any highway where the traffic is given the right-of-way over intersecting highways as indicated by signs or other traffic control devices.

O.C.G.A. §40-1-1(64)

42.150 **Motor Vehicles; Definitions; Right-of-Way**

(Note: The statutory language has been purposely simplified, and refinements applicable to many individual situations have been necessarily omitted in a work of this length. If the court considers it necessary to charge the law in greater detail, it will be necessary to go to the text of the applicable statute.)

Right-of-way is the right of one vehicle or pedestrian to proceed in a lawful manner in preference to another vehicle or pedestrian approaching under such circumstances of direction, speed, and proximity as to give rise to danger or collision unless one gives way to the other.

O.C.G.A. §40-1-1(52)

42.200 **Motor Vehicles; Right-of-Way; Miscellaneous Regulations**

(Note: 42.210 and 42.220 are inapplicable to through highways.)

O.C.G.A. §40-1-1(47)(b)

42.210 **Motor Vehicles; Right-of-Way; Highways Crossing Each Other**

When two vehicles approach or enter an intersection from different highways at approximately the same time, the driver of the vehicle on the left shall yield the right-of-way to the vehicle on the right.

O.C.G.A. §40-6-70

42.220 **Motor Vehicles; Right-of-Way; T-Shaped Intersection**

When a vehicle approaches or enters an intersection with no stop signs or other traffic control devices from a highway that terminates at the intersection, the driver of the vehicle shall yield the right-of-way to the other vehicle, whether the other vehicle approaches from the left or right.

O.C.G.A. §40-6-70

42.230 **Motor Vehicles; Right-of-Way; Yield Signs**

The driver of a vehicle approaching a yield sign shall, in obedience to such sign, slow down to a speed reasonable for the existing conditions and, if required for safety to stop, shall stop at a clearly marked stop line or, if there is no stop line, before entering the crosswalk on the near side of the intersection or, if there is no crosswalk, at the point nearest the intersecting roadway where the driver has a view of approaching traffic on the intersecting roadway before entering it. After slowing or stopping, the driver shall yield the right-of-way to any vehicle in the intersection or approaching on another roadway so closely as to constitute an immediate hazard during the time such driver is moving across or within the intersection or junction of roadways. If the driver is involved in a collision with a vehicle in the intersection after driving past a yield sign without stopping, such collision shall be deemed *prima facie* evidence of his/her failure to yield the right-of-way.

O.C.G.A. §40-6-72(c)

42.240 **Motor Vehicles; Right-of-Way; Stop Signs**

Except when directed to proceed by a police officer, every driver of a vehicle approaching a stop sign shall stop at the clearly marked stop line, or if there is no stop line, before entering

the crosswalk on the near side of the intersection or, if there is no crosswalk, at the point nearest the intersecting roadway where the driver has a view of the approaching traffic on the intersecting roadway before entering it. After having stopped, the driver shall yield the right-of-way to any vehicle in the intersection or approaching on another roadway so closely as to constitute an immediate hazard during the time when such driver is moving across or within the intersection or junction of roadways.

O.C.G.A. §40-6-72(b)

42.250 **Motor Vehicles; Right-of-Way; Left Turns**

The driver of a vehicle intending to turn to the left within an intersection or into an alley, private road, or driveway shall yield the right-of-way to any vehicle approaching from the opposite direction that is within the intersection or so close to it as to constitute an immediate hazard.

O.C.G.A. §40-6-71

42.260 **Motor Vehicles; Right-of-Way; Private Roads**

The driver of a vehicle about to enter or cross a roadway from any place other than another roadway shall yield the right-of-way to all vehicles approaching on the roadway to be entered or crossed.

O.C.G.A. §40-6-73

42.270 **Motor Vehicles; Right-of-Way; Alleys, Driveways, or Buildings**

The driver of a vehicle emerging from an alley, building, private road, or driveway within a business or residential district shall stop the vehicle immediately prior to driving onto a sidewalk or onto the sidewalk area extending across such alley, building entrance, road or driveway or, in the event there is no sidewalk area, shall stop at the point nearest the street to be entered where the driver has a view of approaching traffic.

O.C.G.A. §40-6-144

42.300 **Motor Vehicles; Right-of-Way; Pedestrians on Roadways**

Except as otherwise provided by law, any pedestrian upon a roadway shall yield the right-of-way to all vehicles upon the roadway.

O.C.G.A. §40-6-96(d)

42.310 **Motor Vehicles; Pedestrians on Highway; Generally**

When a sidewalk is provided, it shall be unlawful for any pedestrian to walk along and upon an adjacent roadway.

O.C.G.A. §40-6-96(a)

When a sidewalk is not provided but a shoulder is available, any pedestrian walking along and upon a highway shall walk only on the shoulder, as far as practicable from the edge of the roadway.

O.C.G.A. §40-6-96(b)

When neither a sidewalk nor a shoulder is available, any pedestrian walking along and upon a highway shall walk as near as practicable to an outside edge of the roadway and if on a two-lane roadway, shall walk only on the left side of the roadway.

O.C.G.A. §40-6-96(c)

No pedestrian shall enter or remain on any bridge or approach to a bridge beyond the bridge signal, gate, or barrier, after a bridge operation signal indication has been given.

O.C.G.A. §40-6-96(e)

No pedestrian shall pass through, around, over, or under any crossing gate or barrier at a railroad grade crossing or bridge while such gate or barrier is closed or is being opened or closed.

O.C.G.A. §40-6-96(f)

A person who is under the influence of intoxicating liquor or any drug to a degree that renders that person a hazard shall not walk or be upon any roadway.

O.C.G.A. §40-6-95

42.400 **Motor Vehicles; Rule of the Road (Meeting)**

Drivers of vehicles proceeding in opposite directions shall pass each other to the right.

(Use remainder of charge only when applicable.)

Upon roadways having width for not more than one line of traffic in each direction, each driver shall give to the other at least half of the traveled portion of the roadway, or as nearly as possible.

O.C.G.A. §40-6-41

44.000 NEGOTIABLE INSTRUMENTS

(Note: Refer to Uniform Commercial Code sections for specific charges that apply to the particular facts of each case.)

44.010 Negotiable Instruments; Delivery; Negotiations; Indorsement

"Negotiation" means a transfer of possession, whether voluntary or involuntary, of an instrument by a person other than the issuer to a person who thereby becomes its holder.

O.C.G.A. §11-3-201(a)

(Choose whether "payable to order" or "payable to bearer.")

44.011 Negotiation; Payable to Order

If it is payable to order, it is negotiated by delivery with any necessary indorsement. An indorsement must be written by or on behalf of the holder, and on the instrument or on a paper so firmly affixed as to become a part of it.

O.C.G.A. §11-3-202

Except for negotiations by remitter, if an instrument is payable to an identified person, negotiation requires transfer of possession of the instrument and its indorsement by the holder.

O.C.G.A. §11-3-201(b)

44.012 Negotiation; Payable to Bearer

If it is payable to bearer, it is negotiated by delivery only. An instrument payable to order and indorsed in blank becomes payable to bearer and may be negotiated by delivery alone until it is specially indorsed. An indorsement in blank specifies no particular endorsee and consists of a mere signature. A special indorsement specifies the person to whom it is made payable.

O.C.G.A. §§11-3-202, 11-3-204

If an instrument is payable to bearer, it may be negotiated by transfer of possession alone.

O.C.G.A. §11-3-201(b)

44.013 **Negotiation; Special Indorsement**

If an indorsement is made by the holder of an instrument, whether payable to an identified person or payable to bearer, and the indorsement identifies a person to whom it makes the instrument payable, it is a "special indorsement."

O.C.G.A. §11-3-205(a)

44.014 **Negotiation; Blank Indorsement**

If an indorsement is made by the holder of an instrument and it is not a special indorsement, it is a "blank indorsement." When endorsed in blank, an instrument becomes payable to bearer and may be negotiated by transfer of possession alone until specially endorsed.

O.C.G.A. §11-3-205(b)

44.020 **Negotiable Instruments; Indorsement, Necessity of; Effect of Delivery Without**

Unless otherwise agreed, any transfer for value of an instrument not then payable to bearer gives the transferee the specifically enforceable right to have the unqualified indorsement of the transferor. Negotiation takes place only when the indorsement is made, and until that time there is no presumption that the transferee is the owner.

O.C.G.A. §11-3-201(3)

Unless otherwise agreed, if an instrument is transferred for value and the transferee does not become a holder because of lack of indorsement by the transferor, the transferee has a specifically enforceable right to the unqualified indorsement of the transferor, but negotiation of the instrument does not occur until the indorsement is made.

O.C.G.A. §11-3-203(c)

When a security in registered form has been delivered to a purchaser without a necessary indorsement, that person may become a *bona fide* purchaser only once the indorsement is provided. Against the transferor, the transfer is complete upon delivery, and the purchaser has a specifically enforceable right to have any necessary indorsement provided.

O.C.G.A. §§11-3-201(3), 11-8-307

If a security certificate in registered form has been delivered to a purchaser without a necessary indorsement, the purchaser may become a protected purchaser only when the indorsement is provided. However, against a transferor, a transfer is complete upon delivery, and the purchaser has a specifically enforceable right to have any necessary indorsement provided.

O.C.G.A. §11-3-304(d)

44.100 Negotiable Instruments; Negotiability; Fraud, Incapacity, and Other Defects as Affecting Rescission; Void Transactions

Negotiation is effective to transfer an instrument even though the negotiation is made by an infant or any other person without capacity; or obtained by fraud, duress, or mistake of any kind; or part of an illegal transaction; or made in breach of duty. Except as against a subsequent holder in due course, such negotiation is in an appropriate case subject to rescission, the declaration of a constructive trust, or any other remedy permitted by law.

O.C.G.A. §11-3-207(1)

Negotiation is effective even if obtained from an infant, a corporation exceeding its power, or a person without capacity; or obtained by fraud, duress, or mistake; or in breach of duty or as part of an illegal transaction. To the extent permitted by other law, negotiation may be rescinded or may be subject to other remedies, but those remedies may not be asserted against a subsequent holder in due course or a person paying the instrument in good faith and without knowledge of facts that are a basis for recission or other remedy.

O.C.G.A. §11-3-202

"Holder in due course" means the holder of an instrument if

1) the instrument when issued or negotiated to the holder does not bear such apparent evidence of forgery or alteration or is not otherwise so irregular or incomplete as to call into question its authenticity and
2) the holder took the instrument
    a) for value,
    b) in good faith,
    c) without notice that the instrument is overdue or has been dishonored or that there is an uncured fault with respect to payment of another instrument as part of the same series,
    d) without notice that the instrument contains an unauthorized signature or has been altered,
    e) without notice of any claim to the instrument on its proceeds or a claim to rescind the negotiation and recover the instrument or its proceeds, and
    f) without notice that any party has a defense or claim in recoupment of the obligor against the original payee of the instrument.

O.C.G.A. §11-3-302(a)

(The following provisions of O.C.G.A. §11-3-302 may be applicable and should be given as required.)

Notice of discharge of a party, other than discharge in an insolvency proceeding, is not notice of a defense under subsection (a) of section O.C.G.A. §11-3-302, but discharge is effective against a person who became a holder in due course with notice of the discharge. Public filing or recording of a document does not of itself constitute notice of a defense, claim in recoupment, or claim to the instrument.

Except to the extent a transferor or predecessor in interest has rights as a holder in due course, a person does not acquire rights of a holder in due course of an instrument taken

a) by legal process or by purchase in an execution, bankruptcy, or creditor's sale or similar proceeding,

b) by purchase as part of a bulk transaction not in the ordinary course of business of the transferor, or

c) as the successor in interest to an estate or other organization.

O.C.G.A. §11-3-302(c)

In the event the instrument is issued or transferred for a promise of performance and if the promise of performance that is the consideration for an instrument has been partially performed, the holder may assert rights as a holder in due course of the instrument only to the fraction of the amount payable under the instrument equal to the value of the partial performance divided by the value of the promised performance.

O.C.G.A. §11-3-302(d)

If the person entitled to enforce an instrument has only a security interest in the instrument and the person obliged to pay the instrument has a defense, claim in recoupment, or claim to the instrument that may be asserted against the person who granted the security interest, the person entitled to enforce the instrument may assert rights as a holder in due course only to an amount payable under the instrument that at the time of enforcement of the instrument does not exceed the amount of the unpaid obligation secured.

O.C.G.A. §11-3-302(e)

To be effective, notice must be received at a time and in a manner that gives a reasonable opportunity to act on it.

O.C.G.A. §11-3-302(f)

(This portion of the charge should be given only if applicable to the facts.)

If a transaction is absolutely void from the beginning, such as a note or check being given for stolen property, it is not good, even in the hands of a holder in due course.

Middle Ga. Livestock v. Comm. Bk., 123 Ga. App. 733 (1971)

46.000 NUISANCES

46.010 Nuisances; Definition

A nuisance is anything that causes hurt, inconvenience, or damage to another. The fact that the act done may otherwise be lawful shall not keep it from being a nuisance. The inconvenience complained of shall not be fanciful or such as would affect only one of extraordinary or demanding taste, but it shall be such as would affect an ordinary, reasonable person.

O.C.G.A. §41-1-1

46.020 Nuisances; Air, Right to

Every person has the right to have the air over the person's premises remain in its natural state and free from artificial impurities, consistent with the locality and character of the community. The pollution of air, as far as reasonably necessary to the enjoyment of life and indispensable to the progress of society, is not actionable.

Holman v. Athens Empire Laundry Co., 149 Ga. 345 (1919)
Poultryland Inc. v. Anderson, 200 Ga. 549, 557 (1946)

46.030 Nuisances; Reasonable Use of Property, Duty of

The privilege of use incident to the right of property must not be exercised in an unreasonable manner so as to inflict injury upon another unnecessarily. To constitute a nuisance, the use must be such as to produce actual, tangible, and substantial injury to neighboring property or such as to interfere sensibly with its use and enjoyment by persons of ordinary sensibilities.

Holman v. Athens Empire Laundry Co., 149 Ga. 345 (1919)
Gordy v. Armstrong, 190 Ga. 670, 679 (1940)

46.040 **Nuisances; Public Nuisances, Private Right to Abate**

Generally, a public nuisance gives no right of action to any individual, but if a public nuisance causes special damage to an individual other than that suffered by the general public, the special damage gives that person a right of action.

O.C.G.A. §§41-1-3, 41-2-2

A private nuisance may be abated on the application of the person injured.

O.C.G.A. §41-2-3

48.000 PARTNERSHIP

48.010 Partnership; Defined

A partnership is an association of two or more persons to carry on as co-owners of a business for profit (and includes for all purposes of the laws of this state, a limited liability partnership).

O.C.G.A. §14-8-6(a)

48.020 Partnership; Creation; Generally and as to Third Persons

A partnership may be created either by written or oral contract. Joint tenancy, tenancy in common, tenancy by the entireties, joint property, common property, or part ownership alone does not establish a partnership but are only factors to consider. The sharing of gross returns alone does not establish a partnership. Sharing of profits of the business, however, is *prima facie* evidence of the existence of a partnership provided that the share was not for a payment of the following:

a) debt;
b) wages, salary, or other compensation;
c) rent;
d) annuity;
e) interest or payment on a loan;
f) consideration for a sale.

Except as provided otherwise by law (O.C.G.A.§14-8-16), persons who are not partners as to each other are not partners as to third persons.

O.C.G.A. §14-8-7

A partnership is a contractual relationship and may result from an express agreement that the relationship shall exist or by implication from certain agreements that the parties have made. If the parties, by written or oral contract, expressly agree to become partners, a partnership is created. If they enter into an agreement whereby there is a joint ownership, use, or enjoyment of the profits of undivided property, real or personal, a partnership arises

by implication. If two or more persons put into an enterprise property, money, or other things of value other than mere personal services upon agreement that they shall each have an interest in the profits and that the earnings on the investment shall determine the extent of all profits, if any, to be received, it is a partnership, although no mention may be made as to losses.

Butler v. Frank, 7 Ga. App. 655 (1910)
West Lumber Co. v. Chandler, 46 Ga. App. 408 (1933)

48.100 Limited Partnerships under the Revised Uniform Limited Partnership Act

(Note: The following provisions of the Revised Uniform Limited Partnership Act shall not apply to limited partnerships existing before 7/1/88, unless otherwise elected to be bound pursuant to O.C.G.A. §14-9-1201.)

48.110 Limited Partnership; Definition

A limited partnership means a partnership formed in accordance with the laws of the state by two or more persons and having one or more general partners and one or more limited partners.

O.C.G.A. §14-9-101

48.120 Limited Partner, Liability of

A limited partner is not liable for the obligations of a limited partnership by reason of being a limited partner (and does not become so by participating in the management or control of the business.)

O.C.G.A. §14-9-303

48.130 Limited Partner; Right of Inspection and Information

If a limited partner makes a reasonable request during ordinary business hours, that person has the right to

1) inspect the partnership records,
2) copy such records,
3) obtain from the general partner(s) information related to the interest of the limited partner,
4) obtain tax returns as they become available, and
5) obtain other information regarding the affairs of the limited partnership as is just and reasonable.

O.C.G.A. §14-9-305

48.140 **Limited Partnership; General Partner; Rights, Powers, and Liabilities**

A general partner of a limited partnership has the rights and powers and is subject to the restrictions of and liabilities to the partnership and to the other partners of a partner in a partnership without limited partners.

O.C.G.A. §14-9-403(a)

A general partner of a limited partnership has the liabilities of a partner in a partnership without limited partners to persons other than the partnership and other partners.

O.C.G.A. §14-9-403(b)

48.150 **Limited Partnership; Contribution, Forms of**

The contribution of a partner to the capital of a limited partnership may include cash, property, and services rendered.

O.C.G.A. §14-9-501

48.160 **Limited Partner; Distribution upon Withdrawal**

A limited partner may withdraw from a limited partnership at the time or upon the occurrence of events specified in writing in the partnership agreement.

O.C.G.A. §14-9-603

A partner who withdraws is entitled to receive the fair value of the partner's interest within a reasonable time after the partner withdraws. The fair value of the withdrawn

interest is determined as of the date of withdrawal. This provision does not apply if the partnership agreement provides otherwise.

O.C.G.A. §14-9-604

48.170 **Limited Partnership; Partnership Interest, Nature of**

A partnership interest is personal property. A partner has no interest in specific partnership property.

O.C.G.A. §14-9-701

48.180 **Limited Partner; Right to Bring Action**

A limited partner may maintain an action in the right of a limited partnership to recover a judgment in its favor if general partners with authority to do so have refused to bring the action or an effort to make them bring the action is not likely to succeed.

O.C.G.A. §14-9-1001

To bring such an action, the limited partner must have been a partner at the time of bringing the action and must have been a partner at the time of the transaction for which he/she complains or that partner's status must have devolved by laws or by terms of the partnership agreement from a person who was a partner at the time of the transaction.

O.C.G.A. §14-9-1002

48.200 **Limited Partnerships under the Uniform Limited Partnership Act**

(Note: The following charge applies to limited partnerships formed since 2/15/52 and before 7/1/88 that did not elect to be bound by the Revised Uniform Limited Partnership Act. See O.C.G.A. §14-9A-5 for law on limited partnership existing prior to that date. The charge contains many of the more important statutory provisions concerning limited partners but is not exhaustive. It should not be given in full but should be scrutinized carefully for the provisions applicable to any given case.)

48.210 **Limited Partnership; Definition**

A limited partnership is a partnership formed by two or more persons under the provisions of law having as members one or more general partners and one or more limited partners.

O.C.G.A. §14-9A-2

48.220 **Limited Partnership; Obligations**

The limited partners as such shall not be bound by partnership obligations.

O.C.G.A. §14-9A-2

48.230 **Limited Partnership; Contributions**

The contributions of a limited partner may be cash or other property but not services.

O.C.G.A. §14-9A-40

48.240 **Limited Partnership; False Statements in Certificate, Liability for**

If the certificate contains a false statement, one who suffers loss by reliance on such statement may hold liable any party to the certificate who knew the statement to be false

a) at the time the person signed the certificate or
b) subsequently but within a sufficient time before the statement was relied upon to enable the person to cancel or amend the certificate or to file a petition for its cancellation or amendment.

(Note: O.C.G.A. §14-9A-20 requires certificates of limited partnership to be filed with the clerk of superior court.)

O.C.G.A. §14-9A-27

48.250 **Limited Partnership; Rights**

A limited partner shall have the same rights as a general partner to expect

1) the partnership books to be kept at the principal place of business of the partnership and at all times to inspect and copy any of them;
2) on demand, true and full information of all things affecting the partnership and a formal account of partnership affairs whenever circumstances render it just and reasonable;
3) dissolution and winding up by decree of court.

A limited partner shall have the right to receive a share of the profits or other compensation by way of income and to the return of that partner's contribution as provided by law.

O.C.G.A. §14-9A-42

48.260 **Limited Partnership; Withdrawal or Reduction of Contributions**
(See 48.261–48.264.)

48.261 **Limited Partnership; Conditions for Receipt of Contribution**
A limited partner shall not receive from a general partner or out of a partnership property any part of that partner's contribution until

1) all liabilities of the partnership, except liabilities to general partners and to limited partners on account of their contribution, have been paid or there remains property of the partnership sufficient to pay them,
2) the consent of all members is had, unless the return of the contribution may be rightfully demanded under the provisions of charge 48.262, and
3) the certificate is cancelled or so amended as to set forth the withdrawal or reduction.

48.262 **Limited Partnership; Demand for Return of Contribution**
Subject to the provisions of charge 48.261, a limited partner may rightfully demand the return of that partner's contribution

a) on the dissolution of a partnership,
b) when the date specified in the certificate for its return has arrived, or

c) after six months' notice in writing has been given to all other members if no time is specified in the certificate, either for the return of the contribution or for the dissolution of the partnership.

48.263 **Limited Partnership; Right to Receive Cash**

In the absence of any statement in the certificate to the contrary or the consent of all members, a limited partner, irrespective of the nature of that partner's contribution, has only the right to demand and receive cash in return for the contribution.

48.264 **Limited Partnership; Dissolution of Partnership**

A limited partner may have the partnership dissolved and its affairs completed when

a) the limited partner rightfully but unsuccessfully demands the return of that partner's contribution or
b) the other liabilities of the partnership have not been paid or the partnership property is insufficient for their payment as required by 48.261 (1) and the limited partner would otherwise be entitled to the return of that partner's contribution.

O.C.G.A. §14-9A-47

48.270 **Limited Partnership; Liability to Partnership**

Limited partners are liable to the partnership

1) for the difference between their contributions as actually made and that stated in the certificate as having been made and
2) for any unpaid contribution that they agreed in the certificate to make in the future at the time and on the conditions stated in the certificate.

Limited partners hold as trustees for the partnership

1) specific property stated in the certificate as contributed by them but that was not contributed or that has been wrongfully returned and
2) money or other property wrongfully paid or conveyed to them on account of their contribution.

The liabilities of a limited partner as set forth above can be waived or compromised only by the consent of all members, but a waiver or compromise shall not affect the right of a creditor of a partnership who extended credit or whose claim arose after the filing and before a cancellation or amendment of the certificate to enforce such liabilities.

When contributors have rightfully received the return in whole or in part of the capital of their contributions, they are liable to the partnership for any sum not in excess of such return with interest necessary to discharge its liabilities to all creditors who extended credit or whose claims arose before such return.

O.C.G.A. §14-9A-48

48.280 **Limited Partnership; Nature of Interest in Partnership**

A limited partner's interest in the partnership is personal property.

O.C.G.A. §14-9A-49

48.290 **Limited Partnership; Death, Effect of**

On the death of a limited partner, the executor or administrator shall have all the rights of that limited partner for the purpose of settling the decedent's estate and such power as the deceased had to constitute an assignee as a substitute limited partner.

The estate of a deceased limited partner shall be liable for all that limited partner's liabilities.

O.C.G.A. §14-9A-51

48.295 **Limited Partnership; General Partners; Rights, Powers; Liabilities**

A general partner of a limited partnership shall have all the rights and powers and be subject to all the restrictions and liabilities of a partner in a partnership without limited partners, except that without the written consent or ratification of the specific act by all the limited partners, a general partner or all of the general partners have no authority to

a) do any act in contravention of the certificate,
b) do any act that would make it impossible to carry on the ordinary business of the partnership,

c) confess a judgment against the partnership,
d) possess partnership property or assign their rights in specific partnership property, for other than a partnership purpose,
e) admit a person as a general or limited partner, unless the right to do so is given in the certificate, or
f) continue the business with partnership property on the death, retirement, or insanity of a general partner, unless the right to do so is given in the certificate.

O.C.G.A. §14-9A-70

48.300 **Partnership; Employee Distinguished from Partner**

An agreement to pay an employee a share in the profits of a business when the employee has no interest in the business as owner or its control or responsibility for its losses does not make that employee a partner. The test as to whether two persons are partners is their intention to bind each other (that is, be agents for each other) in connection with a business. Ordinarily, an agreement to share profits and losses will prove partnership.

Floyd v. Kicklighter, 139 Ga. 133 (1912)

48.400 **Partnership; Other Transactions**

Ordinarily, evidence of actions and transactions other than those involved in the case on trial are not admissible. There are certain exceptions to this rule. One exception is in cases in which the motive and intent of a party have been questioned. In such cases, evidence of similar transactions occurring at about the same time may be received by the jury for consideration in determining the motive and intent of such party.

Deckner-Willingham v. Turner, 171 Ga. 240 (1930)
Grainger v. Jackson, 122 Ga. App. 123 (1970)

50.000 PRESCRIPTION

50.010 Prescription; Definition

Title by prescription is the right to property that a possessor acquires by reason of the continuance of possession for a period of time established by law.

O.C.G.A. §44-5-160

In order for possession to be the foundation of prescriptive title, it must

1) be in the right of the possessor and not of another,
2) not have originated in actual or positive fraud,
   (Note: Except as provided in O.C.G.A. §44-5-162, actual or positive fraud and not merely constructive or legal.)
3) be public, continuous, exclusive, uninterrupted, and peaceable, and
4) be accompanied by a claim of right.

Permissive possession cannot be the foundation of a prescription, until it becomes an adverse claim and actual notice to the other party is given.

O.C.G.A. §44-5-161

50.100 Prescription; Possession, Actual

(See 50.110–50.112.)

50.110 Prescription; Possession, Actual; Definition

Actual possession of lands may be evidenced by enclosure, cultivation, or any use and occupation of the lands that is so notorious as to attract the attention of every adverse claimant and so exclusive as to prevent actual occupation by another.

O.C.G.A. §44-5-165

50.111 Prescription; Possession, Actual; Boundaries and Nature

It is not required that the lot should be enclosed on every side by an artificial enclosure. A natural barrier in part may be utilized, provided it is of such a character as, in connection

with a fence, will constitute substantial enclosure of the land and provided it is sufficient to indicate possession over the premises and to give notoriety to the claim of possession. When the occupant locates boundaries by visible marks such as chops, blazes, setting up stones, or some other visible manner, and uses the land within them, this action would constitute possession. Such possession would be established whenever the boundaries of the occupied property can be clearly determined in any way.

McCrea v. Georgia Power Co., 179 Ga. 1 (5) (1934)
Fitzpatrick v. Massee, 188 Ga. 80 (1939)

In order to acquire a prescriptive title by virtue of possession alone for twenty years, such possession must be actual, and the prescription will not extend beyond the limits of actual possession. If one seeks to prescribe by virtue of actual possession alone, one must show the extent of such possession.

Tillman v. Bomar, 134 Ga. 660(5) (1910)
Toms v. Knighton, 199 Ga. 858, 866 (1945)

50.112 **Prescription; Possession, Actual; Duration**

Possession of real property in conformance with the requirements of O.C.G.A. §44-5-161 for a period of 20 years, by itself, shall confer or give good title by prescription to the property against everyone except the state and those persons laboring under the disabilities stated in O.C.G.A. §44-5-170.

(Note: O.C.G.A. §44-5-170 will not run against rights of [1] minors during their minority, [2] incompetents due to mental illness or retardation, or [3] prisoners during imprisonment.)

O.C.G.A. §44-5-170

50.121 **Prescription; Possession, Constructive**

(See 50.122–50.125.)

50.122 **Prescription; Possession, Constructive; Definition; Conflicting Claims**

Constructive possession of land exists when one who has paper title to a tract of land is in actual possession of only a part of the tract. In such a case, that possession shall be construed to extend to the boundary of the tract. When land is included in the boundaries of more than one tract so that adjacent owners are in constructive possession of the same land, no prescription shall arise in favor of any such owners.

O.C.G.A. §44-5-166

50.123 **Prescription; Possession, Constructive; Recorded Deeds; Boundaries**

Possession under a duly recorded deed will be construed to extend to all the contiguous property embraced in the deed.

O.C.G.A. §44-5-167

50.124 **Prescription; Possession, Constructive; Duration, Fraud, and Forgery**

Possession of real property, under written evidence of title for seven years, shall confer or give good title by prescription to the property against everyone except the state and those persons laboring under disabilities, except that if such written title is forged or fraudulent and if the person claiming adverse possession had actual notice of such forgery or fraud when that person commenced possession, no prescription may be based on such possession.

O.C.G.A. §44-5-164

50.125 **Prescription; Possession, Constructive; Color of Title**

A color of title is anything in writing connected with the title that serves to define the extent of the claim. It matters not how imperfect or defective the writing, which is considered to be a conveyance, may be if it defines the extent of the claim.

Street v. Collier, 118 Ga. 470(1) (1903)
Rogers v. Manning, 200 Ga. 844-852 (1946)

It is necessary that the writing relied upon as color of title should describe the property or furnish a key for description.

McCrea v. Georgia Power Co., 187 Ga. 708-710 (1939)

The same certainty of description that is necessary to a good deed is necessary to any paper that is relied on as color of title.

McCrea v. Georgia Power Co., 187 Ga. 708-710 (1939)
Crawford v. Verner, 122 Ga. 814, 816 (1905)

50.200 **Prescription; Acquiescence in Line**

Acquiescence for seven years, by acts or declaration of adjoining land owners, shall establish a dividing line.

O.C.G.A. §44-4-6

To establish a line by acquiescence, it must appear that the owners of the property to be affected by the establishment of the line either acted in such a manner for a duration of seven years or made such declaration during the continuance of that period as to show that the line claimed was the true line dividing the properties. Actual possession by the respective owners up to the line may show acquiescence in the line, but such actual possession is not necessary to show acquiescence in the line.

Tietjen v. Dobson, 170 Ga. 123(3) (1930)
Peacock v. Boatright, 221 Ga. 661, 663 (1966)

50.210 **Prescription; Agreed Line**

An unagreed upon, undetermined, or disputed line between adjoining owners may be established by oral agreement, if the agreement is accompanied by actual possession up to the line or is otherwise acknowledged or executed. The agreement may be acknowledged or executed by the erection of physical monuments upon the agreed line or by the marking of

trees plainly indicating the line when such erection of monuments or marking of trees is done with the knowledge and mutual assent of the respective owners.

Tietjen v. Dobson, 170 Ga. 123(4) (1930)
Griner v. Lindsey, 210 Ga. 563, 566 (1954)

50.220 **Prescription; Fraud to Prevent Prescription**

In order for fraud to prevent the possession of property from being the foundation of prescription, such fraud must be actual or positive and not merely constructive or legal. When actual or positive fraud prevents or deters another party from acting, prescription shall not continue until such fraud is discovered.

O.C.G.A. §44-5-162

The actual or positive fraud referred to is actual moral fraud, a wrongful act, and not an act that the law designates as fraud regardless of good faith.

Connell v. Culpepper, 111 Ga. 805 (1900)
Ware v. Barlow, 81 Ga. 1 (1887)

In a suit for land in which the defendant relies upon title by prescription in order to defeat such defense on the ground of fraud, it must appear that the fraud of the alleged prescriber was such as would originally affect the conscience and thus amount to actual moral wrong.

Kelley v. Tucker, 175 Ga. 796(1) (1932)
Barfield v. Vickers, 200 Ga. 279, 281 (1946)

50.300 **Prescription; Cotenants**

There may be no adverse possession against a cotenant until the adverse possessor effects an actual ouster and retains exclusive possession; in such event, the cotenant may bring an action to recover possession.

O.C.G.A. §44-6-123

When two or more persons own lands jointly, they are known in law as cotenants, and possession of one would constitute possession of all, and there could be no adverse

possession on the part of one against the other or others until an actual ouster, or exclusive possession after demand, or express notice of adverse possession.

Cowart v. Strickland, 170 Ga. 530(8) 537 (1930)

52.000 PRIVATE WAYS

52.001 Private Ways; Establishment by Statute (Ways of Necessity)

(See 52.010–52.020.)

52.010 Private Ways; Generally

Before one can assert a way of necessity over the land of another, every essential condition to such a right must affirmatively appear. Not only must the necessity of entry to and exit from the applicant's own land exist, but also it must appear that there is no other suitable outlet and that the applicant has complied with the provisions of the law as to adequate compensation having been paid or tendered to the owner of the land to be subjected to the burden of the easement sought.

Charleston, etc., Railway Co. v. Fleming, 119 Ga. 995(2) (1904)
Miller v. Slater, 182 Ga. 552, 557 (1936)

(Note: Provisions to O.C.G.A. §§44-9-41–44-9-47 relate to the laying out of ways of necessity.)

52.020 Private Ways; Indispensability

Cases of necessity contemplated in that provision of the constitution that declares that in cases of necessity, private ways may be granted upon just compensation being first paid do not arise except when the way sought to be laid out is absolutely indispensable to the applicant as a means of reaching the applicant's property. If there is in existence a way suitable for all the purposes for which the property is to be used, a case of necessity does not arise, even though such way may be less convenient than the one proposed.

Chattanooga, etc., RR Co. v. Philpot, 112 Ga. 153 (1900)
Wyatt v. Hendrix, 146 Ga. 143 (1916)

52.100 **Private Ways; Establishment by Prescription**

Whenever a private way has been in constant and uninterrupted use for seven years or more and no legal steps have been taken to abolish it, it shall not be lawful for anyone to interfere with that private way.

O.C.G.A. §44-9-54

In order to acquire a prescriptive title to a right-of-way, it must not exceed twenty feet in width and those using it must keep it in repair. They cannot acquire a right to a greater width by swerving to avoid an obstacle that they themselves should have removed.

Parts of the way that were over twenty feet wide when originally laid out would not necessarily prevent the establishment of a private way.

Kirkland v. Pitman, 122 Ga. 256, 260 (1905)

Ridley v. Griffeth, 216 Ga. 167 (1960)

(Note: O.C.G.A. §44-9-40[a] changed maximum width of private ways from 15 to 20 feet.)

52.200 **Private Ways; Permissive Use**

When the use of a private way originates by permission of the owner, prescription does not begin to run until the user notifies the owner, by repairs or otherwise, that the user's position has changed from that of a mere licensee to that of a prescriber.

First Christian Church v. Realty Investment Co., 180 Ga. 35(1) (1934)

Rothberg v. Peachtree Investments Inc., 220 Ga. 776, 780 (1965)

54.000 PROCESSIONING

54.010 Processioning; General Rules

In cases of disputed land lines, it is the duty of the processioners to fix and determine the boundaries as they actually exist. They shall mark anew those lines that can be taken as having been formerly located and established and not undertake to locate them as they might think they should originally have been laid out.

Cosby v. Reid, 21 Ga. App. 604 (1918)

In all cases of disputed lines, the following rules shall apply: natural landmarks, being less liable to change and not capable of counterfeit, shall be the most conclusive evidence; ancient or genuine landmarks, such as corner stations or marked trees, shall control the course and distance called for by the survey. If the corners are established and the lines not marked, a straight line, as required by the plat, shall be run, but an established marked line, though crooked, shall not be overruled; courses and distances shall be resorted to in the absence of higher evidence.

O.C.G.A. §44-4-5

The law with respect to the duties of processioners in determining land lines shall guide you in determining the case now before the court on a protest filed to the return of the processioners.

54.020 Processioning; Issue

On the trial of a protest to the return of processioners, the issue is not title but boundary, as was the case before the processioners. The rules of law governing processioners in determining the probative value of facts established by the evidence also shall govern you in weighing the evidence and determining the issues raised by the protest.

Georgia Talc Co. v. Cohutta Talc Co., 140 Ga. 245 (1913)
Stanfill v. Hiers, 80 Ga. App. 874, 879 (1950)

54.030 **Processioning; Muniments of Title**

Muniments, that is, deeds or other written evidence of title accompanied by diagrams or plats that might on paper locate the boundaries of land, will not by themselves be enough to mark a line.

Even though the course and extent of the line may not have been actually marked out upon the earth's surface, if there should exist enough physically established corners or landmarks, the mere connecting of which by straight lines or from which the projecting of the courses and distances shown by the plat would be enough to complete the boundary, it would be the duty of the processioners to ascertain, mark, and establish the same, respecting always the rights under actual possession.

Cosby v. Reid, 21 Ga. App. 604(1) (1918)
Stripland v. Nalley, 108 Ga. App. 311, 312 (1963)

54.040 **Processioning; Possession, Actual (Adverse)**

(Note: For definition of actual possession, see 50.100, Prescription; Possession, Actual.)

When actual possession has been claimed as a of right for more than seven years, such claim shall be respected, and the lines shall be marked so as not to interfere with such possession.

O.C.G.A. §44-4-7

In order for such possession to be respected by the processioners and the lines marked so as not to interfere with it, possession must be actual at the time of the processioning and must have been under a claim of right for more than seven years.

Norman v. Smith, 131 Ga. 69(4), 72 (1908)
McCollum v. Thomason, 32 Ga. App. 160 (1924)

54.050 **Processioning; Landmarks; Reputation**

General reputation in the neighborhood shall be evidence as to ancient landmarks of more than 30 years' standing.

O.C.G.A. §44-4-6

Traditional evidence as to ancient boundaries and landmarks shall be admissible in evidence, the weight to be determined by you according to the source from which it comes.

O.C.G.A. §24-3-13

It is competent to establish boundaries by proof of traditional reputation in the neighborhood derived from ancient sources or from earlier declarations of persons since deceased who had peculiar means of knowing what the reputation of the boundary was in an ancient day.

McAfee v. Newberry, 144 Ga. 473 (1915)
Knighton v. Hasty, 200 Ga. 507, 508 (1946)
Plantation Land Co. v. Bradshaw, 232 Ga. 435 (1974)

56.000 RAILROAD CROSSINGS

56.001 Railroad Crossings; Signals Outside Municipalities (Blowpost Law)

Upon the line of each railway at a point 400 yards from the center of its intersection at grade with any public road or street used by the public generally in crossing the tracks of the railway and on each side of the crossing, there shall be erected by the railroad company operating the railway a blowpost to indicate the existence of the crossing. The engineer operating the locomotive engine of any railroad train moving over the tracks of the railroad shall be required, upon reaching the blowpost, as a signal of approach to the crossing, to blow through the whistle two long blasts, one short blast and one long blast, said blasts to be loud and distinct.

In addition to these requirements, after reaching the blowpost farthest removed from the crossing and while approaching the crossing, the engineer shall keep and maintain a constant and vigilant lookout along the track ahead of the engine and shall otherwise exercise due care in approaching the crossing in order to avoid injuring any person or property that may be on the crossing or upon the line of the railway at any point within fifty feet of the crossing.

O.C.G.A. §46-8-190
Luke v. Powell, 63 Ga. App. 795, 802 (1940)

The law does not undertake to say what would constitute a constant and vigilant lookout nor due care in approaching the crossing. What would constitute a reasonable and substantial compliance with those requirements is a question for you, the jury, to determine in light of all the facts and circumstances of the case. A violation of any of the requirements of this code section would constitute negligence, but it would remain for you, the jury, to determine under all the facts and circumstances of the case whether such negligence was the proximate cause of injury.

Central of Georgia Railway Co. v. Johnston, 45 Ga. App. 773 (1932)

56.010 **Railroad Crossings; Signals within Municipalities; Bell**

Within the corporate limits of cities, a railroad company shall not be required either to erect blowposts or to blow the whistles of its locomotives in approaching the crossings or public roads. Instead, the engineer of each locomotive shall be required to signal the approach of the train to the crossing within the corporate limits by constantly tolling the bell of the locomotive.

The engineer shall keep and maintain a constant and vigilant lookout along the track ahead of the engine while moving within the corporate limits of a city, town, or village and shall exercise due care in controlling the movements of the engine or train so as to avoid injuring persons or property that may be on the crossing or within fifty feet of the crossing on the line of the railway and shall observe any ordinance of the city, town, or village regulating the speed at which railroad trains may run.

O.C.G.A. §46-8-191

A violation of any of the requirements of this code section would constitute negligence, but it would remain for you, the jury, to determine under all the facts and circumstances of the case whether such negligence was the proximate cause of injury.

Pollard v. Savage, 55 Ga. App. 470 (1937)
Southern Railway Co. v. Blanton, 63 Ga. App. 93, 104 (1940)
Seaboard Coastline Railroad Co. v. Smith, 131 Ga. App. 288 (1974)

56.100 **Railroad Crossings; General**

(The following should be given if applicable.)

56.110 **Railroad Crossings; Maintenance of Grade Crossings**

Any railroad whose track or tracks cross a public road at a grade shall have a duty to maintain the grade crossings in such condition as to permit the safe and convenient passage of public traffic. This duty of maintenance shall include that portion of the public road lying between the track or tracks and for two feet beyond the ends of the cross ties on each side of the crossings.

O.C.G.A. §32-6-190

56.120 **Railroad Crossings; Stop at Railroad Grade Crossings**

(Note: Legislation pertaining to stops at railroad grade crossings may be found in O.C.G.A. §§40-6-140–40-6-143. The original charge was split into 56.121 through 56.124.)

56.121 **Railroad Crossings; Obedience to Signal Indicating Approach of a Train**

When a signal of an approaching train is clearly visible or a crossing gate is lowered or an approaching train is dangerously close, an approaching motorist shall stop between fifteen and fifty feet from the nearest rail, and the motorist shall not drive through a crossing barrier while it is opening or closing.

O.C.G.A. §40-6-140

56.122 **Railroad Crossings; All Vehicles Must Stop at Certain Railroad Grade Crossings**

O.C.G.A. §40-6-141; applies to crossings where stop signs are erected

56.123 **Railroad Crossings; Certain Vehicles Must Stop at All Railroad Crossings**

Vehicles carrying passengers for hire, school buses, and vehicles containing explosives or flammable liquids shall make stops at all crossings, together with additional safety provisions.

O.C.G.A. §40-6-142

56.124 **Railroad Crossings; Moving Heavy Equipment at Railroad Grade Crossings**

O.C.G.A. §40-6-143; contains miscellaneous safety provisions pertaining to the moving of heavy equipment

58.000 SUBROGATION

58.010 Subrogation; Circumstances Creating Right

Subrogation is the substitution of another person in the place of the creditor. This other person succeeds to all the rights of the creditor, but subrogation occurs only in certain cases.

Subrogation arises only in those cases in which

a) the party claiming it advanced the money to pay a debt that, in the event of a default by the debtor, the party would have been bound to pay,
b) the party has some interests to protect, or
c) the party advanced the money under an agreement, express or implied, made either with the debtor or creditor that the party would be subrogated to the rights and remedies of the creditor.

Lutes v. Warren, 146 Ga. 641 (1917)

Gilbert v. Dunn, 218 Ga. 531, 533 (1962)

Liberty Mutual Insurance Co. v. Alsco Construction Inc. et al., 144 Ga. App. 307, 309 (1977)

A person who makes an advancement of money in payment of the debts of another without any assignment or agreement for subrogation and without any legal obligation to make such payment is not entitled to be subrogated to the rights of the creditors to whom payments have been made.

Putney v. Bryan, 142 Ga. 118 (1914)

Graves v. Carter, 208 Ga. 5, 6(3)(4) (1951)

60.000 TORTS

60.001 Torts Introduction

The case before you is (a tort case) (one) in which the plaintiff must prove by a preponderance of the evidence that the negligence of the defendant, if any, was a proximate cause of the injuries to the plaintiff.

60.010 Torts; Ordinary Negligence (Ordinary Diligence)

Ordinary negligence means the absence of or the failure to use that degree of care that is used by ordinarily careful persons under the same or similar circumstances. Before a plaintiff can recover damages from a defendant in a case such as this, there must be injury to the plaintiff resulting from the defendant's negligence.

O.C.G.A. §51-1-2

(See also 60.200, Torts; Promixate Cause; Definition.)

60.020 Torts; Slight Negligence (Extraordinary Diligence)

In general, extraordinary diligence or care is the extreme care and caution that very careful and thoughtful persons use under the same or similar circumstances. (Applied to the preservation of property, extraordinary diligence or care means the extreme care and caution that very careful and thoughtful persons use in securing and preserving their own property.) The absence of such extraordinary diligence or care is termed slight negligence.

O.C.G.A. §51-1-3

60.030 **Torts; Gross Negligence (Slight Diligence)**

In general, slight diligence or care is the degree of care that persons of common sense, however inattentive they may be, use under the same or similar circumstances. (Applied to the preservation of property, slight diligence or care means the degree of care that persons of common sense, however inattentive they may be, take of their own property.) The absence of slight care is termed gross negligence.

O.C.G.A. §51-1-4

60.040 **Torts; Children, Due Care by**

The term due care, when used in reference to a child of tender years, is such care as the child's mental and physical capabilities enable the child to exercise in the actual circumstances of the occasion and situation under investigation.

O.C.G.A. §51-1-5

Ashbaugh v. Trotter, 237 Ga. 46 (1976); child six years three months must use due care

Sturdivant v. Polk, 140 Ga. App. 152, 154 (1976); child under 14 years of age bound is to exercise care according to age and capacity

Lequire v. Youmans, 147 Ga. App. 174 (1978)

60.050 **Torts; Negligence *Per Se***

The plaintiff contends that the defendant violated certain laws or ordinances *(name them).* Such violation is called negligence *per se,* which means negligence as a matter of law. It is your duty to decide whether such violation took place or not.

Central R.R. & Banking Co. v. Smith, 78 Ga. 694 (1886)

Wilson v. Georgia Power & Light Co., 200 Ga. 207, 208 (1946)

Ford Motor Co. v. Carter, 141 Ga. App. 371, 374; 239 Ga. 647, 662 (1977)

(See also 60.200, Torts; Proximate Cause; Definition.)

60.060 **Torts; Negligence; One Act Sufficient**

The plaintiff must prove that the defendant was negligent in one or more ways alleged in order to recover. It is not necessary for the plaintiff to prove that the defendant was negligent in every way that the plaintiff claims. If you find no negligence at all on the part of the defendant, then the plaintiff's case against the defendant ends.

General Seat, etc., Co. v. Bergen & Sons Inc., 91 Ga. App. 431–33 (1955)

(See also 60.200, Torts; Proximate Cause; Definition.)

60.110 **Torts; Care for Own Safety, Duty to Exercise**

Every person has a duty to use ordinary care for his or her own safety. If you should determine from the evidence that the plaintiff failed to use ordinary care and that this failure was the sole proximate cause of the plaintiff's injuries, then the plaintiff could not recover from the defendant.

Southland Butane Gas Co. v. Blackwell, 211 Ga. 665 (1955)

60.120 **Torts; Avoidance of Consequences**

If the plaintiff, by the exercise of ordinary care, could have avoided the consequences caused by the defendant's negligence, then the plaintiff is not entitled to recover. In other cases, the defendant is not relieved even though the plaintiff may have contributed to the injury sustained. The plaintiff's duty to exercise ordinary care to avoid the consequences of the defendant's negligence does not arise until the defendant's negligence exists and the plaintiff knew or, in the exercise of ordinary care, should have known of such negligence.

O.C.G.A. §51-11-7

60.130 **Torts; Assumption of Risk**

When a person knowingly and voluntarily takes a risk of physical injury, the danger of which is so obvious that the act of taking such risk, in and of itself, amounts to a failure to exercise ordinary care for one's own safety, that person cannot hold another liable for injuries proximately caused by such action even though the injuries may be in part attributable to the negligence of the other person.

Southland Butane Ga. Co. v. Blackwell, 211 Ga. 665 (1955)

Doctors Hospital of Augusta Inc. v. Poole, 144 Ga. App. 184, 185 (1977)

Johnson v. Jackson, 140 Ga. App. 252, 258(5) (1976)

Little Rapids Corp. v. McCamy, 218 Ga. App. 111 (1995)

(Note: Assumption of risk does not extend to assuming the risk of the negligent act of another.)

Vaughn v. Pleasent, 266 Ga. 862 (1996)

Sutton v. Sumner, 224 Ga. App. 857 (1997)

Muldovan v. McEachern, 271 Ga. 805 (1999); willful or wanton acts of a defendant

60.150 **Torts; Emergency**

One who is confronted with a sudden emergency that was not created by one's own fault and is without sufficient time to determine accurately and with certainty the best thing to be done is not held to the same accuracy of judgment as would be required of that person if he/she had more time for deliberation. The requirement is that the person act with ordinary care under all particular facts and circumstances surrounding the situation.

Savannah Electric & Power Co. v. Russo, 71 Ga. App. 397 (1944)

Clackler v. Barnwell, 83 Ga. App. 515(3) (1951)

Young v. Tate, 112 Ga. App. 603, 606 (1965)

60.160 **Torts; Accident**

(Note: After 1/21/93, it is reversible error to charge jury on accident. Tolbert v. Duckworth *262 Ga. 622 [1992].)*

60.170 **Torts; Imputed Negligence**

(See 60.171–60.173.)

60.171 **Torts; Imputed Negligence; Generally**

For the negligence of one person to be properly placed upon another, the negligent person must be the agent of the person to whom it is attributed.

O.C.G.A. §51-2-1(a)

60.172 **Torts; Imputed Negligence; Children**

In an action by an infant, the fault of the parents or of custodians selected by the parents is not allowed to be placed upon the child.

O.C.G.A. §51-2-1(b)

60.173 **Torts; Imputed Negligence; Guests**

The negligence, if any, of the driver would not be a defense to a suit by a guest passenger in the car against a third party for an injury, unless the driver's negligence was the sole proximate cause of the injury.

Fields v. Jackson, 102 Ga. App. 117, 130(7); cert. denied (1960)
Pitts v. Farlow, 94 Ga. App. 314 (1956)
Sheppard v. Georgia, etc., Co., 68 Ga. App. 697 (1942)

60.200 **Torts; Proximate Cause; Definition**

Proximate cause means that cause which, in a natural and continuous sequence, produces an event, and without which cause such event would not have occurred. In order to be a proximate cause, the act or omission complained of must be such that a person using ordinary care would have foreseen that the event, or *some similar event*, might reasonably result therefrom. There may be more than one proximate cause of an event, but if an act or omission of any person not a party to the suit was the sole proximate cause of an occurrence, then no act or omission of any party could have been a proximate cause.

When I use the expression "proximate cause," I mean a cause that, in the natural or ordinary course of events, produced the plaintiff's injury. [It need not be the only cause, nor the last or nearest cause. It is sufficient if it combines with another cause resulting in the injury.] (Use the bracketed part if there is evidence of a concurring or contributing cause to the injury or death.) *Illinois v. Wilson*, 935 NE2d 587 (2010)

O.C.G.A. §§51-12-3, 51-12-8, 51-12-9

60.202 **Torts; Proximate Cause; Foreseeability; Natural and Probable Consequence; Intervening Cause Rules (Chain Reaction Situation)**

A defendant may be held liable for an injury when that person commits a negligent act that puts other forces in motion or operation resulting in the injury when such other forces are the natural and probable result of the act that the defendant committed and that reasonably should have been foreseen by the defendant. When the injuries could not reasonably have been foreseen as the natural, reasonable, and probable result of the original negligent act, then there can be no recovery. If the chain reaction that resulted from the defendant's alleged negligence, if any, meets the above tests, then the plaintiff may recover.

Stern v. Wyatt, 140 Ga. App. 704, 705 (1976)
Stapleton v. Amerson, 96 Ga. App. 471, 472 (1957)

60.210 **Torts; Proximate Cause; Last Clear Chance**

People are under an obligation to use ordinary care to avoid injuring others after finding them in a dangerous place, regardless of how they got there, and are liable for the failure to do so. This rule is known as the Last Clear Chance Doctrine. The Last Clear Chance Doctrine only applies when it is proved by a preponderance of the evidence that the plaintiff(s) placed himself/herself/themselves in danger because of his/her/their own negligence, the defendant actually knew of the plaintiff's (plaintiffs') danger, and the defendant had opportunity to take action to avoid the injury to the plaintiff(s) by the use of ordinary care under the conditions and circumstances that existed at that time but failed to do so. If you find such to be proved, then the failure of the defendant to use ordinary care under such circumstances to avoid the injury to the plaintiff(s) would be considered the proximate cause of the plaintiff's (plaintiffs') injuries.

Stallings v. Cuttino, 205 Ga. App. 581, 583 (1992)
Smith v. Mobley, 185 Ga. App. 462, 463 (1987)
Lovett v. Sandersville R.R. Co., 72 Ga. App. 692, 695–98, 700 (1945)

60.220 **Torts; Counterclaims; Burden of Proof, Comparative Negligence, Proximate Cause, and Damages as Applied to Verdict**

The defendant has filed what is known as a counterclaim; that is, the defendant claims that the plaintiff has negligently caused the defendant damage and that the plaintiff should pay for the defendant's damage instead of the defendant paying for the plaintiff's damage.

(Note: The same rules as to comparative negligence, proximate cause, and damages apply to the counterclaim that apply to plaintiff's claim. The pertinent charges on these subjects should be given and applied to the defendant, emphasizing that he/she is a plaintiff for the purpose of the counterclaim.)

If both the plaintiff and the defendant were equally negligent, then neither should recover damages from the other, and you should render a verdict in favor of the defendant but without any damages.

60.300 **Negligence Amplified; Agency; Generally**

Principals shall be bound for the care and loyalty of their agent in their business and shall be bound for the neglect and fraud of their agent in the transaction of such business.

O.C.G.A. §10-6-60

60.310 **Negligence Amplified; Spouse, Child, or Employee**

Every person shall be liable for the wrongful conduct or torts committed by a spouse, a child, or an employee by direction or in the prosecution and within the scope of the person's business, whether the same are committed by negligence or voluntarily.

O.C.G.A. §51-2-2

60.320 **Negligence Amplified; Willful Torts**

An employer is liable for the willful torts or willful wrongful conduct of an employee committed in the course of the employment.

Columbus Railroad Co. v. Woolfolk, 128 Ga. 631(3) (1907)
Ford v. Mitchell, 50 Ga. App. 617 (1935)

If an employee should do something in furtherance of a lawful direction given by the employer, the employer would be liable for any injury suffered by another, whether caused by the employee's negligence or by the wanton and reckless conduct of the employee in an attempt to accomplish the employer's business in an unlawful manner.

Southern Railway Co. v. James, 118 Ga. 840(2) (1903)
Ledman v. Calvert Iron Works Inc., 92 Ga. App. 733, 735 (1955)

60.330 **Negligence Amplified; Employees, When Employer Not Liable for**

If an employee should injure another person either negligently or on purpose but at the time of the injury, is not engaged in the employer's business and is not within the scope of the employment, then the employee's negligence or misconduct would not be chargeable to the employer.

Broome v. Primrose Tapestry Mills Inc., 59 Ga. App. 70 (1938)
Henderson v. Nolting, etc., Corp., 184 Ga. 724 (1937)

This condition is true even when the employee commits a tort or wrongful act while the employee is working on the job because if the commission of the tort or wrongful act had no reference to or connection with the job, then the employer would not be liable.

Atlanta, etc. v. Lawrence, 38 Ga. App. 497 (1928)
Community Theatres Co. v. Bentley, 88 Ga. App. 303, 305 (1953)

60.340 **Negligence Amplified; Family Purpose Doctrine**

When a member of a family provides an automobile for the use, comfort, pleasure, enjoyment, and convenience of members of the family living in the same home, that person is liable for the negligent acts of every member of that family who live in the same home and use the car for these purposes.

Hubert v. Harpe, 181 Ga. 168 (1935); relationship to owner, adult son
Levy v. Rubin, 181 Ga. 187 (1935); relationship to owner, sister
Goldstein v. Johnson, 64 Ga. App. 31 (1940); relationship to owner, husband
Hexter v. Burgess, 52 Ga. App. 819 (1936); relationship to owner, wife

Ficklen v. Heichelheim, 49 Ga. App. 777 (1934); holding that car owner does not have to be head of household

Bailey v. Butler, 199 Ga. App. 753 (1991)

Simmons v. Hill, 242 Ga. App. 22 (2000); child must live at parents' residence.

The fact that a person lives in the same place and is a member of the same family as a car owner does not, however, make the owner automatically liable for the use of the car under the family purpose doctrine. If the user of the car has his/her own car or uses the car without permission or for some reason is not one of the persons in the family ordinarily allowed to use the car, this principle would not apply.

Brown v. Porto, 106 Ga. App. 226 (1962); relationship to owner, daughter

Grahl v. McMath, 59 Ga. App. 247 (1938); relationship to owner, minor son

Bryant v. Keen, 43 Ga. App. 251 (1931); relationship to owner, son-in-law

Dougherty v. Woodward, 21 Ga. App. 427 (1917); relationship to owner, son aged 20 years

Marques v. Ross, 105 Ga. App. 133 (1961); relationship to owner, adult son; the test at all times is whether the person driving the car was the agent of the owner under the facts of the case.

Durden v. Maddox, 73 Ga. App. 491 (1946)

Medlin v. Church, 157 Ga. App. 876 (1981)

McCray v. Hunter, 157 Ga. App. 509 (1981)

60.350 **Negligence Amplified; Independent Contractor**

The employer generally is not responsible for torts committed by the employee when the employee exercises an independent business and is not subject to the immediate direction and control of the employer.

O.C.G.A. §51-2-4

(The following exceptions should not be charged except as they may apply to the facts.)

An employer is liable for the negligence of the contractor

a) when the work is wrongful in itself or, if done in the ordinary manner, would result in a nuisance;
b) if, according to the employer's previous knowledge and experience, the work to be done is in its nature dangerous to others, however carefully performed;
c) if the wrongful act is the violation of a duty imposed by express contract upon the employer;
d) if the wrongful act is the violation of a duty imposed by statute;
e) if the employer retains the right to direct or control the time and manner of executing the work or interferes and assumes control so as to create the relation of employer and employee or so that an injury results that is traceable to the employer's interference; or
f) if the employer ratifies or approves the unauthorized wrong of the independent contractor.

O.C.G.A. §51-2-5

The real test by which to determine whether a person was acting as the employee of another at the time of injuring someone is to determine whether at that particular time that person was subject to the other person's orders and control and was liable to be discharged from the particular employment for disobedience of orders or misconduct.

Bibb Mfg. Co. v. Souther, 52 Ga. App. 722 (1935)
Redd v. Brisbon, 113 Ga. App. 23, 24 (1966)

60.400 **Dangerous Instrumentalities**

(See 60.410–60.420.)

60.410 **Dangerous Instrumentalities; Entrusting to Others**

One who knowingly entrusts or gives a dangerous instrumentality to another person who is not competent to use it is legally responsible for injuries to third persons that result from its negligent use by the person.

38 AM. JUR. *Negligence* §86 (p. 746)

This rule applies to a person who lends an automobile to someone who is under the influence of intoxicating liquor or drugs.

Graham v. Cleveland, 58 Ga. App. 810(2) (1938)
Hines v. Bell, 104 Ga. App. 76, 82 (1961)
Young v. Kickliter, 213 Ga. 42, 43 (1957)
Brown v. Sheffield, 121 Ga. App. 383 (1970)

60.420 **Dangerous Instrumentalities; Use, Generally**

One is under a legal duty to use a dangerous instrumentality with a degree of care in proportion to the danger of the instrumentality.

38 AM. JUR. *Negligence* §85 (p. 744)
Lee v. Georgia Forest Products Co., 44 Ga. App. 850, 852 (1932)
Milton Bradley Co. v. Cooper, 79 Ga. App. 302 (1949)

60.500 **Animals, Injuries by; Generally**

A person who owns or keeps a vicious or dangerous animal of any kind and who by careless management or by allowing the animal to run free causes injury to another person who does not provoke the injury shall be liable in damages to the person injured.

O.C.G.A. §51-2-7
Sutton v. Sutton, 145 Ga. App. 22, 25 (1978); bull case

60.510 **Animals; Knowledge of Viciousness**

The owner of a vicious or dangerous animal who allows it to run free is liable to one who sustains injury as a result of the vicious or dangerous tendency of the animal only if the owner knows of the animal's vicious or dangerous character. If there is no such knowledge, then the owner will not be liable for an injury unless the injury is the usual and natural result to be expected from allowing an ordinary animal of that kind to run free.

Rodrigues v. Newby et al., 131 Ga. App. 651, 653(2) (1974); horse

Connell v. Bland, 122 Ga. App. 507, 512 (1970)

Harvey v. Buchanan, 121 Ga. 384 (1904)

Latimer v. Kieffer, 99 Ga. App. 642, 648 (1959)

60.600 **Invitees**

(See 60.610–60.630.)

60.610 **Invitees; Definition**

A person who enters the premises of another for any purpose connected with the business of the owner or occupier is an invitee, and the owner or occupier of the premises owes that person the duty to exercise ordinary care in keeping the premises safe. That duty would extend to all portions of the premises that are reasonably necessary for the invitee to use in the course of the business for which the invitation was given.

Coffer v. Bradshaw, 46 Ga. App. 143(6) (1932)

Higdon v. Georgia Winn-Dixie Inc., 112 Ga. App. 500, 504 (1965)

Fender v. Colonial Stores Inc. et al., 138 Ga. App. 31, 36 (1976)

60.620 **Invitees; Duty to**

When the owner or occupier of land, by express or implied invitation, induces or leads others to come upon the premises for any lawful purpose, then the owner is liable in damages to such persons for injuries caused by the failure to exercise ordinary care in keeping the premises and approaches safe.

O.C.G.A. §51-3-1

Sutton v. Sutton, 145 Ga. App. 22, 24 (1978); includes animals or ill-tempered individuals likely to inflict harm upon invitees visiting upon premises

60.625 **Invitees; Actual or Constructive Knowledge**

While not an insurer of the invitee's safety, the owner/occupier is required to exercise ordinary care to protect the invitee from unreasonable risks of harm of which the

owner/occupier has superior knowledge. The owner/occupier owes persons invited to enter the premises a duty of ordinary care to have the premises in a reasonably safe condition and not expose the invitees to unreasonable risk (or to lead them into a dangerous trap). The owner/occupier is not required to warrant the safety of all persons from all things, but to exercise the diligence toward making the premises safe that a good business person is accustomed to use in such matters. The true ground of liability is the owner/occupier's superior knowledge of the perilous condition and the danger therefrom to persons coming upon the property. It is when the perilous condition is known to the owner and not known to the person injured that a recovery is permitted.

In order to prevail, the person injured, the plaintiff, must prove by a preponderance of the evidence that the owner/occupier, the defendant, had actual or constructive knowledge of the hazard and that the plaintiff lacked knowledge of the hazard or for some reason, attributable to the defendant, was prevented from discovering it. To establish constructive knowledge, the plaintiff must show that (1) the defendant or the defendant's employee was in the immediate area of the hazard and could have easily seen the substance or (2) the foreign substance remained long enough that ordinary diligence by the defendant or the defendant's employees should have discovered it. Constructive knowledge may be inferred by you, the jury, when there is evidence that the owner lacked a reasonable inspection procedure, but if the plaintiff produces no evidence that the substance could have been discovered during a reasonable inspection, then no inference arises that the defendant's failure to discover the defect was the result of any alleged failure to inspect.

Alterman Foods v. Ligon, 246 Ga. 620 (1980)
Robinson v. Kroger Co., 268 Ga. 735 (1997)
Chastain v. CF Georgia North DeKalb, LP, 256 Ga. App. 802 (2002)
Pirkle v. Quiktrip Corp., 325 Ga. App. 597 (2014)

60.630 **Invitees; Implied Invitation**

An implied invitation is one that is extended because of the owner doing something or permitting something to be done, fairly indicating to the person entering that the entry and use of the property is consistent with the intents (or interests) and purposes of the owner.

Coffer v. Bradshaw, 46 Ga. App. 143, 148 (1932)

Smith v. Jewell Cotton Mill, 29 Ga. App. 461 (1923)

Bryant v. Rushing, 121 Ga. App. 430, 434 (1970)

60.700 **Licensees**

(See 60.710–60.730.)

60.710 **Licensees; Definition**

A licensee is a person who

1) is not a customer, employee, or trespasser;
2) does not stand in any contractual relation with the owner of the premises; and
3) is permitted expressly or impliedly to go on the premises merely for his/her own interests, convenience, or gratification.

O.C.G.A. §51-3-2

Cobb v. First National Bank of Atlanta, 58 Ga. App. 160 (1938)

60.720 **Licensees; General Test**

The general test as to whether a person is an invitee or a licensee is whether the injured person at the time of the injury had business relations with the owner of the premises that would cause his/her presence to be beneficial to both. In the absence of some relationship with the owner or occupier of the premises, no invitation may be implied, and the injured person must be regarded as a licensee.

Petree v. Davison-Paxon-Stokes Co., 30 Ga. App. 490, 492 (1923)

Hyde v. A. and W. P. Railroad Co., 47 Ga. App. 139 (1933)

Rodrigues v. Newby et al., 131 Ga. App. 651, 653(1) (1974)

60.730 **Licensees; Duty to**

A licensee enters on the premises at his/her own risk, and the owner owes the licensee no duty as to the conditions of the premises, except that the owner should not knowingly let the licensee run into a hidden peril or willfully or wantonly cause him/her injury.

O.C.G.A. §51-3-2

Clark v. Rich's Inc., 114 Ga. App. 242 (1966)

Kahn v. Graper, 114 Ga. App. 572, 577 (1966)

60.750 **Trespassers; Definition; Duty to**

A trespasser is one who goes upon private premises without the permission or consent of the owner or person in charge. One continues to be a trespasser even though the owner or person in charge may know that it is that person's custom to come upon the premises.

As a general rule, one is not bound to anticipate the presence of trespassers on private property, and the owner or person in charge of the property owes no duty to keep the premises in a condition safe for trespassers who enter without the knowledge of the owner or person in charge.

The owner of the premises owes no duty to a trespasser until after his/her presence is actually known and then only owes the trespasser the duty not to willfully or wantonly injure him/her.

(See exceptions as to children, Holcomb v. Ideal Concrete Co.*, 140 Ga. App. 857, 858 [1976].)*

Rowland v. Byrd, 57 Ga. App. 390 (1938)

Rawlins v. Pickren, 45 Ga. App. 261 (1932)

Norris v. Macon Terminal Co. et al., 58 Ga. App. 313(2) (1938)

60.800 ***Res Ipsa Loquitur***

When something unusual and unexplained happens with respect to a thing or instrumentality over which the defendant has exclusive control, an inference may arise that the injury was due to the defendant's negligence. The inference may or may not be drawn by you, but in any event it would be a question of fact for you to determine under all the surrounding facts and circumstances as you find them to have existed at the time and place of the occurrence.

Should you draw an inference of negligence under the doctrine of *res ipsa loquitur* from the manner of the occurrence or the circumstances of the occurrence, the drawing of such inference is not necessarily to result in a finding for the plaintiff or to eliminate a finding for the defendant. It is your duty to further inquire about whether the inference has

been overcome by satisfactory explanation. The inference that you may draw from the proved facts is circumstantial evidence only, which you have for consideration along with all other evidence in the case. It is your duty to weigh this evidence along with all other evidence and determine where the preponderance of evidence lies.

Hotel Dempsey Co. v. Miller, 81 Ga. App. 233, 234 (1950)
Chenall v. Palmer Brick Co., 117 Ga. 106 (1903)
Palmer Brick Co. v. Chenall, 119 Ga. 837 (1904)
Atlanta Coca-Cola Bottling Co. v. Burke, 109 Ga. App. 53, 64 (1964)

(Note: Application of this principle requires careful study of the peculiar facts of each case as well as adjustment of the exact language of the charge.)

Atlanta Coca-Cola v. Ergle, 128 Ga. App. 381 (1973)
Fender v. Colonial Stores Inc., 138 Ga. App. 31 (1976)

60.900 **Settlement of Torts**

If the tort or legal wrong complained of does not amount to a crime, the person injured may consent to a satisfaction and settlement of it. If it does amount to a crime, the person injured may agree upon and receive compensation for the personal injury.

O.C.G.A. §51-11-20

(The following charge should not be given unless authorized by the facts.)

Any attempt to satisfy the crime or to suppress a prosecution for it is illegal and destroys the entire agreement, except in those cases in which the law expressly allows such a settlement.

O.C.G.A. §51-11-20(b)(2)

(The following rule applies unless it comes into conflict with the preceding sentence.)

One having a right of action on account of injury to one's person or injury to or the death of another or damage to property may enter into a contract in settlement and satisfaction of it, and when executed, such a contract will bar an action on account of the injury.

Western, etc., Railroad Co. v. Burke, 97 Ga. 560 (1895)

Drew v. Lyle, 88 Ga. App. 121, 124 (1953)

Wheat v. Montgomery, 130 Ga. App. 202 (1973)

Daniel v. Conrad, 242 Ga. 119 (1978)

62.000 TORTS; SPECIFIC

62.001 Malicious Prosecution

(See 62.010–62.020.)

62.010 Malicious Prosecution; Generally

A criminal prosecution, maliciously carried on and without any probable cause that which damages the person prosecuted shall give that person a cause of action.

O.C.G.A. §51-7-40

Whether there was probable cause is for you to decide. Lack of probable cause shall exist when the circumstances are such that a reasonable person would believe that the accuser had no reason for proceeding except the desire to injure the person accused.

O.C.G.A. §51-7-43

(Note: Want of probable cause is a question for the jury, but when the material facts are not in dispute, the existence of probable cause for the prosecution is a question of law for determination by the court.)

Williamson v. Alderman, 148 Ga. App. 297, 298(1) (1978)

Probable cause exists when the facts and circumstances are such as would cause a reasonable mind acting on the facts known to the prosecutor to believe that the person charged was guilty of the crime for which he/she was prosecuted.

Tanner-Brice Co. v. Barrs, 55 Ga. App. 453 (1937)
Barber v. Addis, 113 Ga. App. 806, 807 (1966)
West v. Baumgartner, 228 Ga. 671 (1972)
Smith v. Ragan, 140 Ga. App. 33 (1976)

62.020 Malicious Prosecution; Advice of Counsel

Acting upon the advice of counsel will not protect the defendant in a suit for a malicious prosecution, but you may consider it in determining the question of malice and probable

cause. If you should find that the plaintiff is entitled to recover, you may consider it in mitigation of damages.

Fox v. Davis, 55 Ga. 296, 298(3) (1875)
Campbell v. Tatum, 71 Ga. App. 58, 61 (1944)

62.100 **False Imprisonment**

(See 62.110–62.120.)

62.110 **False Imprisonment; Generally**

False imprisonment consists in the unlawful detention of another, for any length of time, whereby the person is deprived of personal liberty and freedom.

O.C.G.A. §51-7-20

The only essential elements in a suit for false imprisonment are detention of the person of the plaintiff without his/her consent and its unlawfulness. Therefore, if one should detain another without the person's consent and that detention was without the authority of law, the person detained would be entitled to recover.

Westberry v. Clanton, 136 Ga. 795(4) (1911)
Atlantic Coast Line Railroad Co. v. Wagner, 90 Ga. App. 267, 277 (1954)

62.120 **False Imprisonment; Warrant, Authority of**

If the imprisonment is by virtue of a warrant, neither the party in good faith issuing out the warrant nor the officer who in good faith executes it shall be guilty of false imprisonment, even though the warrant is defective in form or is void for lack of jurisdiction. In such cases, the good faith of these persons must be determined from the circumstances.

The same is true of the judicial officer issuing the warrant. However, the presumption is always against the judicial officer as to good faith when there is no jurisdiction.

O.C.G.A. §51-7-21

62.200 **Malicious Arrest**

(See 62.210–62.240.)

62.210 **Malicious Arrest; Generally**

An arrest under process of law, without probable cause, when made maliciously, shall give a right of action to the party arrested.

O.C.G.A. §51-7-1

An action for malicious arrest is based upon an arrest in a civil action under process of law but maliciously and without probable cause. To authorize a recovery, it must appear that the plaintiff was arrested under some kind of process in a civil action, that the action was brought maliciously and without probable cause, and that the prosecution terminated in favor of the plaintiff.

Waters v. Winn, 142 Ga. 138 (1914)
Mathews v. Murray, 101 Ga. App. 216, 218 (1960)
Stephens v. Big Apple Supermarket, 130 Ga. App. 841, 843(3) (1974)
Oden & Sims v. Thurman, 165 Ga. App. 500, 503 (1983)

62.220 **Malicious Arrest; Malice, Defined**

Malice may consist in personal spite or in a general disregard of the right consideration of people directed by chance against the individual injured.

O.C.G.A. §51-7-2

62.230 **Malicious Arrest; Probable Cause, Want of**

Want, or lack, of probable cause shall exist when the circumstances satisfy a reasonable person that the accuser had no ground for proceeding but a desire to injure the accused. Whether or not there is probable cause is for you, the jury, to decide.

O.C.G.A. §51-7-3

62.240 **Malicious Arrest; Exempt Persons, Arrest of**

The willful arrest, under civil process, of a person exempt by law from such arrest shall be deemed malicious until the contrary is proved.

O.C.G.A. §51-7-4

(Note: Among persons exempt from arrest under certain circumstances are members of Congress, electors, members of the General Assembly, militiamen [O.C.G.A. §17-4-2], and witnesses [O.C.G.A. §24-10-1]. As to the liability of the owner of a mercantile establishment for false arrest or imprisonment, see O.C.G.A. §51-7-60. The law as to malicious prosecution is substantially the same as that as to malicious arrest.)

(See Waters v. Winn, *142 Ga. 138 [1914]. See also 62.000* et seq., *Malicious Prosecution.)*

62.300 **Physician, Skill Required of**

A person professing to practice surgery or the administering of medicine for compensation must bring to the exercise of the profession a reasonable degree of care and skill. Any injury resulting from a want of such care and skill shall be an act for which a recovery may be had.

O.C.G.A. §51-1-27

This standard, when applied to the facts and circumstances of any particular case, must be of such degree of care and skill as, under similar conditions and like surrounding circumstances, is ordinarily employed by the profession generally.

If a physician or surgeon in the treatment and care of a patient should use that degree of care and skill ordinarily employed by the profession generally under similar conditions and like surrounding circumstances, then the physician or surgeon would not be negligent; therefore, there could be no finding of malpractice. If, on the other hand, the doctor should fail to use such degree of care and skill, the doctor would be negligent, and if injury resulted because of such failure, the doctor would be liable for such injury as a result of malpractice.

Hinkle v. Smith, 12 Ga. App. 497 (1913)
Mills v. Emory, 114 Ga. App. 63 (1966)
Simpson v. Dickson, 167 Ga. App. 344 (1983)

The presumption in such cases is that the services were performed in an ordinarily skillful manner. The person claiming an injury may overcome this legal presumption by introducing evidence that the physician (or other medical professionals) did not treat the patient in an ordinarily skillful manner. Expert testimony is usually required to overcome the presumption, and the burden is on the one claiming injury to show a lack of due care and skill by a preponderance of the evidence.

Beach v. Lipham, 276 Ga. 302 (2003)

In order for the plaintiff to show that the defendant's alleged negligence was the proximate cause of the plaintiff's injury, the plaintiff must present expert testimony. An expert's opinion on the issue of whether the defendant's alleged negligence caused the plaintiff's injury cannot be based on speculation or possibility. It must be based on reasonable medical probability or reasonable medical certainty. If you find that the expert's testimony regarding causation is not based on reasonable medical probability or reasonable medical certainty, then the plaintiff has not proved that the plaintiff's injury was proximately caused by the defendant's alleged negligence, and you would return a verdict for the defendant.

Zwiren v. Thompson, 276 Ga. 498, 503 (2003)

62.310 **Common Knowledge; Expert Not Required**

However, expert testimony is not required when the facts show that the alleged negligence caused the injury and it would be a matter of common knowledge and observation that such an injury would not have occurred if the medical service had been performed with ordinary skill and care.

In such cases, expert medical testimony is not required.

Killingsworth v. Poon, 167 Ga. App. 653 (1983)

62.311 **Physician, Skill Required; After-Acquired Information; Hindsight**

(*Consider whether this point is adequately covered by the general charge under 62.300 in view of* Smith v. Finch, *285 Ga. 709 (2009).*)

In a medical malpractice action, a defendant cannot be found negligent on the basis of an assessment of a patient's condition that only later, in hindsight, proves to be incorrect as long as the initial assessment was made in accordance with reasonable standards of medical care.

McNabb v. Landis, 223 Ga. App. 894 (1996)
Haynes v. Hoffman, 164 Ga. App. 236, 238 (1982)

62.320 **Hospital; Degree of Care**

A hospital owes to its patients the duty of using ordinary care to furnish equipment and facilities reasonably suited to the uses intended and such as are in general use under the same, or similar circumstances in hospitals of approximately the same size serving similar areas or communities.

Smith v. Hospital Authority of Terrell County, 161 Ga. App. 657 (1982); cert. denied
Wade v. Archbold Hospital, 166 Ga. App. 487 (1983); cert. applied for

62.400 **Attorney, Skill Required of**

The initial requirement for establishing liability in a case of this type is that there be a duty. This duty arises from the attorney-client relationship.

If it has been shown that an attorney-client relationship exists, the attorney has a duty to use such ability, care, and skill as lawyers of ordinary skill and capacity commonly possess and use in the performance of the tasks that they undertake.

In the practice of the legal profession, there is a presumption that legal services are performed in an ordinarily skillful manner, and the burden is on the one receiving the services to show a lack of due care and skill by the introduction of expert legal testimony.

O.C.G.A. §15-19-17
Hughes v. Malone, 146 Ga. App. 341 (1978)

(Include the following charge if applicable to the facts of the particular case.)

A client suing his/her attorney in a case not only must prove by expert legal testimony that the claim was valid and would have resulted in a judgment in the client's favor, but also that the judgment would have been collectible in some amount, for therein lies the measure of damages.

The plaintiff in this case must establish the original defendant's ability to pay a judgment had one been rendered against him/her. In this regard, it is proper for you to consider the original tortfeasor's worldly circumstances, financial status, assets, insurance coverage, ownership, or other interest in real and personal property and the like to determine the ability of the original alleged tortfeasor to satisfy, in whole or in part, what has been determined to be the plaintiff's damages. It is this latter amount of money that determines the financial liability and responsibility of the defendant, assuming professional negligence has been determined.

Riddle v. Driebe, 153 Ga. App. 276 (1980)

62.500 **Consent to Injury**

(See 62.510–62.520.)

62.510 **Consent to Injury; Generally**

As a general rule there can be no tort or legal wrong committed against a person consenting to it, if that consent is free and not obtained by fraud and is the action of a sound mind.

(The following sentences of this charge should be given only if applicable to the facts.)

The consent of a person incapable of consenting, such as a minor, may not affect the right of any other person having a right of action for the injury.

O.C.G.A. §51-11-2

62.520 **Consent to Injury; Railroads**

No person shall recover damages from a railroad company for injury done to oneself or one's property when the same is done by one's consent.

O.C.G.A. §46-8-291

62.600 **Strict Liability in Tort; Products Liability**

(See 62.610–62.680.)

62.610 **Strict Liability in Tort; General Explanation and Burden of Proof**

The plaintiff, *(plaintiff's name)*, contends that he/she was injured because of a defective product manufactured by the defendant, *(defendant company's name).*

The manufacturer of a product that is sold as new property may be liable or responsible to any person who is injured because of a defect in the product that existed at the time the manufacturer sold the product. However, a manufacturer of a product is not an insurer, and the fact that a product may cause an injury does not necessarily make the manufacturer liable. To recover damages under this rule, a person injured by an allegedly defective product must establish the following three elements by a preponderance of the evidence:

1) the product was defective,
2) the defect existed at the time the product left the manufacturer's control, and
3) the defect in the product was the proximate cause of the plaintiff's injury.

(Choose appropriate defect[s] the jury will be charged on.)

The types(s) of product defect(s) alleged by the plaintiff is/are a manufacturing defect, a design defect, and/or a defect because of inadequate warning. There is no single general way to define what constitutes a defect in a product. Whether or not a product is defective is a question of fact to be determined by you, the jury, in each case, based on the instruction that I will give you.

O.C.G.A. §51-1-11
Center Chemical Co. v. Parzini, 234 Ga. 868 (1975)
Banks v. ICI Americas Inc., 264 Ga. 732 (1994)
S K Hand Tool Corp. v. Lowman, 223 Ga. App. 712 (1996)

62.620 **Strict Liability; Manufacturing Defect; Generally**

A manufacturer has a duty to exercise reasonable care in manufacturing a product that is reasonably safe for its intended or foreseeable uses. A manufacturing defect is an unintended

flaw or abnormal condition that occurs during the production of the product that makes the product more dangerous than it would have been had the product been manufactured properly. Such a defect may occur because of the use of shoddy materials, poor manufacturing methods, or other such actions or omissions by the manufacturer. A manufacturing defect may be indicated by comparing the questioned product to properly manufactured items in the same product line.

To conclude that a manufacturing defect exists in a product and that the plaintiff is entitled to recover, you must find by a preponderance of the evidence that

1) the product was defective,
2) the defect existed at the time the product left the manufacturer's control, and
3) the defect in the product was the proximate cause of the plaintiff's injury.

O.C.G.A. §51-1-11

Chrysler Corp. v. Batten, 264 Ga. 723 (1994)

Banks v. ICI Americas Inc., 264 Ga. 732 (1994)

Maleski, *Georgia Products Liability, 2d ed.* (1993 and 1997 supp.)

62.630 **Strict Liability; Manufacturing Defect; Deviation from Design**

A manufacturer has a duty to exercise reasonable care in manufacturing a product that is reasonably safe for its intended or foreseeable uses. A manufacturing defect is an unintended flaw or abnormal condition that occurs during the production of the product that makes the product more dangerous than it would have been had the product been manufactured as specified. A manufacturing defect may be indicated by comparing the questioned product to properly manufactured items in the same product line.

To conclude that a manufacturing defect exists in a product and that the plaintiff is entitled to recover, you must find by a preponderance of the evidence that

1) the product deviated from the manufacturer's intended design or production specifications,
2) that deviation existed at the time the product left the manufacturer's control, and
3) the deviation was the proximate cause of the plaintiff's injury.

O.C.G.A. §51-1-11

Chrysler Corp. v. Batten, 264 Ga. 723 (1994)

Banks v. ICI Americas Inc., 264 Ga. 732 (1994)

62.640 **Strict Liability; Design Defect**

A product may be found to be defective because of its particular design. Although a manufacturer is not required to ensure that a product design is incapable of producing injury, the manufacturer has a duty to exercise reasonable care in choosing the design for a product.

O.C.G.A. §51-1-11

Hunt v. Harley-Davidson Motor Co. Inc., 147 Ga. App. 44 (1978)

Banks v. ICI Americas Inc., 264 Ga. 732 (1994)

62.650 **Strict Liability; Design Defect; Risk-Utility Test and Factors**

To determine whether a product suffers from a design defect, you must balance the inherent risk of harm in a product design against the utility or benefits of that product design. You must decide whether the manufacturer acted reasonably in choosing a particular product design by considering all relevant evidence, including the following factors:

1) the usefulness of the product;
2) the severity of the danger posed by the design;
3) the likelihood of that danger;
4) the avoidability of the danger, considering the user's knowledge of the product, publicity surrounding the danger, the effectiveness of warnings, and common knowledge or the expectation of danger;
5) the user's ability to avoid the danger;
6) the technology available when the product was manufactured;
7) the ability to eliminate the danger without impairing the product's usefulness or making it too expensive;
8) the feasibility of spreading any increased cost through the product's price or by purchasing insurance;
9) the appearance and aesthetic attractiveness of the product;

10) the product's utility for multiple uses;
11) the convenience and durability of the product;
12) alternative designs for the product available to the manufacturer; and
13) the manufacturer's compliance with industry standards or government regulations.

If you decide that the risk of harm in the product's design outweighs the utility of that particular design, then the manufacturer exposed the consumer to greater risk of danger than the manufacturer should have in using that product design, and the product is defective. If after balancing the risks and utility of the product, you find by a preponderance of the evidence that the product suffered from a design defect, then the plaintiff is entitled to recover.

Banks v. ICI Americas Inc., 264 Ga. 732 (1994)

62.660 **Strict Liability; Design Defect; Alternative Design Evidence**

In determining whether a product was defective, you may consider evidence of alternative designs that would have made the product safer and could have prevented or minimized the plaintiff's injury. In determining the reasonableness of the manufacturer's choice of product design, you should consider

1) the availability of an alternative design at the time the manufacturer designed this product;
2) the level of safety from an alternative design compared to the actual design;
3) the feasibility of an alternative design, considering the market and technology at the time the product was designed;
4) the economic feasibility of an alternative design;
5) the effect an alternative design would have on the product's appearance and utility for multiple purposes; and
6) any adverse effects on the manufacturer or the product from using an alternative design.

Banks v. ICI Americas Inc., 264 Ga. 732 (1994)
Wilson Foods Corporation v. Turner, 218 Ga. App. 74 (1995)

62.670 **Strict Liability; Design Defect; Compliance with Industry Standards or Government Regulations**

In determining whether a product was defective, you may consider proof of a manufacturer's compliance with federal or state safety standards or regulations and industrywide customs, practices, or design standards. Compliance with such standards or regulations is a factor to consider in deciding whether the product design selected was reasonable considering the feasible choices of which the manufacturer knew or should have known. However, a product may comply with such standards or regulations and still contain a design defect.

Banks v. ICI Americas Inc., 264 Ga. 732 (1994)
Doyle v. Volkswagenwerk Artiengesellschaft, 267 Ga. 574 (1997)

62.680 **Defect Due to Inadequate Warning**

A manufacturer has a duty to give an adequate warning of known or reasonably foreseeable dangers arising from the use of a product. The manufacturer owes this duty to warn to all persons whom the manufacturer should reasonably foresee may use or be affected by the product. A manufacturer's duty to warn may be breached by

a) failing to provide an adequate warning of the product's potential dangers or
b) failing to adequately communicate to the ultimate user the warning provided.

A product, however well or carefully made, that is sold without an adequate warning of such danger may be said to be in a defective condition. If you find by a preponderance of the evidence that the manufacturer did not warn or did not adequately warn when a warning should have been given, then you may find the product to be defective for that reason, and the plaintiff is entitled to recover.

O.C.G.A. §51-1-11
Center Chemical Co. v. Parzini, 234 Ga. 868 (1975)
Chrysler Corp. v. Batten, 264 Ga. 723 (1994)
Wilson Foods Corporation v. Turner, 218 Ga. App. 74 (1995)

62.681 **Duty to Warn; Foreseeable and Unforeseeable Uses**

A product that is safe if used in a normal manner is not ordinarily a defective product. If a person uses a product in an abnormal manner and is injured because of such abnormal use, the manufacturer is not liable for such injury. However, if the manufacturer had reason to anticipate or foresee that the product might be used in this abnormal manner and that such use might result in injury and, knowing these facts, failed to give adequate warning against using the product in this manner, then the manufacturer may be held liable for the resulting injury.

Center Chemical Co. v. Parzini, 234 Ga. 868 (1975)
Wilson Foods Corporation v. Turner, 218 Ga. App. 74 (1995)
Olympia Services Inc. v. Sherwin Williams Co., 224 Ga. App. 437 (1997)

62.682 **Duty to Warn; Open and Obvious Danger**

(The following charge should not be given in conjunction with the design defect risk-utility test charge. Ogletree v. Navistar Int'l Trans. Corp., *269 Ga. 443 [1998].)*

However, a manufacturer is not required to warn of danger that should be known, obvious, or apparent to the user of the product.

Hunt v. Harley-Davidson Motor Co. Inc., 147 Ga. App. 44 (1978)

62.683 **Continuing Duty to Warn**

A manufacturer's duty to warn arises when the manufacturer knows or reasonably should know of the danger presented by the use of a product. Therefore, a manufacturer has a continuing duty to adequately warn the public of defects in a product even after that product has left the control of the manufacturer to be sold or distributed to the consumer.

Chrysler Corp. v. Batten, 264 Ga. 723 (1994)

(Note: In some circumstances, the alternative design evidence charge [62.660] is appropriate in a defect due to inadequate warning case.)

62.690 **Crashworthiness**

Automobile accidents or collisions under ordinary use of an automobile are foreseeable events by an automobile manufacturer. If you find that the plaintiff has proved by a preponderance of the evidence that the automobile in question contained a *(choose appropriate defect[s] on which the jury has already been charged)* manufacturing defect, design defect, or defect due to inadequate warning that was a substantial factor in causing the plaintiff's injuries to be more severe than they otherwise would have been from the accident or collision, then the defendant manufacturer is liable, and the plaintiff is entitled to recover, regardless of who was at fault in causing the accident or collision.

If you find that the injuries suffered by the plaintiff resulted from the combined acts or omissions of two or more defendants, then all the defendants found liable are jointly and severally liable for the injuries. If a defendant manufacturer seeks to limit its liability for the plaintiff's injuries, the manufacturer must prove by a preponderance of the evidence a reasonable basis for attributing responsibility for all or part of the plaintiff's injuries to the effects of the accident or collision and not to any defect found to exist in the automobile.

Polston v. Boomershine Pontiac-GMC Truck Inc., 262 Ga. 616 (1992)

62.700 **Assumption of the Risk Defense**

Every person has the duty to exercise ordinary care for his/her own safety. If a person discovers a product's defect and is aware of the danger but nevertheless proceeds unreasonably to make use of the product, taking a risk which in and of itself amounts to a failure to exercise ordinary care for his/her safety, he/she cannot later hold another person responsible for any injury suffered due to taking such a risk. If you find by a preponderance of the evidence that

1) the plaintiff knew of the danger posed by the defective product,
2) the plaintiff understood and appreciated the risks of that defect, and
3) the plaintiff knowingly and voluntarily exposed himself/herself to such a risk, then the plaintiff would not be entitled to recover, and you would return a verdict for the defendant.

Center Chemical Co. v. Parzini, 234 Ga. 868 (1975)

Sharpnack v. Hoffinger Industries Inc., 223 Ga. App. 833 (1996)

Raymond v. Amanda Co., LTD., 925 F. Supp. 1572 (N.D. Ga. 1996)

62.710 **Assumption of the Risk Defense; Products Liability**

(revised—omits references to ordinary care)

If a person knows of a product's defect and is aware of the danger but nevertheless proceeds unreasonably to make use of the product, he/she cannot later hold another person responsible for any injury suffered due to taking such a risk. If you find by a preponderance of the evidence that

1) the plaintiff knew of the danger posed by the defective product,
2) the plaintiff understood and appreciated the risks of that defect, and
3) the plaintiff knowingly and voluntarily exposed himself/herself to such a risk, then the plaintiff would not be entitled to recover for the resulting injury or damages, and you would return a verdict for the defendant.

Center Chemical Co. v. Parzini, 234 Ga. 868 (1975)

Beringause v. Fogleman Truck Lines Inc., 200 Ga. App. 822, 824 (1991)

Sharpnack v. Hoffinger Industries Inc., 223 Ga. App. 833 (1996)

Raymond v. Amanda Co., LTD., 925 F. Supp. 1572 (N.D. Ga. 1996)

62.720 **Jury Deliberation; Product Defect**

If you find by a preponderance of the evidence that the product was defective when it left the control of the manufacturer and that the plaintiff's injury was proximately caused by that defect, then you would return a verdict for the plaintiff, unless the plaintiff is denied recovery under some other principle of law given to you in these charges.

If after considering all the evidence, you do not believe by a preponderance of the evidence that the product by which plaintiff claims to have been injured was defective when it left the manufacturer's control or that the product was the proximate cause of the plaintiff's injury, then you would end your deliberations; the plaintiff would not be entitled to recover; and you would return a verdict for the defendant.

62.730 **Abusive Litigation**

Any person who takes an active part in the initiation, continuation, or procurement of civil proceedings against another shall be liable for abusive litigation if that person acts

1) with malice and
2) without substantial justification.

O.C.G.A. §51-7-81

The term "without substantial justification" is defined as conduct that is frivolous, groundless in fact or in law, or intended to harass another.

O.C.G.A. §51-7-80

62.731 **Abusive Litigation; Voluntary Termination**

It shall be a complete defense to any claim for abusive litigation that the person against whom the claim is asserted has voluntarily withdrawn, abandoned, discontinued, or dismissed the civil proceeding, claim, defense, motion, appeal, civil process, or other position that the injured person claims constitutes abusive litigation. Termination of the claimed abusive litigation must occur within thirty days after the mailing of the notice required by O.C.G.A. §51-7-84(a) or prior to a ruling by the court relative to the civil proceeding, claim, defense, motion, appeal, civil process, or other position. This defense shall not apply when the alleged act of abusive litigation involves the seizure or interference with the use of the injured person's property by process of attachment, execution, garnishment, writ of possession, *lis pendens*, injunction, restraining order, or similar process that results in special damage to the injured person.

62.732 **Abusive Litigation; Good Faith**

It shall be a complete defense to any claim of abusive litigation that the person against whom the claim is asserted acted in good faith, provided that good faith shall be an affirmative defense, and the burden of proof shall be on the person asserting the actions were taken in good faith.

62.733 **Abusive Litigation; Successful Claim**

It shall be a complete defense to any claim for abusive litigation that the person against whom the claim is asserted was substantially successful on the issue forming the basis for the claim of abusive litigation in the underlying civil proceeding.

O.C.G.A. §51-7-82

62.734 **Abusive Litigation; Verdict for Plaintiff/Defendant**

Upon your consideration of the case, if you reach the conclusion that the plaintiff(s)/defendant(s) is (are) not entitled to recover, that would be the end of your deliberations, and you should return a verdict in favor of the plaintiff(s)/defendant(s).

62.735 **Abusive Litigation; Damages**

(See section 66.000 et seq. *on tort damages charges.)*

A plaintiff who prevails in an action for abusive litigation shall be entitled to all damages allowed by law as proved by the evidence, including costs and expenses of litigation and reasonable attorney's fees.

O.C.G.A. §51-7-83

62.740 **Negligent Construction**

The plaintiff has alleged that the defendant is liable in damages for negligent construction. I charge you that an action for negligent construction arises when one fails to perform work in accordance with industry standards. From the evidence, you must first determine what the standards of the construction industry are with respect to the improvements made by the defendant for the plaintiff. You then must decide whether the defendant's construction was done in a manner that was in conformity with those standards. If you find that the defendant failed to meet industry standards and that the failure resulted in damages to the plaintiff, you would be authorized to return a verdict for the plaintiff. If you find that the defendant met those standards, your verdict would be for the defendant.

Fussell v. Carl E. Jones Development Co., 207 Ga. App. 521 (1993)

62.750 **Duties of Financial Institution Regarding Certificates of Deposit**

Any financial institution that receives money from its customers in exchange for certificate(s) of deposit has a duty to issue and/or change the certificate in a manner that complies with the wishes of the customer as long as

1) the wishes of the customer are not contrary to any applicable law and
2) the financial institution is liable to the customer (or a third-party beneficiary) for mishandling the transaction (including improperly advising the customer about how the certificate should be established or changed to comply with the wishes of the customer).

Every financial institution that issues certificates of deposit should be knowledgeable about the applicable laws governing such certificates and should exercise ordinary care in handling its customers' business so that customers' wishes concerning such certificates can be fulfilled to the extent allowed by law.

Tucker Federal Savings & Loan Ass'n v. Rawlins, 209 Ga. 649, 651 (2) (1993)

66.000 TORT DAMAGES

66.001 Tort Damages; Preliminary Instructions

Damages are given as pay or compensation for injury done.

O.C.G.A. §51-12-4

When one party is required to pay damages to another, the law seeks to ensure that the damages awarded are fair to both parties.

If you believe from a preponderance of the evidence that the plaintiff is entitled to recover, you should award to the plaintiff such sums as you believe are reasonable and just in this case.

O.C.G.A. §51-12-9

66.010 Tort Damages; Generally; Nominal Damages

Damages are given as compensation for an injury done, and generally the injury is the measure when the damages are of a character to be estimated in money. If the injury is small or mitigating circumstances are strong, only nominal damages are given.

What would be a proper amount of nominal damages is a question for you to decide under all the facts and circumstances of the case.

O.C.G.A. §51-12-4
High Shoals Mfg. Co. v. Price, 136 Ga. 22(4) (1911)
Smith v. Overby, 30 Ga. 241, 248 (1859)
Batson v. Higginbothem, 7 Ga. App. 835, 838 (1910)
Ransone v. Christian, 56 Ga. 351(6) (1876)
Miller & Meier & Assoc. v. Diedrich, 174 Ga. App. 249, 252(3) (1985)

(Note: If the action involves contracts, O.C.G.A. §9-15-9 should be charged as to costs, and if it involves slander, assault and battery, or other personal actions, O.C.G.A. §9-15-10 should be charged. It should be noted that a verdict of a specified sum and costs is legally interpreted as such sum including costs. Hardin v. Lumpkin, *5 Ga. 452 [1848]. When there is a plea of justification in a personal action, a verdict for the plaintiff less than*

$10.00 [the minimum sum necessary to carry costs] is self-contradictory and void. Conley v. Arnold, *93 Ga. 823 [1893]. In other suits, such as negligence, see* Saunders v. Parker, *20 Ga. App. 292 [1917];* Grant v. General Baptist Convention, *10 Ga. App. 392 [1911].)*

66.015 **Tort Damages; Duty to Lessen**

When a person is injured by the negligence of another, he or she must mitigate his or her damages as much as is practicable by the use of ordinary care and diligence.

(*Note: This does not apply in cases of positive or continuous torts. Georgia courts have defined three types of "positive and continuous torts": (1) fraud, (2) ongoing violations of property rights, and (3) intentional torts such as assault and battery.* Wachovia Bank of Georgia, NA. v. Namik, *275 Ga. App. 229, 620 S.E. 2d 470 (2005) and* Georgia Law of Damages §*2:9 (2008 ed.), Eric James Hertz and Mark D. Link; see Sidebar Charge Bank for additional research.*)

O.C.G.A. §51-12-11

If you believe that a party has suffered damages as alleged, under the law, that party is bound to reduce those damages, as much as is practicable, by the use of ordinary care. If you believe that by the use of such care, that party could have reduced the damages, you would determine to what extent and reduce such damages to that extent.

Mallock v. Kicklighter, 10 Ga. App. 605 (1912)

66.020 **Tort Damages; Personal Property; Generally**

The plaintiff seeks to recover for the alleged damages to the plaintiff's personal property a *(name item).* If you find that the plaintiff is entitled to recover, this property is a proper item of damages. The (amount that may be recovered) (measure) is the difference between the fair market value of the damaged property immediately before the injury and the fair market value of the damaged item just after the damage, if any, was inflicted.

Douglas v. Prescott, 31 Ga. App. 684 (1924)
Mitchell v. Mullen, 45 Ga. App. 282(5) (1932)
Rutledge v. Glass, 125 Ga. App. 549 (1972); cited to note "value of property"

66.030 **Tort Damages; Personal Property; Not to Exceed Value; Items to Be Considered**

When the owner of personal property has undertaken to make proper and necessary repairs, the owner may establish loss in respect to that property by showing the reasonable value of labor and material used for the repairs and the amount of any permanent impairment in the value of the property after it was repaired, provided the aggregate of these amounts, together with hire on the property while it was incapable of being used, does not exceed the value of the property before injury, with interest. The value may be shown by the testimony of experts or by other testimony as to the nature of the injuries sustained and as to the material and labor supplied. Testimony as to the actual cost is admissible, such costs being a circumstance that may be considered by you in determining such value, but you are not bound by the opinion of the witnesses.

Padgett v. Williams, 82 Ga. App. 509 (1943)
Lamon v. Perry, 33 Ga. App. 248 (1924)
Tapes & Things v. Evans, 133 Ga. App. 705 (1975)

66.040 **Tort Damages; Expenses; Generally; Medical Expenses**

In all cases, necessary expenses resulting from the injury are a legitimate item of damages.

As to medical expenses, such as hospital, doctor, and medicine bills, the amount of the damage would be the reasonable value of such expense as was reasonably necessary.

O.C.G.A. §51-12-7
Georgia Power Co. v. Clark, 69 Ga. App. 273 (1943); medicine
Georgia Railway and Power Co. v. Ryan, 24 Ga. App. 290 (1919); doctor's bill; other decisions cited to notes for "medical expenses" and "physician's bill" following O.C.G.A. §51-12-7

66.100 **Tort Damages; Earnings, Past; Loss of**

Loss of earnings from the time of the alleged injury to the time of trial is a legal item of damages, and (the amount that may be recovered) (its measure) is the value of the earnings that the evidence shows with reasonable certainty the plaintiff has lost as a result of the

injury. You may consider what the plaintiff was making at the time of the injury, what was made since the injury, the amount customarily paid in the locality for the kind of work the plaintiff does, and similar matters. There must be some evidence before you as to the plaintiff's loss.

Atlantic Coastline Railroad Co. v. McDonald, 103 Ga. App. 328, 332 (1961)
Nashville, etc., Railway Co. v. Miller, 120 Ga. 453 (1904)
Western, etc., Railroad Co. v. Sellers, 15 Ga. App. 369 (1914)
Camilla Cotton Oil, etc., Co. v. Walker, 21 Ga. App. 603 (1918); and other decisions following notes for "capacity to labor," "charge," "earning capacity," and "customary wages" following O.C.G.A. §51-12-4

66.200 **Tort Damages; Earnings**

(The following charges are applicable to either partial or total permanent loss of earnings.)

66.201 **Tort Damages; Earnings; Loss of Future Earnings**

If you find that the plaintiff's earnings will be permanently (reduced) (destroyed), lost future earnings—just like lost past earnings—are to be determined on the basis of the earnings that the plaintiff will lose, and there must be some evidence before you as to the amount of such earnings.

(See citations at 66.100, Tort Damages; Earnings, Past; Loss of.)

In considering the evidence, you should take into consideration that old age generally reduces the capacity to labor and earn money.

Florida, etc., R.R. Co. v. Burney, 98 Ga. 1 (1894)

You may also take into consideration the proposition that the ability of the plaintiff to earn money could have increased during some later periods of the plaintiff's life, if it is authorized by the evidence.

A-1 Bonding Service Inc. v. Hunter, 125 Ga. App. 173, 180 (1971)
Standard Oil Co. v. Reagan, 15 Ga. App. 571, 595 (1915)

66.202 **Tort Damages; Earnings; Life Expectancy**

You would also consider the life expectancy of the plaintiff.

Williams v. Vinson, 104 Ga. App. 886, 893 (1961)

(See 66.300, Tort Damages; Life Expectancy.)

66.203 **Tort Damages; Earnings; Average Annual Earnings**

(The following should be charged if mortality or annuity tables are used.)

By taking into consideration the factors as to earning capacity and life expectancy and applying them to this plaintiff's life, you should determine what the average annual loss of future earnings probably would have been.

66.204 **Tort Damages; Earnings; Present Cash Value**

After you have determined the loss of future earnings, you may reduce the plaintiff's gross loss of future earnings to its present cash value. You would do so by using a rate of interest of 5 percent per annum as a reduction factor.

O.C.G.A. §51-12-13

Miller v. Tuten, 137 Ga. App. 188 (1976)

(Note: For the use of annuity tables in determining loss of earnings, see the annuity tables charge [66.303].)

66.300 **Tort Damages; Life Expectancy**

(The following charges are applicable to either partial or total permanent loss of earnings in wrongful death actions or if the injured party is living.)

66.301 **Tort Damages; Life Expectancy; Generally**

You may determine the life expectancy of a person when the person's age is shown without any other direct evidence on the subject. In deciding this matter, you are also entitled to

consider the evidence pertaining to the person's health, habits, surroundings, and method of living.

Davis v. Whitcomb, 30 Ga. App. 497(16) (1923)

66.302 **Tort Damages; Life Expectancy; Mortality Tables**

(The following should be used only if a mortality table is introduced in evidence.)

There is another way in which you may determine the life expectancy of the plaintiff. There has been introduced into evidence a copy of the _____ mortality tables. If you desire to determine from this table the life expectancy of a person, look up that person's age in one column, and across from the age column, you will find the life expectancy of a person of that age. Life expectancy shown on any such table is merely a guide that you may follow while considering the evidence as a whole.

Savannah, etc., Railway v. Stewart, 71 Ga. 427 (1883)

Augusta Railway Co. v. Glover, 92 Ga. 132, 148 (1892); and other cases cited to note "mortality tables"; subnote "conclusive" following O.C.G.A. §51-12-4

(Note: If a more elaborate charge on mortality is desired, an adaptation of the charge in Florida, etc., R.R. Co. v. Burney, *98 Ga. 1 [1894] is recommended.)*

If you use the mortality tables, you should take the average annual loss of future income of the plaintiff and multiply it by the number of years of the plaintiff's life expectancy. The result will give you the probable gross loss of future earnings. You should then reduce the loss to its present cash value by using a rate of interest of 5 percent per annum as a reduction factor.

Florida, etc., R.R. Co. v. Burney, 98 Ga. 1 (1894)

O.C.G.A. §51-12-13

If you find the plaintiff's loss of future earnings is not permanent but will be reduced for some period of time into the future, you should then disregard the mortality table and award to the plaintiff damages for loss of future earnings for such temporary period as you may find.

(Note: O.C.G.A. §§24-24-44 and 24-24-45 make the American Experience Mortality Tables, the Commissioners 1958 Standard Ordinary Mortality Tables, and Annuity

Mortality Table for 1949, Ultimate, admissible in evidence. The older Northampton, Carlisle, and Actuaries' Mortality Tables have been recognized at least since their publication in 70 Ga. 843. Apparently any "standard" or generally accepted mortality or annuity table, when shown by evidence to be such, may be introduced in evidence.)

Atlanta, etc., R.R. v. Johnson, 66 Ga. 259(4) (1881)

Ga. Gas v. Fowler, 77 Ga. App. 675 (1948)

66.303 **Tort Damages; Life Expectancy; Annuity Tables**

(The following should be used in connection with cases involving temporary or permanent loss of future earnings when annuity tables have been introduced in evidence.)

When you have satisfied yourselves what the average annual future loss of income of (plaintiff) (deceased) would be, you would then figure the cash value for the person's life. In order to aid you in coming to a conclusion on that point, *(number of)* annuity tables are in evidence before you. An annuity is a sum a person is entitled to per year during that person's whole life. Sometimes there is a sale of that annuity for which the present cash value of it must be determined. An award of damages for permanent loss of earnings amounts to a forced sale of lifetime earnings. This table is made to show the present cash value of an annuity, according to the age of the person entitled to an annuity. Turn to that table that is before you for the purpose of aiding you in measuring damages for loss of future earnings. Take the average annual loss of future income of (plaintiff) (deceased) and the age of the (plaintiff) (deceased). You would then consult the annuity tables and find opposite the age the present value of an annuity of $1.00 per year for the expected remaining life of a person of that age discounted at the _____ percentage indicated, depending on which you select. You would multiply that present value of the $1.00 annuity from the table by the average annual loss of future earnings, and that would be the present cash value if the plaintiff (deceased) were recovering an annuity of that sum, or entitled to an annuity of that sum for and during that person's remaining life. That would be the sum you are trying to arrive at.

In using your annuity table, you would be entitled to use a rate of interest of 5 percent.

O.C.G.A. §51-12-13

Atlanta, etc., R.R. Co. v. Johnson, 66 Ga. 259, 263 (1881)

Kitchens v. Hall, 116 Ga. App. 41, 43 (1967)

Florida, etc., R.R. Co. v. Burney, 98 Ga. 1 (1894)

An annuity table is based on an average length of life as shown by mortality tables from which it is figured.

You do not have to use the annuity table introduced to you in any way. Such a table is just a guide that you may follow or not as you see fit, while considering the evidence as a whole.

(*See note to 66.201 Tort Damages; Earnings; Loss of Future Earnings. If a more elaborate charge on annuity tables is desired, an adaptation of the charge in* Florida, etc., R.R. Co. v. Burney, *98 Ga. 1 [1894] is recommended.)*

66.304 **Tort Damages; Life Expectancy; Full Value of Life**

The full value of the life of the deceased, as shown by the evidence, is the full value of the life of the deceased without deduction for necessary or other personal expenses of the deceased if that person had lived.

O.C.G.A. §51-4-1

You should consider the gross sum that the deceased would have earned to the end of life had the deceased not been killed, reduced to its present cash value in determining the amount of the full value of the life of the deceased. The full value of the life of the deceased is not limited to the amount of money that could have or would have been earned had the deceased not been killed.

Pollard v. Boatright, 57 Ga. App. 565 (1938)

Bulloch Co. Hospital Authority v. Fowler, 124 Ga. App. 242, 247 (1971)

City of Macon v. Smith, 117 Ga. App. 363, 375 (1968)

Rhodes v. Baker, 116 Ga. App. 157, 162 (1967)

Elsberry v. Lewis, 140 Ga. App. 324 (1976)

(Note: The later decisions cited above would certainly seem to qualify the Pollard *case and also earlier appellate court cases, including the* Bulloch *case [p. 247]. It is noted*

that the Court of Appeals had tried unsuccessfully to get the Supreme Court to clarify the law. Florida, etc., R.R. Co. v. Burney, *98 Ga.1 [1894]*.

When at least as far as the husband or supposed wage earner of the family was concerned, the measure of damages was the gross sum that the deceased would have earned to the end of life, reduced to its present cash value. The later cases definitely hold that this factor is merely something to be considered, without fixing any ultimate test. In the Bulloch Co. *case, it is pointed out [p. 247] that the Court of Appeals had unsuccessfully sought clarification of the matter by the Supreme Court. At any rate, certiorari was denied by the Supreme Court in the* Bulloch *case, which at least tacitly appears to accept the holding thereon.*

It appears that there is now no fixed standard in the matter, and the charge reflects this state of the law. It would further seem that this lack of standard leaves the damages, at least in part, to the "enlightened conscience" of the jury, but so far no decision is found expressly holding even that much.

Code sections adopting the "full value of life" measure of damages are O.C.G.A. §§51-42, 51-4-3, and 51-4-4.)

66.400 **Tort Damages; Consortium**

A married person has a right to recover for the loss of consortium, sometimes called loss of services, of the spouse. You should be careful to remember that services the law refers to are not only household labor but also society, companionship, affection, and all matters of value arising from marriage. There does not have to be any direct evidence of their value, but the measure of damages is their reasonable value, as determined by the enlightened conscience of impartial jurors taking into consideration the nature of the services and all the circumstances of the case.

Brown v. Georgia-Tennessee Coaches Inc., 88 Ga. App. 519 (1953); married woman has action for loss of consortium.

Nunnally v. Shockley, 97 Ga. App. 300 (1958)

Hobbs v. Holliman, 74 Ga. App. 735, 739 (1947)

Shepherd Construction Co. Inc. v. Vaughn, 88 Ga. App. 285 (1953)

66.401 Tort Damages; Consortium; Permanent Loss, Present Cash Value of; Joint Life Expectancy Is Measure of Damages

When permanent loss of consortium occurs, you would determine the damages on the basis of the joint life expectancy of the husband and wife, that is, by how long they would both have lived together if the injury of the spouse had not occurred. That joint lifetime loss would have to be reduced to its present cash value.

Atlantic Coast Line R.R. Co. v. McDonald, 50 Ga. App. 856(5) (1935)

Beavers v. Davis, 110 Ga. App. 248(2) (1964)

Cody v. Peak, 113 Ga. App. 676(2) (1966)

Central Truckaway, etc., Co. v. Harrigan, 79 Ga. App. 117(4) (1949); future consortium must be reduced to present cash value.

(Note: For reduction to cash value, see 62.200 et seq., *Tort Damages; Earnings.)*

66.500 Tort Damages; Pain and Suffering

(See 66.501–66.504.)

66.501 Tort Damages; Pain and Suffering; Generally; Mental; Future

(a) Generally

Pain and suffering is a legal item of damages. The measure is the enlightened conscience of fair and impartial jurors. Questions of whether, how much, and how long the plaintiff has suffered or will suffer are for you to decide.

Western, etc., Railroad Co. v. Young, 83 Ga. 512, 515 (1889)

Redd v. Peters, 100 Ga. App. 316 (1959)

Southern Railway Co. v. Jackson, 146 Ga. 243 (1916)

Chapman v. Western Union Telegraph Co., 88 Ga 763 (1892)

(b) Mental

Pain and suffering includes mental suffering, but mental suffering is not a legal item of damage unless there is physical suffering also.

Williams v. Vinson, 104 Ga. App. 886, 893 (1961)
Langran v. Hodges, 60 Ga. App. 567 (1939)
Atlantic Coast Line Railroad Co. v. Outz, 82 Ga. App. 36, 62 (1950)

In evaluating the plaintiff's pain and suffering, you may consider the following factors, if proven: interference with normal living; interference with enjoyment of life; loss of capacity to labor and earn money; impairment of bodily health and vigor; fear of extent of injury; shock of impact; actual pain and suffering, past and future; mental anguish, past and future; and the extent to which the plaintiff must limit activities.

Food Lion v. Williams, 219 Ga. App. 352 (1995).
OB-GYN Associates of Albany v. Littleton, 259 Ga. 663 (1989)
Southern Railway Co. v. Jackson, 146 Ga. 243 (1916)
Chapman v. Western Union Telegraph Co., 88 Ga. 763 (1892)

(Note: Subsequent cases find the charge from OB-GYN Associates *overgeneralized. Subsequent cases have clarified situations in which mental suffering damages can be collected, even without physical injury. These cases are fact specific.)*

Nationwide Mutual Fire v. Lam, 248 Ga. App. 134 (2001)
Lee v. State Farm Mutual, 272 Ga. 583 (2000)

(Subnote: A possible solution is to continue to use the general charge and, when appropriate, tailor a charge in which the peculiar facts fall into one of the post OB-GYN Associates *exceptions.)*

Damages may be recovered in those cases in which the pain and suffering are caused by a willful or wanton act.

American Security Co. v. Cook, 49 Ga. App. 723 (1934)
Stephens v. Waits, 53 Ga. App. 44 (1936)

66.503 **Tort Damages; Pain and Suffering; Future**

If you find that the plaintiff's pain and suffering will continue into the future, you should award damages for such future pain and suffering as you believe the plaintiff will endure. In making such award, your standard should be your enlightened conscience as impartial jurors. You would be entitled to take into consideration the fact that the plaintiff is receiving a present cash award for damages not yet suffered.

Southern Railway Co. v. Bottoms, 35 Ga. App. 804 (1926)
Brock v. Cato, 75 Ga. App. 79, 82 (1947)
Williams v. Vinson, 104 Ga. App. 886, 893 (1961)
Shore v. Ferguson, 142 Ga. 657 (1914)
Everett v. Holmes, 126 Ga. App. 208 (1972)

66.504 **Tort Damages; Pain and Suffering; Preexisting Injury; Aggravation**

No plaintiff may recover for injuries or disabilities that are not connected with the act or omissions of the defendant in this case. There can be no recovery for a particular plaintiff for any injury or disability that was not proximately caused by the incident in question.

Crandall v. Sammons, 62 Ga. App. 1, 5 (1940)

If you should find that, at the time of the incident, the plaintiff had any physical condition, ailment, or disease that was becoming apparent or was dormant, and if you should find that the plaintiff received an injury as a result of the negligence of the defendant and that the injury resulted in any aggravation of a condition already pending, then the plaintiff could recover damages for aggravation of the preexisting condition.

Whatley v. Henry, 65 Ga. App. 668 (1941)
Mitchell v. Turner, 89 Ga. App. 14 (1953)
Garner v. Driver, 155 Ga. App. 322 (1980)

66.600 General Tort Damages for Injury to Plaintiff's Peace, Happiness, and Feelings

(The following charge, based on O.C.G.A. §51-12-6, which applies only to injury to the peace, feelings, and happiness of the plaintiff, is inapplicable to cases of pain and suffering caused by physical injury. Atlanta, etc., R.R. Co. v. Hardage, *93 Ga. 457 [1893].)*

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

In determining the amount of such damage, you would consider all the facts and circumstances of the case, as disclosed by the evidence, and fix a sum as you think would be reasonable, fair, and just.

O.C.G.A. §51-12-6
Macon, etc. v. Vining, 120 Ga. 511 (1969)
Atlantic, etc. v. Bowen, 125 Ga. 460 (1972)

(Note: When punitive damages are involved, see O.C.G.A. §51-12-5.1.)
See Holland v. Caviness, *292 Ga 332, Footnote 3 (2013).*

66.700 Punitive Liability

In tort actions, there may be aggravating circumstances that may warrant the awarding or imposing of additional damages called punitive damages.

Before you may award (impose) punitive damages, the plaintiff must prove that the defendant's actions showed willful misconduct, malice, fraud, wantonness, oppression, or that entire want of care that would raise the presumption of conscious indifference to consequences. The plaintiff must prove that the defendant is liable for punitive damages by a higher standard than that for proof of other damages; that is, by clear and convincing evidence.

66.701 Clear and Convincing Evidence

(See the general charge 02.040, Clear and Convincing Evidence.)

Clarke v. Cotton, 263 Ga. 861 (1994)

(Note: O.C.G.A. §51-12-5.1 became effective 7/1/87. For cases prior to this date, see O.C.G.A. §51-12-5.)

66.702 **Punitive Liability,** continued

If the plaintiff fails to prove, by clear and convincing evidence, that the defendant was guilty of willful misconduct, malice, fraud, wantonness, oppression, or entire want of care that would raise the presumption of conscious indifference to consequences, then you would not be authorized to award (impose) punitive damages.

Mere negligence, although amounting to gross negligence, will not alone authorize an award (imposition) of punitive damages.

Punitive damages, when authorized, are awarded (imposed) not as compensation to a plaintiff but solely to punish, penalize, or deter a defendant. In your verdict, you should specify whether you do or do not decide (that the plaintiff should receive) (to impose) punitive damages.

Alliance Transp. Inc. v. Mayer, 165 Ga. App. 344, 345 (1983)

66.710 **Nonproduct Liability "Cap"**

Do not use these charges in a products liability case. In other cases, unless the jury finds "specific intent to harm" or a similar alcohol or drug finding (exception for proper prescribed use), punitive damages must be capped at $250,000. O.C.G.A. §51-12-5.1(f), (g). The charge is waived and the cap is imposed unless the plaintiff makes a request for the charge and finding of fact. McDaniel v. Elliott, *269 Ga. 262.*

66.711 **Intent to Harm; Acting with**

If you decide (You have decided) to award (impose) punitive damages,(;) you should further specify whether you find that the defendant acted with specific intent to cause harm. A party possesses specific intent to cause harm when that party desires to cause the consequences of its act or believes that the consequences are substantially certain to result from it. Intent is always a question for the jury. It may be shown by direct or circumstantial evidence.

66.712 **Intent to Harm; Amplified**

Intent is ordinarily ascertained from acts and conduct. You may not presume the defendant acted with specific intent to harm, but intent may be shown in many ways, provided you, the jury, find that it existed from the evidence produced. The jury may find such intent, or the absence of it, upon consideration of the words, conduct, demeanor, motive, and all the other circumstances connected with the alleged act.

O.C.G.A. §16-2-6

(You may presume a person of sound mind and discretion intends the natural and probable consequences of his act. The evidence may or may not rebut this presumption.)

O.C.G.A. §16-2-5

J. B. Hunt Transport v. Bentley, 207 Ga. App. 250, 255 (1992)

Brinson v. State, 163 Ga. App. 567 n. 2 (1982)

Hayes v. State, 193 Ga. App. 33, 36 (1989)

66.720 **Influence of Alcohol; Drugs; Acting under**

If you decide (You have decided) to award (impose) punitive damages,(;) you should further specify whether you find that the defendant acted while under the influence of (alcohol) (drugs) (intentionally consumed glue, aerosol, or other toxic vapor) to that degree that his or her judgment is substantially impaired.

66.721 **Prescription Drugs; Exception**

(If you find that the defendant acted under the influence of drugs, you should further specify whether such drugs were or were not lawfully prescribed drugs administered in accordance with prescription.)

O.C.G.A. §51-12-5.1(f), (g)

66.730 **Nonproduct Liability "Cap"; Burden of Proof**

The plaintiff must prove by a preponderance of the evidence that the defendant *(give the following only as supported by evidence)*

a) acted with "specific intent" to harm,
b) acted while under the influence of alcohol,
c) acted while under the influence of drugs (and that such drugs were not lawfully prescribed or administered in accordance with prescription), or
d) acted while under the influence of intentionally consumed glue, aerosol, or other toxic vapor to that degree that defendant's judgment was substantially impaired.

(Note: "Uncapped" nonproduct liability punitive damages may be awarded against an active tortfeasor only. O.C.G.A. §51-12-5.1[f]. The code section does not give a definition of that term or specify how that determination should be made [i.e., by the jury or by the court upon motion] or the burden. However, in almost all instances, the determination will have been decided by the court on motion or by the jury before having gotten this far.)

(For the rare case, resume charge.) The plaintiff must prove by a preponderance of the evidence that the defendant was active, as opposed to passive, in committing the wrong that caused the harm.

Kothari v. Patel, 262 Ga. App. 168, 585 S.E.2d 97 (2003)

(Note: The jury should return the "cap" findings on a special interrogatory or verdict form. The committee suggests that the court attempt to obtain a consensus in pretrial conference on how the cap issue will be addressed.)

Rolleston v. Estate of Sims, 253 Ga. App. 182, 187

66.740 **Punitive Damages; Amount; Generally**

(Note: Trial shall be bifurcated.

Phase 1. The jury determines whether or not punitive damages shall be imposed. For nonproduct liability cases, Phase 1A or 2A concerns the nonproduct liability cap special findings, i.e., issues of intent, alcohol, or drugs. It is clear the trial must be bifurcated unless stipulated otherwise. There is disagreement on whether the issue of the cap findings should be included in the first phase or the second phase. There are practical and possibly tactical reasons to go either way, but no legal guidance. The committee has attempted to offer either option.

Phase 2. The trial resumes to receive evidence bearing upon the proper amount to deter, penalize, or punish the defendant. Then, the jury sets the amount of punitive damages to be awarded.)

You have decided to award (impose) punitive damages. Next you must determine the appropriate amount of punitive damages. In doing so, you should consider all the evidence in the first phase of the trial, plus any evidence admitted in the most recent phase of the trial. (You should also bear in mind that the plaintiff's injury has been made whole by your award of compensatory damages). The sole purpose of punitive damages is to punish, penalize, or deter the defendant, and the amount you award (impose) should reflect that purpose only.

(Note: The entire subject of punitive damages seems to be in a state of flux and is hotly disputed. These issues must be briefed by counsel and researched by the court. The main benefit of what follows is to acquaint the judge with likely issues and possible, not necessarily approved, charges. Your attention is invited to J. Scalia's comment in dissent: "The punitive damages jurisprudence which has sprung forth from BMW v. Gore *is insusceptible of principled application; accordingly, I do not feel justified in giving the case stare decisis effect.")*

66.741 **Punitive Damages; Measure**

The measure of such damages is your enlightened conscience as an impartial jury (but not more than $250,000*) (but not more than *[insert ratio range]*)** to your compensatory award).

O.C.G.A. §51-12-5.1

(Note: Both parentheticals may or may not be erroneous statements of law but may help solve the problem of the proportionality of punitive damage awards identified in the supreme court cases. See explanation below.)

** Omit cap parenthetical in all product liability cases. In addition, be aware that it has been held to be error to tell the jury that a percentage of punitives in certain cases goes to the state. O.C.G.A. §51-12-5.1(e)(2);* Uniroyal Goodrich Tire Co. V. Ford, *218 Ga. App. 248; 276 Ga. 226. Although reference to the cap is distinguishable, one could argue that the*

cases suggest that it may be error to tell the jury about the cap unless stipulated by both parties. There is no guidance at present.

*** Possibly the judge can obtain a range of ratios from a stipulation in a pretrial order.* State Farm v. Campbell *suggests using a "single-digit" ratio or not more than 9-1; and even 9-1 may only be appropriate in an exceptional case. But see* Craig v. Holsey*, cert. denied 3/29/04 (post* State Farm*), a Georgia case wherein there was an award of 22-1 ratio. The denial of certiorari is not authority, but the case, though rare, illustrates the difficulty of the issue. These precedents may help with the proportionality problem.*

66.750 **Punitive Damages; Amount; Guidelines**

(Note: Georgia statutory law does not recognize guidelines for punitive damages. State Farm Mutual Automobile Insurance Company v. Campbell*, 538 US 408; 123 S. Ct. 1513 [2003] arises from another state and has not been interpreted in Georgia as of this writing. Procedures and evidence addressed are specific to that case; however, in broad language, the opinion addresses and condemns perceived due process problems that occur in many jurisdictions, including Georgia. The trial judge needs to be aware of its [6-3] holding and the trend that it supports. Much of its language may be dicta, but the case is perceived by many to be a bellwether case on punitive damages. The extent of the effect is not known.*

The guidelines of State Farm Mutual Automobile Insurance Company v. Campbell*, are written for postjudgment review, but there is strong language suggesting that postjudgment review [as has often been relied on in Georgia] may not suffice as a substitute for jury guidance and may not be adequate to comply with due process. Punishment without due process [i.e., notice of prohibited conduct and severity of punishment] is the issue, and therefore some guidance adjusted to the evidence is probably necessary. The extent of required guidance is not known. Prompted by a very strong trend in U.S. cases, Georgia case law, especially* Hospital Authority of Gwinnett Co. V. Jones*, has recognized the guidelines that follow. Some of these guidelines may conflict with or duplicate those suggested in* State Farm v. Campbell*. Adjustments to the charge have been made accordingly.)*

In considering the amount of punitive damages, you may consider the following factors:

1) the nature and egregiousness (reprehensibility) of the defendant's conduct *(See 66.760, Reprehensibility; Amplified)*
2) the extent and duration of the defendant's wrongdoing and the (possibility) (likelihood) of its recurrence *(The word "possibility" is from the opinion; substitution of "likelihood" may avoid a burden of proof conflict.)*
3) the intent of the defendant in committing the wrong
4) the profitability of the defendant's wrongdoing *(Give only if supported by evidence.)*
5) the amount of actual damages awarded
6) the previous awards of punitive damages against the defendant (for the same or similar conduct) *(Parenthetical qualifier added due to language of* State Farm v. Campbell*; give only if supported by evidence.)*
7) potential or prior criminal (civil) sanctions against the defendant based upon the same wrongful acts *(Give only if supported by evidence.)*
8) the financial circumstances, that is, the financial condition and or the net worth of the defendant *(Give only if supported by evidence.)*
   (Note: The supreme court identifies net worth an area with great potential for bias but gives no guidance for a charge or other solution. A general sympathy charge has been criticized as insufficient. Consider giving a limiting charge on sympathy and prejudice specifically addressing financial circumstances. See 66.773 Bias, Sympathy, Prejudice and 02.550 Sympathy.)
9) any other pertinent circumstances *(Note: This catchall is from Georgia case law but may violate due process and* State Farm v. Campbell.*)*

Hospital Authority of Gwinnett Co. v. Jones, 259 Ga. 759, 764 (1989); reversed on other grounds

State Farm *and* BMW v. Gore, *517 US 559 (1996) set the following guidelines for review of any punitive award:*

1) degree of reprehensibility of the defendant's conduct;
2) proportionality between conduct, compensatory award, and punitive award; and
3) comparison between the punitive award and authorized civil penalties imposed in comparable cases.

(Note: The potential for these issues is predictable and should be known by both counsel well in advance of trial. The committee strongly suggests that the trial judge insist, to the degree practicable, on a "high-low" agreement from counsel and/or a stipulated range of proportion between actual and punitive damages. Failing that, in pretrial conference, the judge should attempt to obtain and record consensus on how these issues can best be met.)

66.760 **Reprehensibility; Amplified**

(Note: Because State Farm *suggests that reprehensibility is the most significant issue in determining the reasonableness of a punitive verdict, the charge below amplifies that issue. Charge 66.750, however, may suffice.)*

In making your award, you should consider the degree of reprehensibility of the defendant's wrongdoing. You should consider all the evidence, both aggravating and mitigating, to decide how much punishment the defendant's conduct deserves. In assessing reprehensibility, you may consider whether

a) the harm caused was physical, as opposed to economic;
b) the conduct showed an indifference to or a reckless disregard of the health or safety of others;
c) the target of the conduct had financial vulnerability;
d) the conduct involved repeated actions or was an isolated incident;
e) the harm was the result of intentional malice, trickery, or deceit (or mere accident) *(The term "accident" is from the* State Farm *opinion and may conflict with Georgia law; consider substituting "or was merely a consequence not specifically intended.")*

State Farm Mutual Automobile Insurance Company v. Campbell, 538 US 408 (2003)

(Note: In addition to reprehensibility, State Farm *also identifies two other main concerns. The committee can suggest no pattern charge on the other two broad* State Farm *issues. Proportionality is marginally addressed by section number 5 of 66.750 and the conclusion in 66.780. There are simply too many variables and unanswered questions for this issue to be addressed by a pattern charge. The supreme court declined to adopt a "bright line ratio" and conceded that there is no rigid benchmark. Without more guidance,*

the use of the word "proportional" in a charge may provoke or raise more questions than it answers. The issue can perhaps best be addressed if the parties stipulate a proportion range, as suggested. "Penalty comparison" is marginally addressed in charge 66.750. It is not clear how the issue will be presented in evidence to a jury. The trial judge, nevertheless, may be called upon to draft a charge on these issues.)

66.770 **Limiting Instructions**

(Note: Another facet of State Farm Mutual Automobile Insurance Company v. Campbell, *538 US 408; 123 S. Ct. 1513 [2003] is strong criticism of improper jury consideration of certain factors in setting the amount of punitive damages. Two factors criticized are punishment for dissimilar conduct and punishment of conduct outside the trial state, with certain exceptions. If there is no evidence of these issues in the case, limiting instructions may be unnecessary. However, they may be a wise precaution. If there is such evidence, limiting instructions must be given but may restrict consideration of the evidence for proper purposes. The language of limiting charges will likely be hotly disputed. The following are starting points only. They should be addressed in pretrial.)*

66.771 **Extraterritoriality**

(Note: This is a limiting charge where the jury has heard evidence in Phase I from other states.)

You may have heard evidence of conduct and procedures of the defendant in other states that you may properly consider on the issue of intent and reprehensibility. You may not, however, consider for the issue of punitive damages any conduct that was lawful where and when it occurred, nor in other states even though unlawful and which had no impact on (the victim) (Georgia and its residents)—

(State Farm *seems to suggest that the safer approach is to use the word "victim." However, it cites with approval broader language from* BMW v. Gore *that includes impact on the trial state's residents. If the parties do not agree in the case on trial, the judge will have to choose.)*

(Note: Give the following balancing charge only if there is evidence that conduct outside the state contributed to the harm in this case.)

(continued)—unless such conduct in the other state was related to the specific harm suffered by the plaintiff in this case.

BMW v. Gore, 517 US 559 (1996)

66.772 **Dissimilar Conduct**

(Note: This is a limiting charge where the jury has heard evidence in Phase I of dissimilar conduct of the defendant.)

You may have heard evidence of other conduct and procedures of the defendant. For the purpose of aggravation of punitive damages, you may not consider evidence of any conduct of the defendant that is dissimilar to that which resulted in the plaintiff's injury—

(Note: Give the following balancing charge only if there is evidence that dissimilar conduct contributed to the harm in this case.)

(continued)—unless such dissimilar conduct was related to the specific harm suffered by the plaintiff in this case.

66.773 **Bias, Sympathy, Prejudice**

(See 02.550, Sympathy.)

(Note: The Supreme Court, in State Farm*, suggests that a "vague" charge to "avoid passion or prejudice" may be inadequate to prevent a likelihood of biased and excessive punishment because of wealth. For that reason, the pattern includes the option of specifically addressing economic status. Give 02.550 Sympathy, including specific references to economic or corporate status and possibly residence.)*

66.780 **Punitive Damages; Conclusion**

Any award you make should be both reasonable and just in light of your previous award of damages, the conduct and circumstances of the defendant, and the purpose of punitive damages.

66.810 **Tort Damages; Apportionment of Damages**

If you believe that the plaintiff is entitled to recover and further find that the plaintiff is to some degree responsible for the injury or damages claimed, you should not make any reduction because of the negligence, if any, of the plaintiff. The court will enter a judgment based on your verdict and, if you find that the plaintiff was negligent in any degree, the court in entering judgment will reduce the total amount of damages by the percentage of negligence which you attribute to the plaintiff. If you find that the negligence of the plaintiff is equal to or greater than the negligence of the defendant(s), then the plaintiff is not entitled to recover damages.

[Use the following where there is more than one defendant.]

If you believe that the plaintiff is entitled to recover and further find that the damages sustained by the plaintiff were caused by more than one defendant, in determining the total amount of damages to be awarded, if any, you should apportion your award of damages among the parties who are liable according to the percentage of fault of each defendant. The court will take into account, in entering judgment against any defendant whom you find to have been negligent, the percentage of that defendant's negligence compared to the total negligence of all the parties to this action.

[Use the following where there are nonparties on the verdict form.]

If you believe that the plaintiff is entitled to recover and further find that the damages sustained by plaintiff were caused by persons or entities who are not parties to this action, you shall consider the fault of all persons or entities whose negligence contributed to the injury or damage. In determining the total amount of damages, you should not make any reduction because of the negligence, if any, of _____, who is a not a party in this cause of action. The court, in entering judgment, will take into account your allocation of negligence among all persons (or entities) who you find contributed to the plaintiff's damages.

O.C.G.A. §51-12-33; apportionment of fault of non-parties (*Zaldivar v. Prickett*, 297 Ga. 589 (2015); *Walker v. Tensor Machinery, Ltd.*, 298 Ga. 297 (2015)).

66.900 **Tort Damages; Chemical Damage to Crops**

If you believe that the plaintiff is entitled to recover, you should look to the evidence to determine the amount of such damage. In determining such amount, you should consider the condition of the crop before the application of the chemical; its stage of development; the method of cultivation and husbandry; the probable yield of the crop had it not been damaged; its probable value at maturity had it not been damaged; the value of the damaged crop at maturity; and the cost of producing the crop. Considering all these factors, you should award to the plaintiff, if you believe plaintiff is entitled to recover, the difference between the net value of the damaged crop at maturity and the net value it would have had if it had not been damaged. By net value, I mean the amount for which the crop sold or for which it would have sold less the cost of producing the crop.

Ayers v. John B. Daniel Co., 35 Ga. App. 511 (1926)

Kitchens v. Lowe, 139 Ga. App. 526, 531 (1976)

Farmers Mutual Exchange of Baxley v. Dixon, 146 Ga. App. 663, 665 (1978)

Bass v. Carpenter, 152 Ga. App. 298 (1979)

70.000 TROVER

70.010 Trover; Conversion; When Proof Unnecessary

Suits in trover are proceedings to recover possession of chattels (that is, personal or movable property). In such proceedings, it is not necessary to prove any conversion or demand and refusal by the defendant, if the defendant is in unlawful possession when the action is brought.

O.C.G.A. §44-12-150

Farrar Lumber Co. v. Pickering, 22 Ga. App. 404(2) (1918); see notes on "demand" and "evidence of conversion."

Connors v. Omni Insurance Co., 195 Ga. App. 607 (1990); cited to "general note on trover" following O.C.G.A. §44-12-171

When the defendant has come into possession of the property lawfully, there must be a demand and refusal.

Wood v. Sanders, 87 Ga. App. 84, 86 (1952)

Colonial Credit Co. v. Williams, 95 Ga. App. 76 (1957)

McDaniel v. White, 140 Ga. App. 118 (1976)

Connors v. Omni Insurance Co., 195 Ga. App. 607 (1990)

70.020 Trover; Tender at First Term; Effect on Costs

In actions for the recovery of personal property, if the defendant disclaims all title and tenders the property to the plaintiff when the defendant files an answer, together with reasonable hire for the same since the conversion, the costs of the action shall be paid by the plaintiff, unless the plaintiff proves a previous demand of the defendant and a refusal to deliver.

O.C.G.A. §44-12-153

70.030 **Trover; Verdict, Election of**

The plaintiff in an action to recover personal property may elect

a) to accept an alternative verdict for the property or its value, or
b) to demand a verdict for the damages alone, or
c) to have the property alone and its hire, if any.

You, the jury, shall render the verdict as the plaintiff elects, if you decide that the plaintiff is entitled to recover.

O.C.G.A. §44-12-151

70.100 **Trover; Damages, Measure of**

(See 70.110–70.170.)

70.110 **Trover; Damages; Highest Proved Value**

In determining the value of personalty unlawfully detained, the plaintiff may recover the highest amount that shall be proved between the time of the conversion and the trial.

O.C.G.A. §44-12-152

When, in an action in trover, the plaintiff chooses as his/her form of recovery the highest proved value of the property between the time of conversion and the date of the trial, the amount of the recovery may not exceed the value claimed in the petition.

Sappington v. Rimes, 21 Ga. App. 810(2) (1918)
Morris v. Sheppard, 22 Ga. App. 564 (1918)

70.120 **Trover; Damages; Highest Proved Value; Definition**

The phrase "the highest proved value between the conversion and the trial" does not mean the highest estimate given by any witness as to the value during the period stated but means the highest value that you, from consideration of all the proof, find that the property was worth at any time during that period, if there was a change in the value.

Elder v. Woodruff, 9 Ga. App. 484(2)(a) (1911)

Watson v. Tompkins Chevrolet Co. Inc., 85 Ga. App. 410, 412 (1952)

National Bank of Georgia v. Cut-Rate Auto Service Inc., 133 Ga. App. 635 (1974)

(Note: Jurors are not absolutely bound to accept as correct the opinions of witnesses as to the value of property, even though it may be uncontradicted by other testimony. Gwinnett Commercial Bank v. C & S Bank, *152 Ga. App. 137, 140–41 [1979]*, Sanders v. Robertson, *196 Ga. App. 739 [1990].)*

70.130 **Trover; Damages; Highest Proved Value; Hire and Interest Barred**

If the plaintiff elects to take the highest proved value of the property between the date the defendant received it and the time of the trial, there can be no addition of hire or interest.

Bank of Blakely v. Cobb, 5 Ga. App. 289 (1908)

Jaques v. Stewart, 81 Ga. 81(2) (1887)

Household Finance Corporation v. Pugmire Lincoln-Mercury Inc. et al., 123 Ga. App. 428, 431(3) (1971)

70.140 **Trover; Damages; Property and Hire; Valuation Date**

If the plaintiff in an action in trover should elect to take a verdict for the value of the property at the time of conversion, with hire of the same from that date, and the property is of a character that hire may be recovered, you may return such a verdict, but the allowance of hire is in your discretion. If allowed, the same shall be added to the value of the property and the verdict would be for a lump sum that would include the value of the property and hire.

White v. Dalton, 55 Ga. App. 768 (1937)

Youngblood v. Ruis, 96 Ga. App. 290, 294 (1957)

70.150 **Trover; Damages; Property and Hire; Interest**

If the plaintiff elects to take a verdict for the value of the property and interest, the value of the property must be limited to the value proved on the date of the conversion with interest

from that date to the time of the trial; however, in your discretion you may or may not allow the addition of such interest. If you allow interest, it should be added to your verdict.

White v. Dalton, 55 Ga. App. 768 (1937)
Drury v. Holmes, 145 Ga. 558 (1916)
Fussell v. Heard, 119 Ga. 527, 528 (1904)
National Bank of Georgia v. Refrigerated Transport Company Inc., 147 Ga. App. 240, 245 (1978)

(Note: Interest may be a separate item and must be charged as a separate item if properly requested. See O.C.G.A. §9-11-49.)

70.160 **Trover; Damages; Secured Property, Amount of Verdict for**

If the title of the plaintiff is held as security for debt and the plaintiff elects to take a money verdict, he/she cannot recover more than the amount of the debt secured.

Elder v. Woodruff Hardware, etc., Mfg. Co., 9 Ga. App. 484 (1911)
Robbins v. Welfare Fin. Corp., 95 Ga. App. 90, 93 (1957)
Kirkland et al. v. Chrysler Credit Corporation, 119 Ga. App. 759(2) (1969)
William Goldberg & Co. v. Cohen, 219 Ga. App. 628 (1995)

70.170 **Trover; Value; Contract Price *Prima Facie* Evidence of Actual Value**

The agreed contract price between the original purchaser and seller is *prima facie* evidence of actual value and, in a trover action, is sufficient in the absence of evidence to the contrary to prove the value of the property.

Strothers Ford Inc. v. Bullock, 142 Ga. App. 843, 847 (1977)
Hudson Properties Inc. v. Citizens & S. National Bank, 168 Ga. App. 331 (1983)

72.000 TRUSTS

72.010 Trust Definitions

"Trust" means a fiduciary relationship with respect to property arising from a settlor's intention to impose equitable duties on a person to hold, manage, or otherwise administer that property for the benefit of another person. "Settlor" means the person who creates the trust. The terms "grantor" and "trustor" mean the same as "settlor." "Beneficiary" means a person for whose benefit property is held in trust. "Trust instrument" means the document or documents that manifest the elements and other details of a trust. "Trust property" means property placed in a trust by the settlor or property otherwise transferred to or acquired or retained by the trustee for the trust. The terms *trust corpus* and *trust res* means the same as "trust property."

O.C.G.A. §53-12-2(1), (7), (8), (9), (10), (11)

72.100 Trusts, Express and Implied; Definition

Trusts are either express or implied. "Express trust" means a trust in which the settlor's intention to create the trust is expressly stated and that meets the requirements stated later if applicable in this case. "Implied trust" means a trust in which the settlor's intention to create the trust is implied from the circumstances and that meets the requirements stated later if applicable to this case.

O.C.G.A. §53-12-2(2), (3)

72.200 Express Trusts; Requirements

An express trust shall be created or declared in writing. An express trust shall have each of the following elements, ascertainable with reasonable certainty: (1) an intention by a settlor to create a trust; (2) trust property; (3) a beneficiary; (4) a trustee; and (5) active duties imposed on the trustee, duties of which may be specified in the writing or implied by law.

O.C.G.A. §53-12-20

No formal words are necessary to create an express trust. Words otherwise precatory in nature will create a trust only if they are sufficiently imperative to show a settlor's

intention to impose enforceable duties on a trustee and if all other elements of an express trust are present.

O.C.G.A. §53-12-21

Precatory words are words whose ordinary significance imports entreaty, recommendation, or expectation rather than any mandatory direction.

Raines v. Duskin, 247 Ga. 512, 523 (1981)
Herring v. Dunning, 213 Ga. App. 695 (1994)

72.210 **Express Trust, Capacity to Create**

A person has capacity to create an *inter vivos* trust to the extent that person has legal capacity to transfer title to property *inter vivos.* A person has capacity to create a testamentary trust to the extent that person has legal capacity to devise or bequeath property by will.

O.C.G.A. §53-12-22

72.220 **Express Trusts; Purpose**

A trust may be created for any lawful purpose.

O.C.G.A. §53-12-23

72.230 **Express Trusts; Duration of Trust**

Except as otherwise provided by law, a trust shall be executory, and the legal estate shall remain in the trustee only as long as the trustee has any powers or duties in regard to the trust property and the trust serves a material purpose of the settlor.

O.C.G.A. §53-12-26

72.240 **Express Trusts; Parol Evidence**

When the construction of an express trust is at issue, the jury may consider parol evidence of the circumstances surrounding the settlor at the time of the execution of the trust and parol evidence to explain all ambiguities, both latent and patent.

O.C.G.A. §53-12-27

72.300 **Implied Trusts; Requirements**

(See 72.310–72.350.)

72.310 **Implied Trusts; Generally**

An implied trust is either a resulting trust or a constructive trust.

O.C.G.A. §53-12-90

72.320 **Implied Trusts; Resulting Trust**

A resulting trust is a trust implied for the benefit of the settlor or the settlor's successors in interest when it is determined that the settlor did not intend that the holder of the legal title to the trust property also should have the beneficial interest in the property under any of the following circumstances:

a) a trust is created but fails, in whole or in part, for any reason;
b) a trust is fully performed without exhausting all the trust property; or
c) a purchase money resulting trust as defined (below) is established.

O.C.G.A. §53-12-91

72.330 **Implied Trusts; Purchase Money Resulting Trust**

A purchase money resulting trust is a resulting trust implied for the benefit of the person paying consideration for the transfer to another person of legal title to real or personal property. Such payment of consideration shall create a presumption in favor of a resulting trust, but this presumption is rebuttable by a preponderance of the evidence. However, if the payor of consideration and transferee of the property are husband and wife, parent and child, or siblings, a gift shall be presumed, but this assumption is rebuttable by clear and convincing evidence.

O.C.G.A. §53-12-92

(Note: If this is charged, instructions on "preponderance of the evidence" and "clear and convincing evidence" may be needed.)

In order to establish the existence of a purchase money resulting trust, one must show that such a trust was contemplated by both parties by way of an agreement that is either express or implied by the circumstances or conduct of the parties, and such an agreement must have existed at the time the transaction was consummated.

Burt v. Skrzyniarz, 272 Ga. 37 (2000)
Ford v. Ford, 243 Ga. 763, 764-765 (1979)

72.340 **Implied Trusts; Constructive Trust**

A constructive trust is trust implied whenever the circumstances are such that the person holding legal title to property, either from fraud or otherwise, cannot enjoy the beneficial interest in the property without violating some established principle of equity. The person claiming the beneficial interest in the property may be found to have waived the right to a constructive trust by subsequent ratification or long acquiescence.

O.C.G.A. §53-12-93

72.350 **Implied Trusts; Parol Evidence**

In all cases in which a trust is sought to be implied, the jury may consider oral testimony about the nature of the transaction, the circumstances, and the conduct of the parties either to imply or rebut a trust.

O.C.G.A. §53-12-94

72.400 **Trusts; Fiduciary Relationship as Creating Trust**

A fiduciary, that is, an agent or other person in a confidential relationship toward someone else, cannot take advantage and profit out of the relationship or out of the knowledge obtained by it to the injury of the principal but holds any profits or other benefits gained under the relationship as trustee for the use and benefit of the principal.

Stover v. Atlantic Ice and Coal Corp., 154 Ga. 228 (1922)
Brown v. Brown, 209 Ga. 620 (1953)

Sutton v. McMillan, 213 Ga. 90, 95 (1957)

Franco v. Stein Steel Company, 227 Ga. 92, 95(1) (1970)

74.000 UNDUE INFLUENCE

74.010 Undue Influence; Definition

Undue influence that voids an otherwise legal contract is the exercise of sufficient control over the person to destroy the person's free will and compel the person to do what would not have been done if such control had not been exercised. The undue influence that will annul a contract (deed) must be of that potency that substitutes somebody else's willpower for that of the maker (grantor).

Burroughs v. Reed, 150 Ga. 724(1) (1920)
Scurry v. Cook, 206 Ga. 876, 879 (1950)
Sweat v. Hughes, 219 Ga. 703, 706 (1964)
Tidwell v. Critz, 248 Ga. 201 (1981)

74.100 Undue Influence; Duress; Statutory Definition

Because the free assent of the parties is essential to a valid contract, duress by imprisonment, threats, or other acts by which the free will of the party is restrained and his/her consent is induced will render the contract voidable at the election of the injured party. Legal imprisonment, if not used for illegal purposes, is not duress.

O.C.G.A. §13-5-6
Cannon v. Kitchens, 240 Ga. 239, 249 (1977)

74.110 Undue Influence; Duress; Harm, Threats of

Duress is considered as a species of fraud in which compulsion in some form takes the place of deception in accomplishing an injury and, like fraud, constitutes a meritorious ground to set aside a contract executed as a result thereof. Duress that will avoid a contract must consist of illegal imprisonment, legal imprisonment used for an illegal purpose, threats of bodily or other harm, or other means amounting to coercion or tending to coerce the will of another and actually inducing him/her to do an act contrary to his/her free will. The threats must be sufficient to overcome the mind and will of a person of ordinary firmness.

Hazen v. Rich's Inc., 137 Ga. App. 258 (1976)

Tidwell v. Critz, 248 Ga. 201 (1981)

Crockett v. Shafer, 166 Ga. App. 453 (1983)

Frame v. Booth, Wade & Campbell, 238 Ga. App. 428 (1999)

74.120 **Undue Influence; Duress; Economic Duress**

Economic duress is a form of the duress recognized (in the law). Business compulsion or economic duress involves the taking of undue or unjust advantage of a person's economic necessity or distress to coerce him into making a contract and is also recognized as a contractual defense. However, a duress claim of this nature must be based upon acts or conducts of the opposite party that are wrongful or unlawful. When the signer is sophisticated in business matters and has access to and in fact obtains advice of counsel, the defense of duress is not available to void the contract. One may not void a contract on grounds of duress merely because he entered into it with reluctance, the contract is very disadvantageous to him, the bargaining power of the parties was unequal, or there was some unfairness in the negotiations preceding the agreement. *(Add the following if waiver is properly raised as a defense.)* (Moreover, even if acts could otherwise have been construed as sufficient duress to void a note, reliance upon the defense of duress may be waived.)

Frame v. Booth, Wade & Campbell, 238 Ga. App. 428 (1999)

(Note: Duress, waiver, fraud, and illegality are affirmative defenses.)

O.C.G.A. §9-11-8(c); affirmative defenses

O.C.G.A. §9-11-15(b); amendments to conform to the evidence

(Note: The holdings on duress were based in part upon repealed Ga. Code Ann. §96-209 defining duress as "any illegal imprisonment, or legal imprisonment used for an illegal purpose or threats of bodily or other harm, or other means amounting to coercion or tending to coerce the will of another, and actually inducing the person to do an act contrary to his/her own free will." King v. Lewis, *188 Ga. 597 [1939]. There is apparently no further statute on the subject except O.C.G.A. §13-5-6. The only provision on this subject in the Uniform Commercial Code, which repealed former Ga. Code Ann. §96-209, is O.C.G.A. §11-10-103, which merely says that the Uniform Commercial Code [Title 109A]*

supplements the general law on duress and various other matters except insofar as it provides otherwise. Examination of the cited cases indicated that the repealed Ga. Code Ann. §96-209 was based on general common law principles that remain valid despite its repeal and that the older cases and charges remain valid law.)

74.200 **Undue Influence; Inadequacy of Consideration**

(Note: Failure of consideration is an affirmative defense.)

O.C.G.A. §9-11-8(c); affirmative defenses

O.C.G.A. §9-11-15(b); amendments to conform to the evidence

74.210 **Undue Influence; Inadequacy of Consideration; Generally**

Mere inadequacy of consideration alone will not void a contract. If the inadequacy is great, it is a strong circumstance to evidence fraud. In a suit for damages for breach of contract, the inadequacy of consideration will always be included in estimating the damages.

O.C.G.A. §13-3-46

O.C.G.A. §23-2-133; inadequacy of price, unfair or unjust contracts in specific performance actions

74.220 **Undue Influence; Inadequacy of Consideration; Fraud as Indicated by**

Where an issue is made of fraud in the procurement of a contract, you may consider inadequacy of consideration, with other facts in the case, in determining that issue.

Faulkner v. Faulkner, 84 Ga. 73(2) (1889)

(*Note: Although the above may be accurate on the issue of fraud, it is not quoted in* Faulkner. *An instruction that follows recent authority is as follows: Inadequacy of price alone is not sufficient to set aside a conveyance unless the inadequate price, taken in connection with other circumstances of a suspicious nature, raises such a vehement presumption of fraud that you, the jury, find it sufficient to set aside the conveyance.)*

Durrence v. Durrence, 267 Ga. 280 (1996)

Lasater v. Petty, 220 Ga. 592 (1965); "vehement" is used consistently in these cases

74.230 **Undue Influence; Inadequacy of Consideration; When Based on Great Disparity of Mental Ability**

Mere inadequacy of consideration alone will not void a contract. In order to set aside a contract in equity, great inadequacy of consideration, joined with great disparity of mental ability must be established.

O.C.G.A. §13-3-46

O.C.G.A. §23-2-2

Godwin v. Godwin, 265 Ga. 891; concerning erroneous jury instructions that showed care should be taken in defining "great disparity of mental ability"

76.000 **WILLS**

(Note: There was a major revision of the probate code in 1998. Probate or validity of the will is usually appealed from probate court to superior court rather than appealed concerning the construction of a will. Therefore, the charges that follow focus on this difference. Also, since usually "the construction of a will is a question of law for the court," Bennett v. Young, *270 Ga. 422 [1999]. Rather than a jury issue, this issue is not easily or often aptly addressed by the charges.)*

76.010 **Wills; Generally, Definitions**

"Will" means the legal declaration of an individual's testamentary intention regarding that individual's property or other matters. That is, a will is the legal declaration of a person's intention as to the disposition of property or other matters after the person's death. A will includes the will and all codicils to the will. "Codicil" means an amendment to or republication of a will. "Testator" means a person who has made a will, especially a person who dies leaving a will. "Beneficiary" means a person, including a trust, who is designated in a will to take an interest in real or personal property. "Executor" means any person nominated in a will who has qualified to administer a testate estate, including a person nominated as alternative or successor executor.

O.C.G.A. §53-1-2 (17), (4), (3), (7)

Black's Law Dictionary, 7th ed. (St. Paul, MN: West Group, 1999); *Black's* is the source of the definition of "testator"; also see *Dean's v. Deans,* 171 Ga. 664 (1931).

76.011 **Wills; Determination Whether Instrument Is a Will**

No particular form is necessary to constitute a will. To determine whether an instrument is a will, the test is the intention of the maker to be gathered from the whole instrument, read in light of the surrounding circumstances. If the intention is to convey a present interest, even though the possession is postponed until after death, the instrument is not a will. If the intention is to convey an interest accruing and having effect only at death, the instrument is a will.

O.C.G.A. §53-4-3

76.012 **Wills; Power of Testator**

A testator, by will, may make any disposition of property that is not inconsistent with the laws or contrary to the public policy of the state and may give all the property to strangers, to the exclusion of the testator's spouse and descendants.

O.C.G.A. §53-4-1

76.013 **Wills; When It Takes Effect**

A will shall take effect instantly upon the death of the testator, however long probate may be postponed.

O.C.G.A. §53-4-2

76.100 **Wills; Testamentary Capacity; Minimum Age; Conviction of Crime**

Every person 14 years of age or older may make a will, unless the person is laboring under some legal disability arising either from a lack of capacity or a lack of perfect liberty of action.

(An individual who has been convicted of a crime shall not be deprived of the power to make a will.)

O.C.G.A. §53-4-10

76.110 Wills; Testamentary Capacity; Decided and Rational Desire; Incapacity to Contract; Insanity; Advanced Age or Eccentricity

Testamentary capacity exists when the testator has a rational desire as to the disposition of property. An incapacity to contract may coexist with the capacity to make a will. An insane individual generally may not make a will except during a lucid interval. A monomaniac may make a will if the will is in no way connected with the monomania. In all such cases, it must appear that the will expresses the wishes of the testator unbiased by the insanity or monomania with which testator is affected. Neither advancing age nor weakness of intellect nor eccentricity of habit or thought is inconsistent with the capacity to make a will.

O.C.G.A. §53-4-11

76.120 Wills; Testamentary Capacity; Freedom of Volition

A will must be freely and voluntarily executed. A will is not valid if anything destroys the testator's freedom of volition, such as fraudulent practices upon the testator's fears, affections, or sympathies; misrepresentations; duress; or undue influence whereby the will of another is substituted for the wishes of the testator.

O.C.G.A. §53-4-12

76.200 Wills; Execution and Attestation; Required Writing; Signing; Witnesses; Codicil

A will shall be in writing and shall be signed by the testator or by some other individual in the testator's presence and at the testator's express direction. A testator may sign by mark or by any name that is intended to authenticate the instrument as the testator's will. A will shall be attested and subscribed in the presence of the testator by two or more competent witnesses. A witness to a will may attest by mark. Another individual may not subscribe the name of a witness, even in that witness's presence and at that witness's direction. A codicil shall be executed by the testator and attested and subscribed by witnesses with the same formality as a will.

O.C.G.A. §53-4-20

76.210 Wills; Execution and Attestation; Knowledge of Contents of Will by Testator

Knowledge of the contents of a will by the testator is necessary to the validity of a will. If the testator can read, the testator's signature or acknowledgment of that signature is presumed to show such knowledge.

O.C.G.A. §53-4-21

76.220 Wills; Execution and Attestation; Competency of Witness

Any individual who is competent to be a witness and age 14 or over may witness a will. If a witness is competent at the time of attesting the will, the subsequent incompetence of the witness shall not prevent the probate of the will.

O.C.G.A. §53-4-22

76.230 Wills; Execution and Attestation; Testamentary Gift to Witness or Witness's Spouse

If a subscribing witness is also a beneficiary under the will, the witness shall be competent but the testamentary gift to the witness shall be void unless there are at least two other subscribing witnesses to the will who are not beneficiaries under the will. An individual may be a witness to a will by which a testamentary gift is given to that individual's spouse.

O.C.G.A. §53-4-23

76.240 Wills; Execution and Attestation; Self-Proved Will or Codicil

At the time of its execution or at any subsequent date during the lifetime of the testator and the witnesses, a will or codicil may be made self-proved, and testimony of the witnesses in the probate regarding such will may be made unnecessary by the affidavits of the testator and the attesting witnesses made before a notary public (in the manner provided by law).

O.C.G.A. §53-4-24

76.300 **Wills; Revocation and Republication; Power of Testator**

A will may be changed or revoked by the testator at any time prior to the testator's death

O.C.G.A. §53-4-40

76.310 **Wills; Revocation and Republication; Intent**

In all cases of revocation, the intent to revoke is necessary.

O.C.G.A. §53-4-41

76.320 **Wills; Revocation and Republication; Express or Implied Revocation**

A revocation may be express or implied. An express revocation occurs when the testator by writing or action expressly annuls a will. An express revocation takes effect instantly.

An implied revocation results from the execution of a subsequent inconsistent will that does not by its terms expressly revoke the previous will. An implied revocation takes effect only when the subsequent inconsistent will becomes effective. If the subsequent inconsistent will fails to become effective from any cause, the implied revocation is not completed.

O.C.G.A. §53-4-42

76.330 **Wills; Revocation and Republication; Subsequent Will or Other Written Instrument**

An express revocation may be effected by a subsequent will or other written instrument that is executed, subscribed, and attested with the same formality as required for a will.

O.C.G.A. §53-4-43

76.340 **Wills; Revocation and Republication; Destruction or Obliteration of Will or Material Portion Thereof**

An express revocation may be effected by any destruction or obliteration of the will done by the testator with the intent to revoke or by another at the testator's direction. The intent to

revoke shall be presumed from the obliteration or cancellation of a material portion of the will, but some presumption may be overcome by a preponderance of the evidence.

O.C.G.A. §53-4-44

76.350 Wills; Revocation and Republication; Revival or Republication of Previous Will

(Give instruction on 76.330, Wills; Revocation and Republication; Subsequent Will or Other Written Instrument and 76.340 before this provision. After the charge, give 76.440, Wills; Revocation and Republication; Republication of Revoked Will.)

If a will or other written instrument that expressly revoked a previous will in its entirety is revoked by a later will or other written instrument, the previous will remains revoked unless it is revived. The previous will is revived if it appears from the terms of the later will or other written instrument that the testator intended the previous will to take effect.

(Give instruction on 76.340, Wills; Revocation and Republication; Destruction or Obliteration of Will or Material Portion Thereof before this provision.)

If a will or other written instrument that expressly revoked a previous will in its entirety is revoked by an act, the previous will remains revoked unless it is revived. The previous will is revived if it appears from the circumstances of the revocation of the will or other written instrument or from the testator's contemporaneous or subsequent declarations that the testator intended the previous will to take effect.

(Give instruction on 76.330, Wills; Revocation and Republication; Subsequent Will or Other Written Instrument before this provision.)

If a will or other written instrument that expressly revoked or amended a previous will in part is revoked by a later will or other written instrument, the revoked or amended part of the previous will is revived to the extent that it appears from the terms of the later will or other written instrument that the testator intended the previous will to take effect.

(Give instruction on 76.340, Wills; Revocation and Republication; Destruction or Obliteration of Will or Material Portion Thereof before this provision.)

If a will or other written instrument that expressly revoked or amended a previous will in part is revoked by an act, the revoked or amended part of the previous will is revived

unless it is evident from the circumstances of the revocation of the will or other written instrument or from the testator's contemporaneous or subsequent declarations that the testator did not intend the revoked or amended part of the previous will to take effect as executed.

(Give instruction on 76.330, Wills; Revocation and Republication; Subsequent Will or Other Written Instrument and 76.340, Wills; Revocation and Republication; Destruction or Obliteration of Will or Material Portion Thereof before this provision. After the charge, give 76.440, Wills; Revocation and Republication; Republication of Revoked Will.)

If a will or other written instrument that expressly revoked a previous will in whole or in part is revoked by a later will or other written instrument, or by an act, and the previous will or any revoked or amended portion is not revived in accordance with the provisions of this (instruction/code section), the previous will may be republished in whole or in part according to law.

76.360 **Wills; Revocation and Republication; Presumption of Intent**

A presumption of intent to revoke arises if the original testator's will cannot be found to probate.

A copy of a will may be offered for probate in lieu of the original will if the original cannot be found, provided that the copy is proved by a preponderance of the evidence to be a true copy of the original will and that the presumption of intent to revoke is rebutted by a preponderance of the evidence.

O.C.G.A. §53-4-46

76.410 **Wills; Revocation and Republication; Effect of Implied Revocation**

An implied revocation extends only so far as an inconsistency exists between testamentary instruments. Any portion of a prior instrument that is consistent with the testamentary scheme in a subsequent instrument shall remain unrevoked.

O.C.G.A. §53-4-47

76.420 Wills; Revocation and Republication; Effect of Testator's Marriage or Birth or Adoption of Child; Provision in Will for Class of Children

Except as otherwise provided (in the instruction that follows on the effect of the testator's divorce, annulment, or remarriage to former spouse), the marriage of the testator; the birth of a child to the testator, including a posthumous child born within ten months of the testator's death; or the adoption of a child by the testator subsequent to the making of a will in which no provision is made in contemplation of such event shall result in a revocation of the will.

A provision in a will for a class of the testator's children shall be presumed to be made in contemplation of the birth or adoption of additional members of that class absent an indication of a contrary intent, and the mere identification in the will of children already born or adopted at the time of the execution of the will shall not defeat this presumption.

O.C.G.A. §53-4-48

76.430 Wills; Revocation and Republication; Effect of Testator's Divorce, Annulment, or Remarriage to Former Spouse

All provisions of a will made prior to a testator's final divorce or the annulment of the testator's marriage in which no provision is made in contemplation of such event shall take effect as if the former spouse had predeceased the testator, and the provisions (of law concerning the death of a beneficiary before a will is executed or before the death of a testator) shall not apply with respect to the decedents of the former spouse who are not also decedents of the testator. If the testator remarries the former spouse and the testator has not revoked or amended the will that was made prior to the divorce or annulment, the remarriage shall not result in the revocation of the will, and the provisions of the will that were revoked solely due to the application of this code section shall be revived.

O.C.G.A. §53-4-49

(Note: In many cases, O.C.G.A. §53-4-64 will also need to be charged.)

76.440 **Wills; Revocation and Republication; Republication of Revoked Will**

A revoked will may be republished by a writing executed by the testator and subscribed and attested by witnesses with the same formality required for a will.

O.C.G.A. §53-4-50

76.500 **Wills; Probate; Burden of Proof**

Upon the trial of an issue arising upon the propounding of a will and a caveat to it, the burden, in the first instance, is upon the propounder of the alleged will to make out a prima facie case by showing the fact of the will and that at the time of the execution of the will, the testator had sufficient mental capacity to make it and, in making it, acted freely and voluntarily. Then the burden of proof shifts to the caveator.

Oxford v. Oxford, 136 Ga. 589(2) (1911)

Brazil v. Roberts, 198 Ga. 477, 478 (1944)

Bianchini v. Wilson, 220 Ga. 816(1) (1965)

(Note: Heard v. Estate of Lovett, *273 Ga. 111 [2000] ruled that such a burden-shifting charge is erroneous. It relied heavily on* Mobley v. Lyon, *134 Ga. 125 [1910]. The four cases were used to prepare the following instruction.)*

(There are two choices for this charge.)

In a proceeding to probate a will, the propounder of the will to which a caveat (objection) has been filed has the burden to *prima facie* prove that the will was executed with the requisite formalities freely and voluntarily by a testator who was at the time of sound mind and disposing mind and memory. Because he/she offers the will for probate, the propounder assumes the nonshifting burden of proving by a preponderance of the evidence that these issues are the necessary elements of propounder's case. This burden of proof does not shift to the caveator to prove affirmatively that any of these necessary elements do not exist. Rather, the caveator is required only to come forward with evidence to rebut the propounder's *prima facie* case on these necessary elements. So, if the propounder makes out a *prima facie* case, that would authorize the jury to find in his/her favor, if nothing further appeared. But if the caveator introduces evidence tending to disprove the *prima facie* case made by the propounder, then the jury should consider all the evidence introduced both by

the propounder and the caveator (and all the surrounding circumstances) in finally determining if the propounder has satisfactorily carried his/her burden of proof.

(Or, the following.)

In a proceeding to probate a will, the propounder of the will to which a caveat (objection) has been filed has the burden to *prima facie* prove that the will was executed with the requisite formalities freely and voluntarily by a testator who was at the time of sound mind and disposing mind and memory. Because he/she offers the will for probate, the propounder assumes the nonshifting burden of proving by a preponderance of the evidence that these issues are the necessary elements of propounder's case. So, if the propounder makes out a *prima facie* case, that would authorize the jury to find in his/her favor, if nothing further appeared. But if the caveator introduces evidence tending to rebut and disprove the *prima facie* case made by the propounder, then the jury should consider all the evidence introduced by both the propounder and the caveator in finally determining if the propounder has satisfactorily carried his/her burden of proof.

Mobley v. Lyon, 134 Ga. 125 (1910)
Bianchini v. Wilson, 220 Ga. 816(1) (1965)
Wells v. Jackson, 265 Ga. 181 (1995)
Heard v. Estate of Lovett, 273 Ga. 111 (2000)

(Note: Burden of proof is different if the caveator has an affirmative defense. Heard v. Estate of Lovett, *273 Ga. 111 [2000];* Jones v. Cannady, *78 Ga. App. 453, 461[4] [1949] caveator has burden of persuasion as to affirmative defense.)*

78.000 YEAR'S SUPPORT

78.010 Year's Support; Entitlement

The surviving spouse and minor children of a testate or intestate decedent are entitled to a year's support in the form of property for their support and maintenance for the period of twelve months from the date of the decedent's death. As used herein, the terms "child" or "children" mean any minor child who would be entitled to inherit if the child's parent died intestate. It is now up to you to decide what money and property of the estate, if any, is to be awarded as a year's support.

O.C.G.A. §53-3-1(a), (c)

78.020 Year's Support; Amount of Award

If objection is made to the amount or nature of the property proposed to be set aside as a year's support, the jury shall set apart an amount sufficient to maintain the standard of living that the surviving spouse and each minor child had prior to the death of the decedent, taking into consideration the following:

1) the support available to the individual for whom the property is to be set apart from sources other than a year's support, including but not limited to the principal of any separate estate and the income and earning capacity of that individual;
2) the solvency of the estate; and
3) such other relevant criteria as the court deems equitable and proper.

O.C.G.A. §53-3-7(c) (Revised Probate Code of 1998); "jury" is substituted for "court."

78.030 Year's Support; Burden of Proof

The petitioner for a year's support shall have the burden of proof in showing the amount necessary for a year's support.

O.C.G.A. §53-3-7(c) (Revised Probate Code of 1998)

78.040 Year's Support; Vesting of Title to Property Set Apart; Minor Children by Different Spouses

Title to the property set apart shall vest in the surviving spouse and child or children or, if there is no surviving spouse, in the children, share and share alike, and the property shall not be administered as the estate of the deceased spouse or parent. When property is set apart as a year's support for the benefit of the surviving spouse alone, the spouse shall thereafter own the same in fee, without restriction as to use, encumbrance, or disposition. However, if the decedent leaves minor children by different spouses, the jury shall specify the portion going to the children of the former spouse or spouses, which shall be vested in those children. Moreover, if the decedent leaves minor children and the surviving spouse is the parent of the minor children, the jury may in its discretion specify separate portions for the minor children and the surviving spouse, if the jury deems the award of separate portions to be in the best interests of the parties, and the portions shall vest separately in the surviving spouse and the children.

O.C.G.A. §§53-3-9, 53-3-8; "jury" is substituted for "court."

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