Georgia Law Needs Clarification:

Does it Take Willful or Wanton Misconduct to Defeat a Contractual "Exculpatory" Clause, or Will Gross Negligence Suffice?

by Robert B. Gilbreath and C. Shane Keith

Dating back to at least 1915, the law in Georgia has been that to avoid a liability-limiting or exculpatory clause[1] in a contract governing the parties' relationship, a plaintiff must establish that the defendant engaged in willful or wanton misconduct.[2] Starting in the late 1970s, however, the Court of Appeals—unintentionally it seems—planted the seeds for a gross-negligence standard. Now, there exists a parallel line of cases, one indicating that willful or wanton misconduct must be established, and the other suggesting that gross negligence is sufficient.

The two standards are very different. Willful or wanton conduct reflects a willful intent to inflict the injury or conduct that was so reckless or charged with indifference to the consequences, as to justify the jury in finding a wantonness equivalent in spirit to actual intent.[3] Gross negligence means the failure to exer-

cise that degree of care that every man of common sense, however inattentive he may be, exercises under the same or similar circumstances, or lack of the diligence that even careless men are accustomed to exercise.[4] A party acts with gross negligence when it fails to exercise even a slight degree of care.[5] Compared to many other jurisdictions, Georgia's threshold for establishing gross negligence is very low.[6]

This article will show that, at least in commercial cases, the weight of authority requires courts to continue applying the willful or wanton standard, not the gross negligence standard.

Formerly, it was clear that willful or wanton was the controlling standard.

Before 1979, Georgia law was clear that to avoid a liability-limiting clause in a contract governing the parties' relationship, the plaintiff was required to establish that the defendant's conduct rose to the level of willful or wanton.[7] Thus, for example, in a 1975 case involving meat that spoiled after a rental truck's refrigeration unit failed, the Court of Appeals of Georgia held that the rental company's contractual limitation of liability was enforceable because the plaintiff had not alleged any willful or wanton misconduct.[8] That same year, the Court of Appeals affirmed summary judgment for the defendant in a case involving a vehicle lease contract containing a liability-limiting clause because the plaintiff did not "claim that its damages were caused by acts of wanton and wilful misconduct by defendant."[9]

The gross negligence standard makes its first appearance in telephone directory cases.

The drift toward a gross negligence standard began in a 1979 case involving the phone company's failure to publish a customer's yellow pages advertisement, *Tucker v. Southern Bell Telephone & Telegraph Company*.[10] In *Tucker*, the Court of Appeals of Georgia explained that for the customer to avoid the limitation of liability in the parties' contract, the plaintiff was required to show willful or wanton conduct.[11] Then, however, the Court launched into a discussion of the standards for proving gross negligence.[12] The Court seems to have mistakenly conflated willful or wanton misconduct with gross negligence—two standards that Georgia courts have repeatedly held are not synonymous.[13]

The Court in *Tucker* cited a 1977 decision, *Southern Bell Telephone & Telegraph Company v. C & S Realty Company*,[14] for its discussion of the types of evidence needed to establish gross negligence, but *C & S Realty* discussed and applied the gross negligence standard only because the parties' contract explicitly stated that the limitation of liability would not apply if the phone company acted with gross negligence.[15] *C & S Realty* did not hold that even without such an express qualifier, gross negligence is sufficient to defeat a limitation of liability.

After *Tucker*, the Court of Appeals of Georgia in *Southern Bell Telephone & Telegraph Company v. Coastal Transmission Service, Inc.*, overlooked that the contract in *C & S Realty* established a gross negligence standard.[16] The Court's opinion in *Coastal Transmission* could be read as suggesting that any contractual exculpatory clause may be defeated by a showing of either willful or wanton misconduct or gross negligence.[17] On the other hand, *Coastal Transmission* involved telephone directories, and one could argue that the Court was referring exclusively to the typical telephone directory exculpatory clause of the day, which limited the telephone company's liability only for "errors and omissions."[18] That language could be construed as exculpating liability for ordinary, but not gross, negligence.

The Court of Appeals of Georgia begins to apply the gross negligence standard in some cases while continuing to apply the willful or wanton standard in others.

Despite these telephone directory cases, the Court of Appeals of Georgia, after 1983, continued to hold in commercial cases that willful or wanton conduct was required to defeat a contractual exculpatory clause. For example, in a 1984 case involving a fire-detection system that failed to work properly, the Court explained that "[a] clause in a contract limiting one's liability

for negligent acts does not serve to limit one's liability for wilful or wanton conduct."[19] In a 1988 case involving a burglar alarm system that failed to operate properly, the Court cited the same rule in support of its holding.[20] The Court also stated and applied the same rule in 2001 and 2004 commercial cases.[21]

Starting in 2000, however, the Court of Appeals, in a series of cases, stated that proof that the defendant's conduct was grossly negligent would defeat an exculpatory clause. The first such case, *Barbazza v. International Motor Sports Association, Inc.*, involved a personal injury claim.[22] The Court declared, "[a]n injured party may recover for acts of gross negligence despite a valid release for negligence."[23] Oddly, as support for that statement, the Court cited two earlier decisions holding that willful or wanton conduct, not gross negligence, was required.[24] Once again, the Court appears to have been under the misapprehension that willful or wanton conduct and gross negligence are synonymous.

Since *Barbazza*, the Court of Appeals has held or stated several times that gross negligence is sufficient to defeat an exculpatory clause.[25] Those cases, however, are personal injury and reputational injury cases and, in one instance, a suit by trust beneficiaries against the trustee. The Court of Appeals has suggested that commercial contract cases are to be treated differently for exculpatory clause purposes.[26] The Court has largely continued to require a finding of willful or wanton misconduct to avoid the contract's limitations on liability.[27]

The Court of Appeals of Georgia mistakenly imports the gross negligence standard into a commercial case.

In a 2002 commercial case, however, the Court of Appeals declared that "exculpatory clauses do not relieve a party from liability for acts of gross negligence."[28] The decision in *Colonial Properties Realty Limited Partnership v. Lowder Construction Company, Inc.*, involved a subrogation claim by a property owner's insurer against a construction company that damaged an apartment building.[29] The Court held that a waiver-of-subrogation clause would be defeated by a showing of gross negligence on the defendant's part and reversed summary judgment for the defendant because whether the defendant acted with gross negligence was a fact question for the jury.[30] For the proposition that gross negligence will defeat a contractual exculpatory clause, the court in *Colonial Properties* cited *Barbazza,* but as discussed earlier, *Barbazza* mistakenly conflated gross negligence and willful or wanton misconduct when it cited two prior Georgia cases, both of which specifically required willful or wanton misconduct, *not* gross negligence.

Further, the holding in a personal injury case like *Barbazza* arguably should not control in a commercial case. As a New Jersey court aptly summarized the issue in an alarm system case: "[T]his case only involves the validity of an exculpatory clause as applied to property loss for which the buyer of an alarm system may obtain its own insurance coverage. It does not involve the validity of such a clause as applied to a personal injury claim, with respect to which differently public policy considerations would have to be evaluated."[31]

Finally, in addition to erroneously conflating gross negligence with willful or wanton misconduct, *Colonial* also incorrectly equated a waiver-of-subrogation clause with an exculpatory clause when it stated that a waiver-of-subrogation clause is defeated by a showing of gross negligence.[32] Courts distinguish between exculpatory clauses and waiver-of-subrogation clauses, the latter of which simply shifts the source of compensation without restricting the injured party's ability to recover.[33] Subrogation waivers thus deter litigation and help parties avoid higher costs that result from having multiple insurance policies and overlapping coverage.[34] No other Georgia decision has held that a waiver-of-subrogation clause is defeated by gross negligence.[35]

Because courts uniformly reject the notion that a waiver-of-subrogation clause is an exculpatory clause, the majority rule is that the clause will bar a subrogation claim based on gross negligence.[36] These clauses are not contrary to public policy unless they purport to waive subrogation rights for damages caused by an *intentional* injury.[37]

Conclusion

Georgia law on the standard for avoiding a contractual liability limitation or exculpatory clause needs clarifying. Willful or wanton conduct is the proper standard in commercial cases because public policy does not require a gross-negligence exception.[38] This is particularly true given that, in Georgia, as compared to some other states, gross negligence is barely a step above ordinary negligence.

For businesses dealing with one another in an arm's length transaction, the showing necessary to avoid a contractual promise should be higher than mere gross negligence. After all, it is "the paramount public policy" of Georgia that courts "will not lightly interfere with the freedom of parties to contract."[39] And as one court explained in upholding an exculpatory clause: "In this commercial setting . . . no overriding public interest and no special relationship between the parties exists which would warrant relieving the plaintiff of its contract."[40]

Georgia courts should uphold a limitation of liability or exculpatory clause against a gross negligence challenge when the clause is "part of a bargain in fact between business concerns that have dealt with one another at arm's length in a commercial setting."[41] Freedom of contract allows commercial par-

ties to "use their business judgment to exculpate claims for liability in exchange for lower cost."[42] Meanwhile, waiver-of-subrogation clauses, which are not exculpatory clauses, should be upheld unless the defendant intentionally caused the plaintiff's damages. GBJ

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Endnotes

1. Some jurisdictions do not consider a clause limiting a party's liability to be an "exculpatory" clause. *See* Leprino Foods Co. v. Gress Poultry, Inc., 379 F. Supp. 2d 659, 679 (M.D. Pa. 2005) (while acknowledging a difference in Kansas law, explaining that, under Pennsylvania law, liability limiting "clauses are not subjected to the same stringent standards applied to exculpatory and indemnity clauses"); *see also* Russ v. Woodside Homes, Inc., 905 P.2d 901, 905 (Utah Ct. App. 1995) (explaining that exculpatory clauses "relieve one party from the risk of loss or injury in a particular transaction or occurrence and deprive the other party of the right to recover damages for loss or injury").
2. *See* Nashville, C. & St. L. Ry. v. C.V. Truitt Co., 17 Ga. App. 236, 86 S.E. 421, 424 (1915) (in suit for loss of "first class" mule that died during shipment by railroad company, showing of "gross negligence as might amount to willful and wanton negligence" would defeat exculpatory clause); *see also* King v. Smith, 47 Ga. App. 360, 170 S.E.2d 546, 549 (1933) (suit based on damage to tenant's property caused by steam, heat, and moisture); Brady v. Glosson, 87 Ga. App. 476, 478, 74 S.E.2d 253, 255-56 (1953) (contract provision relieving landlord or carrier from liability for damages resulting from simple negligence is enforceable but does not relieve landlord or carrier from liability for wanton and willful conduct).
3. Martin v. Gaither, 219 Ga. App. 646, 652, 466 S.E.2d 621, 625 (1995); *see also* Charles R. Adams III, GEORGIA LAW OF TORTS § 3:5 (2012-2013 ed.).
4. Heard v. City of Villa Rica, 306 Ga. App. 291, 294, 701 S.E.2d 915, 918-19 (2010); *see also* O.C.G.A. § 51-1-4 (2010).
5. O.C.G.A. § 51-1-4 (2010).
6. *See, e.g.*, Tex. Civ. Prac. & Rem. Code § 41.001(11) (defining gross negligence as an act or omission (i) that when viewed objectively from the actor's standpoint at the time of its occurrence involves an extreme degree of risk, and (ii) of which the actor has actual, subjective awareness of the risk involved, but nevertheless proceeds with conscious indifference to the rights, safety, or welfare of others); Princetel, LLC v. Buckley, 944 N.Y.S.2d 191, 193 (N.Y. App. Div. 2012) (to constitute gross negligence for purposes of an exemption from an exculpatory agreement, a party's conduct must smack of intentional wrongdoing or evince a reckless disregard for the rights of others); *see also* City of Santa Barbara v. Superior Court, 41 Cal. 4th 747, 754 n.4 (2007) (explaining that some jurisdictions define gross negligence as tantamount to wanton or reckless misconduct).
7. Redfern Meats, Inc. v. Hertz Corp., 134 Ga. App. 381, 215 S.E.2d 10 (1975) (collecting cases).
8. *Id.*
9. S. Protective Prods. Co. v. Leasing Int'l, Inc., 134 Ga. App. 945, 947, 216 S.E.2d 725, 728 (1975).
10. 149 Ga. App. 2, 253 S.E.2d 390 (1979).
11. 149 Ga. App. at 3; 253 S.E.2d at 391.
12. *Id.*
13. Culpepper v. Thompson, 254 Ga. App. 569, 570, 562 S.E.2d 837, 839 (2002); Ford v. Whipple, 225 Ga. App. 276, 283, 483 S.E.2d 591, 596 (1997); Seaboard Coast Line R. Co. v. Clark, 122 Ga. App. 237, 242, 176 S.E.2d 596, 600 (1970); Caskey v. Underwood, 89 Ga. App. 418, 422, 79 S.E.2d 558, 561-62 (1953). One decision sows confusion by stating that an exculpatory clause does not absolve a defendant "of wilful and wanton conduct or gross negligence *amounting to same*." Hitchcock v. Mayfield, 133 Ga. App. 546, 547, 211 S.E.2d 612, 614 (1974) (emphasis added).
14. 141 Ga. App. 216, 233 S.E.2d 9 (1977), *overruled on other grounds by* Georgia-Carolina Brick & Tile Co. v. Brown, 153 Ga. App. 747, 752, 266 S.E.2d 531, 537 (1980).
15. 141 Ga. App. at 218, 233 S.E.2d at 11.
16. So. Bell Tel. & Tel. Co. v. Coastal Transmission Serv., Inc., 167 Ga. App. 611, 612-13, 307 S.E.2d 83, 86 (1983).
17. 167 Ga. App. at 612-13, 307 S.E.2d at 86.
18. 167 Ga. App. at 612, 307 S.E.2d at 86.
19. Lenny's Inc. v. Allied Sign Erectors, Inc., 170 Ga. App. 706, 708, 318 S.E.2d 140, 142 (1984).
20. Peck v. Rollins Protective Serv., Inc., 189 Ga. App. 381, 383, 375 S.E.2d 494, 496 (1988). For a discussion of cases applying liability limiting clauses in the alarm system context, see Martin J. McMahon, *Liability of person furnishing, installing, or servicing burglary or fire alarm system for burglary or fire loss*, 37 A.L.R.4th 47 (1985). Liability limiting clauses in fire and burglar alarm contracts "are commonly ruled enforceable by courts." D.L. Lee & Sons, Inc. v. ADT Sec. Sys., Mid South, Inc., 916 F. Supp. 1571, 1582 (S.D. Ga. 1995).
21. Neighborhood Assistance Corp. v. Dixon, 265 Ga. App. 255, 256, 593 S.E.2d 717, 719 (2004); Flanigan v.

Executive Office Ctrs., Inc., 249 Ga. App. 14, 15, 546 S.E.2d 559, 561 (2001).

22. 245 Ga. App. 790, 538 S.E.2d 859 (2000)
23. 245 Ga. App. at 792, 538 S.E.2d at 861.
24. *Id.* (citing Turner v. Walker County, 200 Ga. App. 565, 408 S.E.2d 818 (1991) and Hawes v. Central of Ga. R. Co., 117 Ga. App. 771, 162 S.E.2d 14 (1968)).
25. *See* Heiman v. Mayfield, 300 Ga. App. 879, 883, 686 S.E.2d 284, 287 (2009) (suit by trust beneficiaries against trustee); Holmes v. Clear Channel Outdoor, Inc., 284 Ga. App. 474, 477, 644 S.E.2d 311, 314 (2007) (personal injury); McFann v. Sky Warriors, Inc., 268 Ga. App. 750, 758, 603 S.E.2d 7, 14 (2004) (personal injury); Barbazza v. Int'l Motor Sports Ass'n, Inc., 245 Ga. App. 790, 792, 538 S.E.2d 859, 861 (2000) (personal injury); McClesky v. Vericon Res., Inc., 264 Ga. App. 31, 33, 589 S.E.2d 854, 856 (2003) (defamation); Sewell v. Dixie Region Sports Car Club of Am., Inc., 215 Ga. App. 611, 613 n.2, 451 S.E.2d 489, 490, n.2 (1994) (personal injury); S. Bell Tel. & Tel. Co. v. Coastal Transmission Serv., Inc., 167 Ga. App. 611, 613, 307 S.E.2d 83, 87 (1983) (defamation) (noting difference between gross negligence and willful or wanton conduct).
26. *See, e.g.*, Underwood v. NationsBanc Real Estate Serv., Inc., 221 Ga. App. 351, 353, 471 S.E.2d 291, 293-94 (1996) ("[The defendant guarantors] also contend Georgia law prevents anything in the guaranty from operating as a waiver of any bank conduct beyond 'simple negligence.' This is not a tort case involving a release. The bank's obligations to the Underwoods are governed by the terms of the contract of guaranty, not by tort concepts of duty of care. [T]he agreement permitted the bank's actions, and the protections afforded by O.C.G.A. §§ 10-7-21 and 10-7-22 can be, and were, waived." (citations omitted)).
27. *See, e.g.*, Winton v. Adams Transfer & Storage Co., Inc., 192 Ga. App. 766, 767, 386 S.E.2d 528, 529 (1989) (claim for property loss caused by moving company); Peck v. Rollins Protective Serv., Inc., 189 Ga. App. 381, 383, 375 S.E.2d 494, 496 (1988); Lenny's Inc. v. Allied Sign Erectors, Inc., 170 Ga. App. 706, 708, 318 S.E.2d 140, 142 (1984).
28. Colonial Props. Realty Ltd. P'ship v. Lowder Const. Co., Inc., 256 Ga. App. 106, 112, 567 S.E.2d 389, 394 (2002). The Court recently repeated this rule in another commercial case, but only in dicta. Monitronics Int'l, Inc. v. Veasley, 323 Ga. App. 126, 135, 746 S.E.2d 793, 809 (2013), *cert. denied*, 2013 Ga. LEXIS 914 (Nov. 4, 2013) (citing Holmes v. Clear Channel Outdoor, Inc., 284 Ga. App. 474, 477, 644 S.E.2d 311, 314 (2007)).
29. 256 Ga. App. at 106, 567 S.E.2d at 390.
30. 256 Ga. App. at 112, 567 S.E.2d at 394.
31. Synnex Corp. v. ADT Sec. Servs., Inc., 928 A.2d 37, 45-47 (N.J. Super. Ct. App. Div. 2007); *see also* Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Guardtronic, Inc., 64 S.W.3d 779, 785 (Ark. Ct. App. 2002) (upholding enforceability of liability-limiting provisions in alarm contract because the parties "were businesses dealing at arm's length").
32. Colonial, 256 Ga. App. at 112, 567 S.E.2d at 394.
33. *See* St. Paul Fire & Marine Ins. Co. v. Universal Builders Supply, 409 F.3d 73, 86 (2d Cir. 2005); *see also* Ace Am. Ins. Co. v. Keystone Const. & Maint. Servs., Inc., No. 3:11cv1136 (SRU), 2012 WL 4483913, at *14 (D. Conn. Sept. 27, 2012); Chadwick v. CSI, Ltd., 629 A.2d 820, 825-26 (N.H. 1993); Best Friends Pet Care, Inc. v. Design Learned, Inc., No. X06CV000169755S, 2002 WL 1949202, at *2 (Conn. Super. July 22, 2002) (collecting cases).
34. Reliance Nat'l Indem. v. Knowles Indus. Servs., Corp., 868 A.2d 220, 227 (Me. 2005)
35. The Court of Appeals of Georgia has, however, mistakenly referred to a waiver-of-subrogation clause as an exculpatory clause in at least one other case. Midtown Glass Co., LLC v. Levent Indus., Inc., 316 Ga. App. 422, 423, 729 S.E.2d 556, 557 (2012). In another case, the Court of Appeals seems to have recognized the distinction between a waiver-of-subrogation clause and an exculpatory clause. F.P. Plaza, Inc. v. Sugrue, 144 Ga. App. 543, 544, 241 S.E.2d 644, 645 (1978), *overruled on other grounds*, Country Club Apts., Inc. v. Scott, 246 Ga. 443, 271 S.E.2d 841 (1980).
36. *See, e.g.*, Abacus Fed. Sav. Bank v. ADT Sec. Servs., Inc., 967 N.E.2d 666, 670 (N.Y. 2012); Metlife Auto & Home v. ADT Sec. Sys., Inc., No. 10-10679-GAO, 2011 WL 1223023 at *7 (D. Mass. Mar. 31, 2011) (Massachusetts law); Jewelers Mut. Ins. Co. v. ADT Sec. Serv., Inc., No. C 08–02035 JW, 2009 WL 2031782, at *5-6 (N.D. Cal. July 9, 2009) (California law); Lexington Ins. Co. v. Entrex Commc'n Servs., Inc., 749 N.W.2d 124, 131 (Neb. 2008); Reliance, 868 A.2d at 226; Behr v. Hook, 787 A.2d 499, 504 (Vt. 2001); *see also* Marc M. Schneier, *AIA Waiver of Subrogation Provision in Construction Contract Applies to Owner's Claim of Gross Negligence Against Contractor*, 29 NO. 9 CONST. LITIG. REP. 12 (2008).
37. St. Paul, 409 F.3d at 86.
38. *See* Hall v. Fruehauf Corp., 179 Ga. App. 362, 363, 346 S.E.2d 582, 583 (1986) ("A limitation of remedies in a commercial setting is not considered unconscionable").
39. Coleman v. B-H Transfer Co., 290 Ga. App. 503, 506, 659 S.E.2d 880, 883 (2008) (internal quotation marks omitted) (noting that "[a] contractual provision which releases or indemnifies a party from liability for injuries arising out of the contract is enforceable unless it contravenes public policy").
40. Sanif, Inc. v. Iannotti, 500 N.Y.S.2d 798, 798 (N.Y. App. Div. 1986); *accord* Atlas Mut. Ins. Co. v. Moore Dry Kiln Co., 589 P.2d 1134, 1136 (Or. Ct. App. 1979) (courts will uphold an exculpatory clause "when it is part of a bargain in fact between business concerns that have dealt with one another at arm's length in a commercial setting"); Chicago Steel Rule & Die Fabricators Co. v. ADT Sec. Sys., Inc., 763 N.E.2d 839, 849 (Ill. Ct. App. 2002) ("Freedom of contract allows commercial parties to use their business judgment to exculpate claims for liability in exchange for lower cost").
41. Atlas, 589 P.2d at 1136.
42. Chicago Steel Rule & Die Fabricators Co. v. ADT Sec. Sys., Inc., 763 N.E.2d 839, 849 (Ill. Ct. App. 2002).