A Little Known Exception to the Rule Against Remote Damages

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I was working away in my office a few years ago when an old lawyer friend called me to ask if I had ever heard of O.C.G.A. § 51-12-10. I pulled it up on Westlaw while we were talking and was surprised that I had never heard of it before:

> **§ 51-12-10. Exception to rule as to remote damages:** When a tort is committed, a contract is broken, or a duty is omitted with knowledge and for the purpose of depriving the plaintiff of certain contemplated benefits, the remote damages occasioned thereby become a proper subject for the consideration of the jury.

One look at the six or seven annotations showed me that I was not alone in my ignorance of this statute, which has been around since 1863. I was intrigued. I became even more intrigued when I learned why my friend was calling to get me involved in an interesting case. His client was a general contractor that had allegedly withheld payments from a subcontractor on a large commercial development. The subcontractor filed a breach of contract action seeking not only the withheld payments, but also many millions of dollars representing the value of the subcontractor's business based on the claim that these withheld payments caused the subcontractor's business to fail.

My first reaction was that anytime you withhold funds from another, you are acting intentionally and for the purpose of depriving the other person of the benefit of those funds. If I am unhappy with the work that my contractor is doing on my house, I act intentionally to withhold payment from him but this surely does not mean I have exposure to a claim for remote damages. After the general contractor hired me as co-counsel, I made that exact argument to a Fulton Superior Court judge, and it landed with a resounding thud. Motion denied.

As a lawyer who just as often represents plaintiffs, I embraced § 51-12-10 like a new friend on the playground—amending pending complaints left and right to assert remote damage claims. Having spent more time briefing the issue, I now know that the statute is as powerful as I had initially believed but it is a valuable tool that many experienced lawyers know nothing about. To appreciate § 51-12-10's value, we must understand what remote damages are in the first place. The best place to start is the Georgia Code:

> **O.C.G.A. § 13-6-2. Damages Contemplated by Parties:** Damages recoverable from a breach of contract are such as arise naturally and according to the usual course of things from such breach and such as the parties contemplated, when the contract was made, as the probable cause of the breach.
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> **O.C.G.A. § 13-6-8. Remote or consequential damages:** Remote or consequential damages are not recoverable unless they can be traced solely to the breach of the contract or unless they are capable of exact computation, such as the profits which are the immediate fruit of the contract, and are independent of any collateral enterprise entered into in contemplation of the contract.
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> **O.C.G.A. § 51-12-8. Damages too remote, when:** If the damage incurred by the plaintiff is only the imaginary or possible result of a tortious act or if other and contingent circumstances preponderate in causing the injury, such damage is too remote to be the basis of recovery against the wrongdoer.
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> **O.C.G.A. § 51-12-9. Rule to Ascertain Remoteness:** Damages which are the legal and natural result of the act done, though contingent to some extent, are not too remote to be recovered. However, damages traceable to the act, but which are not its legal and natural consequence,

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> are too remote and contingent to be recovered.

In classically circular fashion, the Code says that remote damages are not generally recoverable because... they are remote. We know from caselaw that damages are remote if they were not within the contemplation of the parties when they signed the agreement or if they are not the legal and natural result of the act done. *See, e.g., Molly Pitcher Canning Co. v. Cent. of Ga. Ry. Co.*, 149 Ga. App. 5, 11 (1979) ("The rule against the recovery of vague, speculative, or uncertain damages relates more especially to the uncertainty as to cause, rather than uncertainty as to the measure or extent of the damages.") The caselaw also provides helpful examples of the types of damages that courts have found to be remote. For example, mental distress damages in a breach of contract action are too remote because they were not "naturally in the contemplation of the parties at the time of the making of the contract." *Howard v. Cent. of Ga. Ry. Co., 9 Ga. App. 617 (1911).* And lost profits are too remote in a breach of contract action if the plaintiff has no history of profitability. *Johnson Cnty. Sch. Dist. v. Greater Savannah Lawn Care*, 278 Ga. App. 110, 112–13 (2006) (lost profits are only recoverable if they are the legal and proximate result of the breach, they are based on a proven "track record" of profitability, and they may be calculated with a reasonable degree of certainty (albeit not mathematical precision)).

Based on these holdings, we can conclude that if a breach of contract plaintiff can satisfy the requirements of § 51-12-10, he or she might be able to recover mental distress damages or lost profits for a new venture. There are no such holdings in Georgia. The closest I could find was where a plaintiff recovered lost profits under § 51-12-10 that were arguably not the legal and natural consequence of the act. In *John D. Robinson Corp. v. Southern Marine Indus. Supply Co.*, plaintiff's employee went to work for a competitor (the defendant) and then got the bright idea to send a disparaging letter to his former employer's customers. 196 Ga. App. 402, 407 (1990). In its libel claim, the plaintiff sought lost profits but failed to prove that any of the letter recipients would have continued doing business with plaintiff if they had not received the letter. *Id.* This would seem fatal to a lost profits claim in a garden-variety breach of contract case, but the court awarded them under § 51-12-10 because the employee had acted maliciously and with the intent to cause plaintiff to lose customers. *Id.*

The *John D. Robinson Corp.* holding makes sense because the employee's tortious conduct was so obviously calculated to impair the plaintiff's customer relationships that it is difficult to conceive of any good faith motive. The same was true in a federal case involving a salesman's claim that the defendant had converted his sales records thus preventing him from collecting payments from his customers. *Richards v. Int'l Agric. Corp.*, 10 F.2d 218 (N.D. Ga. 1926). In ruling for the plaintiff, the district court clearly articulated how § 51-12-10 requires proof that the defendant intended not only the act, but also consequences of the act:

> If, in point of fact, the information in the book was necessary to the plaintiff to make his collections, and was known to the defendant to be, and with a purpose of defeating the collections the information was wrongfully withheld, it cannot be said that the failure to collect which arose from that cause was too remote to be recoverable damages. A result intended by a wrongdoer cannot be remote.

Id. at 219. *See also Bankers Health Life Ins. Co. v. Fryhofer*, 114 Ga. App. 107, 114 (1996) ("A result intended by a wrongdoer cannot be remote") (citing what is now O.C.G.A. §§ 51-12-9 and 51-12-10).

Going back to my contractor example, if I withheld payment because I knew it would cause the contractor to default on his office lease and suffer an eviction from his building, then under the above holdings, I could be liable for lost business occasioned by his eviction. On the other hand, if I withheld payment because I was unhappy with the workmanship (even if a jury later found it to be adequate), I would only be liable for the contractor's direct contract damages and not his eviction-related damages. The Court of Appeals illustrated this principle in *Whiteside v. Decker, Hallman, Barber Briggs, P.C.*, in which a former client accused a law firm of breaching fiduciary duties that resulted in an excess judgment against the client. 310 Ga. App. 16 (2011). The Court of Appeals rejected the client's claim for remote damages under § 51-12-10 because there was no evidence that the law firm intended to expose the client to an excess judgment. *Id.* at 20 ("Even assuming Decker Hallman knowingly violated fiduciary duties, as alleged, there was no evidence that any violation was for the purpose of imposing an excess verdict on Lucio-Amaya.")

These cases support the rule that recovery of remote damages requires specific intent to cause a specific harm. Although the Court of Appeals decision in *Slater v. Russell* seems on first reading to be in conflict with this rule, closer examination reveals that it is consistent. 100 Ga. App. 563 (1959). In *Slater*, a lawyer sued his former client to recoup a legal fee in a divorce matter after the client terminated the relationship and retained new counsel. The fee was to be 100% of the net earnings of a company in which the client held an interest. *Id.* at 564. The client testified that she terminated the lawyer because she felt he was not looking out for her interests. The Court found for the lawyer because

> [t]he defendant's motive in breaching the contract with the plaintiff was to prohibit him from recovering fees which he would earn under the contract and under [what is now § 51-12-10] the mere fact that such fees are contingent upon the profits of a going business concern does not prohibit the plaintiff from recovering *damages* for the breach of the contract, the damages being what the contract was worth to him.

Id. at 568 (emphasis in original).

Slater seems to be in conflict with the prior holdings because it purports to allow recovery under § 51-12-10 where the defendant withheld payment because of dissatisfaction with the quality of the services rendered. But the last sentence in the quoted passage above emphasizes that the damages the lawyer was seeking in *Slater* were not remote at all; they were direct damages representing the benefit of the lawyer's bargain under the fee agreement. Id. See *also Mitchell Assocs., Inc. v. Glob. Sys. Integration, Inc.*, 356 Ga. App. 200, 202 (2020) ("In a breach of contract action, lost profits are viewed as direct damages where those profits 'represent the benefit of the bargain (such as a general contractor suing for the remainder of the contract price less is saved expenses.'") Thus, the *Slater* court's only sin was to apply § 51-12-10—the exception to the rule against remote damages—to a case that did not involve remote damages in the first place.

In conclusion, my initial concern that § 51-12-10 would transform every run-of-the-mill breach of contract action into an opportunity for a plaintiff to recover remote damages was unwarranted. The appellate courts in Georgia have faithfully limited the statute to only those cases in which the defendant evidenced a specific intent to cause the plaintiff harm. But even so, a claim for § 51-12-10 remote damages certainly has the potential to broaden the scope of discovery significantly and therefore can be a valuable tool for the plaintiff. For example, in the case involving the subcontractor payment dispute discussed above, the subcontractor used § 51-12-10 to successfully compel the general contractor to produce reams of subcontractor payment records from unrelated jobs under the theory that the general contractor had a practice of underbidding its jobs and then inventing reasons to short pay the subcontractors in order to meet budget. Without the § 51-12-10 claim, discovery would more likely have been limited to only the one project.