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Overview of the State of ALABAMA Court System

A. Trial Courts

1. Circuit Courts are the courts of general jurisdiction that afford jury trials as well as bench trials. The circuit courts have exclusive jurisdiction over matters in controversy exceeding $10,000 and concurrent jurisdiction with the district courts for matters less than $10,000 but exceeding $3,000. Circuit courts have appellate jurisdiction over district court cases and municipal cases except in certain matters that are directly appealable to courts of appeals. The circuit courts' jurisdiction over appeals is de novo. Jury trials must be requested in writing within 30 days of the "service of the last pleading directed to such issue" and may be waived if not timely made. Juries contain 12 members, and their decision must be unanimous.

Juries have 12 members per the Constitution of Alabama 1901, § 11. Up to six alternates may be selected Rule 47, Ala. R. Civ. P. Parties may stipulate that any number of jurors less than 12 may be used, Ala. R. Civ. P. 48, and the rule is useful when no alternates are selected and a juror becomes disabled during the trial. Ala. R. Civ. P. 48 and Committee Comments. Verdicts must be unanimous under existing case law. E.g. *McCalley v. Penney,* 191 Ala. 369, 67 So. 696 (1918). Under Rule 48, however, the parties may stipulate that a verdict or finding by a stated majority of jurors shall be taken rather than a unanimous verdict. Ala. R. Civ. P. 48.

Any state court may order parties to mediation governed by the Alabama Court Mediation Rules. Sitting judges are prohibited from serving as mediators.

Roughly speaking, the northern part of the state would be considered more conservative than the southern half. Birmingham, Huntsville, Florence, and Decatur are fairly conservative, as well as some of the less populous counties. Montgomery and Mobile in the southern half may be less conservative than the more northern cities, but they are more conservative than many rural counties statewide. Suburban counties north or south are conservative. The most liberal juries are in the rural counties that stretch roughly across the middle of the state from east to west.

2. District courts have, with certain exceptions, original jurisdiction over all cases in which the matter in controversy does not exceed $10,000. While cases in which the matters in controversy exceeds $3,000 but is equal of less than $10,000, the district courts share jurisdiction with the circuit courts. In cases in which the matter in controversy does not exceed $3,000, the district courts have exclusive jurisdiction. Cases of $3,000 or less are assigned to the small claims docket in which certain rules are applicable. No jury trials are available.

B. Appellate Courts

1. Court of Civil Appeals, with judges, is an intermediate appellate court, like its counterpart, the Court of Criminal Appeals. The Court of Civil Appeals has original jurisdiction for domestic relations, workers' compensation cases, most appeals of administrative decisions, and cases in which the amount involved does not exceed $50,000 exclusive of costs and interest.

2. The Alabama Supreme Court, with nine justices, is the state's highest appeal court and court of last resort. In addition to direct appeals, the Supreme Court can consider decisions of the courts of appeal upon motion for writ of certiorari. The court answers certified questions from the federal courts, decides constitutional issues raised in lower courts, and can issue advisory opinions to the state. The Alabama Supreme Court also has authority to "deflect" cases to the Court of Civil Appeals. Ala. Code § 12-2-7(6).

Procedural

A. Venue

For actions against individuals, contract actions must be commenced in a county where the defendant, or one of the defendants resides, if that individual has a permanent residence within the state. All other actions against individuals may be commenced either in the county where events complained of occurred or in the county where a defendant has a permanent residence. For actions against corporations, venue is proper in the county where a substantial part of the events giving rise to the claim occurred, or in the county of the corporation's principal office in the state, or in the county where the plaintiff resided or had its principal office when the claim accrued. If none of the preceding three options for corporations apply, then in any county where the corporation was doing business by agent at the time of the cause of action. If multiple defendants are jointed, then if venue is proper to one defendant, it is proper to all defendants.

B. Statute of Limitations

1. The statute of limitations for negligence and wantonness is two years.* The statute of limitations for intentional torts and contracts is six years. If an entity is sought to be held liable for the acts of its agent or servant under a theory of vicarious liability, then the statute of limitations as to the principal or employer is two years, even if the statute of limitations applying to the agent or servant is greater than two years. Alabama does not have a "discovery rule" applicable to negligence or wantonness.

2. The statute of limitations for bad faith refusal to pay an insurance claim is two years. The statute of limitations for bad faith refusal to pay insurance benefits accrues when the insured knew of facts that would put a reasonable mind on notice of the possible existence of bad faith.

* While the statute of limitations for wantonness is two years for acts and omissions after June 3, 2011, the limitations period is six years for acts or omissions that occurred between June 3, 2007, and June 3, 2011.

C. Time for Filing An Answer

The time for filing an answer is 30 days after an initial complaint and 10 days after an amended complaint or the time remaining to answer the original complaint, whichever is longer. Ala. R. Civ. P. 12(a) & 15. The time within which a cross-claim or counter claim must be answered is 30 days. Ala. R. Civ. P. 12(a).

D. Dismissal Re-Filing of Suit

A plaintiff may dismiss an action by notice at any time before a responsive pleading is filed. Ala. R. Civ. P. 41(a). Unless specified otherwise, a first-time voluntary dismissal will be without prejudice, but a dismissal of a case already once dismissed will be constitute an adjudication on

the merits. A first-time voluntary dismissal has the effect of the matter's never having been filed. Consequently, such a dismissal has no tolling effect upon the statute of limitations, and the action must re-filed, if ever, prior to the expiration of the limitations period originally applicable for the claim. *See, Harper v. Regency Dev. Co. Inc.,* 399 So. 2d 248, 249 (Ala. 1981).

Liability

A. Negligence

The elements of negligence are the existence of (1) a duty to a foreseeable plaintiff; (2) a breach of that duty; (3) proximate causation; and (4) damage or injury. *Albert v. Hsu,* 602 So.2d 895, 897 (Ala.1992). Negligence is the doing of some act, or the failing to do some act, that an ordinarily prudent person would not have done, or would have done under similar circumstances. Negligence is usually characterized as an inattention, thoughtlessness, or heedlessness, a lack of due care. *Lafarge North America, Inc. v. Nord*, 86 So. 3d 326, 334 (Ala. 2011).

B. Negligence Defenses

1. Contributory negligence.

Contributory negligence is a complete defense to an action based upon negligence. In order to prove contributory negligence, the defendant must show that the party charged 1) had knowledge of the condition; 2) had an appreciation of the danger under the surrounding circumstances; and 3) failed to exercise reasonable care, by placing himself in the way of danger. *Auburn's Gameday Center at Magnolia Corner Owners Ass'n, Inc. v. Murray,* --So. 3d --, 2013 WL 1926389 (Ala. Civ. App. 2013).

Contributory negligence is an affirmative defense that the defendant bears the burden of proving. *Lafarge North America, Inc. v. Nord*, 86 So. 3d 326, 334, 336 (Ala. 2011). The plaintiff must have had a conscious appreciation of the danger confronted at the moment the incident occurred. *Id.* "Heedlessness" is insufficient to support a finding of contributory negligence as a matter of law. *Id.*

Contributory negligence is not a bar to a claim of wantonness. *Id.* Moreover, a defendant's subsequent negligence, or "last clear chance," negates a plaintiff's contributory negligence. *Baker v. Helms,* 527 So. 2d 1241, 1244 (Ala. 1988.)

Comment: Contributory negligence is not a "1% fault version" of comparative fault. Juries seem reluctant to apply the doctrine to return a defense verdict but rather use it to discount an award they make to a plaintiff when the defendant is found negligent. On the other hand, the appellate courts recently have seemed willing to find contributory negligence as a matter of law.

2. Last clear chance or subsequent negligence

The elements of proof of subsequent negligence are: (1) that the plaintiff was in a perilous position; (2) that the defendant had knowledge of that position; (3) that, armed with such knowledge, the defendant failed to use reasonable and ordinary care in avoiding the accident; (4) that the use of reasonable and ordinary care would have avoided the accident; and (5) that plaintiff was injured as a result. *Id., citing Scotch Lumber Co. v. Baugh, 288 Ala. 34, 256 So.2d 869 (1972); Brooks v. Cox, 285 Ala. 267, 231 So.2d 302 (1970).*

3. Assumption of the risk

"The affirmative defense of assumption of the risk requires that the defendant prove (1) that the plaintiff had knowledge of, and an appreciation of, the danger the plaintiff faced; and (2) that the plaintiff voluntarily consented to bear the risk posed by that danger." *Robertson v. Gaddy Elec. and & Plumbing, LLC,* 53 So. 3d 75, 81 (Ala. 2010). Assumption of the risk is not a valid defense to wantonness. *Chance v. Dallas County,* 456 So.2d 295 (Ala.1984); *Blount Bros. Constr. Co. v. Rose,* 274 Ala. 429, 149 So.2d 821 (1962). *See also Brown v. Carver,* 599 So.2d 599 (Ala.1992).

A plaintiff must have assumed the risk *created by the defendant* in order for that defendant to have a valid defense of assumption of risk; otherwise the defense is a form of contributory negligence, not assumption. This strain of contributory negligence "runs to third persons, regardless of the plaintiff's knowledge of the incompetence of those third persons." *Driver v. National Sec. Cas. Ins. Co.,* 658 So. 2d 390 (Ala. 1995).

4. Sudden emergency.

"The sudden emergency doctrine is available to explain why in certain situations a person is not held to the strict standard of care required of a reasonably prudent person acting under ordinary circumstances. Under that doctrine, a person faced with a sudden emergency calling for quick action is not held to the same correctness of judgment and action that would apply if he had the time and opportunity to consider fully and choose the best means of escaping peril or preventing injury. For the sudden emergency doctrine to be applicable, there must be a sudden emergency and the sudden emergency must not be the fault of the one seeking to invoke the doctrine."
Bettis v. Thornton, 662 So.2d 256, 257 (Ala.1995) (quoting *Dairyland Ins. Co. v. Jackson,* 566 So.2d 723, 727 (Ala.1990).

5. Superseding intervening act.

The proximate cause of an injury is that cause which, in the natural and probable sequence of events, and without the intervention or coming in of some new or independent cause, produces the injury, and without which the injury would not have occurred. If a new, independent act breaks the chain of causation, it supersedes the original act, which thus is no longer the proximate cause of the injury. An act is superseding only if it is unforeseeable. A *foreseeable* intervening act does not break the causal relationship between the defendants' actions and the plaintiffs' injuries. *Mobile Gas Service Corp. v. Robinson,* 20 So.3d 770, 780-81 (Ala., 2009).

For conduct to be an intervening cause insulating the defendant from liability, the conduct must (1) occur after the defendant's actions giving rise to the negligence claim, (2) be unforeseeable to the defendant at the time the defendant acts, and (3) be sufficient to be the sole proximate cause of the plaintiff's injury. *Schwartz v. Volvo North America Corp.,* 554 So.2d 927 (Ala.1989).

6. Unavoidable accident

A showing of an unfortunate result does not in and of itself raise an inference of negligence. *Watterson v. Conwell,* 258 Ala. 180, 61 So. 2d 690 (1952). The burden was upon the plaintiff, if he were to recover, to establish negligence to the reasonable satisfaction of the trier of fact. Under all the evidence it was within the province of the jury to find that injury to the plaintiff, if any, was the result of an unavoidable accident, in which case there would be no liability on the part of the defendant. *Senn v. Alabama Gas Corp.*, 619 So. 2d 1320, 1324 (Ala. 1993).

C. Gross Negligence, Recklessness, Willful and Wanton Conduct

1. Wantonness

Wantonness has been defined by the courts as the conscious doing of some act or the omission of some duty, while knowing of the existing conditions and being conscious that, from doing or omitting to do an act, injury will likely or probably result. *Copeland v. Pike Liberal Arts School*, 553 So. 2d 100, 103 (Ala. 1989). Considering that wantonness requires consciously doing an act or omitting a duty while consciously realizing that the act or omission of the duty will likely or probably lead to injury, evidence that someone forgot to do some act will not support a claim of wantonness. *Id.* at 104. The term "reckless" is sometimes used in conjunction with wantonness, but no cases describe recklessness as a separate cause of action.

Also, wantonness is statutorily defined as "[c]onduct which is carried on with a reckless or conscious disregard of the rights or safety of others." Ala.Code 1975, § 6–11–20(b)(3). To prove wantonness, it is not essential to prove that the defendant entertained a specific design or intent to injure the plaintiff.

2. Intentional or willful conduct

A person commits willful or intentional injury if he has a knowledge of the danger accompanied by a design or purpose to inflict injury, whether the act be one of commission or omission. *Ex parte Capstone Bldg. Corp.*, 96 So. 3d 77, 84 (Ala. 2012).

"Malice" is a similar concept and is statutorily defined as "[t]he intentional doing of a wrongful act without just cause or excuse, either … [w]ith an intent to injure the person or property of another person or entity, or … [u]nder such circumstances that the law will imply an evil intent." Ala.Code 1975, § 6–11–20(b)(2).

3. Gross negligence.

Except involving telegraphic transmissions, in Alabama the word "gross," when used in connection with "negligence," implies nothing more than simple negligence with the addition of a vituperative epithet. *Ex parte Priester*, 212 Ala. 271, 102 So. 376 (Ala. 1924). "Gross negligence is negligence, not wantonness." *Miller v. Bailey,* 60 So. 3d 857, 867 (Ala. 2010).

D. Negligent Hiring and Retention

Negligent hiring, supervision, and training are indistinguishable in Alabama, all being described as follows:

"In the master and servant relationship, the master is held responsible for his servant's incompetency when notice or knowledge, either actual or presumed, of such unfitness has been brought to him. Liability depends upon its being established by affirmative proof that such incompetency was actually known by the master or that, had he exercised due and proper diligence, he would have learned that which would charge him in the law with such knowledge. It is incumbent on the party charging negligence to show it by proper evidence. This may be done by showing specific acts of incompetency and bringing them home to the knowledge of the master, or by showing them to be of such nature, character, and frequency that the master, in the exercise of due care, must have had them brought to his notice. While such specific acts of alleged incompetency cannot be shown to prove that the servant was negligent in doing or omitting to do the act complained of, it is proper, when repeated acts of carelessness and incompetency of a certain character are shown on the part of the servant to leave it to the jury whether they would have come to his knowledge, had he exercised ordinary care."

Lane v. Central Bank of Alabama, N.A., 425 So. 2d 1098, 1100 (Ala. 1983). *See Southland Bank v. A&A Drywall Supply Co., Inc.*, 21 So. 3d 1196, 1215 (Ala. 2009)("We see no distinction between claims of wrongful supervision and claims of wrongful training").

If a plaintiff fails to present evidence that a person has a history of negligently performing the work involved in the lawsuit, or fails to prove that the master either knew or should have discovered the incompetency in the exercise of due diligence, a claim of negligent hiring must fail. *McGinnis v. Jim Walter Homes, Inc.,* 800 So. 2d 140, 149 (Ala. 2001).

A mistake or single act of negligence on the part of an employee, including the negligent act leading to the litigated injury, does not establish incompetency: "Negligence is not synonymous with incompetency. The most competent may be negligent." *Southland Bank v. A&A Drywall Supply Co., Inc.*, 21 So. 3d 1196, 1216 (Ala. 2009).

Along the same line, a servant's incompetence must be proven to be the proximate cause of the injury in question. "[I]mplicit in the tort of negligent hiring, retention, training, and supervision is the concept that, as a consequence of the employee's incompetence, the employee committed some sort of act, wrongdoing, or tort that *caused* the plaintiff's injury." *Jackson v. Quada,* 86 So. 2d 298, 305 (Ala. 2010)(new trial when jury found defendant motor carrier negligently hired, etc. its driver, but found in favor of defendant driver for intersection collision). *See also, Bonds v. Busler,* 449 So.2d 244, 245 (Ala.Civ.App.1984) ("We find it settled law in this state that though an entrustor may be guilty of negligent entrustment of a vehicle to an

incompetent driver, he may not be held liable for such negligence unless the injury is proximately caused by the incompetence of the entrustee."); *Lane v. Central Bank of Alabama, N.A.,* 425 So.2d 1098, 1100 (Ala.1983) (noting that, in a cause of action against a master based upon the incompetence of the servant, the plaintiff must show, among other things, that he has been damaged by the acts of the servant and that the damage occurred because of incompetency on the servant's part); and *First Nat'l Bank of Montgomery v. Chandler,* 144 Ala. 286, 307, 39 So. 822, 828 (1905) ("It is understood, of course, that the incompetency of the servant in all cases, in order to charge the master, was the proximate cause of the injury").

Alabama courts have not recognized, or apparently even considered, the proposition that if a master admits vicarious liability for the acts of its agent, that a negligent hiring or supervision claim is due to be dismissed.

E. Negligent Entrustment

1. Negligent entrustment Alabama has adopted the definition of negligent entrustment stated in *Restatement (Second) of Torts* § 390 (1965): "One who supplies directly or through a third person a chattel for the use of another whom the supplier knows or has reason to know to be likely because of his youth, inexperience, or otherwise, to use it in a manner involving unreasonable risk of physical harm to himself and others whom the supplier should expect to share in or be endangered by its use, is subject to liability for physical harm resulting to them." Simply stated, "the essential ingredients of a cause of action for negligent entrustment are: (1) an entrustment; (2) to an incompetent; (3) with knowledge that he is incompetent; (4) proximate cause; and (5) damages." *Edwards v. Valentine,* 926 So. 2d 315, 319-20 (Ala. 2005).

2. Wanton entrustment. Wanton entrustment combines the concepts of wantonness with wrongful entrustment. "Accordingly, to establish wanton entrustment, a plaintiff must show that a defendant entrusted a dangerous instrument to a person while knowing that that entrustment would likely or probably result in injury to others." *Jordan ex rel. Jordan v. Calloway*, 7 So.3d 310, 316-17 (Ala., 2008).

F. Dram Shop

Dram Shop Act, ALA. CODE 1975, § 6–5-71(a): "Every wife, child, parent, or other person who shall be injured in person, property, or means of support by any intoxicated person or in consequence of the intoxication of any person shall have a right of action against any person who shall, by selling, giving, or otherwise disposing of to another, contrary to the provisions of law, any liquors or beverages, cause the intoxication of such person for all damages actually sustained, as well as exemplary damages."

Violation of the Dram Shop Act has three elements: The sale must have 1) been

contrary to the provisions of law; 2) been the cause of the intoxication; and 3) resulted in the plaintiff's injury. *Attalla Golf and Country Club, Inc. v. Harris*, 601 So. 2d 965 (Ala. 1992). The most prominent liquor sales violation that results in Dram Shop Act liability is that regulation prohibiting serving alcohol to any person who appears, considering the totality of the circumstances, to be intoxicated. ALA. ADMIN. CODE r. 20-X-6-.02. *See Duckett v. Wilson Hotel Management Co., Inc.*, 669 So. 2d 977 (Ala. Civ. App. 1995). Dram Shop Act imposes liability in cases in which an alcohol licensee, acting through its managers, permits an underage employee to consume alcoholic beverages on its premises. *McGough v. G&A, Inc.*, 999 So. 2d 898 (Ala. Civ. App. 2007).

Dram Shop liability does not lie where a store sells alcohol to a minor and then the minor shares the alcohol with a minor driver who causes an automobile accident. *Jones v. BP Oil Co., Inc.,* 632 So. 2d 435 (Ala. 1994). Dram Shop liability also does not lie when property owners allow underaged persons to consume alcohol but does not *provide* the alcohol to the minors. *Runyans v. Littrell,* 850 So. 2d 244, 667 (Ala. 2002). No action lies for negligent dispensing of alcohol. *Williams v. Reasoner,* 668 So. 2d 541 (Ala. 1995).

Alabama's Dram Shop Act creates strict liability in case of its violation. The defenses of complicity and contributory negligence are not available, but a defendant can raise as a defense that the injured party assumed the risk of injury, if the facts would support such a defense. *McIsaac v. Monte Carlo Club, Inc.*, 587 So. 2d 320, 324 (Ala. 1991).

G. Joint and Several Liability

Joint and several liability. "Under Alabama law governing joint and several liability, a tort-feasor whose negligent act or acts proximately contribute in causing an injury may be held liable for the entire resulting loss*." Holcim (US), Inc. v. Ohio Cas. Ins. Co.,* 38 So. 3d 722, 729 (Ala. 2009)(internal punctuation omitted). Negligent joint tortfeasors do not have a right of contribution against each other in Alabama. *SouthTrust Bank v. Jones, Morrison, Womack & Deering, P.C.,* 939 So. 2d 885 (Ala. Civ. App. 2005). The Alabama Supreme Court has declined to adopt comparative negligence and abolish contributory negligence, holding that it is the Legislature's prerogative to make such a change. *Golden v. McCurry,* 392 So. 2d 815 (Ala. 1980). Typically, adverse defendants make their comparative fault one of their considerations concerning their contributions to a joint settlement with a plaintiff, especially if one of the parties has a contractual indemnity claim against the other, such as a general contractor/subcontractor situation.

"By allowing punitive damages to be assessed against multiple defendants in wrongful death actions without apportionment based upon the degree of culpability of each, the legislature is 'attempt[ing] to preserve human life by making homicide expensive.' Participation in actions causing the death of a human being, even if slight,

can result in liability without regard to the degree of culpability, and this result, the legislature believes, will lead to greater diligence in avoiding the loss of life." *Tillis Trucking Co., Inc. v. Moses*, 748 So. 2d 874, 889 (Ala. 1999) (internal citations omitted). Boles v. Parris, 952 So.2d 364 (Ala. 2006).

H. Wrongful Death and/or Survival Actions

Wrongful death. Alabama's wrongful death statute has roots identical to those of every other state's statutes—Lord Campbell's Act, passed in Great Britain in 1846 as the Fatal Accidents Act. BERT S. NETTLES & FORREST S. LATTA, ALABAMA'S WRONGFUL DEATH STATUTE: A PROBLEMATIC EXISTENCE, 40 ALA. L. REV. 475, 478079 (1989). Unlike in any other state, however, the Alabama Supreme Court held long ago that damages for wrongful death were to be entirely punitive in nature rather than compensatory. *Savannah and Memphis R. Co. v. Shearer,* 58 Ala. 672 (1877). Consequently, no measures of damages applicable in a single other state applies to Alabama wrongful death verdicts.

The wrongful death statute, Ala. Code § 6-5-410, in pertinent part states:

§ 6-5-410. Wrongful act, omission, or negligence causing death.

(a) A personal representative may commence an action and recover such damages as the jury may assess in a court of competent jurisdiction within the State of Alabama where provided for in subsection (e), and not elsewhere, for the wrongful act, omission, or negligence of any person, persons, or corporation, his or her or their servants or agents, whereby the death of the testator or intestate was caused, provided the testator or intestate could have commenced an action for the wrongful act, omission, or negligence if it had not caused death.

(b) The action shall not abate by the death of the defendant, but may be revived against his or her personal representative and may be maintained though there has not been prosecution, conviction, or acquittal of the defendant for the wrongful act, omission, or negligence.

(c) The damages recovered are not subject to the payment of the debts or liabilities of the testator or intestate, but must be distributed according to the statute of distributions.

(d) The action must be commenced within two years from and after the death of the testator or intestate.

(e) For any cause of action brought pursuant to this section, the action may only be filed in a county where the deceased could have

commenced an action for the alleged wrongful act, omission, or negligence pursuant to Section 6-3-2 or 6-3-7, if the alleged wrongful act, omission, or negligence had not caused death. Nothing in this subsection is intended to override Rule 82 of the Alabama Rules of Civil Procedure.

(f) This section shall only apply to actions filed after June 9, 2011.

Ala. Code § 6-5-410

Alabama's survival statute states:

§ 6-5-462. Survival -- Claims by and against personal representative in proceedings not of an equitable nature.

In all proceedings not of an equitable nature, all claims upon which an action has been filed and all claims upon which no action has been filed on a contract, express or implied, and all personal claims upon which an action has been filed, except for injuries to the reputation, survive in favor of and against personal representatives; and all personal claims upon which no action has been filed survive against the personal representative of a deceased tort-feasor.

ALA. CODE § 6-5-462.

Thus, when a plaintiff has filed a personal injury action but subsequently dies as a result of the injuries, the decedent's personal representative can be substituted as plaintiff to prosecute the personal injury claims for compensatory damages and amend the complaint to allege a wrongful death action as well. *King v. National Spa and Pool Institute, Inc.*, 607 So.2d 1241 (Ala.1992). Any personal injury causes of action that had not been filed at the time of death do not survive the death. *Nationwide Mut. Ins. Co. v. Wood*, --- So.3d ----, 2013 WL 646468 (Ala.).

I. Vicarious Liability

A principal, master, or employer is held liable for a tort committed by its agent, servant, or employee committed within the scope of the employment. *Jones Exp., Inc. v. Jackson*, 86 So. 3d 298 (Ala. 2010).

Vicarious liability arises from the principal's right of supervision and control over the agent's performance. *Kennedy v. Western Sizzlin Corp.,* 857 So.2d 71 (Ala. 2003). Accordingly, the test for determining whether someone is an agent or employee of another is whether the alleged principal or employer has reserved the right of control over the means and method by which the person's work would be performed, whether or not the right of control is actually

exercised. *Alabama Power Co. v. Beam,* 472 So.2d 619 (Ala.1985). *Gonzalez, LLC v. DiVincenti,* 844 So.2d 1196 (Ala.2002). *See Lifestar Response of Alabama, Inc. v. Admiral Ins. Co.,* 17 So.3d 200, 213 (Ala. 2009). The parties' characterization of their relationship is of no consequence; the facts of the relationship control the issue. *Martin By and Through Martin v. Goodies Distribution,* 695 So.2d 1175, 1177 (Ala. 1997).

Factors demonstrating a right of control are: "(1) direct evidence that demonstrates a right or the exercise of control, (2) the method by which the injured individual received payment for his services, (3) whether the equipment is furnished by the alleged employer or not, and (4) whether the individual has the right to terminate." *Ex parte Curry*, 607 So.2d 230, 232 (Ala. 1992); *White v. Henshaw,* 363 So.2d 986, 988 (Ala.Civ.App.1978).

In the context of a workers' compensation case in *Ex parte Curry*, 607 So.2d 230 (Ala. 1992), the Alabama Supreme Court held that a leased trucker was an employee entitled to benefits rather than an independent contractor, noting these factors:

(1) Direct evidence demonstrating a right to control included the terms of the driver's lease agreement with the motor carrier and testimony that the motor carrier controlled what loads the driver would pickup, where to pick them up, where to deliver them, and how the load should be handled;

(2) The motor carrier controlled payment to the driver by paying him 78 percent of the freight charge, less advanced expenses, and retaining 22 percent for itself.

(3) As to whether the equipment was furnished by the alleged employer, other than the truck, the motor carrier provided equipment, fuel/mileage taxes and permits, oversize permits, Public Service Commission-type permits, liability insurance, and "bobtail" insurance; and

(4) As to the right to terminate, the lease agreement provided that the lease agreement would terminate upon 30 days' written notice.

Ex parte Curry, 607 So.2d 230, 233 (Ala. 1992).

With a master-servant relationship established, a plaintiff seeking to hold a motor carrier liable still must prove that the driver was acting within the line-and-scope of his employment by the motor carrier rather than his own personal benefit. *See Vulcan Freight Lines, Inc. v. Buckelew*, 386 So.2d 433 (Ala. 1980)(evidence established that after delivering a load of freight driver was en route to pick another load when he encountered thermostat problems that resulted in his driverless rig rolling across a highway and striking house.); *Stevens v. Deaton Truck Line*, 256 Ala. 229, 54 So.2d 464 (1951)(owner-lessor held not to have been engaged in performing the duties of the owner-contractor because at pertinent time his mission was purely personal in returning home from the lessee's terminal); *Deaton Truck Line v. Acker, 261 Ala. 468,* 74 So.2d 717 (1954)(owner-lessor left lessee's terminal, preceded to his home and died days later when the truck fuel tank he was repairing exploded.).

If the servant is held not liable for his tort, either because the servant is innocent or is immune from prosecution, then any judgment against the master for the act of its servant must be set aside. *Industrial Development Bd. of City of Montgomery v. Russell*, --- So.3d ----, 2013 WL 1277134 *9 (Ala.), citing *Wheeler v. George*, 39 So.3d 1061, 1090 (Ala. 2009).

An action to hold a principal or master vicariously liable for the injurious acts of its agent or employee on a *respondeat superior* theory must be commenced within two years or is time-barred. Ala. Code § 6-2-38(n). The action to the master is barred after two years even if the applicable statute of limitations is six years for the agent or employee who committed the acts. *Wint v. Alabama Eye & Tissue Bank*, 675 So.2d 383, 386 (Ala. 1996); *Crowe v. City of Athens*, 733 So.2d 447 (Ala. Civ. App., 1999).

A general contractor is not liable for the alleged negligence of an independent contractor. *McGinnis v. Jim Walter Homes,* 800 So. 2d 140 (Ala. 2001); *Knight v. Burns, Kirkley & Williams Constr. Co.,* 331 So.2d 651, 655 (Ala.1976). Whether a relationship is one involving an independent contractor or is a master-servant relationship depends on whether the entity for which the work is being performed has reserved the right of control over the means by which the work is done. *McGinnis,* 800 So. 2d at 13.

A placard raises a presumption of control. *See Phillips v. J.H. Transp., Inc.*, 565 So. 2d 66, 69-70 (Ala. 1990)("In light of the purpose behind the promulgation of the I.C.C. regulations, we are persuaded that the better rule is to require carriers to remove their placards prior to relinquishing possession at the termination of their lease. Failure to comply with the I.C.C. regulations raises a presumption that the equipment is still under the control and lease of the carrier.")

Similarly, a rebuttable presumption exists that the registered owner of a license tag is presumed to be the owner of the motor vehicle to which the tag applies. As a rebuttable presumption, that ownership does not raise an inference of fact, but serves in the place of evidence only until evidence to the contrary is adduced. *Ex parte Hicks,* 537 So. 2d 486, 488 (Ala. 1988).

J. Exclusivity of Workers' Compensation

1. Workers' compensation as exclusive remedy—general rule.

The Alabama Workers' Compensation Law is the exclusive remedy for injuries or death arising out of and in the course of the employment. No employee, personal representative, surviving spouse, or next of kin "shall have a right to any method, form, or amount of compensation or damages for an injury or death occasioned by an accident or occupational disease proximately resulting from and while engaged in the actual performance of the duties of his or her employment and from a cause originating in such employment or determination thereof." ALA. CODE 1975 § 25–5–52. Except as provided in the Act, "no employer shall be held civilly liable for personal injury to or death of the employer's employee, for purposes of [the Act], whose injury or death is due to an accident or to an occupational disease while engaged in the service or business of the employer, the cause of which accident or occupational disease originates in the employment." ALA. CODE 1975 § 25–5–53.

Even a murder by a co-worker does not take an on-the-job death outside the exclusive remedy provisions, as to the employer, so long as the workplace shooting death

was not intended or expected by the deceased and, therefore, amounted to an "accident" under the Act. *Beard v. Mobile Press Register, Inc.,* 908 So.2d 932 (Ala.Civ.App.2004).

2. Exceptions to exclusive remedy rule.

On the other hand, the exclusive remedy provision does not shield an employer for limited circumstances such as intentional fraud, "committed beyond the bounds of the employer's proper role," *Hobbs v. Alabama Power Co.,* 775 So.2d 783, 786 (Ala.2000), or to an employer's wrongful conduct that injures an employee's unborn child. *Namislo v. Akzo Chems., Inc.,* 620 So.2d 573, 575 (Ala.1993)). If an employer's intentionally tortious conduct results in an injury that arises out of and in the course of employment from the *employee's* standpoint, however, the exclusive remedy does apply. *Hudson v. Renosol Seating, LLC,* 73 So.3d 1267 (Ala. Civ. App., 2011).

3. Special employers' entitlement to tort immunity.

Businesses or individuals who are not the primary or general employer of an injured worker may be entitled to tort immunity as a "special employer" based upon workers' compensation exclusivity when they meet a three-prong test:

> " '(a) the employee has made a contract of hire, express or implied, with the special employer;
>
> " '(b) the work being done is essentially that of the special employer; and
>
> " '(c) the special employer has the right to control the details of the work.

If all three factors are met, both the general and special employer are liable for w compensation benefits but are entitled to tort immunity based workers' compensation's be injured worker's exclusive remedy.

Gaut v. Medrano, 630 So.2d 362, 364 (Ala. 1993)

4. Co-employee liability under Workers' Compensation Law.

In Alabama employees can file actions against their co-employees only for willful conduct, but not negligence or wantonness, for the acts outlined in ALA. CODE § 25-5-11(c):

> (1) A purpose or intent or design to injure another, including the conscious pursuit of a course of conduct with a design, intent, and purpose of inflicting injury and knowledge of the peril of another;

(2) The willful and intentional removal from a machine of a safety guard or safety device provided by the manufacturer of the machine with knowledge that injury or death would likely or probably result from the removal, under certain conditions;

(3) The intoxication of another employee of the employer if the conduct of that employee has wrongfully and proximately caused injury or death to the plaintiff or plaintiff's decedent; or

(4) Willful and intentional violation of a specific written safety rule of the employer after written notice to the violating employee by another employee.

ALA. CODE § 25-5-11(c).

Damages

A. Statutory Caps on Damages

Alabama does not have statutory caps on compensatory damages. Statutory caps on punitive damages are set forth in G below.

B. Compensatory Damages for Bodily Injury

Alabama allows the following elements of damages for bodily injury: Physical pain and mental anguish; mental anguish when in zone of danger; permanent injuries or disfigurement; aggravation of pre-existing condition; injury aggravated by disease or other cause; medical expenses, and loss of earnings. Alabama Pattern Jury Instructions 2d 11.09 (hereafter, APJI).

APJI 11.10 provides that damages for physical pain and accompanying mental anguish must be fair and reasonable based upon proven factors such as the nature, severity, and duration of the pain and accompanying mental anguish. The jury may also award an amount for future pain and accompanying mental anguish if proven with reasonable certainty. APJI 11.10. Mental anguish without accompanying injury cannot be compensated unless the plaintiff was within the zone of danger when the conduct occurred. APJI 11.11.

If the plaintiff had a pre-existing condition, and evidence shows that the defendant's conduct aggravated the condition, then the jury may aware reasonable compensation for the defendant's conduct. That the plaintiff had a pre-existing condition that made it more likely that he or she would be harmed by the conduct does not affect the amount of damages the plaintiff is entitled to recover for that harm. Moreover, it matters not whether the plaintiff was aware of the pre-existing condition. APJI 11.13

If a plaintiff proves that the original conduct and injury subsequently caused a new injury, then the plaintiff can recover from the original defendant for both the original harm and the subsequent harm. Examples include "fell because of weakened condition and broke hip, stepped in a hole and hurt lower back, treating physician was negligent, etc." APJI 11.14.

Alabama has abrogated the collateral source rule with respect to medical and hospital expenses; consequently the jury instructions concerning the plaintiff's recovery of medical expenses becomes complex.

"The measure of damages for medical expenses is all reasonable expenses for medical

care, treatment, and services caused by [defendant's] conduct, (and the amount of reasonable expenses for medical care, treatment and services that [plaintiff] is reasonably certain to need in the future.)" APJI 11.15. The jury must decide whether the treatment itself was reasonably necessary, whether the expense was reasonable, and whether the defendant's conduct caused the need for the treatment. *Id.* The instruction, continues, however:

> (When there is evidence of third party payment of medical expenses, give the following as appropriate.)
>
> There is evidence that a third party (satisfied) (paid) (name of plaintiff)'s medical expenses, and (name of defendant) asks that you reduce the amount of any award for medical expenses.
>
> (When there is evidence of cost of obtaining reimbursement, give the following as appropriate.)
>
> There is also evidence of the cost of obtaining reimbursement or payment of medical expenses.
>
> (When there is evidence of subrogation, give the following as appropriate.)
>
> There is also evidence that (name of plaintiff) will have to pay back from any award the money (name of third party provider) paid for (name of plaintiff)'s medical expenses.
>
> (When any of the above additional paragraphs are given, give the following also.)
>
> You may consider all this evidence. Whether you reduce the award in any amount is up to you.

APJI 11.15 (See Collateral Source Rule section, infra).

Juries considering loss of earnings of a plaintiff are instructed to consider the amount of money plaintiff is reasonably certain to have earned during the time lost from work, the plaintiff's earning capacity, earnings, how the plaintiff usually spent his or her time before being harmed, and the inability to carry on the plaintiff's work. APJI 11.16.

Plaintiffs may prove that they have lost future earnings or earning capacity as a result of the harm they sustained. The jury considers the following factors in determining whether to make an award for lost future earnings or earning capacity:

1. The plaintiff's health, physical ability, and earning power or capacity before the injury, pain and suffering, and what they are now;
2. The type and degree of injury; and,
3. Whether the jury is reasonably satisfied the injury is permanent, or will last for some time into the future.

If the jury decides the plaintiff lost future income or earning ability, it then decides what amount the plaintiff is reasonably certain to lose and reduce that amount to its present cash value. APJI 11.17.

C. Collateral Source

The Alabama Legislature abrogated the common-law collateral source rule with respect to payment of medical or hospital expenses by collateral sources in ALA. CODE §

12-21-45.

Section 12-21-45 states in pertinent part, that

[…] In all civil actions where damages for any medical or hospital expenses are claimed and are legally recoverable for personal injury or death, evidence that the plaintiff's medical or hospital expenses have been or will be paid or reimbursed shall be admissible as competent evidence. In such actions upon admission of evidence respecting reimbursement or payment of medical or hospital expenses, the plaintiff shall be entitled to introduce evidence of the cost of obtaining reimbursement or payment of medical or hospital expenses."

ALA. CODE § 12-21-45.

Information concerning such reimbursement of payment is discoverable. Evidence that the plaintiff is obligated to repay the reimbursement or payment of such expenses also is admissible, as well as any cost plaintiff paid to obtain payment by the collateral source.

D. Pre-Judgment/Post judgment Interest

Prejudgment interest may be available in a breach-of-contract case if damages were reasonably certain at the time of the breach. ALA. CODE § 8-8-8; *Goolesby v. Koch Farms, LLC*, 955 So.2d 422 (Ala. 2006)(no pre-judgment interest when plaintiffs neither identified the amount nor explained how the parties should have been able to determine the loss at the time of breach.); *cf. Jernigan v. Happoldt*, 978 So. 2d 764 (Ala. Civ. App., 2007)(pre-judgment interest appropriate where contractor's pre-judgment loss could be calculated by adding 10 percent to subcontractors' invoices).

Post-judgment interest in contract actions bear the same rates of interest as to the verdict amounts (but not costs) as stated in the underlying contracts, while all other judgments bear interest at 12 percent per annum. ALA. CODE § 8-8-10; *Jones v. Regions Bank*, 25 So.3d 427 (Ala., 2009). Interest begins to accrue on the date the trial court enters the judgment. *Id.*

E. Damages for Emotional Distress

Alabama has recognized the tort of intentional infliction of emotional distress, also referred to as outrage, that was set forth in *Restatement (Second) of Torts* § 46 (1948). *American Road Service Co. v. Inmon,* 394 So.2d 361 (Ala.1980), framing the action as follows:

> [O]ne who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress

> and for bodily harm resulting from the distress. The emotional distress thereunder must be so severe that no reasonable person could be expected to endure it. Any recovery must be reasonable and justified under the circumstances, liability ensuing only when the conduct is extreme. Comment, *Restatement[(Second) of Torts* § 46], at 78 [(1948)]. By extreme we refer to conduct so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized society. Comment (d), *Restatement, supra* at 72.

394 So.2d at 365 (internal punctuation omitted).

The tort of outrage is so limited in Alabama that it has been applied in only four contexts: "(1) wrongful conduct in the family-burial context, *Whitt v. Hulsey,* 519 So.2d 901 (Ala.1987); (2) barbaric methods employed to coerce an insurance settlement, *National Sec. Fire & Cas. Co. v. Bowen,* 447 So.2d 133 (Ala.1983); […] (3) egregious sexual harassment, *Busby v. Truswal Sys. Corp.,* 551 So.2d 322 (Ala.1989)" and (4) a case "against a family physician who, when asked by a teenage boy's mother to counsel the boy concerning his stress over his parents' divorce, instead began exchanging addictive prescription drugs for homosexual sex for a number of years, resulting in the boy's drug addiction." *O'Rear v. B.H.,* 69 So.3d 106 (Ala.2011).

Alabama does not recognize a discrete cause of action for negligent infliction of emotional distress. *Allen v. Walker,* 569 So.2d 350 (Ala.1990).

The Alabama Supreme Court also has not recognized emotional distress as a compensable injury and element of damages in negligence actions when it is not accompanied by actual physical injury or, absent actual physical injury, fear for one's own physical injury. *AALAR, Ltd. v. Francis,* 716 So.2d 1141 (Ala.1998); *see also, Hamilton v. Scott*, 97 So.3d 728 (Ala., 2012)(mother could not recover emotional distress for death of fetus if she was not actually injured or concerned for her own life).

Alabama has applied a three-prong test for determining whether emotional distress damages can be recovered for a breach of a home construction or repair contract. The elements are: "(1) that the breach be egregious, i.e., that it result in severe construction defects; (2) that those defects render the home virtually uninhabitable**;** and (3) that the breach necessarily or reasonably result in mental anguish or suffering." *Baldwin v.*

Panetta, 4 So.3d 555, 567-68 (Ala. Civ. App., 2008).

F. Wrongful Death and/or Survival Action Damages

As stated in the wrongful death section above, Alabama allows only for punitive damages in wrongful death cases, and statutory caps applying to punitive damages awards expressly exclude punitive damages verdicts in wrongful death cases. Additionally, the amount the jury is to award is not tied to any aspects of the plaintiff's condition but rather to the "wrongness" of what the defendant did to cause the death. Finally, the juries only guides in effect are their own judgment and discretion. The following constitutes the appellate courts' comments on the juries' considerations.

1. Factors to be considered by jury

a. "The legislature has authorized the jury to ascertain an amount of damages appropriate to the goal sought to be achieved--preservation of life because of the enormity of the wrong, the uniqueness of the injury, and the finality of death. Where the enormous wrong results from the combined actions of several tort-feasors, the relative culpability of multiple defendants is only one factor that the jury may consider. […] The jury's consideration of the 'enormity of the wrong' includes assessing *the finality of death, the propriety of punishing the wrongdoer or wrongdoers, whether the death could have been prevented, and, if so, the lack of difficulty that would have been involved in preventing the death, as well as the public's interest in deterring others from committing the same or similar wrongful conduct.*" *Tillis Trucking Co., Inc. v. Moses*, 748 So. 2d 874, 889 (Ala, 1999)(internal citations omitted)(emphasis in original).

b. "It has long been held that the amount of care required by the standard of reasonable conduct is commensurate with the apparent risk or danger. *Industrial Chemical & Fiberglass Corp. v. Chandler*, 547 So.2d 812 (Ala. 1988), *McClusky v. Duncan,* 216 Ala. 388, 113 So. 250 (1927).

c. Per above, the juries are asked to assess damages based strictly upon the nature of the wrongdoing and not on the qualities of the person or persons who died or were otherwise affected by the conduct.

2. Factors not to be considered by the jury.

a. Alabama wrongful death law contains no provision establishing a right in the decedent's survivors to recover compensatory damages for a wrongful death. *Painter v. Tennessee Val. Authority*, 1973, 476 F.2d 943 (5th Cir. 1973). Alabama is the only state that allows only discretionary punitive damages in wrongful death cases, and such damages cannot be tied to concrete compensatory items such as future earnings, medical fees, and funeral expenses. Roe v. Michelin North America, Inc., 637 F.Supp.2d

995 (M.D.Ala.2009), affirmed 613 F.3d 1058.

b. The damages under this section being entirely punitive, evidence as to the age of the deceased going to show the value of the life is inadmissible. Louisville & N.R. Co. v. Tegnor, 125 Ala. 593, 28 So. 510 (Ala.1900).

c. Evidence tending to show actual, pecuniary loss by reason of the death of the intestate is irrelevant and inadmissible. Buckalew v. Tennessee Coal, Iron & R.R., 112 Ala. 146, 148, 20 So. 606 (1896). See also Louisville & N.R.R. v. Robinson, 141 Ala. 325, 37 So. 431 (1904).

d. Evidence of physical and mental condition, earning capacity and occupation of deceased are inadmissible. The amount contributed by him to the support of those dependent on him is also irrelevant. Louisville & N.R. Co. v. Tegnor, 125 Ala. 593, 28 So. 510 (Ala.1900).

e. "Because the policy of this state is to regard human life as being beyond measure in terms of dollars, the jury must disregard the decedent's wealth or lack of wealth, it must disregard the decedent's potential for accumulating great wealth or lack of potential to accumulate wealth; and it must disregard his or her talents and education, or lack of them, as well as his or her station in life." *Tillis Trucking Co., Inc. v. Moses*, 748 So. 2d 874, 889 (Ala,1999).

f. The case law not only prohibits somewhat objective indicia of damages, such as lost income, lost enjoyment, pain and suffering, but also prohibits subjective indications that *this particular person* had qualities the loss of which should be included in the jury's damages calculation:

> "The rationale underlying the Alabama Wrongful Death Act, which allows recovery of punitive damages only, "rests upon the Divine concept that *all human life* is precious." *Estes Health Care Centers, Inc. v. Bannerman,* 411 So.2d 109, 113 (Ala.1982) (emphasis added). Thus, in argument counsel must distinguish between the value of human life in general, as opposed to the value of a *particular* life--a distinction that is not always easy to articulate.
>
> References in counsel's argument in this case to the "unique qualities of the individual" blur that distinction. However, subsequent references to the value of human life in general, such as the acknowledgment that "all of us" are unique and the statement regarding the "intrinsic value of life," placed the argument in the proper context and rendered it reasonably susceptible of the proper construction. See *Griggs v. Finley,* 565 So.2d 154 (Ala.1990); *Gray v. Mobile Greyhound Park, Ltd.,* 370 So.2d 1384

(Ala.1979)

Atkins v. Lee, 603 So.2d 937, 942 (Ala., 1992).

3. Alabama Wrongful Death Jury Instruction

The Alabama Pattern Jury Instruction concerning wrongful death:

APJI 11.28 Wrongful Death

This is a claim for the wrongful death of (name of decedent).

The damages in this case are punitive and not compensatory. Punitive damages are awarded to preserve human life, to punish (name of defendant) for (his/her/its) wrongful conduct, and to deter or discourage (name of defendant) and others from doing the same or similar wrongs in the future.

The amount of damages must be directly related to (name of defendant)'s culpability, and by that I mean how bad (his/her) wrongful conduct was. You do not consider the monetary value of (name of decedent)'s life because thd damages are not to compensate (name of plaintiff) or (name of decedent)'s family from a monetary standpoint because of (his/her) death.

The amount you award is within your discretion based on the evidence and the guidelines in this instruction.

Notes on Use

Use this instruction in all claims for wrongful death.

Alabama Pattern Jury Instructions 11.28.

G. Punitive Damages

Except in wrongful death cases, punitive damages may not be awarded except where it is proven by clear and convincing evidence that the defendant consciously or deliberately engaged in oppression, fraud, wantonness, or malice with regard to the plaintiff. ALA. CODE § 6-11-20.

The general rule capping punitive damages states that no award of punitive damages shall exceed three times the compensatory damages of the party claiming

punitive damages or five hundred thousand dollars ($500,000), whichever is greater. ALA. CODE § 6-11-21(a).

One exception is that if the defendant is a small business ($2 million in net assets or less), no award of punitive damages shall exceed $50,000 or 10 percent of the business's net worth, whichever is greater. ALA. CODE § 6-11-21(b).

Another exception is that when the punishable conduct resulted in physical injury, no award of punitive damages shall exceed three times the compensatory damages of the party claiming punitive damages or $1,500,000, whichever is greater, regardless of whether the defendant is a small business. ALA. CODE § 6-11-21(d).

The final exception is that the statutory caps do not apply in wrongful death actions. ALA. CODE § 6-11-21(j).

The jury may not be informed or instructed concerning these caps. ALA. CODE § 6-11-21(g), and arguments or mention of the caps in the jury's presence constitute ground for mistrial. ALA. CODE § 6-11-22.

After a trial in which punitive damages were awarded, the trial court shall upon motion conduct hearings, receive additional evidence, or both, concerning the amount of punitive damages. The factors the trial court considers includes (1) the economic impact of the verdict on the defendant or the plaintiff, (2) the amount of compensatory damages awarded, (3) whether the defendant has been guilty of the same or similar acts in the past, and (4) the nature and the extent of any effort the defendant made to remedy the wrong and the opportunity or lack of opportunity the plaintiff gave the defendant to remedy the wrong. After such post verdict hearing the trial court shall independently reassess the nature, extent, and economic impact of such an award of punitive damages, and reduce the award if appropriate in light of all the evidence. ALA. CODE § 6-11-23(b).

In conjunction with the statutory factors set forth in the foregoing paragraph, when trial court and appellate courts review punitive damages awards, they apply the factors set forth in *Green Oil Co. v. Hornsby,* 539 So.2d 218, 223–24 (Ala.1989) within the framework of the "guideposts" set forth in *BMW of North America, Inc. v.Gore,* 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996), and restated in *State Farm Mutual Automobile Insurance Co. v. Campbell,* 538 U.S. 408, 418, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003).

The *Gore* guideposts are: "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." *Campbell,* 538 U.S. at 418, 123 S.Ct. 1513(internal citations and punctuation

omitted).

The *Green Oil* factors, which are similar and auxiliary in many respects to the *Gore* guideposts, are:

1. the reprehensibility of [the defendant's] conduct;

2. the relationship of the punitive-damages award to the harm that actually occurred, or is likely to occur, from the defendant's conduct;

3. the defendant's profit from his misconduct;

4. the defendant's financial position;

5. the cost to the plaintiff of the litigation;

6. whether the defendant has been subject to criminal sanctions for similar conduct; and

7. other civil actions the defendant has been involved in arising out of similar conduct.

Green Oil Co. v. Hornsby, 539 So.2d 218, 223–24 (Ala.1989)

The Alabama Supreme Court declared unconstitutional provisions in ALA. CODE § 6-11-23 and elsewhere providing that no presumption of correctness attaches to jury verdicts awarding punitive damages. *Armstrong v. Roger's Outdoor Sports, Inc.,* 581 So. 2d 414 (Ala. 1991). The Supreme Court also overturned a provision in ALA. CODE § 6-11-23(b) that had allowed trial courts to *increase* punitive damages awards following the post-trial hearing. *Bozeman v. Busby*, 639 So.2d 501 (Ala.1994).

A master may not be held liable in punitive damages for the *intentional* acts of its servant, agent, or employee unless it (i) knew or should have known of the unfitness of the servant and employed him or used his services without proper instruction or (ii) authorized the wrongful conduct; or (iii) ratified the wrongful conduct, or (iv) the acts of the servant were calculated to or did benefit the master. ALA. CODE § 6-11-27.

H. Diminution in Value of Damaged Vehicle

Diminution in value, i.e., the difference between the reasonable market value of an automobile immediately before the harm and its reasonable market value immediately after the harm is the primary element of damages for personal property. *Alford v. Jones,* 531 So.2d 659, 660-61 (Ala. 1988). The *Alford* court, however, pointed out that "[t]he rule is subject to the primary and basic principle that it is the purpose of the law to fairly compensate the injured for

the wrong committed." *Id.* Accordingly, the damages calculation can also include the reasonable cost of repairs if the vehicle can be repaired, the reasonable value of the loss of use, and removing it to and from the place of repair. *Id.* See Alabama Pattern Jury Instruction 11.36.

I. Loss of Use of Motor Vehicle

With respect to commercial vehicles, if the damage is repairable, the plaintiff is entitled to reasonable loss of use during the period necessary for making repairs. *Hunt v. Ward*, 262 Ala. 379, 79 So.2d 20 (Ala. 1955)(rev'd on other grounds, *Ex parte S & M, LLC*, --- So.3d ----, 2012 WL 6062565 (Ala.)). If the commercial vehicle is a total loss, then the plaintiff may recover reasonable loss-of-use damages during the time reasonably required to procure a suitable replacement vehicle. *Ex parte S & M, LLC*, --- So.3d ----, 2012 WL 6062565 (Ala.).

Evidentiary Issues

A. Preventability Determination

Neither an Alabama appellate court nor a federal court construing Alabama law has directly addressed the admissibility *vel non* of a preventability determination. What an Alabama appellate court would rule on this issue is difficult to predict. The appellate courts seem to perform conventional analyses of admissibility based upon probative value vs. unfair prejudice under Ala. R. Evid. 403. See, e.g., *McMahon v. Yamaha Motor Corp., U.S.A.,* 95 So.3d 769 (Ala. 2012). Trial courts' rulings on evidentiary matters are reviewed under an abuse of discretion standard. *Jimmy Day Plumbing & Heating, Inc. v. Smith,* 964 So.2d 1, 7 (Ala. 2007).

Alabama's Rule 403 provides in pertinent part: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury...." A trial court could find that introduction of a preventability determination could unfairly prejudice the defendants, could confuse the issues between what is preventability and what is culpability, and could mislead the jury into believing that a preventability determination was tantamount to admitting fault. Defense counsel presumably would make arguments similar to those presented in such cases as *Villalba v. Consolidated Freightways Corp. of Delaware*, Not Reported in F.Supp.2d, 2000 WL 1154073 (N.D.Ill.); *Tyson v. Old Dominion Freight Line, Inc.*, 608 S.E. 2d 266 (Ga. App. 2005); and *Inman v. Sacramento Regional Transit District*, 2003 WL 1611214 (Cal. App. 3 Dist.) Not officially reported.

B. Traffic Citation from Accident

Alabama prohibits admission of a traffic citations issued in connection with a case being tried, or any other conviction of a crime other than a felony, as not falling within a hearsay exclusion. Rule 803 of the Alabama Rules of Evidence addresses hearsay exceptions, and 803(22) provides:

> (22) **Judgment of previous conviction.** Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of *nolo contendere),* adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the state or other governmental authority in a criminal prosecution for purposes other than impeachment, judgment

against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

ALA. R. EVID. 803(22).

Alabama evidence commentator Charles W. Gamble, however, has noted that nothing in the Alabama rules or caselaw prevents a court from admitting the fact of a guilty fee to a traffic citation if offered as an admission. *See* Charles W. Gamble and Robert J. Godwin, McElroy's Alabama Evidence § 269.05(2)(6th ed.). It also bears mention that Alabama does not recognize the plea of *nolo contendere, May v. Lingo,* 277 Ala. 92, 167 So. 2d 267 (1964), but pleas of *nolo contendere* from other states are inadmissible without regard for any purpose for which the plea are offered. *McNair v. /Sate,* 653 So. 2d 320, 328 (Ala. Crim. App. 1992).

C. Failure to Wear a Seat Belt

Front seat passenger car occupants are required to wear seat belts supplied by the manufacturer, ALA. CODE § 32-5B-4, but failure to wear a seat belt cannot be considered evidence of contributory negligence or limit the liability of an insurer. ALA. CODE § 32-5B-7. Moreover, failure to wear seat belt does not constitute failure to mitigate damages because an act of mitigation must occur after the negligent act, not before. *Britton v. Doehring*, 286 Ala. 498, 242 So.2d 666 (1970).

D. Failure of Motorcyclist to Wear a Helmet

ALA. CODE § 32-5A-245 requires that persons driving or riding motorcycles must wear state-approved helmets and also must wear shoes. Alabama does not have any reported cases addressing whether failure to wear a helmet while driving or riding a motorcycle would be admissible as a liability defense or as a failure to mitigate damages. As with the failure to wear seat belts, however, the failure to wear a helmet could not be a failure to mitigate damages because the act of mitigation must occur after the negligent act, not before. *Britton v. Doehring*, 286 Ala. 498, 242 So.2d 666 (1970).

The argument can be made that the failure to wear a helmet while riding a motorcycle constitutes contributory negligence *per se.* Violation of one of the Alabama Rules of the Road, such as § 32-5A-245, constitutes negligence *per se. See Consolidated Freightways, Inc. v. Pacheco–Rivera,* 524 So. 2d 346, 349 (Ala.1988).

E. Evidence of Alcohol or Drug Intoxication

1. Statutory prohibition against driving while under influence of alcohol or controlled stances.

Alabama's Rule of the Road addressing driving under the influence of alcohol or controlled substances states in pertinent part:

(a) A person shall not drive or be in actual physical control of any vehicle while:
(1) There is 0.08 percent or more by weight of alcohol in his or her blood;

(2) Under the influence of alcohol;

(3) Under the influence of a controlled substance to a degree which renders him or her incapable of safely driving;

(4) Under the combined influence of alcohol and a controlled substance to a degree which renders him or her incapable of safely driving; or

(5) Under the influence of any substance which impairs the mental or physical faculties of such person to a degree which renders him or her incapable of safely driving.

Ala. Code § 32-5A-191. The legal limit is 0.02 percent for drivers under the age of 21 and school bus drivers while in the performance of their duties. The limit is 0.04 percent for commercial motor vehicle drivers driving or in control of a commercial motor vehicle. *Id.*

2 Relevance of intoxication

"It is common knowledge that a person under the influence of alcohol is usually unfit to operate a motor vehicle." *Kingry v. McCardle,* 266 Ala. 533, 537, 98 So.2d 44, 47 (1957). Intoxication is relevant to the issue of negligence. *Belew,* 932 So. 2d at 117-18; *Robinson v. Harris,* 370 So.2d 961, 967 (Ala. 1979).

3. Evidentiary considerations

"Intoxication may be shown by introducing evidence of acts and circumstances which taken together are relevant to show intoxication. *Kingry v. McCardle,* 266 Ala. 533, 537, 98 So.2d 44, 47 (1957).

Evidence of intoxication includes testimony by forensic scientists concerning actual blood-alcohol levels and whether such levels would impair driving. *See Middaugh v. City of Montgomery*, 621 So.2d 275 (Ala. 1993). A trial court considering summary judgment may reject evidence that illegal levels of alcohol do not intoxicate certain individuals. *Id.* (Passenger's affidavit stated that driver "had been a regular drinker since childhood and that a blood alcohol level of .209% would not impair his ability to drive a car because he was accustomed to such a blood alcohol level.).

Relevant evidence of intoxication also includes direct testimony concerning consumption of alcoholic beverages. *Belew* at 117*; Chattahoochee Valley Ry. Co. v. Williams,* 267 Ala. 464, 470, 103 So.2d 762, 766 (1958); *see Driver v. National Sec. Fire & Cas. Co.,* 658 So.2d 390, 394 (Ala. 1995); *Kingry v. McCardle,* 266 Ala. 533, 537-38, 98 So.2d 44, 47-48 (1957).

Also relevant is whether a police officer or others observed signs of alcohol use such as the smell of alcohol on a driver, how the driver acted after the accident, and the driver's

appearance. *Driver v. National Sec. Fire & Cas. Co.,* 658 So.2d 390, 394 (Ala. 1995)(Trooper at accident scene testified that driver appeared to be under the influence of alcohol or drugs based the way she acted, the smell of alcohol, the look in her eyes, presence of alcohol in the vehicle and refusal to submit to a test for alcohol.)

"The weight to be given any such evidence is, of course, a matter for the trier of fact. Further, the relevance of such evidence is subject to the rule of remoteness: 'Proof of prior consumption of intoxicating beverages is logically relevant to prove intoxication at a later time unless such drinking occurred at a time too remote to prove the alleged later intoxication.'" *Belew,* 932 So. 2d at 117, quoting *Williams,* 267 Ala. at 469, 103 So.2d at 766.

In addition to consumption of alcoholic beverages, the Supreme Court has held that evidence of driving one's car on the wrong side of the road, even when the issue of negligence is the ultimate issue in the case and is in dispute, can, when coupled with other evidence, lead to the conclusion that the driver of the car was intoxicated. *Kingry v. McCardle,* 266 Ala. 533, 537-38, 98 So.2d 44, 47-48 (1957).

Evidence of intoxication must be competent. A breath alcohol test result was inadmissible for use in opposing summary judgment motion because it was not authenticated. *Shows v. Donnell Trucking Co.,* 631 So.2d 1010, 1013 (Ala. 1994).

Factual disputes concerning the amount of alcohol consumed are for the jury. *Belew,* 932 at 118.

Evidence of intoxication must be competent. A breath alcohol test result was inadmissible for use in opposing summary judgment motion because it was not authenticated. *Shows v. Donnell Trucking Co.,* 631 So.2d 1010, 1013 (Ala. 1994).

4. Jury charge.

A jury charge on voluntary intoxication is appropriate when there is evidence of intoxication, because "[i]ntoxication is relevant to the issue of negligence." *Belew,* 932 So. 2d at 117-18; *Robinson v. Harris,* 370 So.2d 961, 967 (Ala. 1979).

Alabama's pattern jury instruction on voluntary intoxication states:

> A person who is voluntarily intoxicated must use the same care as a sober person would use in a similar situation.
>
> Notes on Use
>
> Use this instruction when there is sufficient evidence that the defendant was intoxicated at the time of the event at issue.

APJMI 28.09.

5. Intoxication as negligence *per se.*

Driving under the influence of an intoxicant has been held to be negligence *per se*, also referred to as negligence as a matter of law. *Harshaw v. Nationwide Mut. Ins. Co*., 834 So.2d 762, 765 (Ala. 2002). See also *Wise v. Schneider,* 205 Ala. 537, 88 So. 662 (1921).

6. Proximate causation.

The party proponent still must prove that intoxication was a proximate cause of an accident. *See City of Mobile v. Jackson,* 474 So.2d 644 (Ala.1985)(jury could decide whether plaintiff's conduct during accident was attributable to intoxication or to a sudden emergency, eliminating contributory negligence defense.); *Shackleford v. Brumley,* 437 So.2d 1044 (Ala. Civ. App. 1983)(evidence supported court's *ore tenous* finding that defendant's intoxication did not contribute to accident).

F. Testimony of Investigating Police Officer

Alabama courts allow investigating officers to testify concerning facts derived from their observations at an accident scene, such point of impact when the officer observed tire tracks, gouge marks, spilled liquids, damage to the vehicles and the final resting places of the vehicles. *Ex parte McKenzie,* 37 So.3d 128, 132 (Ala. 2009); *Brown v. AAA Wood Prods., Inc.,* 380 So.2d 784 (Ala.1980); *Sharp v. Argo-Collier Truck Lines Corp.,* 356 So.2d 147 (Ala.1978); *Griffin v. Gregory,* 355 So.2d 691 (Ala.1978); and *Belew v. Nelson,* 932 So.2d 110 (Ala.Civ.App.2005).

G. Expert Testimony

In 1991, Alabama adopted the standard in *Frye v. United States,* 293 F. 1013 (D.C.Cir.1923), for determining admissibility of an expert witness's testimony. *See Ex parte Perry,* 586 So.2d 242 (Ala.1991). Interpreting the *Frye* standard, the Alabama Supreme Court has said,

> [A] person who offers an opinion as a scientific expert must prove that he relied on scientific principles, methods, or procedures that have gained general acceptance in the field in which the expert is testifying.

Kyser v. Harrison, 908 So.2d 914, 920 (Ala. 2005), quoting *Slay v. Keller Indus., Inc.,* 823 So.2d 623, 626 (Ala.2001).

Two years after Alabama adopted *Frye,* the United States Supreme Court overruled the *Frye* standard for the admissibility of scientific evidence in *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579, 589, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). Alabama, however, has not abandoned the *Frye* "general acceptance test" and have not adopted the *Daubert* standard in civil cases. *See Bagley v. Mazda Motor Corp.,* 864 So.2d 301, 310 (Ala.2003).

By statute, the *Daubert* standard applies only to the admissibility of DNA evidence in

Alabama. Ala. Code § 36-18-30.

Alabama courts also use the standard set forth in Rule 702 of the Alabama Rules of Evidence:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

Rule 702, Ala. R. Evid.

H. Collateral Source

The common-law collateral-source rule, i.e., "an amount of damages is not decreased by benefits received by a plaintiff from a source wholly collateral to and independent of the wrongdoer," *Williston v. Ard,* 611 So.2d 274, 278 (Ala.1992), applies in Alabama except with respect medical or hospital expenses.

In 1987 the Alabama Legislature adopted that following statute abrogating the collateral source rule in certain respects:

> **§ 12-21-45. Evidence that medical or hospital expenses to be paid or reimbursed admissible as competent evidence.**
>
> (a) In all civil actions where damages for any medical or hospital expenses are claimed and are legally recoverable for personal injury or death, evidence that the plaintiff's medical or hospital expenses have been or will be paid or reimbursed shall be admissible as competent evidence. In such actions upon admission of evidence respecting reimbursement or payment of medical or hospital expenses, the plaintiff shall be entitled to introduce evidence of the cost of obtaining reimbursement or payment of medical or hospital expenses.
>
> (b) In such civil actions, information respecting such reimbursement or payment obtained or such reimbursement or payment which may be obtained by the plaintiff for medical or hospital expenses shall be subject to discovery.
>
> (c) Upon proof by the plaintiff to the court that the plaintiff is obligated to repay the medical or hospital expenses which have been or will be paid or reimbursed, evidence relating to such reimbursement or payment shall be admissible.

The statute only provides that evidence that the expenses were or will be paid by collateral sources is competent; it does not require the jury to reduce damages by the amount that the collateral source paid. *See Senn v. Alabama Gas Corp.,* 619 So.2d 1320, 1325 (Ala.1993). The jury may use its discretion in deciding whether the damages should be reduced. *Marsh v.*

Green, 782 So.2d 223 (Ala.2000). Additionally, when evidence of collateral payments has been introduced, the plaintiff may introduce evidence of the cost of obtaining the payments and, if the plaintiff proves to the Court that the payments must be reimbursed from the verdict amount, then such evidence also can be introduced. *Crocker v Grammer,* 87 So.3d 1190 (Ala.Civ.App.2011); s*ee Bruno's Supermarkets, Inc. v. Massey,* 914 So.2d 862, 867 (Ala.Civ.App.2005).

I. Recorded Statements

Recorded statements and transcripts are admissible in Alabama so long as they are properly authenticated by a person with knowledge of the voices in the tape, as provided in Ala. R. Evid. 901(a)&(b)(1). *See McGough v. G&A, Inc.,* 999 So. 2d 898 (Ala. Civ. App. 2007)(witness's deposition testimony acknowledging statements rendered recorded statement transcript admissible because her testimony constituted "evidence sufficient to support a finding that the matter in question is what its proponent claims.").

The completeness doctrine as reflected in Ala. R. Evid. 106 holds that if a party introduces part of a writing or recorded statement, the adverse party may require the introduction then of any other part of the writing or statement that ought in fairness to be considered contemporaneously with it. *Bruno's Supermarkets, Inc. v. Massey,* 914 So. 2d 862 (Ala. Civ. App. 2005).

J. Prior Convictions

Alabama prohibits admission of any conviction of a crime other than a felony, as not falling within a hearsay exclusion. Rule 803 of the Alabama Rules of Evidence addresses hearsay exceptions, and 803(22) provides:

> (22) **Judgment of previous conviction.** Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of *nolo contendere),* adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the state or other governmental authority in a criminal prosecution for purposes other than impeachment, judgment against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

ALA. R. EVID. 803(22).

It bears mention that Alabama does not recognize the plea of *nolo contendere, May v. Lingo,* 277 Ala. 92, 167 So. 2d 267 (1964), but pleas of *nolo contendere* from other states are inadmissible without regard for any purpose for which the plea are offered. *McNair v. /Sate,* 653 So. 2d 320, 328 (Ala. Crim. App. 1992).

K. Driving History

Because a jury might infer that since a defendant's driving history showed he had been charged with negligent conduct in the past, that he was negligent at the time of the accident. Admission of the driving record, therefore, contravenes the general rule that evidence of similar

prior acts of negligence is inadmissible on the issue of negligence at the time of the injury complained of in an action. *Bruck v. Jim Walter Corp.,* 470 So.2d 1141, 1144 (Ala. 1985), citing 29 Am.Jur.2d *Evidence* § 315 (1967). *See Mason v. New,* 475 So.2d 854 (Ala. 1985)(In negligence cases prejudicial error occurs when the lack of a driver's license is admitted because it is not probative of a driver's negligent acts).

Evidence of the prior driving record of the automobile operator, however, may be admissible in a negligent entrustment claim to prove the essential elements of the cause of action. *Rice v. Blackmon,* 559 So. 2d 1070; *Bruck v. Jim Walter Corp.,* 470 So.2d 1141 (Ala.1985), *Mason v. New,* 475 So.2d 854 (Ala.1985). In *Rice,* the Supreme Court held that the trial court's refusal to sever the entrustment claim from the underlying negligence claim was not an abuse of discretion when the court gave the jury a cautionary instruction. *Rice* at 1072.

L. Fatigue

The Alabama appellate courts and the federal courts construing Alabama law have not directly considered the issue of whether the federal hours of service and fatigue regulations are admissible into evidence. However, in a case in which certain FMCSR regulations were admitted into evidence *without objection*, the Alabama Supreme Court affirmed a trial court's reading certain regulations during its jury instructions. *Osborne Truck Lines, Inc. v. Langston,* 454 So. 2d 1317 (Ala. 1984).

The trial court in its instructions listed several state rules of the road the violation of which constituted negligence *per se.* The court without pause or explanation then read to the jury several FMCSA regulations.

> While it is true that the trial court read the federal regulations immediately after reading some of the Alabama rules of the road, the court did not in fact instruct that the regulations were part of the rules of the road or that violation would constitute negligence per se. The objections that it "sounded like" the regulations were included with the rules of the road, and that no charge was given as to the effect of the regulations, were not sufficient to put the trial court in error.

Osborne Truck Lines, Inc., 454 So. 2d at 1325.

The Court further held that since OSHA regulations are admissible regarding the standard of care to be followed, by analogy it would be appropriate for a court to instruct the jury that it could consider the hours of service (49 C.F.R. § 395.3) and the fatigue regulation (49 C.F.R. §392.3) in determining the standard of care applicable to trucking defendants. *Id. Cf., Dixon v. Hot Shot Express., Inc*., 44 So.3d 1082 (Ala., 2010)(affirming trial court's refusal to mention federal regulation and state law concerning federal regulations in its jury charge).

In *Osborne,* the truck driver had been on duty for 16 hours before the accident, the great majority of it driving. *Id.* The Supreme Court held that the trial court had improperly based its denial of a motion for a directed verdict on the ground that the defendants had violated the FMCSR. "While we agree that the mere violation of these regulations would not support a claim of wantonness," sufficient evidence of wantonness was presented to warrant denial of the

motion. *Id.* at 1326. Among other factors, the "jury could also have found that Cartee was fatigued because of the inordinate length of time he had driven the truck and with knowledge of that fact continued to drive." *Id.*

M. Spoliation

Spoliation is a party's attempt to suppress or destroy evidence that would be favorable to an adverse party. A jury may be authorized to assume that spoliated evidence would have been unfavorable to the party that destroyed the evidence. *Vesta Fire Ins. Corp. v. Milam & Co. Const., Inc.,* 901 So.2d 84 (Ala. 2004). Spoliation can also bring discovery sanctions under Rule 37 of the Alabama Rules of Civil Procedure, including dismissal of an action. Rule 37, Ala. R. Civ. P.; *Iverson v. Xpert Tune, Inc.,* 553 So.2d 82 (Ala.1989).

The Alabama Supreme Court has recognized five pertinent factors useful for analyzing spoliation: 1) the importance of the evidence destroyed; 2) the culpability of the offending parties; 3) fundamental fairness; 4) alternative sources of information, and 5) the possible effectiveness of sanctions other than dismissal. *Vesta Fire Ins. Corp. v. Milam & Co. Const., Inc.,* 901 So.2d at 94-95. As to culpability, "[w]hen a party maliciously destroys evidence, that is, with the intent to affect the litigation, that party is more culpable for spoliation. Conversely, willfulness is not shown where the party disposing of an item neither knew nor should have known that the item would be key evidence in the case. *Id.* (internal citations omitted). *See also Alabama Pattern Jury Instructions § 15.14 & 15.*

Alabama also has held that negligence principles afford a plaintiff a remedy when evidence crucial to that plaintiff's case is lost or destroyed through the acts of a third party. In addition to proving duty, breach, proximate cause, and damage, the plaintiff also must prove that "(1) the defendant spoliator had actual knowledge of pending or potential litigation; (2) a duty was imposed upon the defendant through a voluntary undertaking, an agreement, or a specific request; and (3) the missing evidence was vital to the plaintiff's pending or potential action." Proof of all three elements raises a rebuttable presumption that absent spoliation, the plaintiff would have recovered in the underlying lawsuit. *Killings v. Enterprise Leasing Co.*, Inc., 9 So.3d 1216 (Ala. 2008); *see also Alabama Pattern Jury Instructions § 15.25.*

Settlement

A. Offer of Judgment

The Alabama Rules of Civil Procedure provide for offers of judgment in a manner substantially similar to that provided in the Fed. R. Civ. P. 68, differing only in the filing and acceptance deadlines:

Rule 68. Offer of Judgment

At any time more than fifteen (15) days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against the defending party for the money or property or to the effect

specified in the offer, with costs then accrued. If within ten (10) days after the service of the offer, the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time, not less than ten (10) days, prior to the commencement of hearings to determine the amount or extent of liability.

Ala. R. Civ. P. 68.

If the defendant makes an offer of judgment that is rejected, and the defendant wins a verdict, then Rule 68 does not apply as a basis for awarding costs to the defendant. Rule 68 applies only when the plaintiff wins a verdict that is not greater than the amount stated in the offer of judgment. *Judd v. Sandefer*, 852 So.2d 164 (Ala. Civ. App. 2002). Morever, the rule applies only in cases where there was a trial. *Denson v. Bear, Stearns Securities Corp.,* 682 So.2d 69 (Ala.1996).

The Alabama Code does not set forth recoverable costs in a single statute. Instead, those costs are identified in a hodge-podge of statutes and appellate decisions. The recoverable costs include witness fees; costs of any deposition introduced into evidence at the trial by the party taking it; costs of depositions not used at trial; travel expenses; copying costs; filing fees; survey costs; guardian-ad-litem fees. *Ennis v. Kittle*, 770 So.2d 1090 (Ala. Civ. App.,1999)(internal citations omitted). Attorney fees, however, are not taxable costs. *Ex parte Waterjet Systems, Inc.,* 758 So. 2d 505 (Ala.1999), on remand 758 So.2d 515; *Atkinson v. Long,* 559 So. 2d 55 (Ala.Civ.App.1990).

Costs that were incurred prior to the making of an offer of judgment ("pre-rejection costs") are still taxable against the defendant even if the plaintiff verdict fell within the ambit of the offer of judgment rule. *Goree v. Shirley,* 765 Sol 2d 661 (Ala. Civ. App. 2000).

B. Liens

Hospital Liens: Hospitals have a statutory lien "for all reasonable charges for hospital care, treatment and maintenance of an injured person who entered such hospital within one week after receiving such injuries." Ala. Code (1975) §35-11-370. In addition, Ala.

Code (1975) §35-11-371 requires the hospital to file its lien in the office of the judge of probate in the county or counties where the cause of action arose within 10 days after the patient/claimant was discharged.

Worker's Compensation: Employers are entitled to be reimbursed out of any settlement or judgment recovered by the employee or his/her personal representative in an action against the third-party tortfeasor. Ala. Code (1975) §25-5-11(a).

Medicaid: If the Alabama Medicaid Agency has provided medical assistance to the claimant, the State of Alabama has a statutory subrogation interest in any recovery from the tortfeasor. Ala. Code (1975) §22-6-6(a).

Medicare: Medicare has a statutory right of subrogation. 42 U.S.C. §1395y(b)(2).

C. Minor Settlement

The age of majority in Alabama is 19 years. Ala. Code (1975) §26-1-1. Court approval must be obtained for all settlements in excess of $5000. Ala. Code (1975) § 26-2A-6. For settlements less than $5000, court approval may be warranted given the specific facts of the case. Pursuant to Ala. Code (1975) § 26-2A-52, a court may appoint a guardian *ad litem* to represent the interest of a minor or other person at any time in a proceeding.

D. Negotiating Directly With Attorneys

Alabama does not have laws addressing whether claims professionals may directly negotiate with claimants' attorneys. In that absence, claims professionals routinely negotiate directly with claimants' attorneys.

E. Confidentiality Agreements

No statutes address whether settling parties can enter confidentiality agreements. The state appellate courts have not addressed enforcement of confidentiality provisions in settlement agreements. In reversing summary judgment in case alleging violation of a confidentiality agreement in a non-lawsuit context, the Court of Appeals noted that Alabama law provides for nominal damages if a breach of contract is proven, even if a breach-of-contract plaintiff cannot prove actual damages. Once a **breach** of contract has been established, as it was in this case, the nonbreaching party is entitled to a nondiscretionary award of nominal damages even if there was a failure of proof regarding actual damages. *Jones v. Hamilton,* 53 So. 2d 134, 142 (Ala. Civ. App. 2010).

F. Releases

In Alabama, a single injury constitutes an indivisible cause of action and only one satisfaction may be obtained. *Wylam Ice co. v. King,* 304 So.2d 1 (Ala. 1974). Consequently, a release of one tortfeasor operates as a release of all joint tortfeasors. *Battle v. Morris,* 93 So.2 428 (1957). However, a claimant may accept partial satisfaction (a *pro tanto* settlement) from one joint tortfeasor and then proceed against one or more additional tortfeasors. *Steenhuis v. Holland,* 115 So. 1 (1927). The settlement release must specifically reserve the claimant's rights to proceed against other joint tortfeasors. *Johnson v. Collier*, 567 So.2d 1311 (Ala. 1990). In this case, the other joint tortfeasor(s) receive(s) a credit in the amount of the *pro tanto* settlement.

Tatum v. Schering Corp., 523 So. 2d 699 (Ala. 1988).

No Alabama statutes or case law requiring a personal injury release to be notarized. Nevertheless, settlement agreements routinely contain sworn acknowledgments signed by the releasing parties and notarized.

Alabama statutory and case law do not require personal injury releases to be translated into the language of the releaser. The long established rule in Alabama is that "[A] person who signs an instrument without reading it, when he can read, can not, in the absence of fraud, deceit or misrepresentation, avoid the effect of his signature, because [he is] not informed of its contents; and *the same rule [applies] to one who can not read, if he neglects to have it read, or to enquire as to its contents*." *Beck & Pauli Lithographing Co. v. Houppert,* 16 So. 522, (1894) (emphasis added). "If the signer could read the instrument, not to have read it was gross negligence; if he could not read it, not to procure it to be read was equally negligent; in either case the writing binds him." *Massey Automotive, Inc. v. Norris,* 895 So.2d 215 (Ala. 2004), *citing Gaskin v. Stumm Handel GmbH,* 390 F.Supp. 361, 366 (S.D.N.Y.1975). "Conditions such as illiteracy and a lack of education do not make one insane or otherwise deprive one of the ability to contract." *Mason v. Acceptance Loan Co., Inc.*, 850 So.2d 289 (Ala.2002).

G. Voidable Releases

A release, like a contract, is enforced as written. *Sol v. Miller*, 861 So.2d 386 (Ala. Civ. App. 2002). Except in certain narrow circumstances, all contracts of an insane person are void. See Ala. Code (1975) §8-1-170. A contract with a minor is not void *per se* but is *voidable* if it is not a contract for "necessaries." *Wells Fargo Bank N.A. v. Chapman,* 90 So. 3d 774, 779 (Ala. Civ. App. 2012); *S.B. v. Saint James Sch.,* 959 So.2d 72, 96 (Ala.2006); *see also Williams v. Baptist Health Sys., Inc.,* 857 So.2d 149, 151 (Ala.Civ.App.2003). A minor is entitled to disaffirm her contract during her minority or within a reasonable time after she reached the age of majority. *Chapman,* 90 So. 3d at 779; *Standard Motors, Inc. v. Raue,* 37 Ala.App. 211, 65 So.2d 829 (1953).

Thus, caution should be had when settling claims with minors and incompetents, and court approval should be sought when appropriate under the circumstances. Moreover, settlements required to be submitted to the court for approval may be voided if not submitted to and approved by the court. See, e.g., *Ex Parte Winn-Dixie Montgomery,* 865 So.2d 432 (Ala. Civ. App. 2003).

Transportation Law

A. State DOT Regulatory Requirements

By statute Alabama prohibits anyone from operating a commercial motor vehicle or failing to maintain required records or records in violation of Federal Motor Carrier Safety Regulations, 49 C.F.R. Part 107, Parts 171-180, Parts 382-384, and Parts 390-399 as they may be amended. Except as otherwise provided herein, this chapter shall not be construed to repeal or supersede other laws relating to the operation of motor vehicles. Ala. Code § 32-9A-2(a)(1).

A commercial motor vehicle operated in intrastate commerce that does not exceed 26,001

pounds or does not haul 16 passengers or transport hazardous materials "shall be exempt from the federal motor carrier regulations otherwise made applicable in this state pursuant to subsection (a). For purposes of this subdivision, commercial motor vehicle means a commercial motor vehicle as defined in 49 C.F.R. § 390.5." Ala. Code § 32-9A-2(b)(5).

Alabama is a significant steel-producing state. A rash of incidents in which metal coils dropped, fell, shifted or otherwise escaped from trucks caused the Legislature to enact the Metal Coil Securement Act in 2009. The act specifically required strict compliance with 49 C.F.R. § 393.120, concerning securement of metal coil loads of 5,000 pounds or more. The Act also required that drivers be certified in metal coil securement. The act is codified at Ala. Code § 32-9A-2(a)(2)-(4). The Federal Motor Carrier Safety Administration, however, granted an American Trucking Associations petition to preempt the Act on February 27, 2013, holding that the Act was more stringent than FMCSR requirements, placed an unreasonable burden on interstate commerce, and was insufficiently supported by claims of its safety benefits. The FMCSR's ruling prohibited the state from enforcing the act on interstate motor carriers. Federal Register Volume 78, Number 43 (Tuesday, March 5, 2013)[notices][pages 14403-14405].

No provision of the statute exempts someone from the obligations to operate a motor vehicle in a safe and proper manner or to observe the rules of the road, nor does the statute immunize any person from civil liability for actionable conduct. Ala. Code § 32-9A-2(c).

The Alabama Supreme Court has held that a violation of the Federal Motor Carrier Safety Regulations does not equate to tort liability under state law. *Dixon v. Hot Shot Exp., Inc*., 44 So.3d 1082 (Ala., 2010). The Court specifically affirmed a trial court's refusal to instruct a jury to the effect that (1) FMCSR 49 C.F.R. § 392.14 requires drivers to use "extreme caution" while operating in "hazardous conditions" and that (2) "Under Alabama law, no person may operate a commercial motor vehicle in this state in violation of the Federal Motor Carrier Safety Regulations as prescribed by the U.S. Department of Transportation." *Id.* "There is nothing in the federal regulatory scheme that suggests a preemption of that portion of state law providing for various defenses and exceptions to liability," such as the Guest Statute. *Id.*

B. State Speed Limits

The Alabama Rules of the Road provide that no one may drive in excess of 70 miles per hour on interstate highways; more than 65 miles per hour on four-laned state highways; more than 55 miles per hour on other highways; more than 45 miles per hour on county-maintained roads; more than 35 miles per hour on unpaved roads; or more than 30 miles per hour on urban streets, unless provided by other statutes. Ala. Code § 32-5A-171.

No one may operate a vehicle transporting hazardous materials unless it is properly decaled or placarded to indicate the substances it is carrying. No one operating such a vehicle may drive more than 55 miles per hour unless the governor authorizes a different speed. Ala. Code § 32-5A-171.

Driving a motor vehicle at speeds greater than what is reasonable and prudent under the circumstances, with due regard to actual and potential hazards, is prohibited. Ala. Code § 32-5A-171.

No person may drive a motor vehicle so slowly as to impede the normal and reasonable

movement of traffic except when reduced speed is necessary for safe operation or in compliance with law. State officials may set minimum speed limits for certain areas, but they are not effective unless the minimum speeds are posted upon signs. Ala. Code § 32-5A-174.

C. Overview of State CDL Requirements

Alabama adopted the Commercial Motor Vehicle Safety Act of 1986 effective in 1990. Ala. Code § 32-6-49.1 *et seq*. (Alabama Uniform Commercial Driver License Act). No person may drive a commercial motor vehicle on Alabama highways unless the person holds and immediately possesses a commercial driver license with applicable endorsements valid for the vehicle being driven. Ala. Code § 32-6-49.7. The Uniform Act defines a commercial motor vehicle as one with a gross vehicle weight rating of 26,001 pounds or greater, or a vehicle designed to carry 16 or more passengers, including the driver, or a vehicle transporting hazardous materials and required to be placarded. Ala. Code § 32-6-49.3.

Applicants for a CDL must be Alabama residents and pass a knowledge and skills test for driving a commercial motor vehicle which complies with minimum federal standards established by federal regulation enumerated in 49 C.F.R. part 383, subparts G and H, and has satisfied all other requirements of the CMVSA. Ala. Code § 32-6-49.8. A CDL may not be issued to a person while the person is subject to a disqualification from driving a commercial motor vehicle, or while the person's driver license is suspended, revoked, or cancelled in any state or foreign jurisdiction with reciprocity. *Id.*

A person is disqualified from driving a commercial motor vehicle for one year for a first conviction of (1) driving a motor vehicle under the influence of alcohol, or a controlled substance or any other drug which renders a person incapable of safely driving; (2) driving a commercial motor vehicle while the alcohol concentration of the person's blood, urine, or breath is 0.04 or more; (3) knowingly and willfully leaving the scene of an accident involving a motor vehicle driven by the person; (4) using a motor vehicle in the commission of any felony; or (5) refusing to submit to a test to determine the driver's use of a controlled substance or alcohol concentration while driving a motor vehicle. A person is disqualified for life (commutable to 10 years) if convicted of two or more violations of any of the foregoing offenses or any combination of those offenses, arising from two or more separate incidents. The statute also sets forth disqualification periods for convictions of serious traffic offenses, driving while out-of-service, and railroad grade-crossing violations. Ala. Code § 32-6-49.11.

The act provides sanctions for driving under the influence of alcohol and testing protocols for alcohol and drug screening. Ala. Code § 32-6-49.12 & .13. Finally, registered sex offenders are disqualified from holding P (passenger) and S (school bus) endorsements. Ala. Code § 32-6-49.25.

Insurance Issues

A. State Minimum Limits of Financial Responsibility

The minimum statutory limits for automobile liability insurance coverage are twenty-five thousand dollars ($25,000) for bodily injury or death to one person in any one accident, fifty thousand dollars ($50,000) because of bodily injury to or death of two or more persons in any one accident (subject to the per-person limit), and twenty-five thousand dollars ($25,000) for property damage in any one accident. Ala. Code (1975) §32-7-6(c).

B. Uninsured Motorist Coverage

The minimum statutory limits for automobile liability insurance coverage are twenty-five thousand dollars ($25,000) for bodily injury or death to one person in any one accident, fifty thousand dollars ($50,000) because of bodily injury to or death of two or more persons in any one accident (subject to the per-person limit), and twenty-five thousand dollars ($25,000) for property damage in any one accident. Ala. Code (1975) §32-7-6(c).

C. No Fault Insurance

Click to enter – Discuss generally mandatory/waive able; limits; exemptins/off sets.

D. Disclosure of Limits and Layers of Coverage

No Alabama law requires disclosure of limits or layers of coverage prior to the filing of a civil action. Ala. R. Civ. P. 26(b)(3), however, allows discovery of the contents of any insurance agreement by which an insurer "may be liable to satisfy part or all of a judgment that may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment." Limits of liability insurance policies are discoverable in personal injury actions under rule permitting discovery of the existence and contents of liability policy limits. *Ex parte Badham, 730 So.2d 135 (Ala.1999)*.

E. Unfair Claims Practices

Alabama Fair Claims Practices Act is codified at AAC 482-1-125-.01 *et seq.* The Act "sets forth minimum standards for the investigation and disposition of property and casualty claims." For example, the Act covers file and record documentation, prohibitions against misrepresenting policy provisions, guidelines for acknowledgement of claims and communications, time limits for denial or acceptance of claims, guidelines for automobile insurance and fire claim settlements, and do's and don'ts of claims adjusting.

F. Bad Faith Claims

A. First-party bad faith claims

A first-party bad faith action grows out of the premise that every contract contains a covenant of good faith and fair dealing, and that a failure to exercise good faith and fair dealing by an insurer may be the basis for a cause of action against the insurer for bad faith.

The elements of bad faith are:

(1) An insurance contract between the parties; and
(2) A breach of the contract by the defendant (i.e., denial); and
(3) An intentional refusal to pay the insured's claim; coupled with
(4) The absence of any reasonable legitimate or arguable reason for the denial; with
(5) The insurer having actual knowledge of the absence of a legitimate or arguable reason; and lastly
(6) If plaintiff relies on the argument that the insurer intentionally failed to determine the existence of a lawful basis, then the plaintiff must prove such

failure on the part of the insurer.

2. Third-party insurance bad faith claims

When an insurer is presented with a complaint that contains charges covered by the policy in addition to charges not covered by the policy, an immediate conflict of interest arises. By contract, the insurer is obligated to provide the insured with a defense of the entire action, but the insurer is not obligated to pay if a verdict is rendered on uncovered claims. If an insurer defends without notice to its insured that it intends to contest coverage at a later time, it in all probability may be precluded from contesting coverage. Generally, the insurer will give notice of the coverage issue by a letter that has come to be known as a reservation-of-rights letter. By sending such a letter, the insurer fulfill its duty to defend without waiving its rights to contest coverage. The Alabama Supreme Court has encouraged this procedure. L & S Roofing Supply Co. v. St. Paul Fire & Marine Ins. Co., 521 So.2d 1298 (Ala. 1987).

L & S Roofing holds that "when an insurance company undertakes a defense pursuant to a reservation of rights, it does so under an 'enhanced obligation of good faith' toward its insured in conducting such a defense." The "enhanced duty of good faith" puts in place a procedure by which the insured can be confident that his interests will not be compromised nor in any way subordinated to this of the insurer as a result of the defense that he is required to accept under the contract of insurance. Id. at 1304.

To fulfill this "enhanced duty of good faith", the insurer must meet certain specific criteria. "First, the company must thoroughly investigate the cause of the insured's accident and the nature and severity of the plaintiff's injuries. Second, it must retain competent defense counsel for the insured. Both retained defense counsel and the insurer must understand that only the insured is the client. Third, the company has the responsibility for fully informing the insured not only of the reservation-of-rights defense itself, but of all developments relevant to his policy coverage and the progress of the lawsuit. Information regarding progress of the lawsuit includes disclosure of all settlement offers made by the company. Finally, an insurance company must refrain from engaging in any action which would demonstrate a greater concern for the insurer's monetary interest than for the insured's financial risk." Id. at 1303, citing with favor, Tank v. State Farm Fire & Casualty Co., 715 P.2d 1133 (1986).

In addition to the foregoing, defense counsel retained by the insurer to defend its insured under a reservation-of-rights must meet distinct criteria as well. First, attorneys owe a duty of loyalty to their clients. Defense counsel represents only the insured, not the company. Second, defense counsel owes a duty of full and ongoing disclosure to the insured. Potential conflicts of interest must be fully disclosed and resolved in favor of the insured. All information relevant to the insured's defense, including a realistic and periodic assessment of the insured's chances to win or lose the pending lawsuit, must be communicated to the insured. Finally, all offers of settlement must be disclosed to the insured as those offers are presented. In a reservation-of-rights defense, it is the insured who may pay any judgment or settlement. Therefore, it is the insured who must make the ultimate choice regarding settlement.

G. Coverage – Duty of Insured

In Alabama, an insurer can deny coverage only if the insured's failure to cooperate is

material and substantial. See, e.g., *Williams v. Ala. Farm Bureau Mut. Cas. Ins. Co.*, 416 So.2d 744 (Ala. 1982). The test is whether or not the insurer is prejudiced by the insured's lack of cooperation. *Id.*

The standard is different, however, for failure to give notice of a claim or suit. "[T]he failure of an insured to comply within a reasonable time with such conditions precedent in an insurance policy requiring the insureds to give notice of an accident or occurrence releases the insurer from obligations imposed by the insurance contract." *Travelers Indem. Co. v. Miller,* 86 So. 3d 338, 342 (Ala. 2011). The terms "as soon as practicable" and "prompt notice" have been interpreted to mean that notice must be given within a reasonable time in view of the facts and circumstances of the case. *Id.*

The only two factors to be considered to determine the reasonableness of delayed notice are the length of the delay and the reasons for the delay. Prejudice to the insurer from any such delay in providing notice is not a factor. *United States Fid. & Guar. Co. v. Baldwin County Home Builders Ass'n,* 770 So.2d 72, 75 (Ala. 2000).

The Alabama Supreme Court has held that "[a] five-month delay in giving notice is sufficiently protracted as to require the insured to offer evidence of a reasonable excuse for the delay." *Nationwide Mut. Fire Ins. Co. v. Estate of Files,* 10 So.3d 533, 536 (Ala.2008).

Even though an insurer did not receive claim notice for several years, however, a jury question is presented on the notice issue when an insured gave notice of a "suit" to the insurance agency but the agency said no coverage existed and did not pass the claim on to the insurer. *Alabama Plating Co. v. United States Fid. & Guar. Co.*, 690 So. 2d 331 (Ala. 1997).

When the insured possesses both a copy of the policy and a lawyer, overcoming a failure to give prompt notice becomes very problematic. "[W]here a named insured not only has possession of the policy but also is represented by counsel, ignorance of policy terms resulting from a failure to read the policy does not, as a matter of law, constitute an acceptable excuse for noncompliance with the notification requirements of the policy." *Downey v. Travelers Property and Casualty Ins. Co.*, 74 So. 3d 952, 957 (Ala. 2011).

H. Fellow Employee Exclusions

An unambiguous "fellow employee exclusion" is enforceable in Alabama. *Southern Guar. Ins. Co. v. Pittman*, 439 So.2d 7 (Ala. 1983).