# ALABAMA LAW SUMMARY

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# I. COURT STRUCTURE

Alabama has sixty-seven counties. Every county has a circuit court with all the powers and jurisdiction provided to circuit courts by the Alabama Constitution. Ala. Code 1975, § 12-11-1, et seq. Although each county has a courthouse, there are only forty judicial circuits. Thus, many of the smaller counties share a judge with one or more adjoining counties.

The Alabama Constitution divides its court system based upon certain subject matter jurisdiction. In addition to municipal courts, there are provisions for probate courts and small claims courts. Each county has district courts and circuit courts. Appeals of decisions of circuit court judges are made to the Alabama Court of Civil Appeals or the Alabama Supreme Court. Both appellate courts are located in Montgomery, Alabama. Some of the courts in which civil claims are litigated and some of the minimum requirements for those courts are discussed below.

| COURT: | JURISDICTION: |
|---|---|
| District Court: | This court has concurrent jurisdiction of civil cases with the circuit court up to $10,000 not including interest and costs. This court has exclusive original jurisdiction of civil cases where the amount in controversy does not exceed $3,000. This is sometimes referred to as small claims court. An answer to a suit filed in district court is due fourteen days from the date of service. A.R.C.P. 12(dc); Ala. Code 1975, § 12-12-30 and § 12-12-31. |
| Circuit Court: | This court has exclusive original jurisdiction of all civil cases where the amount in controversy exceeds $10,000 not including interest and costs. It has concurrent original jurisdiction of all cases where the amount in controversy exceeds $3,000 not including interest and costs. This court has original jurisdiction of certain equitable remedies and for any action seeking a declaratory judgment. This court also has appellate jurisdiction for rulings from the district court. An answer to a suit filed in circuit court is to be filed within 30 days of service of the complaint. A.R.C.P. 12(a); Ala. Code 1975, § 12-12-30 and § 12-12-31. |

| | |
|---|---|
| Court of Civil Appeals: | As of July 1, 2004, this court has exclusive appellate jurisdiction of all civil cases where the amount involved does not exceed $50,000 not including interest and costs. This court can also decide cases transferred to it by the Alabama Supreme Court. Ala. Code 1975, § 12-3-10 and § 12-3-11. |
| Supreme Court: | This court has appellate jurisdiction of all civil cases decided by any circuit court. With few exceptions, it can deflect certain cases to the Court of Civil Appeals for its determination. The most notable exceptions to its power to transfer a case to the Court of Civil Appeals are those involving substantial questions of federal or state constitutional law or those involving novel legal questions. Ala. Code 1975, § 12-2-7. |

## II. PERSONAL JURISDICTION

### A. STATUTORY BASIS FOR JURISDICTION

The Alabama long arm statute has been interpreted as extending to the full extent of federal due process. Wenger Tree Serv. v. Royal Truck & Equip., Inc., 853 So. 2d 888, 895 (Ala. 2002). The long arm statute governs when a foreign defendant has sufficient contacts with Alabama to confer personal jurisdiction over that defendant upon an Alabama court.

1. The applicability of Alabama's long arm statute "is not limited to rigid transactional categories or subject to a mechanical formula." Wenger Tree Serv., 853 So. 2d at 895.

2. Each case must be analyzed on a case-by-case basis. Ex parte McInnis, 820 So. 2d 795, 804 (Ala. 2001). Specifically, the Alabama Supreme Court has stated "…the relevant facts and attendant circumstances must be examined and the relationship among the defendant, the forum, and the litigation analyzed to determine if the defendant has sufficient minimum contacts so that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." Id. at 802.

## B. MEETING THE CONSTITUTIONAL REQUIREMENTS OF DUE PROCESS

1. Purposeful Availment Requirement:

(a) Courts have universally recognized that "purposeful availment" is the touchstone for determining whether a defendant has sufficient minimum contacts with a given forum under the Due Process Clause of the Fourteenth Amendment to subject them to personal jurisdiction.

(b) If a non-resident has consciously chosen to accept benefits from the forum state, it is neither unfair nor unreasonable to subject him to suit in that state. There is a two-fold rationale underlying the "purposeful availment" requirement: (1) quid pro quo and (2) fair warning.

(i) The *quid pro quo* portion of this rationale is based upon the theory that if the defendant has sought a benefit by doing business within the forum state, then it is fair for him to accept some reasonable burdens which arise from and relate to that benefit (i.e., taxes and amenability to suit); Burger King Corp., 471 U.S. 462, 475-76 (1985).

(ii) The fair warning prong of this rationale is based upon the theory that if it is the defendant's own purposeful conduct which forms the basis for conferring jurisdiction, then the defendant is clearly on notice that his conduct within the forum state may subject him to litigation there. *See* Id. at 471-72.

(c) The Alabama Supreme Court has adopted this universal rule, which the United States Supreme Court promulgated. Ex parte Ga. Farm Bureau Mut. Auto Ins. Co., 889 So. 2d 545 (Ala. 2004). (*See also,* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475 (1985); Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 417 (1984)).

(d) The Alabama Supreme Court has also noted the importance of the "fair warning" requirement for asserting jurisdiction, and has stated that a defendant's conduct in connection with Alabama must be such that it should reasonably anticipate being haled into court here. Ex parte Dill, Dill, Carr, Stonbraker & Hutchings, P.C., 866 So. 2d 519, 540 (Ala. 2003).

2. "Stream of Commerce" Analysis:

(a) The United States Supreme Court has employed a "stream of commerce" analysis to determine whether a given defendant has purposefully directed his activities at Alabama despite using another party to actually effect the sales. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980); Asahi Metal Industry Co. v. Superior Court of California, 480 U.S. 107 (1987).

(b) The World-Wide Volkswagen court articulated the level of activity necessary to support in personam jurisdiction under the "stream of commerce" theory: "The forum state does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum state." World-Wide Volkswagen Corp., 444 U.S. at 502.

(c) In Asahi, the Court adopted a purposeful stream of commerce test. Asahi Metal Industry Co., 480 U.S. at 112. "Additional conduct of the defendant may indicate an intent or purpose to serve the market in the forum State, for example, designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State." Id.

(d) The Alabama Supreme Court has endorsed Justice O'Connor's analysis in Asahi, quoting it extensively with approval in Ex parte McInnis, 820 So. 2d at 804 (*See also,* Ex parte Alloy Wheels International, Ltd., 882 So. 2d 819 (Ala. 2003); Corp. Waste Alternatives, Inc. v. McLane Cumberland, Inc., 896 So. 2d 410 (Ala. 2004)).

3. Traditional Notions of Fair Play and Substantial Justice:

(a) Even where a defendant's contacts with the forum are sufficient to meet the minimum contacts requirement for exercising personal jurisdiction, the Due Process Clause forbids a state court from exercising jurisdiction if doing so would offend "traditional notions of fair play and substantial justice." International Shoe v. Washington, 326 U.S. 310, 316 (1945).

(b) Some factors courts consider when deciding whether exercising personal jurisdiction would be fair and reasonable are the burden

on the defendant, the interests of the forum, the plaintiff's interest in obtaining relief, the interstate judicial system's interest in obtaining the most efficient resolution of the controversy, and the shared interest of the several states in furthering fundamental substantive social policies. Asahi, 480 U.S. at 113-14; Burger King Corp., 471 U.S. at 477-78.

(c) The Alabama Supreme Court has held that a foreign defendant that has an intent or purpose to serve "**the American market**", does not necessarily have sufficient contacts with Alabama to subject it to personal jurisdiction. The crucial factor is whether the defendant has an intent or purpose to serve **the Alabama market**.

Ex parte Alloy Wheels, 882 So. 2d 819, 827 (Ala. 2003).

## III. VENUE

Venue is generally determined at the time the suit is filed. An important rule affecting venue in many cases in which multiple defendants are named is "Ancillary Venue." Alabama Rule of Civil Procedure 82(c) and case law hold that where venue is proper as to any claim against any defendant, then venue is proper for the whole case. Exceptions do exist such as for medical malpractice actions. *See* Ala. Code 1975, § 6-5-546. Moreover, special venue statutes exist for actions such as those for equity in Ala. Code 1975, § 6-2-3; real estate in Ala. Code 1975, § 6-2-3; and in suits against state agencies in Ala. Code 1975, § 41-22-20.

Also, there are some counties in Alabama in which there is more than one courthouse. In these counties, the "divisions" are treated as separate counties for venue purposes. The proper venue will be in the division in which venue would be proper if it were a county. General Motors Corporation v. Hopper, 681 So. 2d 1373 (Ala. 1996).

### A. CONTRACT CLAIMS

1. Resident individual:

   Where the defendant resides.

2. Non-Resident individuals:

   Where the claim arose, or where the defendant can "be found" (any county from which the defendant can be served, so literally, "any" county. Ex parte Bennett, 622 So. 2d 1307 (Ala. 1993)).

3. Corporations (in-state and foreign):

Where the corporation does business.

## B. TORT CLAIMS

1. Resident individual:

   Where the tortious act occurred or where the defendant resides.

2. Non-Resident individuals:

   Where the claim arose, or where the defendant can "be found" (any county from which the defendant can be served, so literally, "any" county. Ex Parte Bennett, 622 So. 2d 1307 (Ala. 1993)).

3. Corporations (in-state and foreign):

   (a) Where the event occurred, **OR**; Where the corporation has its principal Alabama office, **OR**; Where the plaintiff resided when the action accrued if the defendant does business there, **OR**;

   (b) If none of the above apply, then in any county where the corporation was doing business when the action accrued.

## C. COUNTY OR CITY

That county or the county in which the city is located. Ala. Code 1975, § 6-3-11.

## D. HEALTH CARE PROVIDER

Where the act constituting a breach of the standard of care occurred; if the act or acts occurred in more than one county, where the plaintiff resided at the time of the act. Ala. Code 1975, § 6-5-546.

Note: If suit is filed against multiple defendants in a county that is different from the county where the act is alleged to have occurred by a health care provider, the case must be severed and the health care provider transferred to the venue proper for them. Ex parte Kennedy, 656 So. 2d 365 (Ala. 1995).

## E. CLAIMS AGAINST STATE

When an officer or agency of the state is a defendant, venue is only proper in Montgomery County, absent specific statutory authority to the contrary or waiver of venue. Ex parte Sawyer, 892 So. 2d 898, 904 (Ala. 2004); Ex parte Alabama Department of Mental Health and Mental Retardation (In re: Swindle), 894 So.

2d 636 (Ala. 2004) (*holding that cases against Alabama Department of Mental Health, the Department's Commissioner and other Department employees should be transferred from Montgomery County to the county where alleged incidents occurred based on the doctrine of forum non conveniens*).

### F. FORUM SELECTION CLAUSES

An outbound forum selection clause or one providing for trial outside of Alabama is not void as against public policy and will be enforced unless shown to be unfair or unreasonable under the circumstances. "Unfair" includes a showing that the agreement was the result of fraud, undue influence or overwhelming bargaining power, and "unreasonable" includes a showing that a trial in the chosen forum would be seriously inconvenient. Professional Ins. Corp. v. Sutherland, 700 So. 2d 347 (Ala. 1997). (*See also,* Ex parte CTB, Inc., 782 So. 2d 188, 190 (Ala. 2000) *holding that outbound form selection clauses "…implicate the venue of a court, and not its subject matter jurisdiction."*).

## IV. FORUM NON CONVENIENS

In the event a defendant is sued in the wrong county or possibly the wrong state, a defendant can move under Ala. Code 1975, § 6-3-21.1 to have the trial judge transfer the case to another county in the state or pursuant to Ala. Code 1975, § 6-5-430 for a dismissal if there is a more convenient forum outside of the state. Ex parte Mitchell, 690 So. 2d 356 (Ala. 1997); Ex parte Southern Railway Co., 556 So. 2d 1082 (Ala. 1989) (doctrine of forum non conveniens applies to both foreign and domestic corporations equally). *See also,* Ex parte Sawyer (In re: Robinson), 892 So. 2d 898 (Ala.2004) (*citing*, Ex parte Neely, 653 So. 2d at 946-47); Ex parte Sawyer (In re: Percer), 2004 WL 1008569 (Ala. May 7, 2004); Ex parte Alabama Department of Mental Health and Mental Retardation (In re: Swindle), 894 So. 2d 636 (Ala. 2004) (*holding that cases against Alabama Department of Mental Health, the Department's Commissioner and other Department employees should be transferred from Montgomery County to the county where alleged incidents occurred based on the doctrine of forum non conveniens*). Alabama's form non conveniens statute is compulsory. Ex parte Prudential Ins. Co. of America, 721 So. 2d 1135, 1138 (Ala. 1998) ("The word 'shall' is clear and unambiguous and is imperative and mandatory.").

## V. STATUTE OF LIMITATIONS

### A. PERSONAL INJURY (NEGLIGENCE)

Two years. Ala. Code § 6-2-38(l).

The statute runs from the time a claim accrues. Ala. Code § 6-2-30(a). For a tort action, a "cause of action accrues only when the force wrongfully put in motion produces injury, the invasion of personal or property rights occurring at that time." Stephens v. Creel, 429 So. 2d 278, 281 (Ala. 1983).

For a continuous tort, the claim accrues from the "date of injury" which is "the day on which the plaintiff was last exposed to the damages." Hillis v. Rentokil, Inc., 596 So. 2d 888, 889 (Ala. 1989).

Note that Ala. Code § 6-2-8 provides a tolling provision for those with a disability when the statutory time limit expires. Section 6-2-8 applies to incompetents below the age of 19 and insane individuals and allows the incompetent three years after the termination of the disability to commence an action. (*See,* Varden v. Fulmer, 621 So. 2d 1320 (Ala. 1993) (holding that a minor is given three years after reaching majority to file a claim).

## B. WRONGFUL DEATH

Two years from date of death. Ala. Code 1975, § 6-2-38(a).

## C. PRODUCTS LIABILITY

Two years for an action sounding in tort. Denton v. Sam Blount, 669 So. 2d 951, 953 (Ala. 1995).

One year from the injury or discovery of injury if defect was latent. Ala. Code 1975, § 6-5-502.

Alabama's statute of repose for product's liability claims was held unconstitutional in Lankford v. Sullivan, 416 So. 2d 996, 1003-1004 (Ala. 1982).

## D. BREACH OF WARRANTY

Four years. Accrues from the date of injury for consumer goods. Ala. Code 1975, § 7-2-725.

Accrues from tender of delivery for industrial equipment. Ala. Code 1975, § 7-2-725.

## E. LIBEL AND SLANDER

Two years. Ala. Code 1975, § 6-2-38(k).

## F. MALICIOUS PROSECUTION

Two years. Ala. Code 1975, § 6-2-38(h).

## G. BREACH OF CONTRACT

Six years. Ala. Code 1975, § 6-2-34.

## H. FRAUD

Two years from when plaintiff knew or reasonably should have known. Ala. Code 1975, § 6-2-3.

This is one of only a few statutes allowing for a discovery period before the claim accrues.

## I. BAD FAITH

Two years. Alfa Mut. Ins. Co. v. Smith, 540 So. 2d 691, 692 (Ala. 1988). Bad Faith is a species of fraud, and gets the benefit of the discovery rule. Shufford v. Integon, 73 F.Supp.2d 1293, 1302 (M.D. Ala. 1999).

## J. TRESPASS, CONVERSION, ASSAULT AND BATTERY, FALSE IMPRISONMENT, BREACH OF CONTRACT

Six years. Ala. Code 1975, § 6-2-34.

Date of accrual for contracts cases generally begins when the breach of the agreement occurred rather than when resulting damages were incurred. Stephens v. Creel, 429 So. 2d 278, 280 (Ala. 1983).

## K. MEDICAL MALPRACTICE

Ala. Code 1975, § 6-5-482.

Two years from the time of the negligent act or omission.

If not discoverable within two years of the act, within six months from the date of discovery.

Ultimate statute of repose of four years from the act with an exception for a minor under four years of age who shall have until his or her eighteenth birthday to commence suit. Ala. Code 1975, § 6-5-482(b).

## L. ASBESTOSIS CLAIMS

Two years from the date the plaintiff should have discovered the injury. Ala. Code 1975, §§ 6-2-30(b) and 6-2-38(l).

This claim is "deemed to accrue on the first date the injured party, through reasonable diligence, should have reason to discover the injury giving rise to such civil action." Ala. Code 1975, § 6-2-30(b).

### M. CONTRACTS OR WRITINGS UNDER SEAL

Ten years (these often arise in construction/surety litigation on government projects). Ala. Code 1975, § 6-2-33.

### N. ACTIONS AGAINST A PRINCIPAL BASED UPON AN AGENT'S CONDUCT

Two years. Ala. Code 1975, § 6-2-38(n).

## VI. NEGLIGENCE

### A. COMPARATIVE NEGLIGENCE V. CONTRIBUTORY NEGLIGENCE

Alabama is a contributory negligence state. Alabama is one of only four jurisdictions that still adhere to the principle of contributory negligence. The Louisiana Private-Law System: The Best of Both Worlds, 10 Tulane Eur. & Civ. L.F. 1, 30 n.35 (1995). A plaintiff's contributory negligence operates as a complete bar to his recovery on a claim for negligence if it proximately contributes to the plaintiff's injury. Creel v. Brown, 508 So. 2d 684, 687 (Ala. 1987); Aplin v. Tew, 839 So. 2d 635 (Ala. 2002). However, juries are often reluctant to apply this rule, and they are likely to reduce its harshness by reducing the plaintiffs' recovery instead of barring it completely.

1. Burden of proof:

   Defendants bear the burden of raising and proving the defense of contributory negligence. Wyser v. Ray Sumlin Construction Co., Inc., 680 So. 2d 235, 238 (Ala. 1996); Hairrell v. Smith, 678 So. 2d 1139, 1140 (Ala. Civ. App. 1996). Courts will not presume that a plaintiff's conduct fell below the appropriate standard of care. Creel v. Brown, 508 So. 2d 684, 688 (Ala. 1987). A defendant's burden is to prove to the jury's "reasonable satisfaction" that the plaintiffs conduct constitutes contributory negligence. Gilbert v. Vann, 224 So. 2d 635, 637 (Ala. 1969). Note that this is a lesser burden than the "beyond a reasonable doubt" standard. Id.

2. Comparative negligence:

There is no form of comparative negligence in Alabama. Williams v. Delta International Machinery Corp., 619 So. 2d 1330 (Ala. 1993).

3. Jury issue:

The issue of whether a plaintiff's conduct constitutes contributory negligence is almost always for the jury to decide (i.e., summary judgment is usually held to be an improper disposition of a case). Wyser, 680 So. 2d at 238; Robertson v. Travelers Inn, 613 So. 2d 376, 379 (Ala. 1993). Courts are free to decide that a plaintiff's conduct constitutes contributory negligence as a matter of law ". . . only when the facts are such that all reasonable men must draw the same conclusion...." (i.e., summary judgment is proper in these situations). Wyser, 680 So. 2d at 238; Robertson, 613 So. 2d at 379.

4. Child's contributory negligence:

Alabama has adopted a special rule that applies to a child's contributory negligence.

(a) *Under 7*:

A child under seven (7) cannot be guilty of contributory negligence. Mobile Light & RR Co. v. Nicholas, 167 So. 298 (Ala. 1936).

(b) *7 - 14*:

A child between the ages of seven (7) and fourteen (14) is presumed incapable of contributory negligence, but a defendant can rebut this presumption by producing evidence that the child possesses the discretion, intelligence, and sensitivity to danger that an ordinary 14-year-old possesses. Savage Industries, Inc. v. Duke By and through Duke, 598 So. 2d 856, 858 (Ala. 1992). (*Note: These rules for children under 14 also apply to the defense of assumption of the risk*).

Factors to Consider in Rebutting the Presumption:

(i) the child's intelligence;

(ii) the child's capacity to understand the potential danger of the hazard;

(iii) the child's actual knowledge of the danger;

(iv) the child's ability to exercise discretion;

(v) the child's education level;

(vi) the child's maturity; and

(vii) the child's age.

*See*, Ricketts v. Norfolk Southern Railway Co., 686 So. 2d 1100, 1104 (Ala. 1996); Savage Industries, 598 So. 2d at 858; Jones By and Through Jones v. Power Cleaning Contractors, 551 So. 2d 996, 999 (Ala. 1989).

(c) *14 and over*:

Children fourteen (14) years old and older are presumed capable of contributory negligence. Keller v. Kiedinge, 389 So. 2d 129, 133 (Ala. 1980).

Note that the Alabama Supreme Court has explicitly rejected the 14-year age limitation in cases involving a landowner's liability to a child trespasser whose injury arises from an artificial condition on the land. Ricketts, 686 So. 2d at 1103. Prior Alabama law held that a landowner was not liable for an injury to a trespassing child who was fourteen (14) or older at the time of his injury. Id. The Court held that it would apply the factors listed above to determine if the landowner can prevail on the defense of contributory negligence. Id.

## B. EXCEPTIONS TO GENERAL RULES

1. Children engaged in "adult activities":

For public policy reasons, children engaged in "adult activities" are held to an adult standard of care. [*Note*: The Alabama Supreme Court has specifically held that a child passenger in a car driven by another child is not engaged in an "adult activity."] Lemond Construction Co. v. Wheeler, 669 So. 2d 855, 860 (Ala. 1995); Keller, 389 So. 2d at 133.

2. Children working in jobs "fraught with peril":

In these cases, the Alabama Supreme Court has held that it will not hold a child over the age of 14 to an adult standard of care. Jones v. Power

Cleaning Contractors, 551 So. 2d at 999 (Ala. 1989) (this case involved a 15-year-old who lost an eye working with dangerous acids).

3. Disabled persons' contributory negligence:

Under Alabama law, disabled persons are not held to the same standard of care as persons not suffering from a disability. Shepherd v. Gardner Wholesale, Inc., 288 Ala. 43, 256 So. 2d 877 (1972).

(a) Disabled persons are deemed to exercise "ordinary care" if they act as an ordinarily prudent person with the same infirmity would act under the same or similar circumstances. Shepherd, 256 So. 2d 877. This modified analysis essentially converts the "reasonable man standard" to the "reasonable disabled man standard."

## C. IMPUTED NEGLIGENCE

Imputed negligence issues arise whenever a third party affiliated with the plaintiff may have acted negligently and caused or contributed to the plaintiff's injury. The focus of the court's inquiry in imputed negligence situations is whether the third party's negligence is imputable to the plaintiff (i.e., can the plaintiff be charged with this negligence). This issue generally arises in cases where the plaintiff was a passenger in a car driven by another when the injury occurred, or when the plaintiff is the child, spouse, or employee of the person who acted negligently.

1. The Alabama Supreme Court has held that a parent's negligence is not imputable to a child. Pilkington v. Peking Chinese Restaurant, Inc., 596 So. 2d 586, 589 (Ala. 1992).

2. A driver's negligence generally is not imputable to his passenger. Barnett v. Norfolk Southern Railway Co., 671 So. 2d 718, 719 (Ala. Civ. App. 1995); Johnson v. Battles, 52 So. 2d 702, 707, 25 5 Ala. 624, 63 0 (1951); Newell Contracting Co. v. Berry, 134 So. 870, 872 (Ala. 1931); (*See also,* Alabama Guest Statute). The fact that the plaintiff was an occupant at his own request does not affect this rule. Johnson, 52 So. 2d at 707, 255 Ala. at 630.

   A driver's negligence is only imputable to a passenger if the passenger has some authority or control over the car's movement. Barnett, 671 So. 2d at 719; Johnson, 52 So. 2d at 707, 255 Ala. at 630. For instance, negligence might be imputable in a case where the passenger was the driver's employer and was directing the driver's actions. *See also,* Alewine v. So. Ry. Co., 531 So. 2d 315 (Ala. 1988).

Defendants must be careful to distinguish a passenger's own negligence from imputed negligence. Passengers have a duty to exercise reasonable care to prevent injury. Driver v. National Security Fire & Casualty Co., 658 So. 2d 390,393 (Ala. 1995); Barnett, 671 So. 2d at 719; Johnson, 52 So. 2d at 707, 255 Ala. 630. For example, a passenger can be contributorily negligent if she accepts a ride from a driver who she knows is, or may be, intoxicated. Driver, 658 So. 2d at 393.

## D. WANTONNESS OR WILLFULNESS

Contributory negligence is not a defense to a wantonness or willfulness claim. Knight v. Alabama Power Co., 580 So. 2d 576, 577 (Ala. 1991); Ex parte Gradford, 699 So. 2d 149, 153 (Ala. 1997).

1. Negligence, whether called simple or gross, differs by definition from wantonness, which, in turn, is different from willfulness.

2. Wantonness is the conscious doing of some act or omission of some duty with knowledge that an injury will likely or probably result. Before a party can be found wanton, it must be shown that with reckless indifference to the consequences, he/she consciously and intentionally did some wrongful act which produced the injury. Yelder v. Credit Bureau of Montgomery, L.L.C., 131 F.Supp.2d 1275 (M.D. Ala. 2001); McKenzie v. Killian, 2004 WL 406726 (Ala. 2004); Hamme v. CSX Transportation, Inc., 621 So. 2d 281 (Ala. 1993); Berry v. Fife, 590 So. 2d 884 (Ala. 1991).

3. Willfulness is more than wantonness. It involves an intent to injure. It is defined as the conscious doing of some act or omission with a design or purpose to inflict injury. Mobile Infirmary Medical Center v. Hodgen, 2003 WL 22463340 (Ala. 2003); Roe v. Lewis, 416 So. 2d 750 (Ala. 1982).

4. Alabama courts hold that there is a definite distinction between the two Punitive damages can be awarded for wanton and willful acts. Because wantonness does not require an intent to injure, a verdict for wantonness is covered by insurance. Ala. Code 1975, § 6-11-20 (wantoness forms basis for punitive damages claim); Mobile Infirmary Medical Center v. Hodgen, 2003 WL 22463340.

## E. PLAINTIFF'S RESPONSES TO ALLEGATIONS OF CONTRIBUTORY NEGLIGENCE

In some circumstances a plaintiff will argue the sudden emergency doctrine or that the defendant had the last clear chance to avoid the accident and did not do so which absolves the plaintiff of liability for his or her contributory negligence.

1. The Sudden Emergency Doctrine:

In response to an allegation that he or she was contributorily negligent, a plaintiff can assert a defense known as the "sudden emergency doctrine." Moore v. Horton, 694 So. 2d 21 (Ala. 1997). This doctrine relieves the plaintiff from being held to the "reasonable man" standard of care. Id. The Alabama Supreme Court has stated that:

> [t]his doctrine generally states that if a . . . [plaintiff] . . . is faced with an emergency situation through no fault of his own, he is not to be held to the same correctness of judgment and action as if he had time and opportunity to fully consider the situation. This doctrine will apply only where the emergency is sudden and is not the fault of the one seeking to invoke it. It is a question for the finder of fact as to whether the doctrine is properly applicable, and this Court will not reverse the finding on this question unless it is clearly and palpably wrong. Id.

2. Subsequent Negligence (Last Clear Chance):

Plaintiffs are also entitled to raise subsequent negligence, also known as the "last clear chance rule," as a defense to a contributory negligence allegation. Zaharavich v. Clingerman, 529 So. 2d 978, 979 (Ala. 1988). Note that defendants often raise this as a defense. This rule provides that a victim's initial contributory negligence in placing himself in a perilous situation is no defense to the victim's claim that the defendant was guilty of subsequent negligence (*i.e., the defendant had the last clear chance to avoid injuring the plaintiff and failed to do so*). Id.

*Elements*:

(i) that the plaintiff was in a perilous position;

(ii) that the defendant had knowledge of that position;

(iii) that, armed with such knowledge, the defendant failed to use reasonable and ordinary care to avoid the accident;

(iv) that the use of reasonable and ordinary care would have avoided the accident; and

(v) that the plaintiff was injured as a result. Zaharavich, 529 So. 2d 978.

3. Pattern jury charges on contributory negligence:

APJI 30.00 (DEFINITION): Contributory negligence is negligence on the part of the plaintiff that proximately contributed to the alleged (injury) (death) (property damage).

With regard to "non-standard" jury charges, the Alabama Supreme Court has held that trial courts should not use the term "slightest degree" in a jury charge on contributory negligence. Bohannon v. Driskell, 519 So. 2d 1314, 1318 (Ala. 1988).

APJI 30.01 (BURDEN OF PROOF): The defendant's(') answer raising contributory negligence is an affirmative defense. Therefore, the burden is upon the defendant to reasonably satisfy you from the evidence as to the truth of all of the material allegations of this defense.

APJI 30.02 (EFFECT OF): if you are reasonably satisfied from the evidence that the plaintiff was guilty of contributory negligence, the plaintiff cannot recover for any initial simple negligence of the defendant.

**F. ASSUMPTION OF THE RISK**

1. Elements:

(a) that the plaintiff knew about the dangerous condition;

(b) that he or she appreciated the danger under the surrounding circumstances; and,

(c) that the plaintiff failed to exercise reasonable care by placing himself in the way of danger.

Robertson, 613 So. 2d at 379; Hairrell, 678 So. 2d at 1140.

2. As a matter of law:

The standard applied to a judgment as a matter of law when contributory negligence has been raised as a defense is the functional equivalent of assumption of the risk. Aplin v. Tew, 839 So. 2d 635 (Ala. 2002). To establish assumption of the risk as a matter of law in cases filed under the Alabama Extended Manufacturer's Liability Doctrine, the evidence must show that the plaintiff discovered the alleged defect, was aware of the danger, proceeded unreasonably to use the product, and was injured. Sears v. Waste Processing Equipment, Inc., 695 So. 2d 51 (Ala. Civ. App. 1997).

## G. JOINT AND SEVERAL LIABILITY

The general rule is that when two alleged tort-feasors are deemed to have caused the plaintiff's injury, the two tort-feasors are treated as joint tort-feasors and are jointly and severally liable to plaintiff. Thus, either one or more of the tort-feasors can be held liable for the entire amount of damages irrespective of how much culpability each tort-feasor had in causing the plaintiff's damages. There is no apportionment of damages among the joint tort-feasors based on their culpability. Springer v. Jefferson County, 595 So. 2d 1381 (Ala. 1992).

## H. CONTRIBUTION AND INDEMNITY

1. General rules:

The general rule in Alabama is that there is no right to contribution or indemnity among joint tort-feasors. Gobble v. Bradford, 147 So. 619, 619-20 (Ala. 1933); Consolidated Pipe & Supply Co., Inc., v. Stockham Valves & Fittings, Inc., 365 So. 2d 968, 970 (Ala. 1978); Crigler v. Salac, 438 So. 2d 1375, 1385 (Ala. 1983). As a result, a plaintiff may recover the full verdict from any tort-feasor he or she chooses. Because the tort-feasors are jointly and severally liable, the plaintiff may obtain a judgment for a sum from any one of several defendants who have had a general verdict entered against them.

Each defendant is totally liable for that judgment. Thus, the one with the deepest pockets often gets to pay, (i.e., the insured defendant).

Alabama's prohibition against contribution is based upon the equitable maxim that " . . . no man can make his own misconduct the ground for an action in his own favor." Sherman Concrete Pipe Machinery, Inc., v. Gadsden Concrete & Metal Pipe Co., Inc., 335 So. 2d 125, 127 (Ala. 1976).

2. Separate jury verdicts:

A jury verdict that assesses separate amounts (equal or unequal) against joint tort-feasors is an illegal verdict. Reese v. Trism Specialized Carriers, Inc., 718 So. 2d 49, 51 (Ala. Civ. App. 1997).

There are two public policies that provide the basis for this rule. Gobble, 147 So. at 620. The first public policy is the discouragement of tortious conduct by subjecting joint tort-feasors to full liability for their actions *(as opposed to a pro rata share)*. Id. The second public policy is the preservation of state resources by not involving the courts in disputes between parties that have disregarded the law. Id.

3. Burden:

Alabama courts are extremely hesitant to permit contribution among joint tort-feasors, and impose a very high burden of proof on parties seeking contribution. Consolidated Pipe, 365 So. 2d at 971.

*Note: Alabama courts will recognize a party's statutory right to contribution or indemnity from joint tort-feasors.*

*See*, Consolidated Pipe, 365 So. 2d at 971 (recognizing that Alabama's Commercial Code provides for contribution in products liability cases involving breaches of warranty, if proper notice has been given pursuant to Ala. Code §7-2-607).

*See*, Redwing Carriers, Inc., v. Saraland Apartments, Ltd., 875 F. Supp. 1545, 1568 (S.D. Ala. 1995) (holding that CERCLA actions permit contribution among joint tort-feasors if the damages are divisible).

*Contrast*, Lane v. United Steelworkers of America, 871 F. Supp. 1434, 1435 (N. D. Ala. 1994) (holding that neither the Equal Pay Act nor Title VII permits contribution).

Alabama courts also recognize a party's right to contribution and indemnity in maritime cases. Alabama Power Co. v. Marine Builders, Inc., 475 So. 2d 168, 184 (Ala. 1985).

The exceptions permitting contribution or indemnity apply solely to compensatory damages.

Alabama also allows limited statutory indemnification in regulations concerning automobile dealerships and the workers' compensation laws.

4. Punitive damages:

Alabama law does not allow punitive damage awards to be apportioned among tort-feasors. Alabama Power, 475 So. 2d at 180. This rule is based upon the belief that apportioning punitive damage awards lessens the deterrent effect of punitive damages. Id.

5. When contribution or indemnity allowed:

(a) *By statute*:

Ala. Code 1975, § 7-2-607.

(b) *Common law*:

Alabama recognizes an equitable right to contribution or indemnity if a party's liability is "technical" or "constructive" and another party's actions were the proximate or primary cause of the injury. Crigler, 438 So. 2d at 1385. To successfully establish that he or she is entitled to equitable contribution or indemnity, a party must be able to prove that he or she did not actively or affirmatively contribute to the plaintiffs injury. Sherman Concrete, 335 So. 2d at 127.

This type of indemnity usually arises when the constructive liability arises out of a non-delegable duty (employer v. employee) or a public duty (construction of a sidewalk) or master-servant/principal-agent relationships. *See e.g.,* Alabama Power Co. v. Marine Builders, Inc., 475 So. 2d 168 (Ala. 1985).

(c) *Contractually*:

The Alabama Supreme Court has, on a number of occasions, made it clear that it does not favor indemnity provisions. However, indemnity provisions are enforceable if there is a clear and concise writing confirming the intent of the parties.

# VII. INDEMNITY AGREEMENTS

## A. INTERPRETATION AND ENFORCEABILITY OF INDEMNITY AGREEMENTS

1. Test to uphold an indemnity contract:

   (a) The contract clearly indicates an intention to indemnify against the consequences of the indemnitee's negligence;

   (b) Such provision was clearly understood by the indemnitor; and,

   (c) There is not shown to be evidence of a disproportionate bargaining position in favor of the indemnitee.

   Industrial Tile, Inc. v. Stewart, 388 So. 2d 171 (Ala. 1980).

2. General rules:

   Alabama courts will enforce indemnity agreements for negligence if they are "unambiguous and unequivocal." Royal Ins. Co. of Am. v. Whitaker Contracting, 824 So. 2d 747 (Ala. 2002); City of Montgomery v. JYD Int'l, 534 So. 2d 592, 594 (Ala. 1988) (citing, Industrial Tile, Inc. v. Stewart, 388 So. 2d 171 (Ala. 1980), cert. denied, 449 U.S. 1081, 101 S. Ct. 864, 66 L.Ed. 2d 805 (1981)); Brown Mechanical Contractors v. Centennial Ins., 431 So. 2d 932 (Ala. 1983).

   There is no requirement that an indemnity agreement contain any "talismanic" language specifically referring to the indemnitee's own negligence. Nationwide Mut. Ins. Co. v. Hall, 643 So. 2d 551 (Ala. 1994); Brown Mechanical Contractors, Inc. v. Centennial Ins. Co., 431 So. 2d 932 (Ala. 1983).

3. Industrial Tile, Inc. v. Stewart:

   In Industrial Tile Inc. v. Stewart, 388 So. 2d 171, 172 (1980), *cert. denied*, 449 U.S. 1081, 101 S. Ct. 864, 66 L.Ed. 2d 805 (1981), John Stewart sued several parties after suffering injuries from uninsulated high voltage wires. One of the parties, Courtaulds Inc, asserted its right to indemnification pursuant to an agreement with its contractors. Industrial Tile, 388 So. 2d at 172. The Supreme Court of Alabama reviewed Courtaulds agreement with its contractors and reversed an earlier dismissal of the indemnification claim. Id. at 176.

*Agreement*:

The Contractor [Industrial Tile] shall be solely responsible to indemnify and hold harmless the Owner [Courtaulds], its agents, servants and employees, from and against any and all claims, losses, suits, damages, judgments, expenses, costs and charges of every kind and nature, whether direct or indirect, on account of or by reason of, bodily injuries (including death) to any person or persons . . . whether or not caused or contributed to, or alleged to have been caused by or contributed to, by the active passive, affirmative, sole or concurrent negligence or breach of any statutory duty, whether non-delegable or otherwise on the part of the owner . . .

Industrial Tile, 388 So. 2d at 175.

Ex Parte Holland Mfg., 689 So. 2d 65, 67 (Ala. 1996) (*citing*, Industrial Tile, for the governing rules in interpreting indemnity agreements); Nationwide Mut. Ins. v. Hall, 643 So. 2d 551, 556 (Ala. 1994) (noting that, under Industrial Tile, a court must find a "clear and unambiguous" intent to indemnify the indemnitee for his negligence"); Beazer East, Inc. v. Mead Corp., 34 F. 3d 206, 215-16 (3d Cir. 1994) (applying Alabama law under Industrial Tile and Hall and noting that these cases require that intent to indemnify be clear).

4. Nationwide Mutual Insurance Co. v. Hall:

In 1994, the Alabama Supreme Court addressed the issue of indemnity in the context of a contractual relationship between an apartment building manager and the building owner. Nationwide Mutual Insurance Co. v. Hall, 643 So. 2d 551 (Ala. 1994). After paying a settlement on behalf of the manager arising from a fatal apartment fire, the manager's insurer filed an action against the building owner and the owner's insurer for reimbursement of the settlement monies paid. The court had to determine "whether an indemnity clause in the Rental Management Agreement between Friedlander and Hall is enforceable." Id. at 553.

(a) *Agreement*:

Owner agrees to save agent harmless from all damage suits and claims arising in connection with said property and from all liability for injuries to persons or property while in, on, or about the premises. Owner agrees to carry, at his own expense, appropriate amounts of public liability insurance and such other liability insurance as may be reasonably applicable to this property[;] said policies shall be so endorsed as to protect agent in

the same manner and to the same extent as owner. If these policies or endorsements are not furnished to agent within 10 days after execution of this agreement, coverage may be secured by agent and charged to owner, although agent does not assume this responsibility.

Id.

(b) *Trial Court*:

The trial court held that "the indemnity provision of the management agreement was unenforceable because it did not contain unambiguous language evincing an intent to indemnify Friedlander for the consequences of its own negligence." Id. at 555. Both Hall and Alfa argued the indemnity agreement lacked certain "critical language" which appears to be language specifically referring to the negligence of the indemnitee. Id. at 556. Hall and Alfa further argued that Friedlander, the indemnitee, was "actively negligent" where Hall argues it was only "technically liable." Id.

(c) *Holding*:

The Supreme Court refused to recognize any distinction between active and passive negligence in interpreting an indemnity agreement. Id. The Court recognized the test is one of intent which is "qualified by the requirement that to be sufficient any expression of intent to indemnify for the consequences of one's own negligence had to be clear and unambiguous." Id. The court held:

> The language of the indemnity provision of the Friedlander management contract makes no specific references to its application to the negligence of Friedlander, the indemnitee. It simply states without qualification that Hall, the "Owner," agrees to indemnify Friedlander "from all damage suits and claims arising in connection with the property" and "from all liability for injuries to persons or property while in, on, or about the premises." The provision contains no language referring to the party responsible for such "damage suits," “claims," or "liability." It is this allegedly "critical language," i.e. language specifically referring to the negligence of the indemnitee, or, more generally, the lack of "specificity" which, according to Hall and Alfa, makes the provision unenforceable. We reiterate,

however, that talismanic or thaumaturgic language, such as a specific reference to the negligence of the indemnitee, is not necessary if the requisite intent is otherwise clear. Brown Mechanical Contractors, 431 So. 2d at 945.

Reading the indemnitee provision and the management contract as a whole, we conclude that Friedlander and Hall expressed in clear and unambiguous language an intention that Hall would indemnify Friedlander for *all* liability for damages arising from property damage in connection with the management of the apartment and for all liability for personal injury suffered on the premises of the apartments. The provision is not made ambiguous merely because it did not expressly provide that the language "all damage suits and claims" and "all liability" included suits, claims, or liability arising from Friedlander's own negligence. That the indemnity provision also obligated Hall to carry public liability insurance protecting Friedlander to the same extent as it protected Hall further supports our conclusion that the parties intended that Hall would indemnify Friedlander fully from all liability arising from Friedlander's management of the apartment building.

Moreover, nothing in the record indicates or suggests that the parties did not knowingly, evenhandedly, and intelligently enter into this agreement. The Friedlander management agreement is less than two pages long, and the indemnity provision is printed on the first page. Hall and Friedlander are in the business of commercial real estate investment and management and nothing in the record indicates that Hall was unsophisticated or that he was unable to obtain the advice of counsel.

Id. at 556-557.

5. Other cases:

(a) Apel Machine & Supply Co., Inc. v. J.E. O'Toole Engineering Co., Inc., 548 So. 2d 445 (Ala. 1989) (upholding an indemnity clause providing: "Contractor hereby agrees to indemnify and hold harmless Owner . . . from any and all claims, suits, or judgments, based upon damage to property or injury or death to persons arising out of, or connected with, the work covered by the contract, regardless of how it may be caused. . . .)

(b) Brown Mechanical Contractors, Inc. v Centennial Insurance Co., 431 So. 2d 932 (Ala. 1983), (finding language referring to work performed "by . . . , for and on behalf of the subcontractor" to be ambiguous as to any indemnification for the acts of the general contractor).

(c) Craig Const. Co., Inc. v. Hendrix, 568 So. 2d 752 (Ala. 1990); Humana Medical Corporation v. Bagby Elevator Company, Inc., 653 So. 2d 972 (Ala. 1995) (holding an indemnity clause providing that "Vendor [Bagby] hereby indemnifies and holds the Hospital, its directors, officers and employees harmless from and against any and all claims, demands, suits (including legal expenses in connection therewith), judgments or awards arising out of or in any way connected with the activities of Vendor, its employees, during the term of this agreement" did not clearly and unequivocally require Vendor to indemnify the hospital for the hospital's acts of negligence). (Emphasis supplied by Court.)

## B. MISCELLANEOUS APPLICATIONS

1. Public policy:

Alabama Courts have refused to enforce an indemnity agreement as against public policy. Price-Williams Assoc., Inc. v. Nelson, 631 So. 2d 1016 (Ala. 1994); City of Montgomery v. JYD Int'l, 534 So. 2d 592, 592-93 (Ala. 1988) (looking to the amount of control one party exercised over the area in which an injury occurred before refusing to enforce an indemnity agreement).

2. Indemnity v. Workers' Compensation Exclusivity:

The Alabama Supreme Court has held that the worker's compensation exclusivity provision does not bar an attempt by a third party to obtain contractual indemnity from an employer for injuries to its employee. McInnis Corp. v. Nichols Concrete Constr., Inc., 733 So. 2d 418 (Ala. Civ. App. 1998); GoodYear Tire & Rubber Co. v. J.M. Tull Metals Co., 629 So. 2d 633 (Ala. 1993).

## C. INDEMNIFICATION FOR ATTORNEY FEES

Under Alabama common law, attorney fees are recoverable as costs in an action only where authorized by contract, in certain cases of equity, or by statute. Buckley v. Seymour, 679 So. 2d 220, 227 (Ala. 1996); Subway Restaurants, Inc. v. Madison Square Associates, Ltd., 613 So. 2d 1255, 1257 (Ala. 1993).

In 1988, the Alabama Supreme Court cursorily affirmed a trial court's decision to award attorneys fees pursuant to an indemnification agreement although it disagreed with the trial court's amount of fees awarded. Freeman WreckingCompany, Inc. v. City of Prichard, 530 So. 2d 235 (Ala. 1988).

The Alabama Supreme Court's decision in Freeman Wrecking is consistent with other jurisdictions on this issue. "As a general rule, an indemnitee is entitled to recover, as part of the damages, reasonable attorney's fees, and reasonable and proper legal costs and expenses, even though not expressly mentioned." 42 C.J.S. Indemnity § 20 (1968); Insurance Company of North America v. M-V Ocean Lynx, 901 F. 2d 934 (11th Cir. 1990); Lirette v. Union Texas Petroleum Corp., 467 So. 2d 29 (1st Cir. La. 1985); Bunce v. Skyline Harvestore Systems, Inc., 348 N.W. 2d 248 (Iowa 1984) (finding reasonable defense expenses are recoverable by an indemnitee in the absence of language evidencing a contrary intent in the contract). Although some jurisdictions require specific language concerning indemnification for "attorneys fees" in order for such costs to be recoverable by an indemnitee, as noted above, this is not the case in Alabama. Cf. Beaudin v. Michigan Bell Telephone Co., 403 N.W. 2d 76,157 Mich. App. 185 (1986).

Notwithstanding the foregoing, an indemnitee owes an indemnitor a duty of good faith in making reasonable charges for attorney fees. Kilgor v. Union Indemnity Co., 132 So. 901 (Ala. 193 1).

## D. EFFECT OF PARTIAL NEGLIGENCE ON OPERATION OF INDEMNITY CLAUSE

In McBro, Inc. v. M & M Glass Co., 611 So. 2d 283 (Ala. 1992), an indemnity agreement containing language whether "caused in whole or in part by any negligent act . . . of the contractor" was held to be enforceable by a construction manager against a contractor. The Court cited McDevitt & Street Co. v. Mosher Steel Co., 574 So. 2d 794 (Ala. 1991), and noted that in a case involving a similar clause, a judgment in favor of the indemnitee was rendered even though the indemnitee was partially, although not solely, at fault for the underlying injury.

Issues have arisen concerning insurance coverage involving a subcontract which stated one party was to be indemnified "even if [this party] or others are claimed to be partially or concurrently negligent." This phrase has not previously been interpreted in a reported decision by any Alabama Court. Most of the contracts addressed by this state's courts include the terms "solely" or "wholly.” However, other states have interpreted clauses that do not contain words such as "solely" in the indemnification clause to require indemnity for the indemnitee in cases where the employee of the indemnitor sued the indemnitee. Although not factually identical, one Court found that where the indemnitor was partially at fault, although protected by the exclusivity provision of a Workers' Compensation Act,

the indemnitor would have to indemnify it where the indemnitee was only partially at fault per the terms of the agreement. *See,* Precision Air v. Standard Chlorine of Delaware, Inc., 654 A. 2d 403 (Del. 1995); Babcock & Wilcox Company v. Fischbach and Moore, Inc., 280 A. 2d 582 (Pa. 1971).

# VIII. WRONGFUL DEATH

## A. PUNITIVE DAMAGES

Under Alabama law, a plaintiff's recovery for wrongful death is limited to punitive damages. King v. National Spa & Pool Institute, Inc., 607 So. 2d 1241, 1248 (Ala. 1992); In re Amtrak "Sunset Ltd." Train Crash, 1121 F.3d 1421, 1423 (11th Cir. 1997) (cert. denied 552 U.S. 1110, 118 S. Ct. 1041 (Feb. 23, 1998)); Ala. Code 1975, § 6-5-410 et seq. Alabama is the only state with a "punitive damages only" wrongful death statute.

1. Proof required:

Alabama law specifically provides that, in a wrongful death case, punitive damages are recoverable upon a showing of simple negligence. In re Amtrak, 121 F. 3d at 143; Ala. Code 1975, §§ 6-5-391(a) (addressing death of a minor) and 6-5-410(a) (1993).

2. Rationale:

Speaking of its rationale for only allowing punitive damage awards in wrongful death cases, the Alabama Supreme Court stated as follows:

> [t]he damages assessed in a wrongful death action are imposed against the tort-feasor for the purpose of preserving human life, to punish the tort-feasor for the wrongful act, and to deter the tort-feasor and others from similar conduct in the future.

Ex parte Cincinnati Insurance Co., 689 So. 2d 47, 50 (Ala. 1997).

3. Damages excluded:

Damages for wrongful death do not include economic losses and future earnings. Damages do not include personal injuries and suffering unless suit is filed alleging such damages before the individual's death. Lance, Inc. v. Ramanauskas, 731 So. 2d 1204, 1218 (Ala. 1999). A plaintiff with a case pending before death can recover compensatory damages for pain

and suffering prior to death. Industrial Chemical and Fiberglass Corporation v. Chandler, 547 So. 2d 812 (Ala. 1988); King v. National Spa & Pool Institute, Inc., 607 So. 2d 1241 (Ala. 1992).

4. Damages:

Damages are based on the culpability of the defendant and the enormity of the wrong, and they are imposed for the preservation of human life. Magnusson v. Swan, 279 So. 2d 425 (Ala. 1973). Therefore, the decedent's age, economic status, health, occupation, etc. are irrelevant and not to be taken into consideration by the jury.

5. Cap on damages:

Alabama does not place any limitation on the amount a party can recover in a wrongful death action. In addition, the Alabama Supreme Court has held that nothing in the wrongful death statute authorizes a jury to apportion damages among joint tort-feasors. Campbell v. Williams, 638 So. 2d 804, 809 (Ala. 1994) (cert. denied 513 U.S. 868, 115 S. Ct. 188 (Oct. 3, 1994)).

6. Subrogation:

In Ex parte Cincinnati Ins. Co., 689 So. 2d 47 (Ala. 1997), the Court held that a worker's compensation carrier could amend its complaint to allege wrongful death where the comp carrier paid death benefits and proceeded with a third party suit after the decedent's wife chose not to do so. (Comp carriers have six months after statute runs in which to file third party suit.) The Court said the carrier could seek an award of punitive damages, and in order to allow a jury to deter such future acts by the third party defendant, the jury may need to impose damages in excess of the comp carrier's subrogation interest.

## B. RECOVERY OF PERSONAL INJURY DAMAGES

1. Survival statute:

Under the survival statute, should the plaintiff die as a result of the injuries alleged in the original complaint, a properly substituted personal representative may amend the original complaint to add a wrongful death claim. Ala Code § 6-5-462, et seq.

> **Note:** Tort claims alleging conversion, intentional misconduct, bad faith and fraud do not survive the death of the claimant. McCulley v. SouthTrust Bank of Baldwin County, 575 So. 2d

1106 (Ala. 1991); Smith v. Equifax Services, Inc., 537 So. 2d 463 (Ala. 1988); McMahan v. Old Southern Life Ins. Co., 512 So. 2d 94 (Ala. 1987); Country Side Roofing and Sheet Metal, Inc. v. Mutual Ben. Life Ins. Co., 587 So. 2d 987 (Ala. 1991).

2. King v. National Spa & Pool Institute, Inc., 607 So. 2d 1241 (Ala. 1992):

In this case, the Alabama Supreme Court overturned longstanding wrongful death case law which prohibited a plaintiff from recovering damages for personal injuries that subsequently resulted in the plaintiffs death. King, 607 So. 2d at 1246; Patterson v. Hayes, 623 So. 2d 1142, 1145 (1993) (holding that the King decision did not apply retrospectively). The King court held that plaintiffs are entitled to recover damages for both personal injury and wrongful death if they file a personal injury action prior to their death. King, 607 So. 2d at 1248.

Subsequent decisions have strictly limited this holding to cases where a plaintiff filed a personal injury action prior to their death. Id. at 1246; Patterson, 623 So. 2d at 1145; Jones v. DCH Health Care Authority, 621 So. 2d 1322, 1323 (Ala. 1993); Huckaby v. East Alabama Medical Center, 830 F. Supp. 1399, 1403 (M.D. Ala. 1993).

3. Where personal injury suit filed before death:

In cases where the parties to the personal injury claim and the wrongful death claim are identical and the causes of action arise from the same set of facts, the plaintiff must bring both claims in a single action. Ex parte Burnham Service Co., Inc., 649 So. 2d 1270, 1273 (Ala. 1994).

Because Alabama law only allows a party to recover punitive damages for wrongful death, the wrongful death claim displaces any claim for punitive damages on the plaintiffs personal injury claim. King, 607 So. 2d at 1248. Therefore, the plaintiff is only entitled to recover compensatory damages for his personal injuries. *(i.e., medical expenses, lost wages, pain and suffering, etc.)* Id.

4. Amendment and relation back:

Plaintiffs will often attempt to amend their complaint to allege a claim for personal injuries on the theory that the amendment "relates back" to the original complaint. Malcom v. King, 686 So. 2d 231, 236 (Ala. 1996); Ala. R. Civ. P. 15(c) (2). The Alabama Supreme Court has rejected plaintiffs' attempts to fit their case into the strict requirements of King v. National Spa & Pool Institute by subsequently filing a personal injury claim and alleging that it should be allowed in the wrongful death suit

because the personal injury claim relates back to the date of the filing of the original complaint. Id. However, the Supreme Court's opinion in Malcom v. King suggests that it would allow such an amendment in a proper case. Id.

The Malcom v. King court refused to allow the plaintiff to assert a claim for personal injuries by amending his wrongful death complaint. Id. The court based its ruling on its finding that the acts that formed the basis for the wrongful death claim ". . . were distinctly different, both in time as well as in regard to conduct, from the acts that formed the basis for the personal injury claim filed on October 31, 1991. . . ." Id. However, the Alabama Supreme Court phrased the issue before it in Malcom v. King in such a narrow fashion, that one might expect the court to allow such an amendment in the right case. Id. The Malcom court phrased the issue before it as follows:

> whether a personal injury claim, upon which an action is filed on behalf of the decedent, **after** his death, survives the death of the decedent by relating back under rule 15(c) (2) to the date of the filing of the decedent's complaint alleging a personal injury claim against a different defendant filed **before the decedent's death**.
>
> Id.

5. Who can maintain a wrongful death suit:

6. Alabama's wrongful death statute permits an adult's personal representative to commence an action for wrongful death. Ala. Code 1975, § 6-5-410(a) (1975).

Personal representative is defined as either the executor or administrator of the injured testator or intestate. Downtown Nursing Home, Inc. v. Pool, 375 So. 2d 465 (Ala. 1979) (cert. denied, 445 U.S. 930, 100 S. Ct. 1318) (Mar. 17, 1980).

Generally, the personal representative must be formally appointed before the statute of limitations runs or the suit is a nullity. In Pool, 375 So. 2d 465, plaintiff filed suit within the statute of limitations but did not become appointed as the personal representative until after the statute had run. The plaintiff could not amend the suit, and the amendment did not relate back to the date the suit was filed. Suit dismissed.

However, Alabama's statute governing wrongful death actions involving minors permits the child's custodial parents as well as the child's personal representative to maintain a wrongful death action. Alabama Code 1975,

§ 6-5-391(a) (1975). The reader should note that a noncustodial parent lacks standing to maintain a wrongful death action on behalf of a child. Miller v. Dismukes, 624 So. 2d 1038 (Ala. 1993); Gladhill v. Lamar County Commission, 698 So. 2d 113, 115 (Ala. 1997).

### C. WRONGFUL DEATH OF A MINOR

An action for the wrongful death of a minor is governed by Alabama Code 1975, § 6-5-39.

The statute was created for the benefit of the parents.

Parental contributory negligence may bar recovery in instances of simple negligence. However, in suits alleging culpability higher than simple negligence, it will not act as a defense. Collins v. Wilkinson, 679 So. 2d 1100 (Ala. Civ. App. 1996); Peoples v. Seamon, 249 Ala. 284 (Ala. 1947).

Recovery under the Wrongful Death statute is allowed for the death of a stillborn fetus. Eich v. Gulf Shores, 293 Ala. 95, 300 So. 2d 354 (1974), Gentry v. Gilmore, 613 So. 2d 12411244 (Ala. 1993) (*discussing recovery for wrongful death only if fetus is viable*).

## IX. PRODUCT LIABILITY

Alabama's product liability law is unique, because, unlike most jurisdictions, Alabama has not adopted strict liability. Alabama has adopted the Alabama Extended Manufacturer's Liability Doctrine (hereinafter "AEMLD"), which is a fault-based doctrine. Plaintiffs may also characterize their product liability action as a breach of warranty or negligence.

The expressed intent of the AEMLD is to ameliorate the stringent evidentiary burden on plaintiffs in product liability cases grounded in traditional theories of negligence and wantonness.

### A. THE ALABAMA EXTENDED MANUFACTURER'S LIABILITY DOCTRINE (AEMLD)

1. Strict liability?:

The language of AEMLD is identical to that of § 402(A) of the Restatement of Torts. Casrell v. Altec Industries, 335 So. 2d 128,132-33 (Ala. 1976); Atkins v. American Motors Corp., 335 So. 2d 134, 141 (Ala. 1976); Graham v. Sprout-Waldren & Co., 657 So. 2d 868, 870 (Ala.

1995); Rutledge v. Arrow Aluminum Industries, Inc., 733 So. 2d 412 (Ala. Civ. App. 1998). However, the AEMLD has specifically rejected the concept of strict liability and retained "fault" as its basis for liability. Casrell, 335 So. 2d at 130.

2. Elements:

(a) That he suffered injury or damages to himself or his property by one who sells a product in a defective condition unreasonably dangerous to the plaintiff as the ultimate user or consumer, if the seller is engaged in the business of selling such a product, and it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(b) Showing these elements, the plaintiff has proved a prima facie case although

(i) the seller has exercised all possible care in the preparation and sale of its product; and

(ii) the user or consumer has not bought the product from, or entered into any contractual relation with the seller.

Casrell, 335 So. 2d at 132-33; Atkins, 335 So. 2d at 141; Graham, 657 So. 2d at 870; Rodgers v. Shave Mfg. Co., 993 F. Supp. 1428 (M.D. Ala. 1998).

3. Seller:

The seller can be the manufacturer, the supplier, the retailer, the marketer or the entity that placed the product on the market. It is not necessary that there was an actual exchange of money for a "sale".

(a) Non-sale transactions:

The Alabama Supreme Court has recognized that "non-sale" transactions can result in AEMLD liability. First Nat'l Bank of Mobile v. Cessna Aircraft Co., 365 So. 2d 966 (Ala. 1978). *See also*, American States Ins. Co. v. Lanier Business Products, 707 F.Supp. 494 (M.D. Ala. 1989). The Court specifically held that AEMLD liability should attach ". . . when a product is placed in the stream of commerce, . . . whether by demonstration, lease, free sample or sale. . . ." Id. at 968. The Court appears to have based its holding on the manufacturer's profit motive. Id.

(b) Privity of contract:

A plaintiff need not show privity in an AEMLD claim, nor is the plaintiff required to show privity in a breach of warranty action unless plaintiff's sole injury is economic loss. Wellcraft Marine v. Zarzour, 577 So. 2d 414 (Ala. 1990); Rampey v. Novartis Consumer Health, Inc., 867 So. 2d 1079, 1087 (Ala. 2003).

4. Defective:

A product is defective if it is unreasonably dangerous. Casrell, 33 5 So. 2d at 13 1; Moore v. Kawasaki Motors Corp., USA, 703 So. 2d 990 (Ala. Civ. App. 1997). Therefore, if a product is "unreasonably dangerous," it is necessarily defective and the consumer is not required to prove defectiveness as a separate matter. The defect can be in the manufacturing of the product, the design of the product, the warnings on the product or in the instructions.

(a) Plaintiffs must prove that the product was in a defective condition when it left the defendant's control, and speculation as to the existence of a defect is insufficient to survive summary judgment. Allstate Ins Co. and Ceruzzi v. Mitsubishi Electric America, Inc., 709 So. 2d 1306 (Ala. Civ. App. 1998).

(b) Even if the defect did not cause the accident, plaintiff has a product liability claim if the defect contributed to or exacerbated plaintiff's injuries. Volkswagen of America, Inc. v. Marinelli, 628 So. 2d 378 (Ala. 1993).

(c) Damage to product itself:

A plaintiff does not have a claim under AEMLD where his/her sole damages are the defective product itself. Wellcraft Marine v. Zarzour, 577 So. 2d 414 (Ala. 1990). In that situation, plaintiff's remedy is breach of warranty. *See also,* Lloyd Wood Coal Co. v. Clark Equipment Co., 543 So. 2d 671 (Ala. 1989); Rampey v. Novartis Consumer Health, Inc., 867 So. 2d 1079, 1087 (Ala. 2003).

5. Design defect:

(a) Proof:

(i) In design defect cases, the plaintiff must prove that a safer, practical, alternative design was available to the

manufacturer when it manufactured the product. Townsend v. General Motors Corp., 642 So. 2d 411, 418 (Ala. 1994); Brest v. Chrysler Corp., 939 F. Supp. 843, 846 (M.D. Ala. 1996) citing, Beech v. Outboard Marine Corp., 584 So. 2d 447, 450 (Ala. 1991)).

However, merely showing that a safer design is technically feasible is not sufficient; the plaintiff must also show that the alternative design could be adapted to the existing market. Frantz v. Brunswick Corp., 866 F. Supp. 527, 535 (S.D. Ala. 1994).

(ii) To carry the burden of proving that a safer, practical, alternative design existed at the time the product was manufactured, the plaintiff must prove that his or her injuries would have been eliminated or reduced by the alternative design, and that the utility of the alternative design outweighed the utility of the design actually used. Townsend, 642 So. 2d at 418; Brest, 939 F. Supp. at 846.

(b) To determine if the alternative design's utility outweighs the utility of the design actually used, courts consider the following factors:

(i) the intended use of the product;

(ii) its styling;

(iii) its cost;

(iv) its desirability;

(v) its safety aspects;

(vi) the foreseeability of a particular accident;

(vii) the likelihood of injury;

(viii) the probable seriousness of the injury if that accident occurred;

(ix) the obviousness of the defect; and

(x) the manufacturer's ability to eliminate the defect.

Id.

(c) If the plaintiff is successful in proving that a safer, practical alternative design was available to the manufacturer, compliance with industry standards is not a complete defense to AEMLD liability. Frantz, 866 F. Supp. at 534.

6. Used products:

The Alabama Supreme Court has recognized that a party can incur AEMLD liability for selling used products. Rhodes v. Tractor & Equipment Co., 677 So. 2d 194, 196 (Ala. 1995).

7. Statute of repose:

(a) Alabama does not have a statute of repose that applies to product liability cases. Ala. Code 1975, § 6-5-500, et seq.; Lankford v. Sullivan, Long & Hagerty, 416 So. 2d 996 (Ala. 1982).

Although the legislature did enact legislation containing a ten-year statute of repose, the Alabama Supreme Court held that the statute was unconstitutional. Ala. Code 1975, § 6-5-500 1975, et seq.; Lankford v. Sullivan, Long & Hagerty, 416 So. 2d 996 (Ala. 1982). The legislature subsequently repealed this legislation and has yet to reenact a similar bill.

(b) Interestingly, Alabama does have a common-law rule of repose that bars actions which are not instituted for more than 20 years from the time they could have been commenced. Ex parte Grubbs, 542 So. 2d 927 (Ala. 1989); Tierce v. Ellis, 624 So. 2d 553, 554 (Ala. 1993); Willis v. Shadow Lawn Memorial Park, et al., 709 So. 2d 1241 (Ala. Civ. App. 1998).

(c) Alabama also has a statute of repose that applies in cases against architects, engineers, and builders in which the product at issue is an improvement to real property. Ala. Code 1975, §§ 6-5-220 and 6-5-221.

This statute bars any action that "accrues" (or would have accrued) more than thirteen (13) years after construction is "substantially complete." Id. Note that the 13 - year statute of repose does not apply if the architect, engineer, or builder was aware of the defect or deficiency prior to the expiration of the 13 - year period, and did not disclose that fact. Ala. Code 1975, § 6-5-221(a) (1993). There do not appear to be any reported decisions interpreting or applying § 6-5-221. Baugher v. Beaver Construction Co., 791 So. 2d 932 (Ala. 2000).

## B. DEFENSES TO PRODUCT LIABILITY

In Haisten v. Kubota Corp., 648 So. 2d 561, 565 (Ala. 1994), the Court stated there are currently four recognized defenses to AEMLD liability. Those include: (1) lack of causal connection; (2) assumption of the risk; (3) contributory negligence; and (4) product misuse. Part of the rationale for these defenses arises from the Court stating that a "manufacturer of a product does not insure against all harm that might be caused by the use of the product, and the manufacturer or designer is not obligated to produce an accident-proof or injury-proof product." Brooks v. Colonial Chevrolet Buick, 579 So. 2d 1328 (Ala. 1991). *See also,* Townsend v. General Motors Corp., 642 So. 2d 411 (Ala. 1994).

1. Lack of causal connection defense:

   (a) Although considered a defense, this principle is not meant to shift the burden of proof to the defendant but to allow the defendant to prove through the evidence that there is no causal relationship between the defendant's activities in connection with handling the product and the product's alleged defective condition.

   (b) Sealed container doctrine:

   This may also be known as the "new-in-a-box" doctrine. This defense is primarily used by retailers in products liability cases.

   (i) Elements of defense:

   (1) Defendant is in the business of either distributing or processing finished products for distribution;

   (2) Defendant received a product already in a defective condition;

   (3) Defendant did not contribute to, or have knowledge of, this defective condition; and,

   (4) Defendant did not have an opportunity to inspect the product which was superior to the consumer's knowledge or opportunity.

   Atkins, 335 So. 2d at 143; Allen v. Delchamps, 624 So. 2d 1065,1069 (Ala. 1993); Charpie v. Lowe's Home Centers, Inc., 930 F. Supp. 1498, 1501 (M.D. Ala. 1996).

(ii) This defense is only available to persons distributing, but not manufacturing, a finished product. Foremost Insurance v. Indies House, Inc., 602 So. 2d 380 (Ala. 1992); Hicks v. Vulcan Engineering Co., 749 So. 2d 417 (Ala. 1999).

(iii) In Caudle v. Partridge, 566 So. 2d 244 (Ala. 1990), the Alabama Supreme Court rejected this defense in a case where a defendant retailer (owner of off-road vehicle shop) sold plaintiff a conversion kit to convert his two wheel drive truck to four wheel drive because the defendant had superior knowledge of the nature of the converted trucks. Wakeland v. Brown & Williamson Tobacco Corp., 996 F.Supp. 1213 (S.D. Ala. 1998) (A defendant involved only in distributing and selling a product is entitled to the defense of lack of causal relation as a matter of law).

(c) A defendant's "superior opportunity to inspect" must be meaningful. It does not apply if it could not have discovered the defect through a reasonable inspection (i.e., a latent defect) or did not have an opportunity superior to that of the plaintiff to inspect. Id.; Dickerson v. Cushman, 909 F. Supp. 1467, 1468 (M.D. Ala. 1995).

(d) There are two circumstances in which the "lack of causal relation" defense is unavailable. Casrell, 335 So. 2d at 134; Atkins, 335 So. 2d at 143; Johnson v. Niagra Machine & Tool Works, 555 So. 2d 88, 90-91 (Ala. 1989); Sears Roebuck & Co. v. Morris, 273 Ala. 218, 136 So. 2d 883 (1961).

(i) to a manufacturer when the defect is in a component part; or

(ii) to a distributor who distributes a product under its trade name. Id.

2. Assumption of the risk defense:

(a) Elements of defense:

(i) the plaintiff must actually recognize and appreciate the danger he is incurring; and,

(ii) the plaintiff must voluntarily consent to bearing that risk. Kelton v. Gulf States Steel, Inc., 575 So. 2d 1054, 1055 (Ala. 1991); Grider v. McKenzie, 659 So. 2d 612, 617

(Ala. Civ. App. 1994); Hicks v. Commercial Union Ins. Co., 652 So. 2d 211 (Ala. 1993); H.R.H. Metals, Inc. v. Miller, 833 So. 2d 18 (Ala. 2002).

(b) Assumption of the risk does not concern itself with what a reasonable person would have recognized, appreciated, and voluntarily consented to; it requires that the particular plaintiff involved in the case actually recognize and appreciate the danger (*i.e., the analysis is subjective, not objective*). Superskate, Inc., v. Nolen, 641 So. 2d 231, 237 (Ala. 1994). For example, the plaintiff must testify that he knew he should be tied off while erecting steel on a skyscraper because that would prevent him from falling, but that he didn't use his safety grab because it slowed him down.

3. Contributory negligence defense:

(a) The defense of contributory negligence is determined objectively based upon the "reasonable man" standard of care. Gulledge v. Brown & Root, Inc., 598 So. 2d 1325, 1328 (Ala. 1992). Thus, the defense of contributory negligence focuses on whether the plaintiff's conduct was "unreasonable" when compared to a "reasonable man's conduct." Although it should not matter what the particular plaintiff at issue knew and appreciated for the purposes of establishing contributory negligence as a defense, Alabama courts often use the term "contributory negligence" to describe an "assumption of the risk" analysis. Dennis v. American Honda Motor Co., 585 So. 2d 1336, 1340 (Ala. 1991); Campbell v. Cutler Hammer, 646 So. 2d 573, 577 (Ala. 1994).

**Note**: Failure to wear a seat belt is not considered per se contributory negligence in Alabama, but can constitute contributory negligence in proper cases. General Motors Corp. v. Saint, 646 So. 2d 564, 566 (Ala. 1994).

(b) At one time, the Alabama Supreme Court indicated that contributory negligence was only a defense to AEMLD liability if it amounted to product misuse. Harley-Davidson v. Toomey, 521 So. 2d 971 (Ala. 1988); Dennis, 585 So. 2d at 1339; Williams v. Delta Internat'l Machine Corp., 619 So. 2d 1330, 1332 (Ala. 1993). These rulings had the effect of requiring defendants to meet the additional burdens of the product misuse defense (discussed below). However, in 1994 the Alabama Supreme Court issued three opinions that clearly held that AEMLD defendants are entitled to assert contributory negligence as a defense if the plaintiff used the product at issue in an unreasonable manner.

General Motors Corp. v. Saint, 646 So. 2d 564 (Ala. 1994); Campbell, 646 So. 2d at 577; Haisten, 648 So. 2d at 565 (*See also,* Uniroyal Goodrich Tire Co. v. Hall, 681 So. 2d 126, 129 (Ala. 1996)); Culpepper v. Weihrauch, 991 F.Supp. 1397 (M.D. Ala. 1997).

(c) Elements of the defense:

(i) that the plaintiff had knowledge of the dangerous condition of the product;

(ii) that the plaintiff appreciated the danger under the circumstances; and,

(iii) that the plaintiff unreasonably placed himself in harm's way.

Gulledge, 598 So. 2d at 1327; Whitaker v. Coca Cola Co. USA, Div. of Coca-Cola Co., 812 So. 2d 1252 (Ala. Civ. App. 2001).

4. Product misuse defense:

(a) The plaintiff has the burden to prove a product was in substantially the same condition at the time it caused the injury as when it left the manufacturer's control.

(b) Elements of the defense:

(i) the plaintiff used the product in a manner different than the manufacturer intended; and

(ii) the plaintiff used the product in a manner that was not reasonably foreseeable by the manufacturer.

Uniroyal Goodrich Tire Co. v. Hall, 681 So. 2d 126, 129 - 30 (Ala. 1996); Culpepper v. Weihrauch, 991 F. Supp. 1397 (M.D. Ala. 1997).

(c) The mere fact that a product has been modified by the user or consumer does not always relieve the manufacturer of liability.

Plaintiff must, however, show that the injury was not caused by the modification and that the injury still would have occurred notwithstanding the modification. Not surprisingly, the manufacturer or seller can still be held liable if the modification was foreseeable, and the manufacturer took no action to prevent or

warn against the modification. Halsey v. A.B. Chance Co., 695 So. 2d 607 (Ala. 1997); Rodgers v. Shave Mfg. Co., 993 F. Supp. 1428 (M.D. Ala. 1998).

5. State of the art:

(a) Alabama law allows either party to offer "state of the art" evidence to prove or disprove that a safer, practical, alternative design was available to the manufacturer at the time it manufactured the product. Caterpillar Tractor Co. v. Ford, 406 So. 2d 854, 858 (Ala. 1981); Coca-Cola Bottling Company, United, Inc. v. Anchor Glass Container Corp., 622 So. 2d 882, 885 (Ala. 1993); Frantz, 866 F. Supp. at 534.

(b) Although Alabama has never directly addressed the issue, the "state of the art" defense is probably not an absolute defense to a products- liability action under the AEMLD. Id., fn. 49.

6. Federal preemption:

(a) Preemption is not truly a defense to AEMLD liability; rather, it displaces the AEMLD in favor of federal law. Defendants should not overlook the possibility that federal law may be more favorable than Alabama law.

Federal law displaces any and all conflicting state statutes, regulations, and state common-law rules. Cantley v. Lorillard Tobacco Co., Inc., 681 So. 2d 1057, 1059 (Ala. 1996) (*citing*, San Diego Building Trades Council v. Garmon, 359 U.S. 236, 247, 79 S. Ct. 773, 780-81, 3 L.Ed.2d 775 (1959)); Steele v. First Deposit Nat. Bank, 732 So. 2d 301 (Ala. Civ. App. 1999).

(b) The Alabama Supreme Court has specifically held that fraud claims against a cigarette manufacturer were preempted by the federal Cigarette Labeling and Advertising Act, but that a state law defective design claim was not preempted by the Act because the claim was not premised upon any duty to communicate information to the buying public. Id. at 1061-62. This holding was based upon the Supreme Court's finding that the federal Cigarette Labeling and Advertising Act regulated only a cigarette manufacturer's communications with the public. Id.

(c) Alabama also recognizes preemption by implication. Schwartz v. Volvo, 554 So. 2d 929 (Ala. 1989); Spain v. Brown & Williamson Tobacco Co., 363 F. 3d 1183 (11th Cir. 2004).

For example, seat belts are not required in school buses where the legislature is presumed to have considered the issue and declined to enact such legislation. Compliance with statutes and regulations is not a complete defense, but is admissible to show absence of a defect. Id.

### C. CLAIMS ARISING UNDER THE UNIFORM COMMERCIAL CODE

1. Alabama has adopted the Uniform Commercial Code:

   Ala. Code 1975, §§ 7-1-101, et seq. The sections that are most applicable to products-liability cases are:

   (a) 7-2-313 Breach of express warranty

   (b) 7-2-314 Implied warranty of merchantability

   (c) 7-2-315 Implied warranty of fitness for a particular purpose

   (d) 7-2-607 Indemnity from manufacturer

2. The implied warranties of merchantability and fitness for a particular purpose place obligations only on sellers, not manufacturers:

   Weaver v. Dan Jones Ford, Inc., 679 So. 2d 1106, 1113 (Ala. Civ. App. 1996); Bryant v. Southern Energy Homes, Inc., 682 So. 2d 3, 5 (Ala. 1996); Certain Teed Corp. v. Russell, 51 UCC Rep. Serv. 2d 418 (Ala. Civ. App. 2003).

## X. PUNITIVE DAMAGES

### A. GENERALLY

1. When recoverable:

   Except in wrongful death cases, punitive damages are not recoverable unless there is "clear and convincing evidence that the defendant consciously or deliberately engaged in oppression, recklessness, fraud, wantonness or malice with regard to the plaintiff." Ala. Code 1975, Section 6-11-20(a).

(a) FRAUD is defined as:

"An intentional misrepresentation, deceit, or concealment of a material fact that the concealing party had a duty to disclose, which was gross, oppressive, or malicious and committed with the intention on the part of the defendant of thereby depriving a person or entity of property or legal rights or otherwise causing injury." Ala. Code 1975, Section 6-11-20(b) (1).

(b) MALICE is defined as:

"The intentional doing of a wrongful act without just cause or excuse, either:

(i) With an intent to injure the person or property of another person or entity, or

(ii) Under such circumstances that the law will imply an evil intent." Ala. Code 1975, § 6-11-20(b)(2).

(c) WANTONNESS is defined as:

"Conduct which is carried on with a reckless or conscious disregard of the rights or safety of others." Ala. Code 1975, Section 6-11-20(b) (3).

(d) CLEAR AND CONVINCING EVIDENCE is defined as:

"Evidence that, when weighed against evidence in opposition, will produce in the mind of the trier of fact a firm conviction as to each essential element of the claim and a high probability as to the correctness of the conclusion. Proof by clear and convincing evidence requires a level or proof greater than a preponderance of the evidence or the substantial weight of the evidence, but less than beyond a reasonable doubt." Ala. Code 1975, § 6-11-20(b)(4).

(e) OPPRESSION is defined as:

"Subjecting a person to cruel and unjust hardship in conscious disregard of that person's rights." Ala. Code 1975, § 6-11-20(b)(5).

2. Physical injury:

Punitive damages may be awarded for mental anguish without physical injury. Orkin Exterminating Co., Inc. v. Jeter, 832 So. 2d 25,39 (Ala. 2001).

3. Apportionment:

Punitive damages may not be apportioned among joint tort-feasors. Alabama Power Co. v. Marine Builders, Inc., 475 So. 2d 168, 180 (Ala. 1985).

4. Cap on damages:

- Henderson v. Alabama Power Co., which held that a statutory cap on punitive damages was an unconstitutional restriction on a defendant's right to a jury trial, was overruled by Ex parte Apicella. Ex parte Apicella held that, "[t]o the extent … [the Supreme Court of Alabama] held that § 11 [right to a trial by jury] restricted the Legislature from removing from the jury the unbridled right to punish, Henderson and Schulte were wrongly decided." Ex parte Apicella, 809 So. 2d 865, 874 (Ala. 2001). However, Apicella was a criminal case and though it abrogated that principal basis for Henderson's ruling, the holding in Ex parte Apicella was in the context of a criminal defendant. The Court ruled that, "the determination of punishment is not a question of fact and that § 11 of the Constitution of Alabama of 1901 does not require that a jury determine the punishment of a criminal defendants." Id.

- Henderson overruled § 6-11-21 of the Alabama Code which placed a $250,000 cap on punitive damages. However, in 1999, § 6-11-21 was rewritten to provide that with three exceptions, "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 1975, § 6-11-21(a) (2002 Supp.) The first exception is that when the defendant is "a small business, no award of punitive damages shall exceed fifty thousand dollars ($50,000) or 10 percent of the business' net worth, whichever is greater." § 6-11-21(b). The second exception is that, "in all civil actions for physical injury … no award of punitive damages shall exceed three times the compensatory damages of the party claiming punitive damages or one million five hundred thousand dollars ($1,500,000), whichever is greater." § 6-11-21(d). The third exception is that, "this section shall not apply to wrongful death or for intentional infliction of physical injury." § 6-11-21(j).

5. Recovery against principal, employer, or other master for agent's, servant's, or employee's conduct:

For a plaintiff to hold a principal, employer, or other master liable for an agent's, servant's, or employee's intentional misconduct (or conduct involving malice), the plaintiff must prove that the principal, employer, or master either:

(a) knew or should have known of the unfitness of the agent, employee, or servant, and employed him or continued to employ him, or used his services without proper instruction with a disregard for the rights or safety of others; or

(b) authorized the wrongful conduct; or

(c) ratified the wrongful conduct, unless the acts of the agent, servant, or employee were calculated to or did benefit the principal, employer, or other master. . . . Ala. Code 1975, §6-11-27(a).

## B. REVIEW OF JURY VERDICTS

1. Post-verdict review:

- In Horton Homes, Inc. v. Brooks, the Supreme Court of Alabama ruled that, "[t]he Alabama Legislature in Act No. 87-185, Ala. Acts 1987, enacted what became Ala. Code 1975, § 6-11-23(a) ("No presumption of correctness shall apply as to the amount of punitive damages awarded by the trier of the fact.") and § 6-11-24(a) ("On appeal, no presumption of correctness shall apply to the amount of punitive damages awarded."). Therefore, appellate courts have a duty to conduct an independent assessment of punitive damages, awarded by a jury. Webb Wheel Products, Inc. v. Hanvey, 2004 WL 3016999 (Ala.) "In applying the de novo standard of review to Horton Homes' constitutional challenge to the amount of the punitive-damages award, we must review the evidence and the law without deference to the jury's award or to the trial court's ruling." Horton Homes, Inc. v. Brooks, 832 So. 2d 44, 57 (Ala. 2001).

2. Factors in post-verdict review:

This post-verdict judicial review focuses on seven factors (the first three of which are "guideposts" the United States Supreme Court requires):

(a) the degree of reprehensibility of the defendant's conduct;

(b) the ratio of punitive damages to the amount of actual or potential harm suffered by the plaintiff;

(c) a comparison of the amount of the jury's verdict with civil or criminal penalties (if any) that could be imposed under the law for comparable misconduct;

(d) whether the punitive damages award removes the profit the defendants received from their misconduct;

(e) the defendants' financial position;

(f) the costs of litigation; and

(g) whether other civil actions for the same misconduct are pending against the same defendant(s).

BMW, 701 So. 2d 507 (Ala. 1997).

3. Remittitur:

The BMW v. Gore Court indicated that, in the future, it may be less likely to uphold a large punitive award in cases where the plaintiff's damages are purely economic, and the plaintiff is not "financially vulnerable." BMW, 701 So. 2d 507 (Ala. 1997). Therefore, one must consider the plaintiff's financial means and the type of damage he suffered when assessing the reasonableness of a punitive award. Id.

The United States Supreme Court held that BMW could not be punished in Alabama for acts occurring outside Alabama which did not affect Alabama residents. Thus, it was improper to base punitive damages on BMW's national sales. BMW, 116 S. Ct. 1589 (1996).

In State Farm Mutual Auto Ins. Co. v. Campbell, 538 U.S. 408 (2003), the United States Supreme Court reaffirmed BMW v. Gore and gave more guidance as to the calculation of punitive damage ratios. State Farm has been cited in Alabama cases primarily for its recognition of the 3-1 ratio of punitive damages to compensatory damages and the due process concerns of excessive punitive damages. Shiv-Ram, Inc. v. McCaleb, 2003 WL 23025586 at 13 (Ala. Dec. 30, 2003).

4. Bifurcated trials:

After remand of the BMW case, the Alabama Supreme Court reversed its requirement of a bifurcated trial and having the state collect a portion of the award. Life Insurance Co. of Georgia v. Johnson, 701 So. 2d 524 (Ala. 1997).

## C. COVERAGE FOR PUNITIVE DAMAGES

**Directly assessed and vicarious punitive damages are insurable in Alabama.** However, the Alabama Supreme Court has not considered the vicarious insurability argument since 1939 and has not addressed many of the public policy arguments adopted by states which have refused to allow insurance coverage for punitive damage awards.

# XI. DRAM SHOP

## A. GENERALLY

Alabama, along with forty-one (41) other states, has enacted laws which create penalties and liabilities for the illegal furnishing of liquor or alcohol to minors and for the right of the parent or the spouse of a person to recover damages for alcoholic beverages dispensed either illegally or in conflict with prevailing public policy. It places the burden on sellers of such beverages to determine that the purchasers are not minors.

1. Section 6-5-71(a) states in pertinent part:

   "Every wife, child, parent, or other person who shall be injured … by any intoxicated 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…"

2. One of the elements of a cause of action under the Dram Shop Act is that the defendant must have provided the alcoholic beverages to the intoxicated person. Martin v. Watts, 513 So. 2d 958, ,963 (Ala. 1987).

3. The Supreme Court has held that a homeowner is not liable for injuries to a minor who consumed alcohol on the homeowner's premises when the homeowner was present and had knowledge that alcohol was consumed by minors, where the homeowner did not provide the alcohol. Runyans v. Littrel, 850 So. 2d 244 (Ala. 2002); Williams v. Reasoner, 668 So. 2d 541 (Ala. 1995).

## B. STATUTORY PROVISIONS

1. Ala. Code 1975, § 6-5-70A (1977) provides parent of a minor with a cause of action to recover damages against person who unlawfully furnishes alcohol to said minor, but only if that person had actual or imputed knowledge of such minority.

2. Ala. Code 1975, § 6-5-71 (1977) creates a cause of action to any third person injured as a consequence of the illegal sale or disposition of alcoholic beverages or liquor.

# XII. INSURANCE COVERAGE

## A. INTERPRETATION

1. Requirements:

Essential terms of an insurance contract include:

(a) Rate of premium;

(b) Duration of policy;

(c) Nature of risk;

(d) Description of property or person or interest to be insured and its location; and

(e) Amount of insurance.

Mobile Airport Auth. v. HealthSTRATEGIES, Inc., 2004 WL 226090 at * 7 (Ala. February 6, 2004); Gulf Gate Management Corp. v. St. Paul Surplus Lines Ins. Co., 646 So. 2d 654 (Ala. 1994).

Alabama Courts have held that a policy "is not complete until the minds of the parties have met and they arrive at an understanding of the terms of the agreement, i.e., the proposals of one party being accepted by the other, and the risk does not attach until the conditions precedent have been fulfilled." Gillilan v. Federated Guaranty Life Ins. Co., 447 So. 2d 668, 671 (Ala. 1984). *See also,* Knight v. Alfa Life Ins. Corp., 594 So. 2d 1229 (Ala. 1992). Conditions precedent to forming a contract of insurance include: "payment of a premium and the assumption of a risk. The payment of the required premium is essential to formation of the contract. Whether the

payment of the first premium is a condition precedent to the insurer's obligation depends upon the language of the contract." Blue Cross-Blue Shield of Ala. v. Caudle, 404 So. 2d 684, 686 (Ala. Civ. App. 1981). *See also,* Strength v. Ala. Dept. of Finance, Division of Risk Management, 622 So. 2d 1283 (Ala. 1993) (holding elements of a valid insurance contract include: "an offer and an acceptance, consideration and mutual assent to terms essential to the formation of a contract"); Ala. Code 1975, § 27-14-11 (1975) (listing the essential requirements of an insurance contract).

2. Written or oral:

An insurance contract need not be written as long as the essential terms of the insurance contract are agreed upon. Mobile Airport Auth., 2004 WL 226090, at * 7 (citing, Powell v. State Farm, 601 So. 2d 60 (Ala. 1992)).

3. Interpretation:

(a) Ambiguities in an insurance policy are to be construed in favor of the insured. Turvin v. Alfa Mut. Gen. Ins. Co., 774 So. 2d 597, 590 (Ala. Civ. App. 2000) (citing, Amerisure Ins. Companies v. Allstate Ins. Co., 582 So. 2d 1100, 1102 (Ala. 1991)).

(b) Unambiguous provisions will be enforced as written. Brown Mach. Works & Supply Co., Inc. v. Ins. Co. of N. Am., 659 So. 2d 51, 59 (Ala. 1995); Gardner v. Cumis Ins. Society, Inc., 582 So. 2d 1094, 1096 (Ala. 1991).

(c) Courts will construe a policy in light of the interpretation that an ordinary person would place on the language used therein. Sweatt v. Great American Ins. Co., 574 So. 2d 732 (Ala. 1990).

(d) Endorsements take precedent over the printed portions of the policy. Commercial Standard Ins. Co. v. General Trucking Co., 423 So. 2d 168 (Ala. 1982).

(e) Exclusions will be interpreted narrowly so as to afford the insured the maximum amount of coverage available. Alliance Ins. Co. v. Reynolds, 494 So. 2d 609 (Ala. 1986).

4. Conflict of laws:

An insurance contract is interpreted under the laws of the state where the contract was executed. Ailey v. Nationwide Mutual Ins. Co., 570 So. 2d 598 (Ala. 1990).

Industrial Chemical & Fiberglass Corp. v. North River Ins. Co., 908 F. 2d 825 (11th Cir. 1990) held that the place of the last act to form the contract is where the receipt and acceptance of the policy occurred.

**B. DUTY TO DEFEND AND/OR INDEMNIFY**

1. What is decision based upon?:

Alabama is a four corners plus state. In determining whether a duty to defend arises, an insurer must look not only to the allegations in the complaint but also to any available and admissible evidence. Towsend Ford, Inc. v. Auto-Owners Ins. Co., 656 So. 2d 360, 362 (Ala. 1995) (citing Tapscott v. Allstate, 526 So. 2d 570 (Ala. 1988)); Ladner & Co. v. Southern Guar. Ins. Co., 347 So. 2d 100 (Ala. 1977).

2. Enhanced obligation to insured:

When defending under a reservation of rights, the insurer owes an "enhanced obligation" to its insured as follows:

(a) Insurer must adequately investigate the occurrence and plaintiff's injuries;

(b) Insurer must retain competent defense counsel;

(c) Insurer must keep insured fully informed as to its coverage position; and

(d) Insurer may not engage in any action that demonstrates a greater concern for its own monetary interest than for the insured's financial risk.

Only when the insurer fails to discharge its enhanced obligation is the insured entitled to personal counsel at the insurer's expense. L&S Roofing Supply Co. v. St. Paul Fire & Marine Ins. Co., 521 So. 2d 1298 (Ala. 1987).

3. Time of an occurrence:

The time of an occurrence of an accident within the meaning of an insurance policy is the time the complaining party was actually damaged and not when the wrongful act was committed. American States Ins. Co. v. Martin, 662 So. 2d 245, 249 (Ala. 1995) (*quoting,* U.S. Fidelity & Guaranty Co. v. Warwick, 446 So. 2d 1021 (Ala. 1984)).

## C. ISSUES RELATED TO EXCESS INSURERS

1. Discovery:

A coverage opinion by a lawyer to an insurance company is not discoverable. Great American Surplus v. St. Paul Fire & Marine Insur. Co., 540 So. 2d 1357 (Ala. 1989).

2. Interpretation:

Any ambiguity in a primary policy will be construed in favor of the excess carrier. Home Indemnity Co. v. Employers National Ins. Corp., 564 So. 2d 945 (Ala. 1990).

3. Notice:

Alabama is among a minority of jurisdictions following a "no prejudice" rule with regard to primary insurers. The same duties owed an insured by a primary insurer do not apply to an excess insurer. As a result, Alabama holds that an excess insurer must show prejudice when relying on untimely notice. Midwest Employers Cas. Co. v. East Alabama Health Care, 695 So. 2d 1169 (Ala. 1997).

4. Two excess clauses:

Where an insured has two policies, both of which contain a clause classifying them as excess, the clauses will be deemed mutually repugnant, and the loss will be apportioned between the two carriers on a pro rata basis. Horace Mann Ins. Co. v. United Int'l Ins. Co., 762 F. Supp. 1470 (N.D. Ala. 1990) aff'd, 932 F.2d 1443 ($11^{th}$ Cir. 1991); State Farm Mut. Auto Ins. Co. v. General Mut. Ins. Co., 282 Ala. 212, 210 So. 2d 688 (1968).

5. Duty owed by primary to excess:

Primary insurers owe no duty of good faith to an excess insurer to settle a case, in deciding whether to settle, or to keep the excess carrier informed of settlement negotiations and adverse developments in a case. Fed. Ins. Co. v. Travelers Cas. & Surety Co., 843 So. 2d 140, 143 (Ala. 2002). Although not necessary to its decision, the Alabama Supreme Court commented in Nationwide Mutual Ins. Co. v. Hall, 643 So. 2d 551, 562-563 (Ala. 1994) as follows:

> We recognize that a number of courts in other jurisdictions have recognized that a primary insurance carrier owes a duty of good

faith to an excess insurance carrier of its insured and on that basis have allowed an excess insurer to bring a claim of bad faith against a primary insurer. Hartford Accident & Indem. Co. v. Aetna Cas. & Surety Co., 164 Ariz. 286, 792 P.2d 749, 752-53 & nn.2-3 (1990) (survey of jurisdictions) (*See also*, Excess Carrier's Right to Maintain Action Against Primary Liability Insurer for Wrongful Failure to Settle Claim Against Insured, 10 A.L.R.4th 879 (1981)). A few courts have even recognized a direct duty owed by a primary insurer to an excess insurer and have permitted excess insurers to bring claims of bad faith against primary insurers without being limited to asserting rights as subrogees of their insureds. e.g., Hartford Accident & Indem. Co. v. Michigan Mut. Ins. Co., 93 A.D.2d 337, 462 N.Y.S.2d 175 (1983), affirmed, 61 N.Y.2d 569, 463 N.E.2d 608, 475 N.Y.S.2d 267 (1984); Estate of Penn v. Amalgamated General Agencies, 148 N.J. Super. 419, 424, 372 A.2d 1124, 1127 (1977) (*See also*, Annotation, Liability Insurance: Excess Carrier's Right of Action Against Primary Carrier for Improper or Inadequate Defense of Claim, 49 A.L.R. 4th 304 (1986)).

6. Duty of Excess to "Drop Down" when primary becomes insolvent:

This issue has not been addressed to any large extent. It appears, though, that the courts will look to the policy language, and if it is ambiguous, will construe it in favor of the insured. In Alabama Insurance Guaranty Ass'n v. Magic City Trucking, 547 So. 2d 849 (Ala. 1989), the Court held policy language agreeing to provide coverage in excess of "the applicable limits of any underlying insurance collectible by the insured" was ambiguous and held that the excess coverage dropped down, and that the insured had a "reasonable expectation" that drop down excess insurance coverage would be afforded in the event of the primary carrier's insolvency .

Drop down not required where the policy provided that excess carrier will not be liable in "excess of the limit or limits of liability of the applicable underlying insurance policy or policies provided, however, in the event of reduction or exhaustion of the applicable aggregate limit or limits of liability under said underlying policy or policies solely by reason of losses paid thereunder on account of occurrences." Alabama Insurance Guaranty Ass'n v. Kinder-Care, 551 So. 2d 286 (Ala. 1989).

## D. UNINSURED MOTORIST COVERAGE

1. Generally:

UM coverage is required in all automobile policies except where rejected by the insured. There is no distinction between underinsured and uninsured motorist coverage. Alabama has minimum limits which are set and required by statute, thus, an automobile which has minimum limits is not an "uninsured motor vehicle" even though the limits are exhausted by payments to other claimants. Criterion Ins. v. Anderson, 347 So. 2d 384 (Ala. 1977).

2. Physical contact:

Alabama does not require physical contact. However, policy provisions purporting to require physical contact will be enforced by courts. UM coverage was triggered in a case where a truck hit a park bench laying on the side of an interstate because it could be inferred to have been dropped by an uninsured motor vehicle. Khirieh v. State Farm, 594 So. 2d 1220 (Ala. 1992) (when a car hits a puddle of oil in the road, the oil could have been left by an uninsured vehicle, thus a claim is allowed); Jones v. Nationwide, 598 So. 2d 837 (Ala. 1992).

3. Limits on events triggering coverage:

There are limits, however, to what events trigger UM coverage. In Allstate Ins. Co. v. Skelton, 675 So. 2d 377 (Ala. 1996), the court held plaintiff was not entitled to UM benefits after he was intentionally forced off the road and assaulted and battered by an insured driver (whose insurer denied coverage). The court reasoned that the driver's intervening criminal act (assault and battery) broke the casual connection between his use of the vehicle and plaintiffs injury, which was caused by the battery and not by being forced off the road.

4. Stacking:

Amendment of Ala. Code § 32-7-23, effective January 1, 1985, provided that insurers could not prohibit stacking of UM coverage. Isler v. Federated Guar. Mut. Ins. Co., 594 So. 2d 37 (Ala. 1991). Therefore, stacking of uninsured motorist policies is permissible regardless of the policy provision. Gaught v. Evans, 361 So. 2d 1027 (Ala. 1978). Furthermore, the amount paid under worker's compensation laws does not act as a set off for uninsured motorist coverage.

Punitive damages are covered by UM as well.

5. Equitable subrogation:

A UM carrier has an equitable subrogation interest to the extent of benefits paid to its insured. The insured must notify its insurer of a possible UM claim prior to any settlement with the third-party tort-feasor. If the carrier chooses to assert its subrogation right, it must promptly investigate the claim and either consent to the insured's proposed settlement with the tort-feasor or advance the insured an amount equal to the tort-feasor's settlement offer. The UM carrier's subrogation interest is waived if the carrier fails to investigate the claim within the reasonable time or denies the claim without a good faith basis. Lambert v. State Farm, 576 So. 2d 160 (Ala. 1991); Allstate Ins. Co. v. Brantley, 867 F.Supp. 1004 (M.D. Ala. 1994).

Prejudice is required to be proved where notice is alleged to be untimely. State Farm Mutual Automobile Ins. Co. v. Burgess, 474 So. 2d 634 (Ala. 1985) (*See also,* Pennsylvania Nat. Mut. Cas. Ins. Co. v. Colyer-Lloyd, Ins., 1994 WL 927423 (N.D. Ala.) limiting Burgess to uninsured motorist cases).

## E. AUTO INSURANCE

1. The omnibus clause has been given broad effect in Alabama.

2. The Family Car/Purpose Doctrine is not recognized.

3. The Guest Statute, Code Section 21-1-2 is still valid and provides no liability to a guest unless injuries or death are caused by willful or wanton misconduct. Ex parte Anderson, 682 So. 2d 467 (Ala. 1966).

4. Last Clear Chance is applied in Alabama. Campbell v. Ala. Power Co., 567 So. 2d 1222 (Ala. 1990).

5. Alabama is not a “no fault” jurisdiction.

## F. BAD FAITH

The tort of bad faith refusal to pay a valid claim is recognized under Alabama's common law. Chavers v. National Sec., 405 So. 2d 1 (Ala. 1981). No cause of action for bad faith is permitted by third-parties to the insurance contract (*i.e., Alabama is not a direct action jurisdiction*). Williams v. State Farm Auto Ins. Co., 2003 WL 22977464 (Ala.).

## G. LATE NOTICE TO PRIMARY INSURER

1. Prejudice:

Prejudice is not required to be proved by a primary insurer when coverage is denied because of untimely notice. American Fire & Cas. Co. v. Tankersley, 270 Ala. 126, 116 So. 2d 579 (1959).

2. Test for sufficiently timely notice:

Alabama courts have developed a two-pronged inquiry for determining whether notice was sufficiently timely to preserve coverage: (1) length of delay; (2) reason for delay.

3. Denial of coverage:

The general rule in Alabama is that absent extenuating circumstances creating a question as to whether the delay was reasonable, coverage may be denied as a matter of law. Pharr v. Continental Casualty, 429 So. 2d 1018 (Ala. 1983). However, where an insured offers reasonable excuses for delay, the issue is for the jury. Reeves v. State Farm, 539 So. 2d 252 (Ala. 1989); Freeman v. Alabama Farm Bureau, 395 So. 2d 1014 (Ala. Civ. App. 1980).

## H. UNUSUAL OR SIGNIFICANT COVERAGE ISSUES

1. Fraud/Misrepresentation:

There are many cases in Alabama where plaintiffs allege that they relied on misrepresentations by an insured which caused plaintiff to suffer mental anguish. Courts routinely hold that negligent, innocent and reckless misrepresentations constitute an "occurrence" under general liability policies. Ajdarodini v. Alabama State Farm Automobile Mutual Insurance Co., 628 So. 2d 312 (Ala. 1993).

The court has also held "mental anguish" resulting from allegedly reckless misrepresentations constitutes "bodily injury" under a policy of insurance. Ajdarodini, 628 So. 2d at 313.

Causes of action are recognized for *Reckless Misrepresentation* - Parker v. Johnson-Smith Realty, Inc., 465 So. 2d 415 (Ala. Civ. App. 1984); for *Mistaken Representation* - Lynn Strickland Sales & Service, Inc. v. Aero-Lane Fabricators, Inc., 510 So. 2d 142 (Ala. 1987) (overruled on other grounds); and for *Willful*

*Misrepresentation* - Osborn v. Custom Truck Sales & Services, Div. of Alley-Cassetty Coal, Inc., 562 So. 2d 243 (Ala. 1990)

2. Wantonness covered by insurance:

Because wantonness does not require an intentional act, a verdict for wantonness is covered by insurance. Ala. Code 1975, §6-11-20 (wantoness forms basis for punitive damages claim); Mobile Infirmary Medical Center v. Hodgen, 2003 WL 22463340 (Ala. 2003).

# XIII. BAD FAITH

## A. CREATION

1. Chavers v. National Security Fire & Casualty Co.:

The tort of bad faith for failure to pay an insurance claim was first recognized by an Alabama court in the case of Chavers v. National Security Fire & Casually Co., 405 So. 2d 1 (Ala. 1981).

*When arise:* The tort arises when an insurer intentionally refuses to pay a claim with no lawful basis for the denial and the insurer has actual knowledge of that fact. Id. at 7. The cause of action can also arise if an insurer intentionally fails to determine whether there is any lawful basis for the refusal. Id.

2. The foremost regarded case concerning the tort of bad faith is National Security Fire & Casualty Company v. Bowen, 417 So. 2d 179 (Ala. 1982). In National Security, the Court held that an insurance provider is liable for refusing to pay a claim when a lawful basis does not exist for the refusal and there is actual knowledge of that fact. Id. at 183.

(a) No Lawful Basis:

The term "no lawful basis" has been defined to mean that the insurer does not have a legitimate or arguable reason for failing to pay the claim. Id. An insurance company is permitted to contest the claim when the claim is "fairly debatable." Id.

(b) Debatable Claim:

A debatable claim is one that is open to dispute or question. Id.

(c) Facts to Consider:

When determining whether to deny a claim, an insurance company may only consider the facts that are before it at the time of this decision. Nat'l Savings Life Ins. Co. v. Duton, 419 So. 2d 1357, 1362 (Ala. 1982).

(d) Plaintiffs Burden to Prove:

(i) an insurance contract between the parties and a breach thereof by the defendant;

(ii) an intentional refusal to pay the insured's claim;

(iii) the absence of any reasonably legitimate or arguable reason for that refusal (the absence of a debatable reason) based upon information available to theinsurer at the time of its decision;

(iv) the insurer's actual knowledge of the absence of any legitimate or arguable reason; and

(v) if the intentional failure to determine the existence of a lawful basis is relied upon, the plaintiff must prove the insurer's intentional failure to determine whether there is a legitimate or arguable reason to refuse to pay the claim.

National Security, 417 So. 2d at 183.

"In short, plaintiff must go beyond a mere showing of nonpayment and prove a bad faith nonpayment, a nonpayment without any reasonable ground for dispute. Or, stated differently, the plaintiff must show that the insurance company had no legal or factual defense to the insurance claim." Id. When a plaintiff fails to eliminate an arguable reason for denying payment, the plaintiff cannot recover under the tort of "bad faith refusal." Id. at 185. **The insurer must only show that its reason for denial was arguable, not that it was correct**. Liberty National Life Insurance Company v. Allen, 699 So. 2d 138 (Ala. 1997).

3. "[B]ad faith is the intentional failure by the insurer to perform this duty implied in law." Madison County Sheriff's Posse, Inc. v. Horseman's United Association, Inc., 434 So. 2d 1387, 1390 (Ala. 1983). It is extremely difficult for plaintiffs to prove the elements of a bad faith claim. Id. The court in Madison County Sheriff's Posse stated:

> **In the normal case, in order for a plaintiff to make out a prima facie case of bad faith refusal to pay an insurance claim, the proof offered must show that the plaintiff is entitled to a directed verdict on the contract claim and, thus, entitled to recover on the contract claim as a matter of law**. Ordinarily, if the evidence produced by either side creates a fact issue with regard to the validity of the claim and, thus, the legitimacy of the denial thereof, the tort claim must fail and should not be submitted to the jury.

Id. at 1390-91.

4. Non-parties to an insurance contract cannot be liable for bad faith. Ligon Furniture Company v. Hughes Ins., 551 So. 2d 283 (Ala. 1989).

5. Bad faith is only actionable in the context of a breach of an insurance contract. Keaton v. Bank of Red Bay, 466 So. 2d 937 (Ala. 1985).

## B. DUTY OF GOOD FAITH AND DAMAGES

1. Good faith:

The law finds an implied covenant of good faith and fair dealing in every contract which means that neither party will interfere with the rights of the other to receive the rights and benefits defined by the agreement. Chavers, 405 So. 2d at 5.

2. Damages:

A plaintiff suing for a bad faith refusal of an insurance claim may recover compensatory and punitive damages for mental distress and economic loss. Id.

# XIV. FRAUD

Alabama law recognizes three distinct types of fraud. These are fraud, promissory fraud, and fraudulent suppression.

## A. GENERAL FRAUD

1. Elements:

   (a) A false representation;

   (b) Of an existing material fact;

   (c) That is reasonably relied upon; and,

   (d) Damage resulting as a proximate cause.

   Pinyan v. Cmty. Bank, 644 So. 2d 919, 923 (Ala. 1994).

2. Fraud can be innocent or negligent:

   In Alabama, fraud can arise from innocent/negligent conduct, reckless/wanton conduct, and intentional conduct. Bowker v. Willis, 580 So. 2d 1333, 1336 (Ala. 1991).

3. Reasonable reliance:

   The "reasonable reliance" element requires the fact-finder to determine whether the plaintiff's reliance was reasonable based upon the circumstances surrounding the transaction, his mental capacity, educational background, relative sophistication, and bargaining power. Foremost Ins. Co.v. Parham, 693 So. 2d 409, 421 (Ala. 1997).

4. Discovery Rule applies:

   "In actions seeking relief on the ground of fraud where the statute has created a bar, the claim must not be considered as having accrued until the discovery by the aggrieved party of the fact constituting the fraud, after which he must have two years within which to prosecute his action." Ala. Code 1975, § 6-2-3. The "reasonable-reliance" standard determines when an aggrieved person should have discovered the facts constituting the fraud. Foremost, 693 So. 2d at 421.

(a) A trial court can enter a judgment as a matter of law in a fraud case where the undisputed evidence indicates that the party or parties claiming fraud in a particular transaction was fully capable of reading and understanding their documents, but nonetheless made a deliberate decision to ignore written contract terms. Id.

(b) Consequently, the statute of limitations will begin to run on a plaintiff's fraud claim as soon as he receives documents that he is capable of reading and understanding; this should put a reasonable person on notice of fraud. Id.

5. Statements of opinion not actionable:

An expression of opinion that "I think I have coverage for you" is not a statement of an existing fact which will support a claim for fraud." Cowne Invs. v. Bryant, 638 So. 2d 873, 877 (Ala. 1994).

## B. PROMISSORY FRAUD

1. Future act:

A claim for promissory fraud is one that is predicated upon "a promise to act or not to act in the future." Allstate Ins. Co. v. Hilley, 595 So. 2d 873, 876 (Ala. 1992).

2. Elements:

(a) A false representation;

(b) Of an existing material fact;

(c) That is reasonably relied upon;

(d) With damage resulting as a proximate cause;

(e) That the defendant had the intention not to perform the promised act; and,

(f) That the defendant had an intent to deceive.

Bethel v. Thorn, 757 So. 2d 1154, 1159 (Ala. 1999).

3. Distinction from traditional fraud:

The critical difference between traditional fraud and promissory fraud is that promissory fraud requires proof that, at the time of the representation, the promisor did not intend to perform the future act promised (i.e., that he had a present intent to deceive). Graham Foods, Inc. v. First Alabama Bank, 567 So. 2d 859, 861 (Ala. 1990); Gen. Motors Acceptance Corp. v. Covington, 586 So. 2d 178, 181 (Ala. 1991); Willingham v. United Ins. Co. of Am., 628 So. 2d 328, 330 (Ala. 1993).

(a) A promising party's mere failure to perform, without more, is insufficient to prove a fraudulent intent, because this would make every breach of contract tantamount to fraud. Pinyan, 644 So. 2d at 923-24. Russellville Production Credit Assignment v. Frost, 484 So. 2d 1084, 1086 (Ala. 1986).

(b) The Alabama Supreme Court has consistently held that actions against insurers that deny claims constitute traditional fraud because "…[t]he alleged misrepresentation had to do with the validity of the…insurance policies at the time they were sold and not whether [the insurer] intended to perform the promises embodied in the policies." Willingham, 628 So. 2d at 330.

## C. FRAUDULENT SUPPRESSION

1. Elements:

(a) A duty to disclose the facts;

(b) Concealment or nondisclosure of material facts by the defendant;

(c) Inducement of the plaintiff to act; and,

(d) Action by the plaintiff to his injury.

Foremost, 693 So. 2d at 423.

2. Silence:

Ordinarily, silence is not actionable unless a confidential relationship, or some special duty, imposes a duty to disclose. Id.; Bama Budweiser v. Anheuser-Busch, 611 So. 2d 238, 245 (Ala. 1992) (*See also*, Ala. Code 1975, § 6-5-102).

3. Confidential relationship:

The factors courts consider when determining whether a duty to disclose exists include the relationship of the parties, the relative knowledge of the parties, the value of a particular fact, and other factors. Foremost, 693 So. 2d at 423. Alabama law defines a confidential relationship as:

> A relationship in which] one person occupies toward another such a position of adviser or counselor as reasonably to inspire confidence that he will act in good faith for the other's interests, or when one person has gained the confidence of another and purports to act or advise with the other's interest in mind; where trust and confidence are reposed by one person in another who, as a result, gains an influence or superiority over the other; and it appears when the circumstances make it certain the parties do not deal on equal terms, but, on the one side there is an overmastering influence, or, on the other weakness, dependence, or trust, justifiably reposed; in both an unfair advantage is possible. It arises in cases in which confidence is reposed and accepted, or influence acquired, and in all the variety of relations in which dominion may be exercised by one person over another.
>
> Holdbrooks v. Cent. Bank of Alabama, N.A., 435 So. 2d 1250, 1252 (Ala. 1983).

## XV. EMPLOYERS LIABILITY/WORKERS' COMPENSATION

Worker's Compensation is an injured employee's exclusive remedy against his employer. However, the exclusivity provisions do not prohibit an action for intentional torts such as fraud or outrageous conduct. Ala. Code 1975, § 25-5-53. An injured worker may assert a tort claim (outrage) against his worker's compensation carrier for suspending benefits during an appeal where the worker can establish that he clearly had a right to those benefits. Ex parte Lumberman's Underwriting Alliance, 662 So. 2d 1133 (Ala. 1995).

In Goodyear Tire v. JM Tull Metals, 629 So. 2d 633 (Ala. 1993), the Supreme Court held that enforcement of an express indemnity agreement against an employer by a third party does not violate the exclusive remedy provision. The Court held that since Goodyear's claim against Tull was a claim alleging breach of contract for failure to procure insurance, and not for personal injury or death of the employees employee, as noted in Code Section 25-5-53, the exclusive remedy provision has no application. **Please note that the Court also held that an employer's breach of contract to obtain insurance wasn't an "occurrence" that would give rise to coverage under the employer's general liability insurance.

## A. CLAIMS NOT BARRED BY THE EXCLUSIVE REMEDY PROVISION

1. General Rule:

   The Workers' Compensation Act is the exclusive remedy for an employee against his/her employer for injuries sustained on the job. Ala. Code 1975, § 25-5-52 and Ala. Code 1975, § 25-5-53.

2. In those instances where the employee's injury meets the requirements of the Act:

   A claim under the Workers' Compensation Act is the only possible method for the employee to recover. However, multiple exceptions, listed below, may apply that will allow an employee to seek redress under general civil law.

   (a) **Compensability of injury not required to invoke exclusive remedy provision.** Akins v. Drummond Co., Inc., 628 So. 2d 591 (Ala. 1993):

   Claim brought by wife of deceased coal miner under Alabama Coal Mine Safety Law for coal company's alleged failure to provide miner with proper medical care and prompt first aid after he suffered heart attack while working in line and scope of his employment. The trial court held that the claim was barred by exclusivity provision of Workers' Compensation Act, even though heart attack was not compensable "injury" under Workers' Compensation Act, where miner was employee of coal company at time of death.

   (b) **Death without Dependents.** Story & Co. Inc. v. King, 628 So. 2d 593 (Ala. 1993):

   Alabama Workers' Compensation Act provided exclusive remedy against employer for death of employee when employee's death arose out of or in the course of employment, even where employee left no dependents so there was no recovery of death damages under the Act. *See* Champion Int'l, Inc. v. Truitt, 653 So. 2d 968 (Ala. 1995); Yarchak v. Munford, Inc., 570 So. 2d 648 (Ala. 1990).

3. Individual attempts to circumvent the Workers' Compensation Act:

   (a) Bell v. General Am. Transp. Corp., 290 So. 2d 184 (Ala. Civ. App. 1973):

   After an election is made to come under the provisions of the Act, coverage provided by the Act as passed by the legislature cannot be modified or changed by private contract. The legislature declared the policy of the Act is for employees to be covered by the Act as written.

   (b) Owens v. Ward, 271 So. 2d 251 (Ala. Civ. App. 1972):

   Court found that benefits under the Act were in lieu of wages for the injured employee and that the injured employee's rights to these benefits cannot be transferred to others.

## B. POTENTIAL EXCEPTIONS TO THE GENERAL RULE

1. Third-Party Claims Against Manufacturers
2. Fraud
3. Outrage
4. Sexual Harassment
5. Wrongful Termination
6. Indemnity Claims
7. Intentional Tortious Conduct Generally
8. Special Employers
9. Acceptance of Benefits by Employee
10. Employers Exempt from Workers' Compensation
11. **Co-Employee Suits** (*See* Chapter under this heading)

## C. THIRD-PARTY CLAIMS AGAINST MANUFACTURERS OF PRODUCTS (ALA. CODE 1975, § 25-5-11)

1. Employee can directly sue a party who is jointly liable with employer for injuries or death:

   Employer is subrogated to the claim against the third party. Ala. Code 1975, § 25-5-11(a).

2. Employer may be required to pay employee's legal fees:

   Ala. Code § 25-5-11(d).

3. If the employee does not bring suit within statute of limitations, employer or insurer has an extra six months to bring suit. Ala. Code § 25-5-11(d).

4. Section 25-5-11 gives to the dependents of an employee killed under circumstances creating liability against a third-party a right to bring an action against such third party, but such action, when brought, must be deemed to arise under the wrongful death statute (Ala. Code § 6-5-410); for there can be only one action for wrongful death. Nicholson v. Lockwood Greene Eng'rs, Inc., 179 So. 2d 76 (Ala. 1965); Alabama Power Co. v. White, 377 So. 2d 930 (Ala. 1979).

## D. FRAUD AND MISREPRESENTATION

1. Lowman v. Piedmont Excutive Shirt Mfg. Co., 547 So. 2d 90 (Ala. 1989):

   Fraud, conspiracy to defraud, and outrage causes of action brought against employer by former employee were not prohibited by the exclusivity provisions of the Workmen's Compensation Act, as actions of employer and coemployee in allegedly threatening former employee if she did not file her disability claim as an off-the-job injury did not constitute an "accident" compensable under the Act. The Court declined to extend this holding in Ex parte Progress Rail Services Corp., 869 So. 2d 459, 470 (Ala. 2003), stating that while intentional tortious conduct committed beyond the bounds of the employer's proper role is actionable, intentional tortious conduct committed within the bounds of the employer's proper role is not necessarily actionable. Further, the employee bears the burden of proving by clear and convincing evidence, because the legislature does not want to allow recovery in frivolous or borderline claims.

2. Gibson v. S. Guar. Ins. Co., 623 So. 2d 1065 (Ala. 1993):

Employee sued for outrage, bad faith, fraud, conspiracy, negligence and wantonness in handling a claim for psychological testing. Summary judgment for carrier was affirmed. The Court reaffirmed the difficulty in making a successful claim of outrage and intentional fraud against an employer by holding: "Because the evidence tends to show that Gibson's difficulties in obtaining the medical care he desired were the result of ordinary delays, misunderstandings, and breakdowns in communication at least as much as it tends to show that his difficulties were due to any deliberate attempt by the defendants to deny him further medical care, the summary judgment is due to be affirmed as to the claim of outrageous conduct." There was no clear and convincing evidence of fraud.

3. Reid v. Aetna Cas. & Sur. Co., 692 So. 2d 863 (Ala. Civ. App. 1997):

The employee alleged fraudulent concealment and conspiracy between the insurance company and vocational nurse hired by the company to report the employee at maximum medical improvement regardless of her actual improvement in health. Summary judgment for the insurance company affirmed. The evidence fell short of the clear and convincing proof needed to remove the case from the exclusivity provision of the compensation act.

## E. OUTRAGE

1. Cont'l Cas. Ins. Co. v. McDonald, 567 So. 2d 1208 (Ala. 1990):

The Court affirmed a verdict for the employee for an outrage claim. The Court held that in order to prevail on a claim of outrage, the employee must show that the employer's "conduct [was] 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." The Court found outrage due to the insurance company's intentional acts to delay or obstruct payment of injured worker's medical bills in an attempt to coerce a settlement. Evidence was presented showing that the insurer set out in a course of conduct to attempt to "squeeze" the employee into settling for a lower amount.

McAfee v. Shredders, Inc., 650 So. 2d 871 (Ala. 1994). The Court found that the failure to provide vocational rehab was not outrageous when the employer had an arguable reason to deny them. There was no evidence of improper motive or an intent to cause severe emotional distress.

2. Bad Faith:

Stewart v. Matthews Industries, Inc., 644 So. 2d 915 (Ala. 1994):

A tort claim against a workers' compensation carrier alleging a bad faith failure to pay an insurance claim is barred by the exclusivity provision of the Workers' Compensation Act.

A number of cases hold that there was no question for the jury on the stringent test required to prove outrage:

Lumpkin v. Cofield, 536 So. 2d 62 (Ala. 1988); Gallups v. Cotter, 534 So. 2d 585 (Ala. 1988); Therrell v. Fonde, 495 So. 2d 1046 (Ala. 1986); American Road Service Co. v. Inmon, 394 So. 2d 361 (Ala. 1981).

## F. SEXUAL HARASSMENT

Busby v. Truswall Sys. Corp., 551 So. 2d 322 (Ala. 1989):

The Court held that female employees' claims against their employer for damages for psychological injuries resulting from actions of their supervisor which allegedly constituted torts of outrageous conduct and invasion of privacy were not barred by exclusivity provisions of Workmen's Compensation Act. The Court found that no physical injury had occurred which barred recovery for psychological injury. If the exclusivity provision applied, "the plaintiff would be left with no remedy, when she has been subjected to harassment, extreme verbal abuse, or an invasion of her right to privacy."

## G. WRONGFUL TERMINATION

These claims are specifically excepted from the exclusivity provisions of the Workers' Compensation Act in Ala. Code § 25-5-11. For more details *See* Chapter on Retaliatory Discharge.

## H. INDEMNITY CLAIMS

Goodyear Tire & Rubber co. v. J.M. Tull Metals Co., 629 So. 2d 633 (Ala. 1993):

The Court held that the enforcement of an express indemnity agreement against an employer by a third-party does not violate the exclusive remedy provision of Alabama's Workers' Compensation Act. The Court went on to acknowledge "the strong public policy interest favoring enforcement of contractual agreements entered into voluntarily by competent parties, unless they clearly contravene some positive law or rule of public morals. … Sophisticated business entities should be

permitted to enter into loss distribution arrangements as they see fit." Note that implied indemnification was not considered.

## I. INTENTIONAL TORTIOUS CONDUCT GENERALLY. ARE OTHER CAUSES OF ACTION BASED ON WILLFUL OR INTENTIONAL CONDUCT OUTSIDE OF THE ACT?

Ex parte Progress Rail Services Corp., 869 So. 2d 459 (Ala. 2003). Where an employee's claim is covered by the Workers' Compensation Act, the employee does not have a remedy in tort against the employer, regardless of whether the conduct of the employer is alleged to be intentional and willful. If an employee's work-related injury and resulting death are covered under the Workers' Compensation Act, then the Act's exclusivity provisions preclude tort claims by employee's survivors for breach of employer's statutory duty to provide employee with a safe place to work, even if such breach was willful or intentional.

The savings provision of the Workers' Compensation Act, permitting actions arising from intentional and willful conduct, is limited to actions against co-employees.

Garvin v. Shewbart, 564 So. 2d 428 (Ala. 1990):

The Court held that a higher burden of proof will be placed upon a plaintiff alleging an intentional tort such as fraud because of the exclusivity provision of the Act. Proof must be by clear and convincing evidence.

## J. SPECIAL EMPLOYERS

1. A change in status of an employee from a regular employee to a "special employee" operating for the benefit of another employer while still employed by the original employer may expose both employers to civil liability.

   Rhodes v. Alabama Power Co., 599 So. 2d 27 (Ala. 1992). "The 'exclusive remedy' provision of the Alabama Work[ers'] Compensation Act has been extended to include 'special employers,' described as 'individuals or businesses who, for practical purposes, may be considered primary or co-employers of the injured employee.'" The Court further quoted the test for when a special employer becomes liable for compensation set out in Terry by Terry v. Read Steel Prods., 430 So. 2d 862, 865 (Ala. 1983)):

   (a) The employee has made a contract of hire, express or implied, with the special employer; and

(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.

When all three criteria are satisfied, both the general employer and the special employer are liable for workers' compensation benefits, and consequently, neither are liable in tort.

Key v. Maytag Corp., 671 So. 2d 96 (Ala. Civ. App. 1995). Employee applied for work with a temporary employment agency which assigned him to work for Maytag. It has been held that a "special employer-employee relationship exists when the general employer is an employment agency or employment service which furnishes employees under contract." Thus, Maytag was a special employer and had an implied contract with the employee.

Hicks v. Alabama Power Co., 623 So. 2d 1050,1054-55 (Ala. 1993). In a case involving a temporary agency, the court noted that "in these cases, the general employer was nothing more than the bargaining agent or employment agent for the plaintiffs. When those plaintiffs contacted Kelly Services, Manpower, or Pep Services, it was not for the purpose of entering into employment with those companies to do the work of those companies; rather, the plaintiffs intended for the general employers to 'market' them to secure employment with another, special employer. Once those plaintiffs were presented by the employment services to the special employers, those plaintiffs then entered into a contract of hire with those special employers."

2. Independent Contractor:

Wheeler v. Wright, 668 So. 2d 779 (Ala. Civ. App. 1995). The general test for determining whether a party is either an employee or an independent contractor is the reserved right of control. Factors demonstrating a right of control include:

(a) Direct evidence of a right or exercise of control;

(b) The method of payment for services;

(c) Whether equipment is furnished; and

(d) Whether the other has the right to terminate the employment.

## K. ACCEPTANCE OF BENEFITS BY EMPLOYEE

Baptist Memorial Hospital v. Gosa, 686 So. 2d 1147 (Ala. 1996). The Court reaffirmed its position that "the acceptance of compensation payments under the Work[ers'] Compensation Act constitutes an election that estops the employee from resorting to any other remedy."

Brown v. Hixon, 686 So. 2d 1220 (Ala. Civ. App. 1996). An employee who accepts workers' compensation benefits is estopped from asserting he is an independent contractor so he may maintain action outside of the Workers' Compensation Act.

## L. EMPLOYERS EXEMPT FROM WORKERS' COMPENSATION EXCLUSIVITY

Employers, such as those listed below, are not covered by the Act but may choose to send written notice to the Alabama Department of Industrial Relations that they wish to opt into coverage by the Act; likewise, these same employers may also withdraw their optional coverage by giving written notice. A withdrawing employer must simultaneously write his/her employees personally and display a notice on the premises in a conspicuous location informing employees of the decision to withdraw coverage under the Act.

There is a presumption that every employer and employee accepts and is covered by the Workers' Compensation Act unless the Act provides to the contrary. Ala. Code 1975, § 25-5-54.

The following employers, under Ala. Code 1975, § 25-5-50 are not covered by the Act:

1. Employers of domestic servants.

2. Employers of farm laborers.

3. Employers of casual employees.

4. Municipalities with population of two thousand or less.

   Cities with a population of 250,00 or more are also exempted (e.g., Birmingham). Ala. Code 1975, § 25-5-13b.

5. State Employees (as defined by Ala. Code 1975, § 41-9-62).

- County employees are covered.
- Employees of City and County Boards of Education are also covered.
- Employees of the Alabama Institute for the Dead and Blind.
- All employees of two year colleges controlled by the State Board of Education.

6. Employees of city and county.

Employer who regularly employs less than five employees.

(a) Definition of "Regularly Employs" LaPoint v. Barton, 328 So. 2d 605 (Ala. Civ. App. 1976):

For purpose of Workmen's Compensation Act, exclusion from definition of "employer" of one who "regularly employs" less than four employees, the term "regularly employs" does not mean constant employment of the requisite number of persons, but rather is a function of the frequency, regularity, and duration of the occurrences of which that number is employed, and what is decisive is the established mode or plan in the operation of the business. The totality of circumstances concerning the employment practices of the business must be examined, and this necessitates that regard must be had to the number of persons employed over a reasonable time.

(b) Are Working Partners Counted?

Phillips v. Powers Discount Furniture Center, 686 So. 2d 349 (Ala. Civ. App. 1996):

The Court held that a "working partner" was not an employee for purposes of determining whether the employer was subject to the Workers' Compensation Act. (*But see,* Treadwell v. A-O Machine Co., Inc., 749 So. 2d 1265, 1266 (Ala. Civ. App. 1998) *holding that executives of small corporations should be treated as employees of the corporation absent a showing of circumstances that would justify ignoring the corporate entity altogether*).

Read News Agency, Inc. v. Moman, 383 So. 2d 840 (Ala. Civ. App. 1980):

The Court held that, under basic tenets of corporate law, a corporate executive is necessarily an employee of the corporation. The legislature has ratified the Civil Appeals Court's decision that a corporate executive or officer is an employee of the corporation

by adopting § 10-2B-1.40(9), Ala. Code 1975 (Cum. Supp. 1998). That section provides that " 'Employee' includes an officer but not a director...."

(c) Those Not to be Considered Employees:

(i) A licensed real estate agent operating under a licensed broker shall not be considered an employee for the purposes of this chapter. Ala. Code 1975, § 25-5-50(g) (2000 & Supp. 2003).

(ii) An individual who performs services as a product demonstrator and meets specific statutory requirements shall not be considered an employee. The requirements for being a "product demonstrator" are found at Ala. Code 1975, § 25-5-50(i) (2000 & Supp. 2003).

## XVI. CO-EMPLOYEE SUITS

1. Analysis:

Has the injury resulted from willful conduct which is excepted in § 25-5-11(b) which is defined in four separate ways under § 25-5-11(c). The Code of Alabama explicitly rejects co-employee suits based on negligence or wanton conduct; only willful conduct will create a cause of action in a co-employee suit. Ala. Code 1975, § 25-5-14 (2003). The courts have followed the plain language of the statute in denying a cause of action based on negligent or wanton conduct. Powell v. USF & G, 646 So. 2d 637 (Ala. 1994).

2. Background:

"An action against third parties or co-employees as allowed by § 25-5-11 is not a claim for Workmen's Compensation, but is a ready tort action for damages that is removed from the exclusive remedy provisions of §§ 25-5-52 and 53 by virtue of the exceptions set forth in § 25-5-11." Dudley v. Mesa Industries, 770 So. 2d 1082, 1084 (Ala. 2000). While the Alabama Legislature limited recovery for work-related injuries against an employer by passing the Worker's Compensation Act, the lawmakers also allowed for a cause of action against co-employees (and others) under § 25-5-11. Kevin W. Patton and William L. Campbell, Jr., Alabama Code § 25-5-11: A Narrow Cause of Action Against Co-Employees, 64 Ala. Law. 39 (2003). An unscientific sampling, however, of fifty (50) appellate cases in which relief was sought under this cause of action found relief was denied in seventy-five (75%) percent of those cases. Id. at 40.

3. Statute of Limitations:

The two-year statute of limitations, set forth in Ala. Code 1975, § 6-2-38(g), is applicable to these third-party suits authorized under the provisions of the Worker's Compensation Act. Hubbard v. Liberty Mutual Ins. Co., 599 So. 2d 20, 22 (Ala. 1992).

4. Causation:

"Under § 25-5-11, an employee may be liable for damages for the death of, or injuries sustained by, a fellow employee; however, such liability can be based only on injury or death proximately caused by the offending employee's 'willful conduct.'" Reed v. Brunson, 527 So. 2d 102, 119 (Ala. 1988). *See also*, Smith v. Lewis, 684 So. 2d 1317, 1319 (Ala. Civ. App. 1996).

## A. INTENTIONAL INJURY

A purpose or intent or design to injure another; and if a person, with knowledge of the danger or peril to another, consciously pursues a course of conduct with a design, intent, and purpose of inflicting injury. (Ala. Code 1975, § 25-5-11(c) (1) (2003)).

1. Employee must only show that co-employee **intended to injure someone** as opposed to him/her personally. Reed v. Brunson, 527 So. 2d 102 (Ala. 1988); Lee v. Ledsinger, 577 So. 2d 900 (Ala. 1991).

2. Employee must prove willful conduct under (c)(1) by **substantial evidence**. Padgett v. Neptune Water Meter Co., 585 So. 2d 900 (Ala. 1991) (*finding co-employee supervisor was not liable for employee's injuries where there was no evidence that co-employee intentionally forced employee to do work with knowledge that it was against doctor's orders*).

3. Recklessness:

   "[A] reasonable man in the position of the defendant would have known that a particular result (i.e., injury or death) was *substantially certain* to follow from his actions." Reed v. Brunson, 527 So. 2d 102, 120 (Ala. 1988); *See also,* Ex parte Newton, 1021368, 2004 WL 406753, *3 (Ala. 2004).

(a) An employee must go even one step further and present substantial evidence "tending to show the existence of a state of mind on [the employee-defendant's] part above and beyond that required to establish negligence or wantonness." Williams v. Price, 564 So. 2d 408 (Ala.. 1990) (*finding no willful conduct where plant manager with knowledge that paper waste removal system was blocked and thereafter ordering employee to unclog the machine with it running which resulted in employee's legs being crushed because it was not substantially certain that an injury would follow*).

(b) Lee v. Longhorn Steaks, 662 So. 2d 672 (Ala. Civ. App. 1995) (holding an accident arising during horseplay at work is not willful conduct).

4. Judicial test of whether conduct is willful under subsection (c)(1):

(a) Layne v. Carr, 631 So. 2d 978 (Ala.1994):

"Evidence showing only knowledge and an appreciation of the risk of injury or death, short of a substantial certainty that injury or death would occur, is insufficient for the purpose of showing willful conduct under subsection (c)(1) . . .. Even though the co-employee defendants may have perceived a risk of injury, such a perception would be insufficient for a jury to infer that they acted with a purpose to injure [the plaintiff]." (*See also*, Bean v. Craig, 557 So. 2d 1249 (Ala. 1990) (*"[e]vidence showing only a knowledge or an appreciation of a risk of injury will not entitle a plaintiff to a jury determination of whether the co-employee acted with a purpose, intent, or design to injure another."*).

(b) Jones v. Dudley and Massingill, 706 So. 2d 758 (Ala. Civ. App. 1997):

Summary judgment for the defendant affirmed in light of the principles enunciated above. The employee was killed in the course of inspecting wood shavings at a lumber yard in the same manner in which such inspections had been done for 15 years without incident. Afterwards, OSHA recommended using a "buddy system" to avoid another accident. The evidence suggested negligence and maybe wantonness by the employer who had knowledge of a potential hazard, but this was not the requisite knowledge that injury or death would occur to a substantial certainty. Thus, "willfulness" was not proved and summary judgment was proper.

5. Pitts v Beasley, 706 So. 2d 711 (Ala. 1997) (finding that receipt of multiple safety citations and the subsequent correction of most of the underlying safety issues, alone does not create a substantial certainty that the harm cited would occur).

6. No liability for failure to replace safety mechanisms:

   No liability under subsection (c)(1) for **failure to replace safety mechanisms** such as brakes as there was no substantial evidence to show that this failure was taken with a design, intent, or purpose to inflict injury, nor was there evidence showing that an injury to employee was likely to occur. Merritt v. Cosby, 578 So. 2d 1242 (Ala. 1991). Finding that the design, intent or purpose in failing to repair was to save money, not to inflict injury.

   Likewise, no liability arose from an eye injury to an employee from a chip of metal while holding a chisel which was being hit by a co-employee. There was no evidence to suggest the co-employee "had any intent to injure Lane by failing to provide him with safety glasses before he held the chisel". Lane v. Georgia Casualty & Surety Co., 670 So. 2d 889 (Ala. 1995).

7. Insurance coverage:

   For **coverage purposes**, policy exclusions denying coverage for acts expected or intended from the standpoint of the insured [co-employee] apply to claims under § 25-5-11(c)(1) as conduct under this section to be actionable must have an **objective intent**. However, subsections (c)(2) and (c)(4) apply a **subjective test of intent** because a co-employee does not have to necessarily intend a particular result to occur. Haisten v. Audubon Indemnity Co., 642 So. 2d 404 (Ala. 1994).

## B. REMOVAL OF SAFETY GUARD

The willful and intentional [1] removal [2] from a machine [3] of a safety guard or safety device [4] provided by the manufacturer of the machine [5] with knowledge that injury or death would likely or probably result from the removal; provided, however, that removal of a guard or device shall not be willful conduct unless the removal did, in fact, [6] increase the danger in the use of the machine and [7] was not done for the purpose of repair of the machine or was not part of an improvement or modification of the machine which rendered the safety device unnecessary or ineffective. (Ala. Code 1975, § 25-5-11(c)(2)).

1. Elements of a Prima Facie Case:

The safety guard or device must have been provided by the manufacturer of the machine;

(a) The safety guard or device must have been removed from the machine;

(b) The removal of the safety guard or device must have occurred with knowledge that injury would probably or likely result from that removal;

(c) The removal of the safety guard or device must not have been part of the modification or an improvement that rendered the safety guard or device unnecessary or ineffective. Harris v. Gill, 585 So. 2d 831, 835 (Ala. 1991); Murray v. Manz, 813 So. 2d 918, 921 (Ala. Civ. App. 2001).

2. Elements analyzed:

(a) **Removal**:

(i) **Failure to install an available safety guard**:

In Bailey v. Hogg, 547 So. 2d 498 (Ala. 1989), the Court held that supervisor who knew that machine was delivered with safety device yet did not install the device was liable for "removing" that device. However, where no safety device is made by a manufacturer, a co-employee is not liable for removing it. Kruszewski v. Liberty Mutual Ins. Co., 653 So. 2d 935 (Ala. 1995) (*holding co-employee not liable for injury to employee from becoming entangled in a spinning shaft where no guard was made for the shaft*); Hutchins v. Huntley, 595 So. 2d 886 (Ala. 1992) (*holding that claim of negligently failing to provide a safety device is not actionable*).

(ii) **Probable duty to add a safety device if available from manufacturer but not provided:**

In Harris v. Simmons, 585 So. 2d 906 (Ala. 1991), the court indicated that if a safety device was subsequently made by the manufacturer, the co-employee/supervisor could be liable for willful conduct. Note that the plaintiff

may have trouble showing evidence that the co-employee had notice of this new addition.

(iii) Subsequent Co-Employees Have No Duty to Add a Safety Device. "Section 25-5-11(c) (2) does not require co-employees to add a safety device to compensate for the willful removal of one by previous co-employees." Burkett v. Loma Mach. Mfg., Inc., 552 So. 2d 134, 138 (Ala. 1989).

(1) **Bypassing a Safety Device:**

"[W]e hold that the act of 'bypassing' a safety device of a particular machine that would prevent an injury . . . is encompassed within the word 'removal.'" Harris v. Gill, 585 So. 2d 831, 837 (Ala. 1991) (*See also*, Murray v. Manz, 813 So. 2d 918 (Ala. Civ. App. 2001).

(iv) **Substituting a safety device with another device may constitute willful removal**:

In Harris v. Gill, 585 So. 2d 831 (Ala. 1991), the employer was held to have effectively removed a safety device by replacing hand control buttons on a forty year old punch press with foot controls because the hand controls were designed to protect employee's hands from danger. Evidence also existed to prove the employer had knowledge that an accident could occur.

(v) **Failure to repair or maintain a safety device:**

Where a co-employee failed to repair the lock on a car door out of which employee fell and was injured, Court held that "the failure to maintain and/or repair a safety guard or device provided by the manufacturer of a particular machine would be tantamount to the removal of or the failure to install a safety guard or device." Moore v. Reeves, 589 So. 2d 173 (Ala. 1991).

(b) **From a Machine**:

In Mallisham v. Kiker, 630 So. 2d 420 (Ala. 1993), the Court found that a co-employee could not be liable for willful conduct in failing to properly repair support timbers in a coal mine because

support timbers are not a machine or a safety device under subsection (c) (2).

(c) **Safety Guard or Device**:

(i) **Definition:**

In Moore v. Reeves, 589 So. 2d 173 (Ala. 1991), the Court defined a "safety device" and "safety guard" as:

"… an invention or contrivance intended to protect against injury, damage, or loss that insures or gives security that an accident will be prevented. Therefore, for purposes of construing these terms within § 25-5-11(c)(2), we hold that a "safety device" or "safety guard" is that which is provided, principally, but not exclusively, as protection to an employee, which provides some shield between the employee and danger so as to prevent the employee from incurring injury while he is engaged in the performance of the service required of him by the employer: it is not something that is a component part of the machine whose principal purpose is to facilitate or expedite the work. (*See also*, Cumbie v. L&A Contracting Co., Inc., 739 So. 2d 1099, 1103 (Ala. 1999)).

(ii) **The machine itself and component parts are not safety guards:**

Layne v. Carr, 631 So. 2d 978 (Ala. 1994) (malfunctioning of water pumping machine in mine or the need to replace the machine with a larger one involved the "machine" and not a safety device); Hallmark v. Duke, 624 So. 2d 1058 (Ala. 1993) (holding splitter box, transfer lines and ninety degree elbow joint in a liquor clarifying system was not a safety device but part of the machine itself resulting in no liability) (*See also*, Cumbie, 739 So. 2d at 1103).

(iii) Components of a Machine May have Concurrent Principal Purposes/A Tool Rest on a Grinder May be a Safety Device:

Smith v. Wallace, 681 So. 2d 1034, 1037 (Ala. 1995) (finding that the tool rest had concurrent principal purposes: a place to rest tools and to protect the safety of the user of the grinder).

(1) **Instructions for Safety Procedures are Not Safety Devices**:

Williams v. Price, 564 So. 2d 408, 411 (Ala. 1990) (finding that instructions pertaining to safety procedures, whether given or not, do not fall under Ala. Code § 25-5-11(c) (2)) (*See also*, Moore v. Reeves, 589 So. 2d 173, 178 (Ala. 1991)).

(2) **Failure to Inform/Safety Shut-Off Bar and Cables on an Abrasive Planer (Wood Sander) are Safety Devices:**

Jackson v. Hill, 670 So. 2d 917, 919 (Ala. 1995) (finding that "it was not the intention of the legislature to allow supervisors to fail to inform employees about safety devices so that the supervisors could remove them and then not be responsible for injuries resulting from the removal") (*See also*, Ex parte Newton, 1021368, 2004 WL 406753 (Ala. 2004)).

(3) **Door and Door-Closure Mechanism of a Vehicle Is a Safety Guard/Device on a Machine:**

Moore v. Reeves, 589 So. 2d 173, 178 (Ala. 1991) (holding that the door and door -closure mechanism of a vehicle is a safety guard/device under § 25-5-11(c) (2)).

(4) **Adequate Lighting in a Stairwell is Not a Safety Guard/Device**:

Blackwood v. Davis, 613 So. 2d 886, 888 (Ala. 1993) (finding that an "alleged failure to provide adequate lighting does not constitute the removal of, or failure to install, a safety device or safety guard provided by manufacturers of machine, within the meaning of § 25-5-11(c)(2)") (*See also*, Cumbie v. L&A Contracting Co., Inc., 739 So. 2d 1099 (Ala. 1999)).

(iv) Scrubbers, exhaust fans, and respirators in a chemical plant are not safety devices or guards on a machine:

Namislo v. Akzo Chemical Co., Inc., 671 So. 2d 1380 (Ala. 1995).

(v) A device on a nail gun which prevents accidental discharges is a safety device:

Siniard v. Allstate Ins. Co., 657 So. 2d 882 (Ala. 1995).

(vi) A dual hand activation system and safety bracelet systems on a punch press are safety devices:

Cunningham v. Stern, 628 So. 2d 576 (Ala. 1993).

(vii) A wire mesh covering a blower unit on a plastic grinder is a safety device:

Kirk v. Klements, 628 So. 2d 580 (Ala. 1993).

(viii) A mine ventilation system is not a safety device as a mine is not a machine:

Pitts v. Beasley, 706 So. 2d 711 (Ala. 1997).

(ix) "Safety Officer" is Not Per Se Liable for Injuries Resulting from Alleged Removal of a Safety Device:

Key v. Maytag Corp., 671 So. 2d 96, 101 (Ala. Civ. App. 1995) (finding that without a cause of action identified under § 25-5-11(c), a safety officer was not per se liable for an alleged removal of a manufacturer's safety device from a machine under § 25-5-11(c) merely as a result of his or her position) (*See also*, Morris v. Merritt Oil Co., 686 So. 2d 1139, 1142 (Ala. 1996) (citations omitted) (holding that "A co-employee is not liable to another employee unless he (1) voluntarily assumed or (2) was delegated his *employer's* duty to provide a reasonably safe workplace," and the "burden is upon the injured party to prove with specificity the defendant's delegated or assumed duty and its breach for which recovery is sought. *The position he occupies, without more, cannot serve as a basis for a co-employee's liability*").

(d) **Provided by the Manufacturer**:

Definition:

"[T]he term 'manufacturer' may include not only the original manufacturer (one who produces articles for use or trade), but also a subsequent entity that substantially modifies or materially alters the produce through the sue of different components and/or methods of assembly." Harris v. Gill, 585 So. 2d 831, 836 (Ala. 1991) (*See also*, Murray v. Manz, 813 So. 2d 918 (Ala. Civ. App. 2001)).

**Only Manufacturer's Safety Device Must be Installed:** "There is no duty under § 25-5-11 (c)(2) et seq. on co-employees to *add* safety guards that the manufacturer fails to provide." "Section 25-5-11(c)(2) does not require co-employees to add a safety device to compensate for the willful removal of one by previous co-employees." Burkett v. Loma Mach. Mfg., Inc., 552 So. 2d 134, 138 (Ala. 1989) (*See also*, Cooper v. Nicoletta, 797 So. 2d 1072 (Ala. 2001).

(e) **With Knowledge**:

No liability for co-employees who had no knowledge that a safety device was removed or was defective or that there existed a dangerous condition with the machine. Key v. Maytag Corp., 671 So. 2d 96 (Ala. 1995); Raines v. Browning-Ferris Industries of Ala., Inc., 638 So. 2d 1334 (Ala. Civ. App. 1995); Kirk v. Klements, 628 So. 2d 580 (Ala. 1993) (*holding that two supervisors, one of whom was responsible for maintaining the machine, lacked knowledge of the prior damage to a wire mesh guard*). However, in Jackson v. Hill, 670 So. 2d 917 (Ala. 1995), the Court held that whether the co-employee knew safety devices were not on the machine was a jury question. The Court found substantial evidence of knowledge from evidence suggesting co-employee was responsible for work place safety, had recently shown employee how to operate machine and could *See* machine from work station.

(f) **Proximate Cause**:

Injury must proximately result from removal of safety device:

Landers v. O'Neal Steel, Inc., 564 So. 2d 925 (Ala. 1990).

## C. DEFENSES TO CO-EMPLOYEE SUITS

1. Intoxication:

(a) **Statute**: "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, but no employee shall be guilty of willful conduct on account of the intoxication of another employee or another person." Ala. Code 1975, § 25-5-11(c)(3) (2003).

(b) **An Injured Employee May Sue a Manager/Director for Allowing the Intoxication of Another Employee**: Hobden v. Snow, 551 So. 2d 317, 319 (Ala. 1989) (finding that "officers an directors have the responsibility for supervising their employees and ensuring that they remain sober on the job," and an "injured employee may recover against an officer if that officer's conduct resulted in the intoxication of another employee who, in turn, caused the injury").

(c) **Mere Evidence of Drinking Alone is Not Sufficient to Show Intoxication**: Rudolph v. Gwin, 526 So. 2d 581, 584 (Ala. 1988) (finding that "not every one who 'drinks' an alcoholic beverage will be 'intoxicated,'" and "the legislature did not intend to include 'drinking' in its definition of 'willful' conduct in § 25-5-11(c)(3)").

2. Violation of Written Safety Rule:

(a) **Statute**:

"Willful and intentional violation of a specific written safety rule of the employer after written notice to the violating employee by another employee who, within six months after the date of receipt of the written notice, suffers injury resulting in death or permanent total disability as a proximate result of the willful and intentional violation. The written notice to the violating employee shall state with specificity all of the following:

(i) The identity of the violating employee.

(ii) The specific written safety rule being violated and the manner of the violation.

(iii) That the violating employee has repeatedly and continually violated the specific reference to previous times, dates, and circumstances.

(iv) That the violation places the notifying employee at risk of great injury or death.

A notice that does not contain all of the above elements shall not be valid notice for purposes of this section. An employee shall not be liable for the willful conduct if the injured employee himself or herself violated a safety rule, or otherwise contributed to his or her own injury. No employee hall be held liable under this section for the violation of any safety rule by any other employee or for failing to prevent any violation by any other employee." Ala. Code 1975, § 25-5-11(c) (4) (2003).

(b) **No Requirement to Show Intent to Injure; Must Show Willful Violation of Written Safety Rule**:

Haisten v. Audobon Indem. Co., 642 So. 2d 404, 406 (Ala. 1994) (*See also*, Pettibone v. Tyson, 794 So. 2d 377 (Ala. 2001).

(c) **Notice Must Substantially Conform to Statutory Requirements**:

Layne v. Carr, 631 So. 2d 978, 983 (Ala. 1994) (finding that "the required notice must substantially conform to the requirements of that subsection," and that when written notice of a violation did not originate from the injured employee as required under subsection (c) (4), there was no substantial conformance).

(d) **Oral Notice of Violation is Not Sufficient**:

Scott v. Goins, 677 So. 2d 1154 (Ala. 1996).

(i) Coates v. Guthrie, 707 So. 2d 204 (Ala. 1997):

A citation received by an employer from an agency and not from the deceased employee before fatal mine explosion does not meet the notice requirements of § 25-5-11(c) (4). Thus, denial of a summary judgment in a co-employee suit was reversed.

# XVII. RETALIATORY DISCHARGE

## A. DEFINITION

1. No employee shall be terminated by an employer solely because the employee instituted or maintained any action against the employer to recover worker's compensation benefits under this chapter or solely because the employee has filed a written notice of violation of a safety rule pursuant to subdivision (c)(4) of § 25-5-11. (§ 25-5-11.1)

2. General Rule:

   Absent an employment contract or violating one's civil rights, the general rule of law in Alabama is that an employee can be terminated at any time for any reason under the employment at will doctrine. Meeks v. Opp Cotton Mills, 459 So. 2d 814 IAla. 1984). Following the Meeks decision, the legislature enacted § 25-5-11.1 as an exception to the general rule. Thus, Meeks has been overruled to the extent the Court did not recognize the exception to employment-at-will doctrine as provided in § 25-5-11.1. Hoffman La-Roche v. Campbell, 512 So. 2d 725 (Ala. 1987).

3. Plaintiff asserting retaliatory discharge claims is entitled to a trial by jury. Philips v. Sentinel Consumer Products, Inc., 2004 WL 1178356, *2 (Ala. Civ. App. 2004)

## B. ESSENTIAL ELEMENTS AND PROOF

1. Elements:

   Graham v. Shoals Distributors, Inc., 630 So. 2d 417 (Ala. 1993):

   A plaintiff establishes a prima facie case of retaliatory discharge by showing that:

   (a) a worker's compensation claim was filed;

   (b) the plaintiff's injury prevented him from working for a period; and

   (c) when the plaintiff returned to work, he no longer had a job.

2. Shifting Burden:

   Coastal Lumber Co. v. Johnson, 669 So. 2d 803 (Ala. 1995):

   "After the defendant has met the burden of coming forward with evidence of a legitimate reason for terminations, the plaintiff has the burden of

going forward with rebuttal evidence to prove that the defendant's reasons for termination are not true. However, the plaintiff does not have to prove that the defendants reasons for termination are not true unless the defendants evidence is sufficiently certain, without more evidence from the plaintiff to support a directed verdict. If the plaintiff's prima facie case is strong, and the defendants evidence of an asserted reason is weak or equivocal, the jury might simply disbelieve the defendant." Id.

3. Example of Inadequate Proof:

Allen v. Albrecht Enterprises, Inc., 675 So. 2d 425 (Ala. Civ. App. 1995):

No prima facie case of retaliatory discharge proved where the former employee testified in her deposition that she had no evidence she was terminated because she filed a worker's compensation claim. In fact, she admitted she was terminated the date **BEFORE** she filed her claim. This latter admission was deemed fatal to her claim.

4. Willing and able to work:

In Consolidated Stores, Inc. v. Gargis, the Alabama Court of Civil Appeals held that the plaintiff being "willing and able" to return to work was an additional element for a prima facie case of retaliatory discharge. However, the Supreme Court of Alabama held in Bleier v. Wellington Sears Co. that "willing and able" is no longer a prima facie element of a claim of retaliatory discharge.

The Court stated:

> "We conclude that the "willing and able' doctrine is relevant in a retaliatory discharge claim brought pursuant to § 25-5011.1. To hold otherwise would give an excessively broad effect to the Legislature's retaliatory-discharge exception to the employment-at-will doctrine. However, to accommodate the continued relevance of an employee's willingness and ability to work by embedding the "willing-and-able" requirement into the elements of the plaintiff's prima facie case of retaliatory discharge would exclude a substantial class of employees from the protection of the remedy provided by § 25-5-11.1. We cannot conclude that the Legislature intended to exclude that class from the remedy, in the absence of specific direction. For that reason, we decline to follow the precedent taken from the federal statutory remedies relied upon in Gargis . . . We hold, therefore, that the "willing-and-able" doctrine does not establish an element of an employee's prima facie case, but that the question whether an employee is willing

and able to return to work is relevant to the defendant's opportunity to establish a defense to a claim alleging retaliatory discharge or to eliminate or reduce the damages recoverable for lost wages." Bleier v. Wellington Sears Co., 757 So. 2d 1163, 1171 (Ala. 2000).

5. Legitimate business reason:

Culbreth v. Woodham Plumbing Co., Inc., 599 So. 2d 1120 (Ala. 1992):

It is not legitimate business reason for an employer to state that an injured employee who filed a worker's compensation claim no longer had a job upon that employee's return to work because others have been hired to do the injured employee's work or there is no work left for the position the injured employee held to perform.

## C. TERMINATION

1. Actual or constructive termination:

National Sec. Ins. Co. v. Donaldson, 664 So. 2d 871 (Ala. 1995):

Alabama courts recognize claims for constructive discharge. The standard for establishing a claim for constructive discharge is a follows: "[i]f the employer deliberately makes and employee's working conditions so intolerable that the employee is forced into a involuntary resignation, then the employer has [brought about] a constructive discharge and is liable for any illegal conduct involved therein as if it had formally discharged the aggrieved employee."

Kent Corp. v. Hale, 699 So. 2d 954 (Ala. 1997):

Jury verdict awarding $1.25 million reversed in a retaliatory discharge case. Following an on-the-job-injury, the employee began returning for light duty work but made persistent complaints of unsubstantiated medical problems. On his last day, the employee showed up at work wearing a back brace. The employer requested medical documentation showing the brace was medically prescribed, and when the employee could not do so, he was escorted from the premises. The employer offered several light duty jobs to the employee after this incident, but the employee testified in his deposition that he did not intend to return. In reversing, the Supreme Court found a prima facie case had not been proved. Because there was no actual termination, the employee had to prove his employer deliberately made his working conditions so intolerable that he had no choice but to quit. This was not done under these facts.

2. Demotion may constitute a constructive termination:

White v. Midtown Rest. Corp., 632 So. 2d 1330 (Ala. 1994):

The Court held that demoting an employee from manager to assistant manager after he returned to work was not tantamount to termination pursuant to § 25-5-11.1. However, the Court's decision appears to have been greatly influenced by the fact that the employer in this case did not reduce the employee's salary, and the employee had not resigned from his position. (*But see*, National Sec. Ins. Co. v. Donaldson, 644 So. 2d 871 (Ala. 1995) *holding that because the employee's demotion was accompanied by a salary reduction and ultimate resignation from employment, the jury should determine if the demotion was tantamount to a termination*).

3. No proof of termination:

Keystone Foods Corp. v. Meeks, 662 So. 2d 235 (Ala. 1995):

Employee was prevented from working in the laboratory. Employee admitted she was offered another job with the employer, but she refused to accept it. There was no proof that her working conditions were made so intolerable that she was forced to leave to prove constructive termination. Because there was no actual or constructive termination, jury verdict for plaintiff was reversed.

## D. SOLELY

Twilley v. Daubert Coated Products, Inc., 536 So. 2d 1364 (Ala. 1988):

The Court determined that because the retaliatory discharge statute is remedial in nature that the term "solely" does not mean solely or singularly. Instead, once the plaintiff presents a prima facie case of wrongful termination, the employer then must come forward with evidence that the employee was terminated for a legitimate reason; whereupon, the plaintiff must show the employer's reason was only a pretext for an impermissible termination. Whether the "sole" reason was for filing a worker's compensation claim is generally a jury question. (*See also,* Coastal Lumber Co. v. Johnson, 669 So. 2d 803 (Ala. 1995)).

Chesser v. Mid-South Electrics, Inc., 652 So. 2d 240 (Ala. 1994):

The Court found no error in a jury instruction reciting the language contained in the statute referencing the word "solely".

## E. ACTION

McClain v. Birmingham Coca-Cola Bottling Co., 578 So. 2d 1299 (Ala. 1991): The Court held the term "action" contained in the statute encompasses both suits and claims filed for worker's compensation benefits.

## F. MISCELLANEOUS ISSUES

1. Lozier Corporation v. Gray, 624 So. 2d 1034 (Ala. 1993):

   An employee has a duty to mitigate his damages by accepting reasonably comparable employment (if offered) after termination. The Court reduced the trial court's award of $200,000 for compensatory damages to $11,053.50 because the plaintiff had been offered at least four jobs since being terminated. Furthermore, if a plaintiff earns more money after being terminated with no proof that the plaintiff became less employable because of the termination, and where there was no proof of emotional distress, the plaintiff can only recover the amount of their salary and benefits lost during the time the plaintiff was unemployed.

2. Continental Eagle Com. v. Mokrzycki, 611 So. 2d 313 (Ala. 1992):

   A plaintiff may not recover as damages for a wrongful discharge lost wages previously awarded the plaintiff in his or her underlying case for worker's compensation benefits. **Plaintiffs may use pattern and practice evidence of similar prior terminations to establish a prima facie case**.

3. Rowe v. Woods Associates, Inc., 695 So. 2d 1210 (Ala. Civ. App. 1997):

   Section 25-5-11.1 provides that no employee shall be terminated solely for filing written notice of a safety violation. The written notice essentially strengthens a future cause of action against a co-employee if remedial measures are not taken.

# XVIII. PREMISES LIABILITY

## A. GENERAL RULES AND PROOF REQUIRED

1. The duty a landowner owes to a person on the landowner's property depends upon whether that person is an invitee, a licensee, or a trespasser.

2. To withstand a summary judgment in an ordinary slip and fall case, Alabama requires a plaintiff to submit "evidence of such weight and quality that fair-minded persons in the exercise of impartial judgment can reasonably infer the existence of the fact sought to be proved." Ex parte Haralson, 871 So. 2d 802, 805 (Ala. 2003).

3. General proof:

   (a) That the foreign substance slipped upon was on the floor a sufficient length of time to impute constructive notice to the defendant; or

   (b) That the defendant had actual notice of the substance's presence on the floor; or

   (c) That the defendant was delinquent in not discovering and removing the foreign substance.

## B. INVITEE

1. Defined: An invitee has been defined as a "visitor, a transient who enters property at the express or implied invitation of the owner or occupier for the material or commercial benefit of the occupier." Ingram v. Akwell Industries, Inc., 406 So. 2d 897, 899 (Ala. 1981) (*See also*, Baldwin v. Gartman, 604 So. 2d 347, 349-50 (Ala. 1992)).

2. Duty owed: An invitee is owed a "duty to keep [its] premises in a reasonably safe condition," Brown v. Autry Greer & Sons, Inc., 551 So. 2d 1049, 1050 (Ala. 1989), and a duty to warn of hidden dangers known to the invitor, but unknown to the invitee. Heath v. Sims Bros. Const. Co., 529 So. 2d 994, 995 (Ala. 1988).

   The law in Alabama regarding the scope of a landowner's duty to an invitee was concisely summarized in Heath v. Sims Bros. Const. Co., 529 So. 2d. 994 (Ala. 1988):

   > The duty to keep an area safe for invitees is limited to hidden defects which are not known to the invitee and would not be discovered by him in the exercise of ordinary care. **All ordinary risks present are assumed by the invitee, and the general contractor or owner is under no duty to alter the premises so as to obviate known and obvious dangers . . .** the entire basis of an invitor's liability rests upon his superior knowledge of the danger that causes the invitee's injuries.
   >
   > Id. at 995. (Emphasis added).

3. Open and obvious:

A premises owner does not owe an invitee a duty to warn of open and obvious dangers. Id. "The owner of a premises in [business invitee] cases is not an insurer of the safety of his invitees, and the principle of *res ipsa loquitur* is not applicable. There is no presumption of negligence which arises from the mere fact of an injury to an invitee." Parrott v. Home Quarters Warehouse, Inc., 699 So. 2d 228 (Ala. Civ. App. 1997). Furthermore, "[e]vidence that affords nothing more than mere speculation, conjecture, or guess is completely insufficient to warrant the submission of a case to the jury." Id.

> *See also,* Hale v. Sequoyah Caverns and Campgrounds, Inc., 612 So. 2d 1162 (Ala. 1992) (affirming summary judgment on the issue of open and obvious where plaintiff fell crossing a ditch which she had previously crossed without incident earlier in the day where there was no evidence of notice to the premises owner of any defect).

4. Proof in general slip and fall case:

To prove negligence of a store owner in a general slip and fall case, a plaintiff must show by substantial evidence:

(a) That the foreign substance slipped upon was on the floor a sufficient length of time to impute constructive notice to the defendant, or

(b) That the defendant had actual notice of the substance's presence on the floor, or

(c) That the defendant was delinquent in not discovering and removing the foreign substance. Winn-Dixie Store No. 1501 v. Brown, 394 So. 2d 49 (Ala. C iv. App. 1981).

> *Cases*: *See* Cox v. Western Supermarkets, Inc., 557 So. 2d 831, 832 (Ala. 1989); Bonds v. Brown, 368 So. 2d 536 Ala. 1979 (holding the plaintiff failed to make out a prima facie case that defendant was negligent in maintaining its floors in the absence of evidence showing the hospital had notice of the condition of the floor); Hale v. Sequoyah Caverns and Campgrounds, Inc., 612 So. 2d 1162 (Ala. 1992).

## C. LICENSEE

1. Defined:

A licensee is a "person who visits a landowner's property with the landowner's consent or as the landowner's guest but with no business purpose." Ex parte Wooten, 681 So. 2d 149 (Ala. 1996) (*citing*, Hambright v. First Baptist Church-Eastwood, 638 So. 2d 865 (Ala. 1994)).

In Hambright, the Alabama Supreme Court clearly stated that Alabama would not adopt the public or business invitee test when classifying a visitor as a licensee or an invitee.

2. Duty owed:

A landowner owes a licensee a "duty not to willfully, wantonly, or negligently injure him after the landowner has discovered danger to the licensee." Copeland by and through Copeland v. Pike Liberal Arts School, 553 So. 2d 100 (Ala. 1989) (emphasis supplied by Court). (*See also*, Tuders v. Kell, 739 So. 2d 1069 (Ala. 1999)).

## D. TRESPASSER

1. Defined:

A trespasser is a person who enters upon land of another without express or implied permission of the landowner. Copeland by and through Copeland v. Pike Liberal Arts School, 553 So. 2d 100 (Ala. 1989).

2. Changing status:

Note that a person's status as an invitee can change if permission for the visitor is withdrawn. Bates v. Peoples Sav. Life Ins. Co., 475 So. 2d 484 (Ala. 1985).

3. Duty owed:

The duty owed a trespasser is "not to wantonly or intentionally injure him and to warn him of dangers known by the [landowner] after it was aware of danger to [the trespasser]." Copeland by and through Copeland v. Pike Liberal Arts School, 553 So. 2d 100 (Ala. 1989) (emphasis supplied by Court).

A landowner’s duty to children is somewhat different. "Under ordinary conditions, trespassing children or children on the land of another as licensees occupy the same position as trespassing adults. Id. Specifically, if the trespasser is a child and physical harm to the trespassing child is caused by a natural condition upon the property, the duty that a landowner

owes to an adult trespasser is the same and only duty owed to the trespassing child." Copeland by and through Copeland v. Pike Liberal Arts School, 553 So. 2d 100 (Ala. 1989).

## XIX. CLASS ACTIONS

### A. GENERAL RULES

1. Defined: A class action is a procedural device used to provide a simple and efficient means for adjudicating numerous related claims. Adams v. Robertson, 676 So. 2d 1265, 1268 (Ala. 1995).

2. Prerequisites for class action:

   (a) The class must be so numerous that joinder is impracticable;

   (b) There must be questions of law or fact common to the class;

   (c) The claims or defenses of the class representatives must be typical of the claims or defenses of the class; and

   (d) The class representatives must be able to fairly and adequately protect the interests of the class.

   Adams, 676 So. 2d at 1268-69 (*citing*, A. R. CIV. P. 23(a)).

   (e) Cheminova Am. Corp. v. Corker, 779 So. 2d 1175, 1182-85 (Ala. 2000). A class was certified under Rule 23. Opinion addresses numerosity, commonality, typicality, and adequacy of representation.

   (f) Funliner of Ala., L.L.C. v. Pickard, No. 1012411, 2003 Ala. LEXIS 158, *15 (Ala. May 23, 2003): Supreme Court of Alabama found that the individuals' claims for money damages predominated over their claims for injunctive relief and that those claims did not flow out of a group injury, but depended upon a showing of individual damages rather than upon a showing of damages suffered by the class as a whole. Therefore, the trial court improperly certified the plaintiff class pursuant to A. R. CIV. P. 23.

3. Class categories: After meeting the prerequisites of Rule 23(a), the class must then fall into one of three categories. Adams, 676 So. 2d at 1269.

(a) Rule 23(b) provides that a class action can be maintained if the prosecution of separate actions would run the risk of inconsistent adjudications regarding individual members, or if adjudications of individual members of a class would dispose of interests of other non-class members. Adams, 676 So. 2d at 1269 (*citing,* A. R. CIV. P. 23(b) (1)).

(b) A class action can also be maintained if the party opposing the class has acted or refused to act in a way applicable to the whole class. Adams, 676 So. 2d at 1269 (*citing*, A. R. CIV. P. 23 (b) (2)).

(c) Lastly, a class action can be maintained "when there are common questions of law or fact among the class members." Adams, 676 So. 2d at 1269 (*citing*, A. R. Civ. P. 23(b) (3)).

## B. CONDITIONAL CLASS CERTIFICATION

1. In the past, class proponents have sought "conditional" class certification based on the pleadings of the class representative prior to the certification becoming final.

2. The conditional certification argument was based on Rule 23 which states that "[a]s soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained." Ex parte Citicorp Acceptance Co., Inc., 715 So. 2d 199, 204 (Ala. 1997) (*quoting* ALA. R. CIV. P. 23(c) (1)).

3. The Alabama Supreme Court issued a series of writs of mandamus in December 1997 to set forth new standards for certification of class actions.

   (a) The abatement rule, which had applied to class action cases since 1995, was effectively overruled in favor of a first-to-file rule.

   (b) In an attempt to curb the practice of conditional certification, the Court gave a detailed explanation outlining the few instances when such certification is acceptable.

   (c) The Court established minimum requirements for a trial court to follow when performing a "rigorous analysis" prior to granting class certification.

4. Relevant cases:

(a) Ex parte State Mut. Ins. Co., 715 So. 2d 207 (Ala. 1997). The Alabama Supreme Court examined whether the Alabama abatement rule applied to class actions.

(i) The abatement rule stands for the proposition that there cannot be two actions against the same defendant for the same cause. Id. at 219.

(ii) The Court held that state courts have the inherent ability to enjoin competing actions under the same power exercised by the federal courts, without application of the abatement rule, and should do so "based upon a reasoned balance of the equities of each particular case." Id. at 225.

(b) Ex parte First Nat'l Bank of Jasper, 717 So. 2d 342 (Ala. 1997): The Court determined that Rule 23(c) and (d) allowed for "conditional" class certification.

(i) One of the best uses of conditional class certification was for settlement purposes. Id. at 347.

(ii) In settlement situations, the actual class ruling is deferred until settlement approval then the court is required to apply the Rule 23 criteria. Id. at 348.

(c) Ex parte Equity Nat'l Life Ins. Co., 715 So. 2d 192 (Ala. 1997): The Court examined whether a conditional certification could be ordered based solely on the pleadings and without an evidentiary hearing.

(i) A full hearing is not required in every case alleging class action, but proper certification of a class can rarely be achieved based solely on the plaintiff's pleadings.

(ii) Trial courts must undertake rigorous analysis to identify the Rule 23 elements as well as a "full evidentiary demonstration" of how the proponents have met those elements. Id.

(d) Ex parte Citicorp Acceptance Co., Inc., 715 So. 2d 199 (Ala. 1997). The Court addressed the issue of ex parte certification orders.

(i) A class should not be certified without notice to the defendant. Id. at 207.

(ii) "Rigorous analysis" of Rule 23 criteria is also required to certify a class. Id. at 208.

(e) Ex parte Mercury Fin. Corp. of Ala., 715 So. 2d 196 (Ala. 1997): The Court focused on protecting the rights of the defendant.

(i) "Because due process rights of the parties are implicated in the certification process, a full evidentiary demonstration and legal analysis are 'indispensable for each of the prerequisites for certification under Rule 23.'" Id. at 200.

(f) In Ex parte Am. Bankers Life Assurance Co. of Fla., 715 So. 2d 186 (Ala. 1997): The Court established minimum requirements for a trial court to follow when performing a "rigorous analysis" prior to granting class certification.

(i) The trial court's order must contain each of the elements set forth in A.R.Civ.P. 23, as well as, how the proponents have carried their burden of proof on each of these elements before a class can be certified.

(ii) The same careful analysis of the Rule 23 elements is necessary whether the order is "conditional" or "final." Id. at 195.

(g) In Reynolds Metals Co. v. Hill, 825 So. 2d 100, 105 (Ala. 2002), the Court recognized that the general rule was that "courts have denied class certification of classes involving fraud claims based on oral communications because of the individualized nature of the communications between the class members and the defendants." (*citing*, Ex parte Household Retail Services Inc., 744 So. 2d 871, 878 (Ala. 1999)).

(i) However, in Household Retail Services, the Court created an exception to that rule and held that a class could be certified when fraud claims based on oral communications were alleged if the plaintiffs could show that the oral misrepresentations were uniform. 744 So. 2d at 878.

## XX. ALABAMA TRADE SECRETS ACT

### A. PURPOSE OF ACT

The Alabama Supreme Court has stated that the purpose of the Alabama Trade Secrets Act ("the Act"), Ala. Code 1975, §§ 8-27-1 to -6, is "to protect individual property rights in trade secrets and, thereby, to foster the development of new products and technology in this state." Warranty Corp. v. Hans, 2000 WL 284261 (S.D. Ala. 2000); IMED Corp. v. Sys. Eng'g Assoc. Corp., 602 So. 2d 344, 346 (Ala. 1992).

### B. WHAT IS A "TRADE SECRET"?

Determining whether a processor piece of information is a trade secret is a question of fact for a jury to decide. Soap Co. v. Ecolab, Inc., 646 So. 2d 1366, 1372 (Ala. 1994). Generally, a trade secret is something that:

1. Is used or intended for use in a trade or business;
2. Is included or embodied in a formula, pattern, compilation, computer software, drawing, device, method, technique, or process;
3. Is not publicly known and is not generally known in the trade or business of the person asserting that it is a trade secret;
4. Cannot be readily ascertained or derived from publicly available information;
5. Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy; AND
6. Has significant economic value.

Ala. Code 1975, § 8-27-2 (2004) (*See also*, Restatement of Torts, § 757 comments (1939) and Drill Parts and Svc.Co., Inc. v. Joy Mfg.Co., 439 So. 2d 43, 48 (Ala. 1983)).

### C. WHO BEARS THE BURDEN OF PROOF?

The party asserting trade secret protection bears the burden of proving that the information satisfies § 8-27-2 and Ala. Code 1975, § 8-27-2(1) (b).

1. In Alagold Corp v. Freeman, 20 F.Supp. 2d 1305, 1315 (M.D. Ala. 1998), the court noted that the information was not marked confidential in any way, the file cabinets were not locked and the employee who needed to know about the information had free access to the information. Id.

Furthermore, the court specifically noted that the employees were not required to sign a confidentiality or non-compete agreement limiting the use of the information. Id. at 1316. Therefore, the court in Alagold held that "it cannot be said that Alagold undertook reasonable efforts under the circumstances to maintain the secrecy of its information. Id. The court further held that the plaintiff had not met its burden of proving that the information satisfied the definition of "trade secret". Therefore, it held that the plaintiff was not entitled to protection under the Act. Id.

2. In Allied Supply Co., Inc. v. Brown, 585 So. 2d 33, 36 (Ala. 1991), the Court held that the plaintiff failed to take reasonable steps to maintain the secrecy of the information sought to be protected. In Allied, the facts indicated that at least 10 employees had free access to the information, the information was not marked confidential, the information was taken home by employees, and the information was kept in the receptionist's Rolodex file. Id. at 36. Therefore, the Court held that the plaintiff had not met its burden of proving reasonable steps to ensure the information was kept secret. Id.

## D. DISTINCTION BETWEEN "HEAD KNOWLEDGE" AND "TRADE SECRETS"

Pre-existing common law (prior to the enactment of the Act) demonstrates a clear distinction between "head knowledge" and "trade secrets." "The [agent, employee] can carry with him any confidential information which he can remember but may take nothing that has been written down." Gilmore Indus., Inc. v. Ridge Instrument Co., 258 So. 2d 55, 59 (Ala. 1972).

## E. MISAPPROPRIATION OF A TRADE SECRET

1. The Act proscribes the misappropriation of trade secrets. Ala. Code 1975, § 8-27-3. It is completely lawful for a company to independently develop an idea that is identical to a competitor's trade secret, even through reverse engineering. Ala. Code 1975, § 8-27-4 (official comment).

2. A person who discloses or uses the trade secret of another, without a privilege to do so, is liable to the other for misappropriation of the trade secret if:

   (a) That person discovered the trade secret by improper means;

   (b) That person's disclosure or use constitutes a breach of confidence reposed in that by person by another;

(c) That person learned the trade secret from a third person, and knew or should have known that (i) the information was a trade secret and (ii) that the trade secret had been appropriated under circumstances which violate the provisions of (a) or (b), above; or

(d) That person learned the information and knew or should have known that it was a trade secret and that its disclosure was made to that person by mistake.

Ala. Code 1975, § 8-27-3.

3. “Improper means” are described as:

(a) Theft;

(b) Bribery;

(c) Misrepresentation;

(d) Inducement of a breach of confidence;

(e) Trespass; or

(f) Other deliberate acts taken for the specific purpose of gaining access to the information of another by means such as electronic, photographic, telescopic or other aids to enhance normal human perception, where the trade secret owner reasonably should be able to expect privacy.

Ala. Code 1975, § 8-27-2(2) (2004).

4. “[A] person is liable under § 8-27-3 if he obtains information from a third person and then "discloses or uses" that information, knowing, or possessing information from which he should know, at the time of disclosure or use that the information is a trade secret and that it had been misappropriated by the third person.” IMED Corp., 602 So. 2d at 346.

5. Remedies:

(a) The Act provides the following basic remedies for actual or threatened misappropriation of a trade secret:

(i) Injunctive and other equitable relief as may be appropriate,

(ii) Recovery of any profits and other benefits conferred by the misappropriation that are attributable to the misappropriation, and

(iii) Actual damages suffered as a result of the misappropriation.

Ala. Code 1975, § 8-27-4(1) (2004).

6. The Act also allows punitive damages "not to exceed the actual award made under subdivision (1), but not less than $5,000, if willful and malicious misappropriation exists." Ala. Code 1975, § 8-27-4(3) (2004).

7. The Act allows the prevailing party to recover reasonable attorney's fees if:

(a) A claim of actual or threatened misappropriation is made or resisted in bad faith,

(b) A motion to terminate an injunction is made or resisted in bad faith, or

(c) Willful and malicious misappropriation exists.

Ala. Code 1975, § 8-27-4(2) (2004).

## XXI. PIERCING THE CORPORATE VEIL

### A. WHETHER OR NOT A CORPORATION MAY BE "PIERCED" IS DETERMINED ON A CASE BY CASE BASIS.

Environmental Waste Control, Inc. v. Browning-Ferris Industries, Inc., 711 So. 2d 912, 914 (Ala. 1997).

### B. PIERCING THE CORPORATE VEIL IS NOT A POWER THAT IS LIGHTLY EXERCISED.

Econ Marketing, Inc. v. Leisure American Resorts, Inc., 664 So. 2d 869, 870 (Ala. 1995). "The concept that a corporation is a legal entity existing separate and apart from its shareholders is well settled in [Alabama]." Ramko, Inc. v. Lander, 707 So. 2d 645, 646 (Ala. Civ. App. 1997) (*quoting*, Co-Ex Plastics, Inc. v. Ala. Pak, Inc., 536 So. 2d 37 (Ala. 1988)).

## C. THE CORPORATE ENTITY MAY BE DISREGARDED AND LIMITED STOCKHOLDER LIABILITY DENIED.

Typically, piercing the corporate veil is justified in three situations: inadequacy of capital, fraudulent purpose in conception or operation of the business, and operation of the corporation as an instrumentality or alter ego. M&M Wholesale Florist, Inc. v. Emmons, 600 So. 2d 998, 1000 (Ala. 1992).

1. Inadequacy of capital:

   A court will not pierce the veil simply because a corporation is undercapitalized or because a corporation is owned by a sole shareholder. Instead, the party seeking to pierce the veil must further demonstrate misuse of control and loss resulting from it, as by showing fraud in asserting corporate existence or that recognition of existence will result in injustice. In re Martin, 184 B.R. 985, 992 (M.D. Ala. 1995).

2. Fraudulent purpose in conception or operation of the business:

   To pierce the corporate veil, a plaintiff must show that "…recognition of the corporate existence will result in injustice or inequitable consequences." Ramko, Inc., 707 So. 2d at 646.

3. Operation of the corporation as an instrumentality or alter ego:

   A parent corporation will be responsible for the obligations of its subsidiary when its control has been exercised to such a degree that the subsidiary is its mere instrumentality. Envtl. Waste Control, Inc. v. Browning-Ferris Indus., Inc., 711 So. 2d 912, 914 (Ala. 1997) (*See also*, Baker v. Hosp. Corp. of Am., 432 So. 2d 1281, 1284 (Ala. 1983)).

   General factors relevant to an alter ego or instrumentality analysis:

   (1) Parent corporation owns all or most of the capital stock of the subsidiary.

   (2) Parent and subsidiary corporations have common directors or officers.

   (3) Parent corporation finances the subsidiary.

   (4) Parent corporation subscribes to all the capital stock of the subsidiary or otherwise causes its incorporation.

   (5) Subsidiary has grossly inadequate capital.

(6) Parent corporation pays the salaries and other expenses or losses of the subsidiary.

(7) Subsidiary has substantially no business except with the parent corporation or no assets except those conveyed to it by the parent corporation.

(8) In the papers of the parent corporation or in the statements of its officers, the subsidiary is described as a department or division of the parent corporation, or its business or financial responsibility is referred to as the parent corporation's own.

(9) Parent corporation uses the property of the subsidiary as its own.

(10) Directors or executives of the subsidiary do not act independently in the interest of the subsidiary but take their orders from the parent corporation.

(11) Formal legal requirements of the subsidiary are not observed.

Envtl. Waste Control, Inc., 711 So. 2d at 915. *See also* S. Ala. Pigs, LLC v. Farmer Feeders, Inc., 305 F. Supp. 2d 1252, 1258 (M.D. Ala. 2004) (Identifying eight additional factors that allow a court to pierce the corporate veil).

## D. THE ESSENTIAL ELEMENTS FOR IMPOSITION OF LIABILITY ON THE DOMINANT PARTY

1. Dominant party must have complete control and domination of the subservient corporation's finances, policy, and business practices so that, at the time of the attacked transaction, the subservient corporation had no separate mind, will, or existence of its own.

2. The control must have been misused by the dominant party.

3. The misuse of this control must proximately cause the harm or unjust loss.

First Health, Inc. v. Blanton, 585 So. 2d 1331, 1334-1335 (Ala. 1991).

## XXII. EXPERT WITNESSES IN ALABAMA

### A. ALABAMA RULE OF EVIDENCE 702:

The Alabama Rules of Evidence provide that, "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." Ala.R.Evid. 702. The Supreme Court of Alabama stated that, "Rule 702 does not require an expert to have scientific literature to support his or her opinion. Indeed a reading of Rule 702 shows a clear rejection of such a narrow interpretation." Courtaulds Fibers, Inc. v. Long, 779 So. 2d 198, 202 (Ala. 2000).

### B. ALABAMA IS A FRYE JURISDICTION:

According to the Alabama Supreme Court, "this Court has not abandoned the 'general acceptance' test stated in Frye v. United States, and it has not adopted the Daubert standard in civil cases." Courtalds, 779 So. 2d at 202. Therefore, in Alabama, "courts will go a long way in admitting expert testimony deduced from a well recognized scientific principle or discovery, [however] the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs." Frye v. United States, 293 F. 1013, 1914 (D.C.App. 1923).

### C. EXCEPTION FOR DNA EVIDENCE:

The Alabama Code states that, "Expert testimony or evidence relating to the use of genetic markers contained in or derived from DNA for identification purposes shall be admissible and accepted as evidence in all cases arising in all courts of this state, provided, however, the trial court shall be satisfied that the expert testimony or evidence meets the criteria for admissibility as set forth by the United States Supreme Court in Daubert, et. us., et. al., v. Merrell Dow Pharmaceuticals, Inc., decided on June 28, 1993." Ala. Code 1975, § 36-18-30.

Therefore, limits on the admissibility of DNA evidence in Alabama will be handled by the trial judge's preliminary determination of "whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. [Which] entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and if whether that reasoning or methodology properly can be applied to the facts in issue." Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 592-93 (1993).

# XXIII. SHAREHOLDER OPPRESSION UNDER ALABAMA LAW

## A. WHAT IS SHAREHOLDER OPPRESSION?

Shareholder oppression occurs when a majority shareholder in a closely held business unilaterally withholds or denies certain expectations and/or privileges through a position, power, or legal device that a minority shareholder could reasonably expect to receive and when the minority shareholder has no market to sell his shares at a fair market price. Andrew P. Campbell & Caroline Smith Gidiere, Shareholder Rights, the Tort of Oppression and Derivative Actions Revisited: A Time for Mature Development?, 63 Ala. Law 315 (2002). Under Alabama law, such activity violates a majority shareholder's duty to "act fairly to minority shareholders." Burt v. Burt Boiler Works, Inc., 360 So. 2d 327, 331 (Ala. 1978).

## B. IS AN OPPRESSION CLAIM A TORT OR CONTRACT CLAIM? WHAT STATUTE OF LIMITATION APPLIES?

There is no authoritative holding on whether an oppression claim is based in tort or contract. Various members of the Alabama Supreme Court, however, have stated that oppression claims are ex contractu. Stallworth v. AmSouth Bank, 709 So. 2d 458, 469-470 (Ala. 1997) (Maddox, J., dissenting); Fulton v. Calhoun, 621 So. 2d 1235, 1254-1255 (Ala. 1993) (Houston, J., concurring specially); Michael E. DeBowe, "Oppression of Minority Shareholders: Contract, Not Tort, 54 Ala. Law 128 (1993) (But see, Robbins v. Sanders, 890 So. 2d 998, 1011 (Ala. 2004) (referring to the tort if oppression)). The statute of limitations for a contract action in Alabama is six years. Ala. Code 1975, § 6-2-34(9).

## C. DISTINGUISHING BETWEEN CLAIM FOR OPPRESSION AND A DERIVATIVE CLAIM

An oppression claim is an individual cause of action an individual shareholder owns. "A minority shareholder cannot parlay a wrong committed primarily against the corporation, which gives rise to a derivative claim only, into a personal recovery of damages under a squeeze-out theory by simply stating that the injury to the corporation is 'unfair to him as well'". Stallworth, 709 So. 2d at 467.

## D. WHAT ARE ACTS OF OPPRESSION?

Difficulty in Determining What Constitutes Oppression:

1. [T]here are few black and white cases of oppression anymore; rather, they are blended into shades of gray. Consider, for example, the majority shareholder of a subchapter S corporation who refuses to declare

> dividends because of a perceived need for additional cash flow. Is this sufficient grounds for a finding of oppression? What if the company is profitable and its net worth has been increased? What about a majority shareholder who, like the majority in Ex parte Brown, discriminates against minority shareholders in employment and payment of corporate profits, but builds the corporation's net worth a hundred- or thousand-fold such that the minority (or their children) will recognize a tremendous gain upon the ultimate sale of the business? When does a minority shareholder have a right to a job if he or she and the majority shareholder cannot get along; how does this square with the doctrines of determination of will; and must the majority shareholder make up for the differential in salaries through increases in dividends paid to the minority shareholder?
>
> Shareholder Rights, the Tort of Oppression, 63 Ala. Law. at 316.

## E. EXAMPLES OF OPPRESSION

Alabama courts appear to recognize an act of oppression as some act by a majority shareholder that would deprive the minority shareholders of their "proportionate rights and powers" or their "legitimate expectations" in the closely held corporation. Burt v. Burt Boiler Works, Inc., 360 So. 2d 327, 331-32 (Ala. 1978).

1. The following actions are examples of oppression:

    (a) Failure to pay adequate dividends

    (b) Payment of large salaries for controlling shareholders

    (c) Removal of minority shareholders from positions as officers and directors

    (d) Elimination of preemptive rights

    (e) Elimination of cumulative voting

    (f) Misappropriation of corporate opportunities

    (g) Preclusion of minority's use of corporate recreational facilities

2. It is unclear if the following actions are examples of oppression:

    (a) Acts of corporate waste

    (b) Interested director transactions

(c) Usurpation of corporate opportunities which may “siphon off”corporate earnings

## F. BREACH OF DUTY AND REMEDIES

1. Breach of Fiduciary Duty:

Oppression represents a breach of fiduciary duty claim that the minority shareholder has against the majority shareholders for a judgment to recover a proportionate share of distributions during the oppression period. Andy Campbell, Litigating Minority Shareholder Rights and the New Tort of Oppression, 53 Ala. Law. 108, 112 (1992).

2. Damages:

No Alabama case has made a computation of damages for oppression, so it is difficult to gauge what damages are available. The courts will likely form a remedy that balances protecting the ongoing operations of the corporation with redressing the minority shareholder’s expectations. Shareholder Rights, the Tort of Oppression, 63 Ala. Law at 321.

3. Attorneys’ Fees:

“[A]bsent fraud, attorney’s fees will not be available on individual claims for oppression.” Litigating Minority Shareholder Rights, 53 Ala. Law. at 114. Attorneys’ fees can be awarded in derivative actions based on the theory that the action has conveyed a benefit on the corporation.

# XXIV. DUTY OF A FOREIGN BUSINESS TO PROPERLY QUALIFY TO CONDUCT BUSINESS IN ALABAMA

## A. GENERALLY

A foreign business (*i.e.* a business incorporated outside of Alabama) has a duty to properly qualify within Alabama before conducting business within the state. If the foreign corporation does not qualify in Alabama, any contracts that it enters to that are to be performed in Alabama are void upon an action by the foreign corporation. The nonqualified foreign corporation, however, will be estopped from asserting that the contract is void in an action by another party. The Commerce Clause in the United States Constitution protects interstate commerce from the bar against maintaining an action. Consequently, contracts involving intrastate commerce made by nonqualified foreign corporations are not

enforceable in Alabama courts, while contracts involving interstate commerce made by nonqualified foreign corporations are enforceable in Alabama courts.

## B. WHEN DOES A BUSINESS NEED TO PROPERLY QUALIFY?

A foreign corporation doing business within the state needs to properly qualify within the state to ensure its contracts are enforceable in state courts.

1. Foreign Corporation:

"Foreign corporation" means a corporation for profit incorporated under a law other than the law of [Alabama]. Ala. Code 1975, § 10-2B-1.40(11).

Exceptions:

The provisions of Article 15, including the requirement to properly qualify within the state, do not apply to foreign corporations organized under the laws of the United States. Ala. Code 1975, § 10-2B-15.01. This includes any bank or national banking association organized under the laws of the United States having its principal place of business in any state of the U.S. other than Alabama. Ala. Code 1975, § 10-2B-15.40.

Foreign corporations acting within the state in a fiduciary capacity do not need to properly qualify when acting in that capacity, but instead must file a verified statement with the Alabama Department of Revenue. Ala. Code 1975, § 10-2B-15.41 and § 10-2B-15.42.

2. "Within the State":

(a) Contracts Made Outside the State:

Ala. Code 1975, § 10-2B-15.02 has no extraterritorial operation and does not render void contracts made outside the state by foreign corporations, although such contracts are to be performed within the state. Franklin Life Ins. Co. v. Ward, 187 So. 462 (Ala. 1939).

(b) Location of Contract Performance, Not Contract Inception:

Where the contract is to be performed in Alabama, regardless of where entered into, and in the performance of the contract the foreign corporation must engage in business in this state, our courts refuse to aid the nonqualified corporation in the enforcement of such contract. Brown v. Pool Depot, Inc., 853 So. 2d 181, 185 (Ala. 2002)

(c) Commerce Clause Protects Interstate Commerce:

The Commerce Clause of the United States Constitution protects businesses engaged in interstate commerce from the bar of § 10-2B-15.02. As such, while contracts involving intrastate commerce made by nonqualified foreign corporations are not enforceable in Alabama courts, contracts involving interstate commerce made by nonqualified foreign corporations are enforceable in Alabama courts. Hays Corp. v. Bunge Corp., 777 So. 2d 62, 64 (Ala. 2000).

(d) Exception to Commerce Clause Protection:

The Commerce Clause does not protect a foreign corporation from the consequences of noncompliance with a state door-closing statute when the corporation has "localized its business" in the forum state, and has not entered the state merely to contribute to or to conclude a unitary interstate transaction. Community Care of America of Alabama, Inc. v. Davis, 850 So. 2d 283 (Ala. 2002).

(e) Case by Case Basis:

The Alabama Supreme Court looks to the facts of each case to determine whether the contract involves interstate commerce or intrastate commerce. Hays Corp., 777 So. 2d at 64.

## C. HOW DOES A FOREIGN BUSINESS PROPERLY QUALIFY?

1. Obtaining a Certificate of Authority:

(a) Process:

Information on obtaining an Alabama Certificate of Authority is located on the internet at:
http://www.sos.state.al.us/business/forqual.htm.

(b) Cost:

The cost to obtain a certificate of authority are minimal. As of June 2004, it cost $175 for a for-profit organization, and $75 for a non-profit organization, to obtain an Alabama Certificate of Authority from the Alabama Secretary of State. Further, prior to filling out the application, a foreign corporation should request a name reservation, to ensure its name is available within the state. A name reservation request costs $10.

## D. CONSTITUTIONAL BASIS FOR DUTY

Article XII, Section 232 of the Alabama Constitution provides in pertinent part:

No foreign corporation shall do any business in this state without having at least one known place of business and an authorized agent or agents therein, and without filing with the secretary of state a certified copy of its articles of incorporation or association.

Ala. Const. Art. XII, § 232.

## E. STATUTORY BASIS FOR DUTY

1. Alabama Code Section 10-2B-15.02(a) is a "door closing" statute that "bars a foreign corporation not qualified to do business in Alabama from enforcing in an Alabama court a contract it made in Alabama." Briarcliff Nursing Home, Inc. v. Turcotte, 894 So. 2d 661 (Ala. 2004).

   Section 10-2B-15.02(a) of the Alabama Code provides:

   > A foreign corporation transacting business in this state without a certificate of authority or without complying with Chapter 14A of Title 40 may not maintain a proceeding in this state without a certificate of authority. All contracts or agreements made or entered into in this state by foreign corporations prior to obtaining a certificate of authority to transact business in this state shall be held void at the action of the foreign corporation or by any person claiming through or under the foreign corporation by virtue of the contract or agreement; but nothing in this section shall abrogate the equitable rule that he who seeks equity must do equity.

   Ala. Code 1975, § 10-2B-15.02(a).

2. A business not properly qualified within the state is estopped from “setting up the fact that the contract or agreement was made in violation of the law.” The contracts made by a business not properly qualified within the state, however, shall be enforceable if they are based upon an interest in real property within the state, and that interest is insured or guaranteed by the Federal Housing Administration or the Veterans Administration, and if the business afterwards properly qualified within the state.

Section 10-2B-15.02(b) of the Alabama Code provides:

> The failure of a foreign corporation to obtain a certificate of authority shall not impair the validity of any contract or agreement heretofore or hereafter entered into and consisting of a mortgage upon real property or an interest in real property in this state, and the note secured thereby, where the mortgage is insured by the Federal Housing Administration or guaranteed by the Veterans Administration, if the foreign corporation shall have thereafter obtained a certificate of authority. In all actions against a foreign corporation or against any person claiming under a foreign corporation by virtue of a void contract, the foreign corporation or person claiming under it shall be estopped from setting up the fact that the contract or agreement was made in violation of the law.

Ala. Code 1975, § 10-2B-15.02(b).

3. Single Act of Business:

Generally, "a single act of business" is sufficient to bring a foreign corporation within the purview of "doing business" in Alabama, though acts such as delivering materials or soliciting business are generally not enough to constitute "doing business." Green Tree Acceptance, Inc. v. Blaclock, 525 So. 2d 1366 (Ala. 1988).

## F. EXCEPTIONS TO BAR AGAINST MAINTAINING ACTION IN STATE COURT

1. Bar Does Not Apply to Certain Corporations Organized Under the Laws of the United States:

Ala. Code 1975, § 10-2B-15.01(b) (e.g., national banking associations).

2. Bar Does Not Apply to Interstate Commerce:

*See* above discussion on exception provided by Federal Commerce Clause. *See also,* Jim Walter Homes, Inc. v. Saxton, 880 So. 2d 428 (Ala. 2003).

3. Bar Does Not Apply to Actions Ex Delicto:

Actions ex delicto by nonqualified foreign corporations are not prohibited in the courts of Alabama. Shiloh Const. Co., Inc. v. Mercury Const. Corp., 392 So. 2d 809, 813 (Ala. 1980). If actions are based on rights derived from contract, those actions may not be maintained. Al Sarena Mines, Inc. v. SouthTrust Bank of Mobile, 548 So. 2d 1356 (Ala. 1989).

4. Bar Does Not Apply to Situations Invoking Equitable Exception Provision:

Alabama Code Section 10-2B-15.02 provides in part that "nothing in this section shall abrogate the equitable rule that he who seeks equity must do equity." This section has been interpreted to allow nonqualified foreign corporations to maintain non-contract actions for fraud (*Freeman Webb Investments, Inc. v. Hale, 536 So. 2d 30, 31-32 (Ala. 1988)*) and trespass (*Jones v. Kendrick Realty Co., 252 So. 2d 61, 64-65 (Ala. 1971)*).

5. Bar Does Not Apply to Nonqualified Foreign Mortgagees:

Amendment 154 to the Alabama Constitution allows non-qualified foreign corporations to take mortgages on Alabama real property and maintain an action on that mortgage. Ala. Const. amend. 154; Weningar v. S.S. Steele & Co., Inc., 477 So. 2d 949 (Ala. 1985).

6. Bar Does Not Apply to Some Lapses in Qualification:

A formerly nonqualified corporation may maintain an action in this state once it obtains a certificate of authority, as long as it was qualified when it entered into the contract. J.W. Hartlein Const. Co., Inc. v. Seacrest Associates, L.L.C., 749 So. 2d 459, 462 (Ala. Civ. App. 1999).

7. Ownership or Leasing of Land:

Ownership or leasing of land does not constitute doing business. Although the state has a valid interest in requiring foreign corporations to register, the mere ownership or leasing of land by a foreign corporation does not constitute doing business in the state. Wallace v. Brewer, 315 F.Supp. 431 (M.D. Ala. 1970).

## G. INTERSTATE COMMERCE

1. In-State Activities Incidental to Interstate Business:

A nonqualified foreign corporation is not barred from enforcing its contracts in Alabama when its activities within this state are incidental to the transaction of interstate business. Wallace Constr. Co. v. Industrial Boiler Co., 470 So. 2d 1151 (Ala. 1985).

2. Mere Sale, Transport, and Delivery:

Transactions in Alabama by a nonqualified foreign corporation involving no more than a sale, transportation, and delivery of materials into this state are acts of interstate commerce to which the laws of Alabama are not applicable. Brown v. Pool Depot, Inc., 853 So. 2d 181, 186 (Ala. 2002).

3. Leasing to In-State Company:

The singular act of a foreign corporation, consisting of a lease of business equipment to an Alabama corporation, constitutes interstate business rather than intrastate business. *In re* Coala, Inc., 182 B.R. 887, 898 (Bkrtcy. N.D. Ala. 1995).

4. Solicitations:

Mere busines solicitations and incidents relative to such solicitations do not constitute transacting business by a foreign corporation within the state of Alabama for purposes of the statutory and constitutional provisions at issue in this case. Brown v. Pool Depot, Inc., 853 So. 2d 181, 186 (Ala. 2002).

## H. INTRASTATE COMMERCE

1. Shipping Materials from Out of State to Do In-State Business is Intrastate Commerce:

An isolated contract by an unqualified foreign corporation to do localized intrastate business within Alabama is subject to Alabama's door-closing statute even though that contract may require the use of materials and equipment shipped into Alabama from out of state. Brown v. Pool Depot, Inc., 853 So. 2d 181, 186 (Ala. 2002).

2. Establishing Continuous Presence:

A nonqualified foreign corporation's establishing a continuing presence in the state over and above the mere shipping of commodities between the states is intrastate activity that invokes door-closing statute. Brown v. Pool Depot, Inc., 853 So. 2d 181 (Ala. 2002).

## I. LABOR:

In almost every instance where the courts have applied § 232 of the Constitution and former Ala. Code 1975, § 10-2A-247 (*See* § 10-2B-15.02) to bar an action, the case has involved the performance of some type of service or labor within the state other than service or labor that could reasonably be argued to be incidental to an interstate sale. Wise v. Grumman Credit Corp., 603 So. 2d 952 (Ala. 1992).

1. In-State Labor Incidental to Out-of-State Contract:

   Where the activities of furniture store within the state of Alabama consisted of delivery, set-up, repair work, and requests for payment when plaintiff fell behind in his payments, these activities were merely incidental to the retail installment contract entered into in the State of Tennessee and did not violate Ala. Const., Art. XII, § 232 or [§ 10-2B-15.02]. Billions v. White and Stafford Furniture Co., Inc., 528 So. 2d 878 (Ala. Civ. App. 1988).

2. In-State Labor Not Incidental to Out-of-State Contract:

   The inclusion of labor and construction in contract, which were neither necessary nor incidental to the interstate sale of the mobile home, clearly brought the contract within the purview of intrastate commerce and, thus, [§ 10-2B-15.02] is applicable. Green Tree Acceptance, Inc. v. Blalock, 525 So. 2d 1366 (Ala. 1988).

3. General Nature of In-State Labor:

   Labor and construction contract did not involve interstate activity; although the construction and labor required to complete performance of the contract was substantial enough that it was not merely incidental to the sale of the structure, the work was of a very general nature that could have been handled by almost any competent contractor and did not require the special expertise of foreign corporation. Stewart Mach. and Engineering Co., Inc. v. Checkers Drive In Restaurants of North America, Inc., 575 So. 2d 1072 (Ala. 1991).

## J. IS "DOING BUSINESS"A QUESTION OF LAW OR FACT?

Whether a foreign corporation is "doing business" within the state is a mixed question of law and fact. Marcus v. J. R. Watkins Co., 188 So. 2d 543 (Ala. 1966).

# XXV. ALABAMA NON-COMPETITION AND NON-SOLICITATION LAW

Covenant's not to compete and non-solicitation agreements are governed by Ala. Code § 8-1-1. These agreements are absolutely void in Alabama, unless they fall within the exceptions set forth in § 8-1-1(b) or (c). "It is clear... that § 8-1-1, Code 1975, expresses the public policy of Alabama that contracts restraining employment are disfavored." King v . Head Start Family Hair Salons, Inc., 2004 WL 68617 (Ala.); De Voe v. Cheatham, 413 So. 2d 1141 (Ala. 1982). This is so "because they tend not only to deprive the public of efficient service, but tend to impoverish the individual." James S. Kemper Co. v. Cox & Assocs., 434 So. 2d 1380, 1384 (*quoting,* Robinson v. Computer Servicenters, Inc., 346 So. 2d 940, 943 (Ala. 1977)).

## A. EXCEPTIONS TO NON-COMPETITION AND NON-SOLICITATION STATUTE

Although non-competition agreements are disfavored, § 8-1-1 subsections (b) and (c) set forth exceptions to the general rule of voidability.

1. The first exception allows "one who sells the good will of a business [to] agree with the buyer ... to refrain from carrying on or engaging in a similar business and from soliciting old customers ... within a specified county, city or part thereof so long as the buyer, or any person deriving title to the good will from him carries on a like business therein." Ala. Code 1975, § 8-1-1(b). Basically, the purchaser of a business may require the seller to refrain from competing with the buyer.

2. The second exception allows for enforcement of agreements in employment contracts. Subsection (b) provides that "one who is employed as an agent, servant or employee may agree with his employer to refrain from carrying on or engaging in a similar business and from soliciting old customers of such employer within a specified county, city or part thereof so long as the ... employer carries on a like business therein." Ala. Code 1975, § 8-1-1(b). This type of agreement in an employment contract is the most heavily litigated exception to § 8-1-1(a).

3. The third exception to § 8-1-1(a) is set forth in subsection (c). Subsection (c) provides that "[u]pon or in anticipation of dissolution of a partnership, the partners may agree that none of them will carry on a similar business within the same county, city or town ... where the partnership business has been transacted." Ala. Code 1975, § 8-1-1(c).

## B. ENFORCEMENT OF NON-COMPETITION OR NON-SOLICITATION AGREEMENTS

An employment covenant not to compete is unenforceable unless the employer/employee relationship exists at the time the covenant is executed. Pitney Bowes, Inc. v. Berney Office Solutions, 823 So. 2d (Ala. 2001); Construction Materials, Ltd., Inc. v. Kirkpatrick, 631 So. 2d 1006, 1009 (Ala. 1994). The Alabama Supreme Court has held that parties cannot enforce covenants not to compete against independent contractors because the exception in § 8-1-1(b) applies only to an "agent, servant, or employee," and not to an independent contractor. Premier Indus. Corp. v. Marlow, 295 So. 2d 396, 399 (Ala. 1974). The courts have interpreted the statute and have developed a test to determine whether a given non-competition agreement is enforceable. A court will enforce the terms of a covenant not to compete only if:

a) the employer has a protectable interest;

b) the restriction is reasonably related to that interest;

c) the restriction is reasonable in time and place;

d) the restriction imposes no undue hardship on the employee.

James S. Kemper & Co., 434 So. 2d at 1384 (*quoting,* DeVoe v. Cheatham, 413 So. 2d at 1142). *See also,* Aerotek, Inc. v. Burton, 2001 Ala. Civ. App. LEXIS (Ala. Civ. App. Aug. 10, 2001); Jones v. Wedgworth Pest Control, Inc., 763 So. 2d 261, 262 (Ala. Civ. App. 2000); Ex Parte Caribe, U.S.A., 702 So. 2d 1234, 1236 (Ala. 1997); Clark v. Liberty Nat'l Life Ins. Co., 592 So. 2d 564 (Ala. 1992); Central Bancshares of the South, Inc. v. Puckett, 584 So. 2d 829, 831 (Ala. 1991).

## C. PROFESSIONALS ARE EXEMPT

Professionals cannot be subject to a non-compete or non-solicitation agreement in Alabama.

According to the Alabama Supreme Court, there are several relevant factors pertinent to resolving the issue of what constitutes a "profession" within the meaning of subsection 8-1-1(a). Friddle v. Raymond, 575 So. 2d 1038 (Ala. 1991); Odess v. Taylor, 211 So. 2d 805 (Ala. 1968). A profession refers to "a group of men pursuing a learned art as a common calling in the spirit of a public service." J.E. Hanger, Inc. v. Scussel, 937 F. Supp. 1546, 1557 (M.D. Ala. 1996) (*quoting,* Odess v. Taylor, 211 So. 2d 805 (Ala. 1968)). Courts consider such factors as (1) the professional training, skill and experience that are required; (2) the delicate nature of the services offered by the individual; and (3) the ability and

need to make instantaneous decisions. J.E. Hanger, Inc. v. Scussel, 937 F. Supp. 1546, 1557 (M.D. Ala. 1996); Friddle v. Raymond, 575 So. 2d 1038, 1039-40 (Ala. 1991); Odess v. Taylor, 211 So. 2d 805, 812 (Ala. 1968). Courts have the discretion to decide whether a particular job rises to the level of a "profession" under the statute.

The Alabama Supreme Court has held that physicians, attorneys, accountants, and veterinarians are "professionals" for purposes of § 8-1-1(a). In the case of these named professionals, covenants that attempt to limit or restrain their trade or business are unenforceable. Anniston Urologic Assocs., P.C. v. Kline, 689 So. 2d 54 (Ala. 1997) (urologist); Pierce v. Hand, Randall, Bedsore, Greaves & Johnston, 678 So. 2d 765 (Ala. 1996) (attorney); Cherry Beaker & Holland v. Brown, 582 So. 2d 502 (Ala. 1991) (accountant); Fiddle v. Raymond, 575 So. 2d 1038 (Ala. 1991) (veterinarian); Salisbury v. Simple, 565 So. 2d 234 (Ala. 1990) (ophthalmologist).

On the other hand, pest control exterminators are not considered "professionals" for purposes of subsection (a), despite the fact that a separate chapter of the Alabama Code refers to exterminators as "persons engaged in professional services." Dobbins v. Getz Exterminators of Ala., 382 So. 2d 1135, 1137 (Ala. Civ. App. 1980). The Dobbins court explained that exterminators "may be professionals in their business in the sense that they may have worthily attained excellence as to knowledge, skill, training, expertise, proficiency and expertise in the pest control field; but this would not convert their pest control business into a profession. There are multitudes of businesses, but few professions." Id.

## D. BURDEN OF PROVING ELEMENTS OF AN ENFORCEABLE RESTRICTIVE COVENANT

"The burden of proof is on the person or entity seeking to enforce a contract which restrains a lawful trade or business to show that it is not void under § 8-1-1." Jones v. Wedgworth Pest Control, Inc., 763 So. 2d 261, 262 (Ala. Civ. App. 2000) (*quoting,* Calhoun v. Brendle, Inc., 502 So. 2d 689, 693 (Ala. 1986)) (*See also,* Clark Substations, L.L.C. v. Ware, 2002 WL 844741 (Ala.); Construction Materials, Inc. v. Kirkpatrick Concrete, Inc., 631 So. 2d 1006, 1009 (Ala. 1994)).

1. A Protectable Interest:

"In order to have a protectable interest the employer must possess a 'substantial right in its business sufficiently unique to warrant the type of protection contemplated by [a] non-competition agreement.'" Ex parte Caribe, 702 So. 2d 1234,1239 (Ala. 1997); Sheffield v. Stoudenmire, 553 So. 2d 125, 126 (Ala. 1989); Greenlee v. Tuscaloosa Office Prods. & Supply, 474 So. 2d 669 (Ala. 1985). "Protectable interests may exist

where an employee was provided access to valuable trade information or customer relationships during the course of his employment. An employer may also have a protectable interest if an employee was in a position to gain confidential information, access to secret lists, or to develop a close relationship with clients. Similarly, a protectable interest may arise from an employer's investment in its employee, in terms of time, resources, and responsibility." Warranty Corp. Inc. v. Hans, 1999 U.S. Dist. LEXIS 18344 *29 (S.D. Ala. November 12, 1999).

In the case of a post-employment covenant not to compete, the employer must have a "legitimate interest in restraining the employee from appropriate valuable trade information and customer relationships to which [the employee] has had access in the course of his employment." Caribe, 702 So. 2d at 1239 (*See also,* Restatement (Second) of Contracts § 188 Comment B (1979)). "If an employee is in a position to gain confidential information, access to secret lists, or to develop a close relationship with clients, the employer may have a protectable interest." Id. at 1241; Sheffield, 553 So. 2d at 126 (*See also*, James S. Kemper & Co. Southeast, Inc. v. Cox & Assocs., Inc., 434 So. 2d 1380, 1384 (Ala. 1983); DeVoe v. Cheatham, 413 So. 2d 1141, 1143 (Ala. 1982)).

2. Restriction Is Reasonable in Time and Place:

a) With respect to geographical restraints, § 8-1-1(b) states that a restriction must be limited by "specified county, city or part thereof."

b) However, the Alabama Supreme Court has upheld restrictions that cover a much larger area. Central Bancshares, 584 So. 2d 829 (covenant encompassed the State of Alabama); Parker v. Ebsco Indus., 209 So. 2d 383 (Ala. 1968) (covenant encompassed the entire U.S. east of the Rocky Mountains); Kershaw v. Kershaw, Inc., 523 So. 2d 351 (covenant limited to encompass all parts of the U.S. and Canada where the plaintiff conducted business prior to specified date) (*See also*, McNeel Marble Co. v. Robinette, 65 So. 2d 221, 223 (Ala. 1953)).

c) Under Ala. Code § 8-1-1(b), an "employee may agree with his employer to refrain from carrying on or engaging in a similar business and from soliciting old customers of such employer within a specified county, city or part thereof so long as the employer carries on a like business therein." This statutory language has been described as requiring that any restriction be

"reasonable in time and place." *See,* Clark v. Liberty Nat'l Life Ins. Co., 592 So. 2d 564, 565-66 (Ala. 1992).

d) Generally, a covenant not to compete is valid if the restraint is limited to two years. Clark v. Lib. Nat'l Life Ins. Co., 592 So. 2d 564 (Ala. 1992); Central Bancshares of the South, Inc. v. Puckett, 584 So. 2d 829, 831 (Ala. 1991).

e) Courts Have the Option to "Blue Pencil" Rather Than Invalidate.

Where a restriction is overly broad or otherwise unreasonable, Alabama courts have the equitable power to strike any unreasonable portion and enforce the remainder. Cullman Broadcasting Co. v. Bosley, 373 So. 2d 830, 835; Mason Corp. v. Kennedy, 244 So. 2d 585, 590 (Ala. 1971). In Mason Corp. v. Kennedy, the Alabama Supreme Court conferred upon the trial courts the power to rewrite or "blue pencil" contracts in this manner. The Court stated:

> [w]e hold that a court of equity has the power to enforce a contract against competition although the territory or period stipulated may be unreasonable, by granting an injunction restraining the [employee] from competing for a reasonable time and within a reasonable area.

Mason Corp., 244 So. 2d at 590.

3. Undue Hardship:

As a general rule, Alabama courts will consider the employee's personal situation when determining whether a restriction places an undue hardship on the employee. Courts have discretion to invalidate a restrictive covenant on the basis that the former employee's means of earning a livelihood may be unreasonably limited by the terms of the agreement. Courts are to consider "the injury which may result to the public from restraining the breach of the covenant in the loss of the employee's service and skill and the danger of his becoming a charge on the public." Clark v. Liberty Nat'l Life Ins. Co., 592 So. 2d 564, 567 (Ala. 1992) (*quoting,* Hill v. Rice, 67 So. 2d 789, 794 (Ala. 1953)). Alabama courts should evaluate the former employee's age, marital or parental status, financial obligations, previous experience in the field at issue, and lack of training in other fields. Nationwide Mut. Ins. Co. v. Cornutt, 907 F. 2d 1085, 1089 (11th Cir. 1990).

## XXVI. GENERAL RULES OF CONTRACT CONSTRUCTION

### A. EXCEPTION TO RULE REGARDING AMBIGUITY

Ex parte Morris, 762 So. 2d 249 (Ala. 2000); Western Sling & Cable Co. v. Hamilton, 545 So. 2d 29 (Ala. 1989) (*stating an exception to the rule that ambiguities are resolved against the maker if the parties "are sophisiticated business persons advised by counsel and the contract is a product of negotiations at arm's length between the parties . . ."*).

### B. SPECIFIC CONTROLS THE GENERAL

ERA Commander Realty, Inc. v. Harrigan, 514 So. 2d 1329, 1335 (Ala. 1987) (*referring to the general rule of ejusdem generis [the specific controls the general] when contract provisions are in conflict*).

## XXVII. ISSUES AFFECTING CONSTRUCTION PROJECTS IN ALABAMA

### A. POTENTIAL STRICT LIABILITY FOR ENGINEERS

Under Alabama law, a civil engineer has been held strictly liable for damage caused by his incorrect drainage specifications, when he "impliedly warranted the sufficiency and adequacy of the plans and specifications to reasonably accomplish the purpose for which they were intended." Broyles v. Brown Eng'g Co., 151 So. 2d 767 (Ala. 1963). The Court distinguished an engineer's position from that of an architect, a lawyer, and a doctor by saying that an engineer is in control of the issues affecting his work product, while the other professionals dealt in circumstances out of their control. The Court said that the engineer's control allows for strict liability regarding his work product. Id.

However, the Court later limited the Broyles holding: "The language in Broyles was limited to the facts of that case and did not state any broad general rule…a case-by-case analysis would be required." K.B. Weygand & Assoc., P.C. v. Deerwood Lake Land Co., 812 So. 2d 1165, 1168 (Ala. 2001). The Broyles decision acknowledged there were "circumstances… [where an engineer would not] have impliedly warranted or insured favorable or certain results. It all depends on the nature of the employment and the particular services to be rendered." Broyles, 151 So. 2d at 771. In Weygand, the Court held that a civil engineer was not liable when there was no evidence he knew or should have known that soil beneath a road would not drain at all, because this was a circumstance where the civil engineer had not "impliedly warranted" certain results. Weygand, 812 So. 2d at 1168.

## B. THIRD PARTY BENEFICIARIES

Third parties may sue on a contract only if its provision is for their direct benefit. E.C. Ernst, Inc. v. Manhattan Constr. Co. of Texas, 551 F.2d 1026 (5th Cir. 1977). The interrelationship of contracts in a construction project does not alone invoke a third party beneficiary duty; the intent of the parties forms such a duty. Id. at 1030.

# XXVIII. MECHANICS' AND MATERIALMEN'S LIENS

## A. CAN BE PERFECTED AND ENFORCED ONLY BY COMPLYING WITH THE REQUIREMENTS IN ALA. CODE 1975, § 35-11-210 ET SEQ.

1. These statutes provide for laborers and material suppliers that contribute to the improvement of property a method to secure the value of the contribution and ensure that it is not lost through the actions of the party with whom the lien holder contracted. *See,* Davis v. Gobble-Fite Lumber Co., Inc., 592 So. 2d 202, 205 (Ala. 1991).

2. "Every mechanic or materialman must properly comply with three essential steps before a lien can be perfected: (1) provide statutory notice to the owner [if a subcontractor]; (2) file a verified statement of lien in the probate office of the county where the improvement is located; and (3) file suit to enforce the lien." Manning Serv. Co., Inc. v. Cmty. Blood & Plasma Corp., 613 So. 2d 1281, 1283 (Ala. 1993) (*See also*, Sherrod v. Crane Co., 182 So. 48, 49 (Ala. 1938) ("It is unnecessary for an original contractor to give notice to the owner that the material for construction of the improvement in question would be furnished, as required of a subcontractor.").

## B. PERSONS ENTITLED TO LIEN

Party must be a contractor, a subcontractor, a supplier of work, labor, or materials to a contractor or subcontractor. Ala. Code 1975, § 35-11-210 (2004). (*See also,* Noland Co. v. S. Dev. Co., Inc., 445 So. 2d 266, 267 (Ala. 1984)).

## C. NATURE OF THE CLAIMANT'S CONTRIBUTION

1. A lien is given to "[e]very mechanic, person, firm or corporation who shall do or perform any work, or labor upon, or furnish any material, fixture, engine, boiler or machinery for any building or improvement on land, or

for repairing, altering or beautifying the same." Ala. Code 1975, § 35-11-210 (2004).

2. The contribution of labor to the betterment or improvement of realty is expressly recognized by statute as a lienable contribution. Ala. Code 1975, § 35-11-210 (2004).

## D. CONTRACT REQUIREMENT

1. Claimant must have contributed his work and labor under a contract, whether express or implied. Davis, 592 So. 2d at 206.

2. "For an implied contract to arise, the supplier must send written notice to the owner of the land prior to delivery of the materials that he plans to supply specified materials at specified prices. A lien will then arise as specified in the notice unless the owner objects." Ala. Code 1975, § 35-11-210; Abell-Howe Co.v. Indus. Dev. Bd., 392 So. 2d 221, 224 (Ala. Civ. App. 1980).

## E. PROCESS OF ENFORCEMENT AND PERFECTION OF THE LIEN

1. Verified Statement Required:

   (a) Original contractors are permitted six months from the last contribution to file a verified statement of lien in the office of the Judge of Probate. Ala. Code 1975, §§ 35-11-213 and 35-11-215 (2004).

   (b) Day laborers and journeymen are allowed thirty days, and all other persons who may claim a lien must file the verified statement within four months of the last contribution. Ala. Code 1975, § 35-11-215.

   (c) If the lien is not filed within these periods, the lien is forever lost, and the claimant becomes a general creditor with unsecured status. Id.

2. Prosecution of a Civil Action Required:

   Civil action must be commenced within six (6) months of the date of the maturity of the indebtedness under the contract. Gov't St. Lumber Co. v. Baldwin County Sav. & Loan Ass'n., 532 So. 2d 645, 646 (Ala. Civ. App. 1988) (*citing*, Ala. Code 1975, §35-11-215).

## F. EXTENT OF THE LIEN

The extent to which a claimant may cause a lien to be imposed on property of an owner must be considered in several ways.

1. The property interest of the contracting owner imposes a limitation on the scope of the lien. Generally, the extent of the owner's interest which may be subjected to a lien is determined by the extent to which the interest of the putative owner could be mortgaged. Jesse P. Evans, III, Alabama Property Rights and Remedies, § 32.5 (2d ed. 1998).

2. The statutes impose geographical limitation on the scope of the lien.

   (a) If the property upon which the lien is sought lies within a municipality, the lien extends to the entire lot or parcel owned by the owner, but if the property is outside the municipality, the lien may be enforced only on the property to which the contribution is made and one adjoining acre. Ala. Code 1975, §§ 35-11-210 and 35-11-217.

   (b) Where the property upon which the lien is sought is not located within a municipality, the law is specific that the verified statement of lien and the complaint in the action brought to perfect and enforce the lien must describe "with reasonable and convenient certainty" the additional acre so that it may be identified and separated from the residue of the tract. Tanner v. Foley Bldg. & Mfg. Co., 48 So. 2d 785, 787 (Ala. 1950).

      (i) The extent to which the indebtedness is secured defines the extent of the lien.

         (1) "Full-price" lien. If the claimant is an "original contractor" who enters into a contract with the owner, his agent or architect, or has an implied contract by virtue of notice to the owner, he or she is entitled to a lien securing the full price of the contract. Davis, 592 So. 2d at 206.

         (2) "Unpaid balance" lien. If there is no express contract between the lien claimant contributing materials and the owner, the extent of the lien is limited to the amount of the unpaid balance owed the original contractor by the owner. Ala. Code 1975, §§ 35-11-210 (2004).

> "Thus, the only lien available to a materialman who sends notice to an owner after he has supplied any material to be used in the particular job is a lien on the unpaid balance owing to the contractor at the time the notice is sent. However, when the materialman is not the general contractor, he must comply with the requirements of § 35-11-218, Ala. Code 1975, to enforce an unpaid balance lien [which] requires (1) that the notice be in writing; (2) that it be given to the owner or his agent prior to the filing of a statement of lien in the office of the judge of probate; and, (3) that the notice set forth the amount of the lien and for what and from whom it is owing. When such a notice is given, the unpaid balance in the hands of the owner or proprietor shall be subject to such a lien." Davis, 592 So. 2d at 207.

## XXIX. COLLATERAL SOURCE RULE

Alabama formerly held it was unconstitutional to allow evidence that health insurance has paid various medical bills in a personal injury case for the plaintiff. American Legion Post Number 57 v. Leahey, 681 So. 2d 1337 (Ala. 1996). In 2000, the Alabama Supreme Court reversed itself on this issue. Marsh v. Green, 782 So. 2d 223 (Ala. 2000). Ala. Code 1975, § 6-5-545 (*applicable to medical malpractice cases*) and § 12-21-45 (*applicable to civil cases generally*) allow evidence of reimbursed medical expenses to be subject to discovery and admitted into evidence. The plaintiff can introduce evidence that these expenses must be reimbursed out of any recovery they receive.