
# STATE OF ALABAMA COMPENDIUM OF LAW

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## PRE-SUIT AND INITIAL CONSIDERATIONS

### Pre-Suit Notice Requirements/Prerequisites to Suit

A) **Counties.** Under ALA. CODE §§ 6-5-20 & 11-12-8 (2008), prior to filing any lawsuit against a County the plaintiff must present the claim for allowance by the County within 12 months of the date the cause of action accrues.

B) **Bond for public works projects.** Where there has been a default on a performance bond for any public works project, no legal action can be brought on the bond until 45 days after written notice is provided to the bond surety. ALA. CODE § 39-1-1(b) (2008).

C) **Governmental entities.** With regards to claims against a City or Town in the State of Alabama, no recovery may be had on a claim for personal injury unless a sworn statement is filed with the city clerk, including the manner, date, time and place of the injury, within six months of the date of the injury. ALA. CODE § 11-47-192 (2008). Any claim against a City or Town other than a claim for personal injury requires pre-suit notice to be provided within two years of the date the cause of action accrues. ALA. CODE § 11-47-23 (2008).

### Relationship to the Federal Rules of Civil Procedure

Alabama has its own Rules of Civil Procedure, which were adopted by Order of the Alabama Supreme Court on January 3, 1973, and became effective on July 3, 1973. However, "[d]ue to the similarity between the Alabama Rules and the Federal Rules, a presumption arises that cases construing the Federal Rules are authority for construction of the Alabama Rules." *Ex parte Scott*, 414 So. 2d 939, 941 (Ala. 1982).

### Description of the Organization of the State Court System

A) **Judicial selection.** Alabama state judges at all levels are elected for six year terms. At the end of their term, the judges must run again in a general election. *See, e.g.,* Alabama Judicial System Online, http://www.judicial.state.al.us/appellate.cfm (last visited January 6, 2009).

B) **Structure.** The Alabama court system includes the Alabama Supreme Court, which is the appellate court of last resort in Alabama, as well as the Court of Civil Appeals, an intermediate appellate court with original jurisdiction over a set category of cases, and the Court of Criminal Appeals, the intermediate court of appeals for criminal cases. The State is also divided into 41 judicial circuits. Each circuit includes one or more Counties. These circuits are the trial courts for the state, including Circuit Court (Civil and Criminal), District Court(Civil and Criminal), and Probate Court. See generally Alabama Judicial System Online, http://www.judicial.state.al.us/ (last visited January 6, 2009).

C) **Alternative dispute resolution.** Alabama does not require mandatory alternative dispute resolution. However, the individual circuit courts have the authority to order parties to any dispute into a non-binding mediation. The appellate courts also review each appeal for potential referral to appellate mediation.

**Service of Summons**

Service of process in general is governed by ALA. R. CIV. P. 4 (2008).

A) **Individuals.** Service upon an individual, other than a minor or incompetent person, may be made by serving the individual with the process, or by leaving a copy of the process at the individual's home with a person of suitable age and discretion who also resides in the home. Said service may be made either by a sheriff or other process server personally delivering the process, or by certified mail under ALA. R. CIV. P. 4.1.

B) **Corporation.** A corporation, whether public or private, foreign or domestic, may be served by delivering process to the authorized agent for service, or by serving the process by certified mail at any of the usual places of business for the corporation. Service of process upon an officer or agent of the corporation, as those terms are generally understood at common law, is effective. ALA. R. CIV. P. 4(c)(6).

C) **Waiver.** A defendant or counsel for the defendant may waive service, provided that the waiver is in a writing signed by the defendant and a credible witness. ALA. R. CIV. P. 4(h).

**Statutes of Limitation**

The following statutes of limitations are applicable to the cited causes of action:

A) **Six-year statute of limitations.** Under ALA. CODE § 6-2-34 (2008), there is a six-year statute of limitations for:

> (1) Actions for any trespass to person or liberty, such as false imprisonment or assault and battery;
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> (2) Actions for any trespass to real or personal property;
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> (3) Actions for the detention or conversion of personal property;
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> (4) Actions founded on promises in writing not under seal;
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> (5) Actions for the recovery of money upon a loan, upon a stated or liquidated account or for arrears of rent due upon a parol demise;
>
> (6) Actions for the use and occupation of land;
>
> (7) Motions and other actions against the sureties of any sheriff, coroner, constable, or

any public officer and actions against the sureties of executors, administrators, or guardians for any nonfeasance, misfeasance, or malfeasance, whatsoever, of their principal, the time to be computed from the act done or omitted by their principal which fixes the liability of the surety;

(8) Motions and other actions against attorneys-at-law for failure to pay over money of their clients or for neglect or omission of duty; and

(9) Actions upon any simple contract or speciality not specifically enumerated in this section.

B) **Contracts, recovery of real property.** Under ALA. CODE § 6-2-33 (2008), the following actions must be commenced within 10 years:

(1) Actions founded upon any contract or writing under seal.

(2) Actions for the recovery of lands, tenements or hereditaments, or the possession thereof, except as otherwise provided in this article.

(3) Motions and other actions brought by or on behalf of the State of Alabama, a county, a municipality, or another political subdivision of the state against sheriffs, coroners, constables and other public officers for nonfeasance, misfeasance, or malfeasance in office.

C) **Medical providers.** ALA. CODE § 6-5-482 (2008) states:

(a) All actions against physicians, surgeons, dentists, medical institutions, or other health care providers for liability, error, mistake, or failure to cure, whether based on contract or tort, must be commenced within two years next after the act, or omission, or failure giving rise to the claim, and not afterwards; provided, that if the cause of action is not discovered and could not reasonably have been discovered within such period, then the action may be commenced within six months from the date of such discovery or the date of discovery of facts which would reasonably lead to such discovery, whichever is earlier; provided further, that in no event may the action be commenced more than four years after such act; except, that an error, mistake, act, omission, or failure to cure giving rise to a claim which occurred before September 23, 1975, shall not in any event be barred until the expiration of one year from such date.

D) **Architects, engineers and builders.** ALA. CODE § 6-5-221 (2008) states:

(a) All civil actions in tort, contract, or otherwise against any architect or engineer performing or furnishing the design, planning, specifications, testing, supervision, administration, or observation of any construction of any improvement on or to real property, or against builders who constructed, or performed or managed the construction of, an improvement on or to real property designed by and constructed under the supervision, administration, or observation of an architect or engineer, or designed by and constructed in accordance with the plans and specifications prepared by an architect or engineer, for the recovery of damages for:

(i) Any defect or deficiency in the design, planning, specifications, testing, supervision, administration, or observation of the construction of any such improvement, or any defect

or deficiency in the construction of any such improvement; or

(ii) Damage to real or personal property caused by any such defect or deficiency; or

(iii) Injury to or wrongful death of a person caused by any such defect or deficiency;

shall be commenced within two years next after a cause of action accrues or arises, and not thereafter. Notwithstanding the foregoing, no relief can be granted on any cause of action which accrues or would have accrued more than thirteen years after the substantial completion of construction of the improvement on or to the real property, and any right of action which accrues or would have accrued more than thirteen years thereafter is barred, except where prior to the expiration of such thirteen-year period, the architect, engineer, or builder had actual knowledge that such defect or deficiency exists and failed to disclose such defect or deficiency to the person with whom the architect, engineer, or builder contracted to perform such service.

E) **Two-year statute of limitations.** Under ALA. CODE § 6-2-38 (2008):

(g) Any action brought under Section 25-5-11(b) [of the Alabama Workers' Compensation Act for co-employee liability must be brought within two years of such injury or death.

* * *

(m) All actions for the recovery of wages, overtime, damages, fees, or penalties accruing under laws respecting the payment of wages, overtime, damages, fees, and penalties must be brought within two years.

(n) All actions commenced to recover damages for injury to the person or property of another wherein a principal or master is sought to be held liable for the act or conduct of his agent, servant, or employee under the doctrine of respondeat superior must be brought within two years.

(o) All actions commenced [by the personal representative of a deceased person] to recover damages for injury or damage to property of a decedent must be brought within two years.

F) **Improvements.** Under ALA. CODE § 6-5-218 (2008):

(a) No action in tort, contract, or otherwise shall be commenced against any person performing or furnishing the design, planning, supervision, or observation of construction or the construction of an improvement to real property more than seven years after the substantial completion of such improvement for the recovery of damages for:

(1) Any deficiency in the design, planning, supervision, or observation of construction or construction of such an improvement; or

(2) Injury to real or personal property caused by any such deficiency; or

(3) Injury to or wrongful death of a person caused by any such deficiency.

G) **Lease statute of limitations.** ALA. CODE § 7-2A-506 (2008) states:

> (1) An action for default under a lease contract, including breach of warranty or indemnity, must be commenced within 4 years after the cause of action accrued. By the original lease contract the parties may reduce the period of limitation to not less than one year.

H) **Legal malpractice.** ALA. CODE § 6-5-574 (2008) states:

> (a) All legal service liability actions against a legal service provider must be commenced within two years after the act or omission or failure giving rise to the claim, and not afterwards; provided, that if the cause of action is not discovered and could not reasonably have been discovered within such period, then the action may be commenced within six months from the date of such discovery or the date of discovery of facts which would reasonably lead to such discovery, whichever is earlier; provided, further, that in no event may the action be commenced more than four years after such act or omission or failure; except, that an act or omission or failure giving rise to a claim which occurred before August 1, 1987, shall not in any event be barred until the expiration of one year from such date.

I) **Tolling.** The following tolling provisions apply:

1) **Fraud.** ALA. CODE § 6-2-3 (2008) states:

> 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.

2) **Persons absent from state.** "When any person is absent from the state during the period within which an action might have been commenced against him, the time of such absence must not be computed as a portion of the time necessary to create a bar under this chapter." ALA. CODE § 6-2-10 (2008).

3) **Disabilities.** ALA. CODE § 6-2-8 (2008) states:

> (a) If anyone entitled to commence any of the actions enumerated in this chapter, to make an entry on land or enter a defense founded on the title to real property is, at the time the right accrues, below the age of 19 years, or insane, he or she shall have three years, or the period allowed by law for the commencement of an action if it be less than three years, after the termination of the disability to commence an action, make entry, or defend. No disability shall extend the period of limitations so as to allow an action to be commenced, entry made, or defense made after the lapse of 20 years from the time the claim or right accrued. Nothing in this section shall be interpreted as denying any imprisoned person the right to commence an action enumerated in this chapter and to make any proper appearances on his or her behalf in such actions.

**Statutes of Repose**

A) A statute of repose operates to foreclose a particular cause of action after a certain period of time, regardless of whether the cause of action has actually accrued. In other words, no actual injury is necessary to have yet occurred or be discovered. A statute of repose begins to run from the date of the act itself, regardless of whether any injury has actually been realized.

B) **Medical.** "Although a discovery rule applies to the accrual of a cause of action against an identified medical provider, in no event may the action be commenced more than four years after the wrongful act." ALA. CODE § 6-5-482 (2008).

C) **Contractors.** ALA. CODE § 6-5-221 (2008) states:

> Although this statute provides for a discovery rule as to the date a cause of action accrues, the statute prohibits any claims based upon an action by an architect, engineer or builder unless suit is filed within 13 years of the act.

**Venue Rules**

A) **Individuals.** The general venue rules are governed by ALA. CODE § 6-3-2 (2008). In lawsuits against individuals:

> (1) All actions where real estate is the subject matter of the action, whether it is the exclusive subject matter of the action or not, must be commenced in the county where the same or a material portion thereof is situated.
>
> (2) If the action is to enjoin proceedings on judgments in other courts, it may be commenced in the county in which such proceedings are pending or judgment entered.
>
> (3) Except as may be otherwise provided, actions must be commenced in the county in which the defendant or a material defendant resides.
>
> (4) In the case of nonresidents, actions must be commenced in the county where the subject of the action or any portion of the same was when the claim arose or the act on which the action is founded was to be performed.

B) **Corporations.** Venue against a corporate defendant is set forth in ALA. CODE § 6-3-7 (2008) as follows:

> (1) In the county in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of real property that is the subject of the action is situated; or
>
> (2) In the county of the corporation's principal office in this state; or
>
> (3) In the county in which the plaintiff resided, or if the plaintiff is an entity other than an individual, where the plaintiff had its principal office in this state, at the time of the accrual of the cause of action, if such corporation does business by agent in the county of the plaintiff's residence; or

(4) If subdivisions (1), (2), or (3) do not apply, in any county in which the corporation was doing business by agent at the time of the accrual of the cause of action.

C) **Change in venue.** Under ALA. R. CIV. P. 82(d), the defendant may move for a change of venue where the venue as originally filed is improper.

D) ***Forum non conveniens.*** ALA. CODE § 6-3-21.1 (2008) states:

> With respect to civil actions filed in an appropriate venue, any court of general jurisdiction shall, for the convenience of parties and witnesses, or in the interest of justice, transfer any civil action or any claim in any civil action to any court of general jurisdiction in which the action might have been properly filed and the case shall proceed as though originally filed therein.

## NEGLIGENCE

### Comparative Fault/ Contributory Negligence

A) **When recovery barred.** In Alabama, contributory negligence serves as a complete bar to recover for simple negligence; however, it is not a defense to acts of wantonness or willfulness. *Golden v. McCurry*, 392 So. 2d 815, 817 (Ala. 1980).

B) **Definition.** Contributory negligence is negligence on the part of the plaintiff that proximately contributes to his or her injury. *Cooper v. Bishop Freeman Co.*, 495 So. 2d 559, 563 (Ala. 1986).

C) **Burden of proof.** Contributory negligence must be pleaded as an affirmative defense and the defendant carries the burden of proof. *Aplin v. Tew*, 839 So. 2d 635, 635 (Ala. 2002).

D) In an attempt to temper the harsh effects of contributory negligence, Alabama has adopted the "sudden emergency" and "last clear chance" doctrines,

1) **Sudden emergency doctrine.** Under the sudden emergency doctrine, a person who, without fault of his own, is faced with a sudden emergency, is held to the standard of care of a reasonably prudent person under the same or similar circumstances. *Tillis Trucking Co. v. Moses*, 748 So. 2d 874, 885 (Ala. 1999).

2) **Last clear chance.** The last clear chance doctrine (also known as subsequent negligence) permits recovery when the plaintiff was in a perilous position and the defendant, armed with knowledge of said peril, "failed to use reasonable and

ordinary care in avoiding the accident" causing injury to the plaintiff. *Baker v. Helms*, 527 So. 2d 1241, 1244 (Ala. 1988).

E) **Assumption of the risk.** Alabama also adheres to "assumption of the risk" doctrine. Under the theory of assumption of the risk, a plaintiff who voluntarily assumes a risk of harm arising from the negligent or reckless conduct of the defendant cannot recover for such harm. *Ex parte Barran*, 730 So. 2d 203 (Ala. 1998) (adopting RESTATEMENT (SECOND) OF TORTS § 496A (1965)).

1) **Distinguishing from contributory negligence.** The difference between contributory negligence and assumption of the risk is that contributory negligence is a matter of some fault or departure from the standard of reasonable conduct and assumption of the risk involves an intelligent decision to confront the danger. *Sprouse v. Belcher Oil Co.*, 577 So. 2d 443, 444 (Ala. 1991).

**Exclusive Remedy – Worker's Compensation Protections**

A) In Alabama, workers' compensation protections are governed by ALA. CODE § 25-5-1 *et seq*. (2008).

1) **Arising out of and in the course of.** Compensation is paid to an employee for injuries caused by an accident arising out of and in the course of the employment, without regard to any question of negligence. ALA. CODE § 25-5-51 (2008).

2) **Burden.** The employee must prove his or her claim by a preponderance of evidence, except for claims based upon cumulative trauma or gradual deterioration, which must be proved by clear and convincing evidence. ALA. CODE § 25-5-81(c) (2008).

3) **Third parties.** "Injury does not include an injury caused by the act of a third person or a fellow employee intended to injure the employee because of reasons personal to him or her and not directed against him or her as an employee or because of his or her employment." ALA. CODE § 25-5-1(9) (2008).

B) **Exclusivity.** In exchange for definitive recovery without the need to prove fault, the remedy provided by the Code is exclusive and any employee covered is not permitted to seek and recover both compensation under the Code and common-law damages from his or her employer. ALA. CODE § 25-5-53 (2008). Further, where the injury is compensable under the Act, any claim against the employer for negligence, wantonness, or other acts which proximately resulted in the employee's injury are excluded by the Workers'

Compensation Act. *See Ex parte Progress Rail Services, Corp.*, 869 So. 2d 459 (Ala. 2003).

C) **Unprotected claims.** However, the exclusive remedy provision does not protect the employer/insurer from the following claims, which are premised upon actions taken outside the context of the injury itself:

1) **Fraud.** *Lowman v. Piedmont Executive Shirt Mfg. Co*., 547 So. 3d 901 (Ala. 1989);

2) **Outrageous conduct.** *Continental Cas. Ins. v. McDonald*, 567 So. 2d 1208 (Ala. 1990);

3) **Retaliatory discharge for filing a workers' compensation claim**. Ala. Code § 25-5-11.1 (2008); and

4) **Sexual harassment.** *Busby v. Truswal Sys. Corp*., 551 So. 2d. 322 (Ala. 1989).

D) **Intentional conduct.** In addition, while the exclusivity provision protects co-employees from acts of negligence, they may still be subject to claims for willful and intentional conduct, for violation of a specific written safety rule, and for removal of safety guard. ALA. CODE § 25-5-11 (2008); *Ex parte Martin*, 733 So. 2d 392 (Ala. 1999); *Moore v. Reeves*, 589 So. 2d 173 (Ala. 1991).

**Indemnification**

A) A claim of indemnity would transfer the entire loss of one tortfeasor, who has been ordered to pay the loss to the plaintiff(s), to another who is culpable. *Sherman Concrete Pipe Mach., Inc. v. Gadsden Concrete & Metal Pipe Co.*, 335 So. 2d 125 (Ala. 1976).

B) Generally, under Alabama law, joint tortfeasors may not obtain contribution or indemnity from each other. *Consolidated Pipe & Supply Co. v. Stockham Valves & Fittings, Inc.*, 365 So. 2d 968, 971 (Ala. 1978). However, Alabama has recognized several circumstances in which indemnity may be granted:

1) **Express indemnity.** When there is an express agreement or contract between the parties that clearly indicates an intention to indemnify, the indemnitor clearly understands the agreement, and there is no evidence of disproportionate bargaining power on the part of the indemnitee. *Industrial Tile, Inc. v. Stewart*,

388 So. 2d 171, 175 (Ala. 1980) (citing *Eley v. Brunner-Lay S. Corp.*, 266 So. 2d 276 (Ala. 1972)).

2) **Negligence-based theory.** A joint tortfeasor may claim indemnity where he has been held liable either (a) "constructively, without fault, for a tort of another party" or (b) "directly, for the party's own fault, when another party's fault actually caused the harm." M. Roberts and G. Cusimano, ALABAMA TORT LAW § 36.05 (4th ed. 2004) (citing Phelps & Johnson, *Indemnity Actions in Alabama Products Liability Cases*, 34 ALA. L. REV. 23, 44-46 (1983)); *see also Mallory S.S. Co. v. Druhan*, 84 So. 2d 1313 (Ala. 1993). Further, "the alleged indemnitee may recover from another party that has breached a duty owed to the indemnitee." *Id.*

3) **Fiduciary relationships.** Typically, in a situation involving a fiduciary relationship, such as master/servant, principal/agent or employer/employee, Alabama recognizes a limited common law right of indemnification. In other words, where a joint wrongdoer is not guilty of any fault other than based upon his or her status as a principal, master or employer, he has a right to seek indemnification against the party serving as the conduit of liability. *Criglar v. Salac*, 438 So. 2d 1375 (Ala. 1983).

**Joint and Several Liability**

A) **Joint liability.** Joint liability occurs where two or more separate acts, on the part of the defendants, combine to cause one indivisible injury to the plaintiff(s). *Butler v. Olshan*, 191 So. 2d 7, 24 (Ala. 1966).

B) **Joint and several liability.** "In Alabama, damages are not apportioned among joint tortfeasors; instead, joint tortfeasors are jointly and severally liable for the entire amount of damages awarded." *Matkin v. Smith*, 643 So. 2d 949, 951 (Ala. 1994).

C) **Satisfaction of judgment.** Moreover, a judgment can be satisfied from either or both of the defendants and satisfaction of the judgment by one joint tortfeasor would discharge the other tortfeasor from liability. The tortfeasor that satisfied the judgment would have no recourse or claim against the other tortfeasor for contribution or indemnity unless there existed a contract stating such terms. *Id.*

D) **Contribution.** Alabama does not allow contribution among joint tortfeasors. *Gobble v. Bradford*, 147 So. 619, 619 (Ala. 1933).

**Strict Liability**

A) Strict liability holds a person responsible for the damage caused by his or her actions regardless of fault.

B) The Alabama Supreme Court has adopted the RESTATEMENT (SECOND) OF TORTS § 519 definition of strict liability which states that:

> One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm, (2) this strict liability is limited to the kind of harm, the possibility of which makes the activity abnormally dangerous.

*Harper v. Regency Dev. Co.*, 399 So. 2d 248, 253 (Ala. 1981).

C) Alabama recognizes two theories of strict liability:

1) **Ultra-hazardous or abnormally dangerous activities.** *Dickinson v. City of Huntsville*, 822 So. 2d 411, 417 (Ala. 2001) states:

> Liability for an abnormally dangerous activity arises out of the intrinsic danger of the ultra hazardous activity itself and the risk of harm it creates to those in the vicinity. The basis for liability is that one who for his own purposes creates an abnormal risk of harm to his neighbors must be responsible for relieving that harm when in fact it does occur.

2) **Unreasonably dangerous products.** *Casrell v. Altec Indus.*, 335 So. 2d 128, 130 (Ala. 1976) (quoting *Balido v. Improved Mach., Inc.*, 105 Cal. Rptr. 890, 895 (Cal. 1973)) states:

> Under this theory, "a danger is unreasonable when it is foreseeable, and the manufacturer's ability, actual, constructive, or potential, to forestall unreasonable danger is the measure of its duty in the design of its product. A manufacturer's failure to achieve its full potential in design and thereby forestall unreasonable danger forms the basis for its strict liability in tort."

D) In determining whether or not a particular activity is subject to strict liability (i.e.- "abnormally dangerous"), Alabama courts apply the factors enumerated in the RESTATEMENT (SECOND) OF TORTS § 520:

> (a) the existence of a high degree of risk of some harm to the person, land or chattels of others; (b) the likelihood that the harm that results from it will be great; (c) the inability to eliminate the risk by the exercise of reasonable care; (d) the extent to which the activity is not a matter of common usage; (e) inappropriateness of the activity to the place where it is carried on; and (f) the extent to which its value to the community is outweighed by its dangerous attributes.

*Dickinson*, 822 So. 2d 411.

E) **Learned intermediary doctrine.** While manufacturers have a duty to sufficiently warn doctors of the harmful effects of a drug, and physicians owe a similar duty to inform their patients of said risks, the Alabama Supreme Court has held that, "'the learned-intermediary doctrine' forecloses any duty upon a pharmacist filling a physician's prescription, valid and regular on its face, to warn the physician's patient, the pharmacist's customer, or any other ultimate consumer of the risks or potential side effects of the prescribed medication." *Walls v. Alapharma USPD, Inc*., 887 So. 2d 881, 886 (Ala. 2004). As such,

> '[t]he pharmacist still has a duty to accurately fill a prescription [citation omitted] and to be alert for clear errors or mistakes in the prescription. The pharmacist does not, however, have a duty to question a judgment made by the physician as to the propriety of a prescription or to warn customers of the hazardous side effects associated with a drug, either orally or by way of the manufacturer's package insert.'

*Id.* at 885 (quoting *McKee v. American Home Prods.*, 782 P.2d 1045, 1055 (Wa. 1989)).

1) **Scope.** In Alabama, the learned intermediary doctrine "is more than just a narrow rule of law regarding a manufacturer's or pharmacist's limited duty to warn. It addresses questions of liability in light of the relationships between the parties involved in the distribution, prescribing, and use of prescription drugs." *Springhill Hosps., Inc. v. Larrimore*, 2008 Ala. LEXIS 38, at *11 (Ala. 2008).

**Willful and Wanton Conduct**

A) **Wantonness.** Under Alabama law, wantonness is "conduct which is carried on with a reckless or conscious disregard of the rights or safety of others." ALA. CODE § 6-11-20(b)(3) (1965). More specifically, the Alabama Supreme Court has defined wantonness as the

> conscious doing of some act or omission of some duty under knowledge of existing conditions and conscious that from the doing of such act or omission of such duty injury will likely or probably result. Before a party [can] be said to be guilty of wanton conduct it must be shown that with reckless indifference to the consequences he consciously and intentionally did some wrongful act or omitted some known duty which produced the injury.

*Duke v. Gaines*, 140 So. 600, 601 (Ala. 1932).

1) **Type of conduct.** "To prove wantonness, it is not necessary to establish that the defendant entertained a specific design or intent to injure the plaintiff." *Alfa Mut. Ins. Co. v. Roush*, 723 So. 2d 1250 (Ala. 1998).

2) **Plaintiff's negligence.** As previously mentioned, if the defendant's behavior goes beyond negligence to wantonness, then the defendant may not claim that the plaintiff's negligence bars recovery. *Sims v. Crates*, 789 So. 2d 220, 224 (Ala. 2001).

3) **Mental state.** Wantonness differs from negligence according to the mental state of the actor. Wantonness, unlike negligence, requires both knowledge and consciousness that an act or omission will likely result in injury to another. *Thompson v. White*, 149 So. 2d 797, 804 (1963).

B) **Willfulness.** Willfulness involves a state of mind different from wantonness; because it implies not only the voluntary and intentional doing of the act, but also the intent to effect the result that follows from the act. *Parker v. Sutton*, 254 So. 2d 425, 431 (Ala. Civ. App. 1971).

C) **Distinction from negligence.** Wantonness and willfulness are qualitatively different from negligence and, under Alabama law, are separate causes of action. *See Lynn Strickland Sales & Serv., Inc. v. Aero-Lane Fabricators*, 510 So. 2d 142, 145 (Ala. 1987).

# DISCOVERY

## Electronic Discovery Rules

Electronic discovery relates to the discovery of electronically-stored information.

A) Neither the Alabama courts nor the state legislature have developed standards for the discovery of electronically stored information. *Ex parte Cooper Tire & Rubber Co.*, 987 So. 2d 1090 (Ala. 2007).

B) **Factors.** The Alabama Supreme Court considers electronic discovery in light of FED. R. CIV. P. 26(b)(2)(B) (2008) ("Specific Limitations in Electronically Stored Information"), and the factor test used in *Wiginton v. CB Richard Ellis, Inc.*, 229 F.R.D. 568 (N.D. Ill 2004). *Ex parte Cooper Tire & Rubber Co.*, 987 So. 2d 1090 (Ala. 2007).

1) FED. R. CIV. P. 26(b)(2)(B) states:

> A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations. The court may specify conditions for the discovery.

2) The general presumption is that the responding party pays for discovery requests. However, the *Wiginton* test determines whether the burden should be shifted from the responding party to the requesting party. Factors to be considered are:

> (1) the specificity of the discovery requests; (2) the likelihood of discovering critical information; (3) the availability of such information from other sources; (4) the purposes for which the responding party maintains the requested data; (5) the relative benefit to the parties of obtaining the information; (6) the total cost associated with production; (7) the relative ability of each party to control costs and its incentive to do so; and (8) the resources available to each party.

*Wiginton*, 229 F.R.D. at 571.

## Expert Witnesses

Disclosure of facts or data by expert witnesses are governed by ALA. R. CIV. P. 26(b)(4) and ALA. R. EVID. 705 (2008).

A) **Forms of Disclosure.** ALA. R. CIV. P. 26(b)(4)(A) allows a party through interrogatories to require an opposing party to disclose the identity of any expert witnesses it expects to call at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds of each opinion.

1) Unless injustice would result, the party requesting discovery must pay the expert a reasonable fee for time spent responding to discovery. ALA. R. CIV. P. 26(b)(4)(C).

B) ALA. R. EVID. 705 allows an expert to "testify in terms of opinion or inference and give reasons therefor without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination." ALA. R. EVID. 705.

1) The rule does not require that underlying facts or data be disclosed as a condition precedent to the expert's giving an opinion or other testimony.

C) **Rebuttal witnesses.** An expert may called as a rebuttal witness only if the calling party has made the proper disclosures required by ALA. R. CIV. P. 26(b)(4)(A). *Coca-Cola Bottling Co. United v. Stripling*, 622 So.2d 882, 889 (Ala. 1993). Furthermore, disclosure of identity and subject matter of the testimony of an expert witness is usually required by a pretrial order, which, under ALA. R. CIV. P. 16, is "clearly a matter of discretion, not subject to reversal." *Super Valu Stores, Inc. v. Peterson*, 506 So. 2d 317, 323 (Ala. 1987).

D) **Discovery of expert work product.** ALA. R. CIV. P. 26(b)(4)(B) provides that if a showing of undue hardship is made by the requesting party, it may discover facts known or opinions held by an expert who has been retained, specially employed or assigned by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness for trial.

1) If the requesting party obtains discovery pursuant to subdivision (b)(4)(B), it is required to pay a fair portion of the fees and expenses incurred by the opposing party in obtaining facts and opinions from the expert. ALA. R. CIV. P. 26(b)(4)(C).

**Non-Party Discovery**

A) **Subpoenas.** Subpoenas are governed by ALA. R. CIV. P. 45. The issuance of a subpoena commands the non-party to appear and, if ordered, to produce documents or other tangible items within the scope of the matter at a specified time and place. A deponent or witness who is subpoenaed is ordered by law to obey it. A subpoena for a third party

witness shall be issued by the clerk of the court in which the action is pending upon request. A subpoena for production or inspection, however, is subject to additional requirements outlined in subsection (a)(3). The additional requirements are:

1) **Notice of intent to serve.** Under subsection (a)(3)(A):

> The party seeking issuance of a subpoena for production or inspection shall serve a notice to every other party of the intent to serve such subpoena upon the expiration of fifteen (15) days from the service of the notice and the proposed subpoena shall be attached to the notice. The court may allow a shorter or longer time.

2) **Objection to issuance of subpoena.** Under subsection (a)(3)(B):

> any person or party may serve an objection to the issuance of a subpoena for production or inspection within 10 days of service of notice, and in such event the subpoena will not issue. The party serving notice may move for an order under Rule 37(a) with respect to such objection. If no objection is timely served, the clerk shall cause the subpoena to be issued on the expiration of 15 days from service of the notice or upon some other time as allowed by the court.

3) **Content of subpoena.** Under subsection (a)(3)(C):

> the subpoena shall sufficiently identify the person to whom it is directed, and give a description of items to be inspected with reasonable particularity. The subpoena shall specify a reasonable time no less than 15 days after service, as well as the manner of performing the inspection or other related acts, unless the court orders otherwise. With respect to documents or tangible things, the inspection will take place where the they are regularly kept, or at some other reasonable place designated by the recipient. The recipient may request payment up front for any copies of documents to be mailed. Any other party has the right to be present at the time of compliance with the subpoena.

B) **Service.** Service of a subpoena to a non-party may is governed by ALA. R. CIV. P. 45(b). If the recipient's attendance is commanded at a place more than 100 miles from the recipient's residence, the serving party must tender to the recipient fees for one day's attendance and an amount to reimburse mileage allowed by law.

C) **Time frames for responses.** Generally, under the ALA. R. CIV. P. 33, 34 and 36, responses to interrogatories, requests to produce, and requests to admit are due within 30 days of receipt.

**Privileges**

The duty of an attorney to protect client communications and information can be found in two main bodies of Alabama law: the attorney-client privilege, which includes the work product doctrine, and confidentiality.

A) **Attorney-client privilege.** The attorney-client privilege is an evidentiary doctrine governed by ALA. R. EVID. 502 (2008). The common law attorney-client privilege was embodied in ALA. CODE, § 12-21-161 (1975). However, Rule 502 supersedes the preexisting statute. *See* ALA. R. EVID. 502 advisory committee's note. The determination of whether a particular communication is privileged is one of fact that must be proven by the party asserting the privilege. To prove that the communication between the attorney and client is confidential the party asserting the privilege must show that the statements were not intended to be communicated to a third party. *Exxon Corp. v. Dept. of Conservation & Natural Resources*, 859 So. 2d 1096, 1104 (Ala. 2002).

1) **General rule of privilege.** ALA. R. EVID. 502(b) states:

> A client has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made for the purpose of facilitating the rendition of professional legal services to the client, (1) between the client or a representative of the client and the client's attorney or a representative of the attorney, or (2) between the attorney and a representative of the attorney, (3) by the client or a representative of the client or the client's attorney or a representative of the attorney to an attorney or a representative of an attorney representing another party concerning a matter of common interest, (4) between representatives of the client and between the client and a representative of the client resulting from the specific request of, or at the express direction of, an attorney, or (5) among attorneys and their representatives representing the same client.

2) **Exceptions.** There is no privilege under ALA. R. EVID. 502 if: (1) the services of an attorney were sought to aid in commission of a crime or fraud; (2) communication involving claimants through the same deceased client; (3) breach of duty by an attorney or client; (4) documents attested to by an attorney; or (5) communication relevant to a matter in which former joint clients are now litigating against each other. ALA. R. EVID. 502(d).

3) **Waiver.** Once it is determined that a confidential communication is made between an attorney and a client, the opposing party may not obtain the communication through discovery unless the privilege has been waived. *Bassett v. Newton*, 658 So. 2d 398, 401 (Ala. 1995).

B) **Work product.** The work product doctrine is governed by ALA. R. CIV. P. 26(b)(3), which parallels FED. R. CIV. P. 26(b)(3) and accurately codifies the Supreme Court's interpretation of the doctrine in *Hickman v. Taylor*, 329 U.S. 495, 502 (1947).

Documents produced by or for an opposing party or their representative, including their attorney and consultants, are protected from discovery if they were created in anticipation of litigation. The work product doctrine requires that there be a causal connection between the document's formation and litigation. In determining whether a specific document is classified as work product the party claiming the privilege must provide evidence that fairly proves that the document was "prepared or obtained because of the prospect of litigation."

C) **Confidentiality.** Under ALA. R. P. C. 1.6(a), a lawyer is prohibited from disclosing information relating to representation of a client unless the client consents either expressly or impliedly. Under Rule 1.6(b), a lawyer may reveal client information to the extent the lawyer reasonably believes is necessary in preventing the client from committing an act that would result in death or serious bodily harm, and may also disclose communication in order to respond to allegations in any proceedings concerning the lawyer's representation of the client.

D) **Self-critical analysis privilege.** *Cryer v. Corbet*, 814 So.2d 239, 249 (Ala. 2001) (quoting 23 Charles Alan Wright and Kenneth W. Graham, Jr., Federal Practice and Procedure: Evidence § 5431, p. 457 (1999 Supp.)) states:

> In recent years there has been some recognition by federal courts of a privilege for certain corporate records under the rubric of 'self-evaluative reports.' … The decisions are divided, and there seems little justification for creating a new privilege if the matter sought to be protected falls outside the required reports privilege.

Although there has been some recognition of a privilege for certain corporate records under the guise of "self-evaluative reports," the Alabama Supreme Court believes that consideration for a possibly controversial rule of evidence should come from either the Alabama Advisory Committee on Rules of Evidence or the state legislature. *Id*; *compare Ex parte Life Ins. Co.*, 663 So.2d 929, 931 (Ala. 1995) (holding that the trial court erred in ordering appellant to produce documents without giving it opportunity to be heard on its asserted privileges, one of which was the "self-critical-analysis" privilege), with *Cryer*, 814 So.2d at 249, (holding that the "self-critical-analysis" privilege does not apply to the medical peer-review process).

E) The Alabama Rules of Evidence governs other forms of privileged communications. These communications are:

1) ALA. R. EVID. 503: psychotherapist-patient privilege;
2) ALA. R. EVID. 503A: counselor-client privilege;
3) ALA. R. EVID. 504: husband-wife privilege;
4) ALA. R. EVID. 505: communications to clergymen; and
5) ALA. R. EVID. 509: identity of informer.

**Requests for Admission**

A) ALA. R. CIV. P. 36 (2008) governs requests for admission. Admissions established by reason of this rule are a sufficient basis for summary judgment. *Steadham v. U.S. Leasing Corp.*, 382 So.2d 563 (Ala. Civ. App. 1980), *cert. denied*, 382 So.2d 565, (Ala. 1980). Under Rule 36, a party may serve upon any other party a written request for the admission of the truth of any matters within the scope of Rule 26(b) set forth in the request that relate to statements or opinions of fact or the application of law to fact, including the genuineness of any documents described in the request.

B) A party served with a request for admission has 30 days to respond or the information contained in the request is admitted. ALA. R. CIV. P. 36. The defendant shall not, however, be required to serve answers or objections before the expiration of 45 days after service of the summons and complaint. *Id.* The answer shall specifically deny the matter for which admission is requested or give an explanation as to why it cannot be answered. *Id.* A party may not claim lack of information or knowledge without making a reasonable inquiry and afterwards being unable to admit or deny. "The trial court may, in its discretion, allow late responses to requests for admission. Appellate review is limited to abuses of discretion." *Bradley v. Demos*, 599 So. 2d 1148, 1149 (Ala. 1992).

**Unique State Issues**

Alabama law pertaining to discovery is closely modeled after the Federal Rules of Civil Procedure and the Federal Rules of Evidence. Thus, no truly unique issues exist that are not common among several other states which also follow the Federal Rules.

## EVIDENCE, PROOFS & TRIAL ISSUES

**Accident Reconstruction**

A) The use of expert testimony is expressly authorized by ALA. CODE § 12-21-160 (2008), which provides that the "opinions of experts on any question of science, skill, trade or like questions are always admissible; and such opinions may be given on the facts as proved by other witnesses." The question of whether or not a particular witness will be allowed to testify as an expert is largely discretionary with the trial court, whose decision will not be disturbed on appeal except for palpable abuse. Further, any objection to expert testimony goes to the weight of the evidence rather than to its admissibility. *Maslankowski v. Beam*, 259 So. 2d 804 (Ala. 1972).

B) **Test.** The admissibility of the substance of an expert's opinion testimony is governed by the rule that opinion testimony as to the location of the point of impact of a collision is proper where the witness first details the facts upon which his conclusion is based. *Baker v. Edgar*, 472 So. 2d 968 (Ala. 1985). The test to determine whether a witness is in fact an expert witness is whether that witness, by "study, practice, experience, or observation as to a particular subject" should have acquired knowledge beyond that of an average juror or witness. *Holland v. State*, 666 So. 2d 547 (Ala. Crim. App. 1995). "Generally before expert testimony is admissible it should appear the jurors themselves are incapable, for want of knowledge or experience of the subject matter, of drawing correct conclusions from the facts proved." *Maslankowski v. Beam*, 259 So. 2d 804 (Ala. 1972).

C) **Law enforcement.** A law enforcement officer may be qualified as an expert with sufficient information, training, and experience. In such cases, such an expert may express an opinion with regard to the speed of an automobile where there exists sufficient scientific data upon which he could reasonably base his opinion, sufficient physical facts around the accident such as post-impact skid marks, and scientific methods to employ in reconstructing the accident. *Jackson v. State*, 636 So. 2d 1275 (Ala. Crim. App. 1994).

**Appeal**

An appeal is considered to be a continuation of a legal proceeding. The scope of appellate court jurisdiction is confined to appeals from any final orders or judgments of the trial court.

A) **Final judgments.** Only final judgments of the circuit court or probate court, are appealable as of right by either party, or their personal representatives, within the time and in the manner prescribed by the Alabama Rules of Appellate Procedure. ALA. CODE § 12-22-2 (2008). *Dees v. State*, 563 So. 2d 1059 (Ala. Civ. App. 1990) states:

> A final judgment or decree is one which puts end to all controversies litigated or which ought to have been litigated with respect to particular controversy. Further, the judgment must be conclusive and certain with all matters decided, including the assessment of damages with specificity for a sum certain determinable without resorting to extraneous facts.

B) **Civil cases.** In civil cases, the notice of appeal shall be filed with the clerk of the trial court within 42 days (6 weeks) of the date of entry of the judgment or order appealed from. ALA. R. APP. P. 3, 4 (2008).

C) **Criminal cases.** In criminal cases, a written notice of appeal shall be filed with the clerk of the trial court within 42 days (6 weeks), or by the defendant's giving an oral notice of

appeal at the time of sentencing, which oral notice shall be noted of record. ALA. R. APP. P. 3, 4.

D) **Other time frames for appeal.** In appeals from the following orders or judgments, the notice of appeal shall be filed within 14 days (2 weeks) of the date of the entry of the order or judgment: (a) any interlocutory order granting, continuing, modifying, refusing, or dissolving an injunction, or refusing to dissolve or to modify an injunction; (B) any interlocutory order appointing or refusing to appoint a receiver; (C) any interlocutory order determining the right to public office; (D) any judgment in an action for the validation of public obligations, including any action wherein a judgment is entered with respect to the validity of obligations of the State of Alabama or any agency or instrumentality thereof; and (E) any final order of judgment issued by a juvenile court. ALA. R. APP. P. 4.

E) **Interlocutory orders.** Generally, interlocutory orders are not final judgments and do not support an appeal. *Bass v. Enterprise*, 243 So. 2d 359 (Ala. 1970). However, a party may request permission to appeal from an interlocutory order in civil actions under limited circumstances. Such appeals are limited to those civil cases which are within the original appellate jurisdiction of the Supreme Court. A petition to appeal from an interlocutory order must contain a certification by the trial judge made within 28 days of the entry of the order. If a certification is made outside this reasonable time, the petition shall include a statement of circumstances constituting good cause for consideration. The petition shall be filed with the clerk of the Supreme Court within 14 days (2 weeks) after the entry of the certification by the trial judge. ALA. R. APP. P. 5(a)(1)-(2) (2008). The rule providing for appeals from interlocutory orders does not turn those orders into "final judgments." *Momar, Inc. v. Schneider*, 823 So. 2d 701 (Ala. Civ. App. 2001).

F) Other interlocutory appeals, such as disputes regarding discovery orders, may be raised by filing a petition for writ of mandamus under ALA. R. APP. P. 21 (2008). Such an interlocutory review is made under an abuse of discretion standard.

**Biomechanical Testimony**

The State of Alabama has not addressed the admissibility of biomechanical testimony. However, the admissibility of scientific testimony has been widely discussed.

A) ***Frye* test.** The admissibility of medical and scientific expert testimony is governed by the *Frye* test. Under the *Frye* standard, expert testimony concerning a scientific or medical principle will be admissible only when the proponent of the evidence establishes that the principle has achieved general acceptance in the scientific field to which it

belongs. The danger of a jury's according undue weight to unproven and perhaps unreliable scientific testimony justifies excluding such evidence. *Hill v. State*, 507 So. 2d 554 (Ala. Crim. App. 1986). *See Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

B) ***Daubert.*** In Alabama, the *Daubert* standard applies only to the admissibility of DNA evidence. *Barber v. State*, 952 So. 2d 393 (Ala. Crim. App. 2005); ALA. CODE § 36-18-30 (2008).

C) **Factors.** The touchstones for admissibility under *Daubert* are reliability and relevancy. If a given theory or technique is so firmly established as to have attained the status of scientific law, then it is admissible. *Barber v. State*, 952 So. 2d 393 (Ala. Crim. App. 2005). The U.S. Supreme Court announced five factors that may be analyzed flexibly in assessing the relevancy and reliability of expert testimony:

> (1) whether the particular scientific theory can be (and has been) tested; (2) whether the theory has been subjected to peer review and publication; (3) the known or potential rate of error; (4) the existence and maintenance of standards controlling the technique's operation; and (5) whether the technique has achieved general acceptance in the relevant scientific or expert community.

*Id.*

D) **Nonscientific expert testimony.** ALA. R. EVID. 702 governs the admissibility of nonscientific expert testimony.

**Collateral Source Rule**

Benefits received by the plaintiff from a source wholly independent of and collateral to the wrongdoer will not diminish the damages otherwise recoverable from the wrongdoer. 22 AM. JUR. 2D DAMAGES § 566 (1988). The collateral source rule prohibits the admission of evidence that an injured party's damages will be compensated by a source other than the person/entity which caused the injury. Such collateral benefits do not reduce the defendant's tort liability, even though they reduce the plaintiff's recovery.

A) Under the collateral-source rule, an amount of damages is not decreased by benefits received by a plaintiff from a source wholly collateral to and independent of the wrongdoer. *Ex parte Barnett*, 978 So. 2d 729 (Ala. 2007).

B) The Alabama Supreme Court first articulated the collateral-source rule in *Long v. Kansas City*, 54 So. 62 (1910), and it thereafter consistently held collateral-source evidence inadmissible. *Marsh v. Green*, 782 So. 2d 223 (Ala. 2000).

C) **Medical expenses.** However, in all actions where damages for any medical or hospital expenses are claimed and are legally recoverable for personal injury or death, ALA. CODE § 6-5-545 (2008) allows evidence that the plaintiff's medical or hospital expenses have been or will be paid or reimbursed to be admitted as competent evidence. This section abolished the collateral-source rule in medical-malpractice cases. The Alabama Supreme Court held that this section has not been shown to violate the constitution. *Marsh v. Green*, 782 So. 2d 223 (Ala. 2000).

**Convictions**

Evidence of prior convictions is only admissible to impeach the credibility of a witness. A conviction is more than being found guilty, a person must have been sentenced for the crime. The party who opposes the admission of the evidence bears the burden of proving it is prejudicial.

A) **Criminal.** ALA. R. EVID. 609 (2008) states that for the purpose of attacking the credibility of a witness, evidence that a witness other than an accused has been convicted of a crime shall be admitted if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused, as long as no more than ten years have passed since the later of the date of conviction or release from jail. Also, evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment. *See Sullivan v. State*, 742 So. 2d 202 (Ala. Crim. App. 1999). "The preexisting Alabama statutory provision authorizing impeachment by evidence showing conviction for a crime involving moral turpitude, ALA. CODE § 12-21-162(b), is superseded by ALA. R. EVID. 609." *Huffman v. State*, 706 So. 2d 808 (Ala. Crim. App. 1997).

B) **Traffic.** The general rule is that a person's conviction in a criminal case is admissible against him in a civil action to show that he did the act for which he was convicted. *Yancy v. Farmer*, 472 So. 2d 990 (Ala. 1985). Therefore, so long as the evidence of conviction was material to the civil action, there is no difference between a conviction of a traffic violation and any other violation or conviction, and it was only an evidentiary fact admitted for the consideration of the trier of the facts. This evidence may be explained and contradicted by the defendant. *Durham v. Farabee*, 481 So. 2d 885 (Ala. 1985). In criminal matters, the dispositive issue is whether a prior driving conviction is relevant to, inseparably connected to or are part of the *res gestae* of the now-charged crime. The prior offenses must involve a similar intent or mental state to be relevant. *Ex parte Smith*, 694 So. 2d 1261 (Ala. 1996).

**Day in the Life Videos**

A "Day in the Life" video is demonstrative evidence prepared by the lawyer who seeks to use it. Thus, it is subject to the same tests and admissibility requirements as photographs, charts, drawings, and models (See "Use of Photographs" section).

A) **Foundation.** *Int'l Union, etc. v. Russell*, 88 So. 2d 175 (Ala. 1956), aff'd, 356 U.S. 634 (1958) states:

> A motion picture does not of itself prove an actual occurrence, but the thing reproduced must be established by the testimony of witnesses. A motion picture, as exhibited to the jury, is the pictorial communication of the witness' testimony and is used to convey the observations of the witness to the jury more fully and accurately than the witness can convey them verbally. The picture is not admissible unless a witness testifies that the picture as exhibited accurately reproduces the objects or actions which he observed.

B) **Relevancy.** *Ellingwood v. Stevens*, 564 So. 2d 932 (Ala. 1990) states:

> Motion pictures are admissible if they are shown to be relevant and to accurately depict the subject matter, and if they tend to aid rather than confuse the jury. Those determinations are left to the sound discretion of the trial court and will not be reversed except for abuse of discretion.

**Dead Man's Statute**

A) The Dead Man's Statute protects the deceased. Alabama's statute provides in pertinent part:

> in civil actions and proceedings, no person having a pecuniary interest in the result of the action of proceeding shall be allowed to testify against the party to whom his interest is opposed as to any transaction with, or statement by, the deceased person whose estate is interested in the result of the action or proceeding.

ALA. CODE § 12-21-163 (2008).

B) **Criteria.** In order for the Dead Man's Statute to disqualify a witness from testifying about his dealings with a deceased individual, three criteria must be met:

1) the witness must have a pecuniary interest in the result of the proceedings;
2) the estate of the deceased must be interested in the outcome of the suit; and
3) the testimony of the witness must relate to a personal transaction with the decedent.

*City of Rainbow City v. Ramsey*, 417 So. 2d 172 (Ala. 1982).

C) **Effect.** "The Dead Man's Statute operates to prevent a living person from testifying about what a dead person said if that testimony would adversely affect the dead person's estate." *Conners v. Mulvehill*, 679 F. Supp. 1071 (N.D. Ala. 1988). The burden is upon the party who invokes the statute to prove its applicability. *Id.*

**Medical Bills**

A) "In all civil actions where damages for any medical or hospital expenses are claimed and are legally recoverable for personal injury or death, a plaintiff's medical or hospital bills are admissible as competent evidence." ALA. CODE § 12-21-45 (2008). "[I]nformation regarding payment or reimbursement of medical expenses is subject to discovery." *Smith v. Darring*, 659 So. 2d 678 (Ala. Civ. App. 1995).

**Offers of Judgment**

A) ALA. R. EVID. 408 (2008) states:

> Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting an offer to compromise is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible . . . . This rule does not exclude evidence offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

B) An offer to allow judgment against the serving party may be served upon an adverse party more than 15 days before a trial begins by the defending party, or after liability has been determined by the party adjudged liable. If within 10 days after the service of the offer, the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance and the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. ALA. R. CIV. P. 68 (2008).

**Offers of Proof**

When an attorney's evidence is successfully objected to, she has the chance to explain what the evidence would have shown had it been allowed by the judge. This is called an offer of proof. *See* ALA. R. EVID. 103 (2008).

A) "Generally, in order to preserve review of the trial court's ruling sustaining an objection to proffered evidence, the party offering the evidence must make an offer of proof indicating what the evidence would have shown." *Kilcrease v. John Deere Indus. Equip. Co.*, 663 So. 2d 900 (Ala. 1995). The primary reason for the offer of proof is that it better enables the trial judge to consider further the claim for admissibility of such evidence. The secondary reason is that the offer of the proposed answer places the same in the official record for the benefit of the appellate court called upon to decide whether there has been error committed in the ruling. *See id.*

B) **Relevancy.** *Hennis v. Hennis*, 977 So. 2d 520 (Ala. Civ. App. 2007) states:

> Where the relevancy of evidence is not self-evident, the proponent of it must make an offer of proof explaining its relevancy in order to preserve error. And where the evidence may be admissible for one purpose but inadmissible for another, the offeror must specify in his offer in order to put the trial court in error.

C) ***Walton* exception.** However, in situations in which the question disallowed indicates on its face the expected answer, no offer of proof is necessary to preserve error on appeal. Therefore, this exception, called the Walton exception, to the "offer of proof" rule is applicable if, from the full context of the record, the trial court is fully aware of the nature of the testimony the witness is prepared to give if permitted to testify. *Kilcrease v. John Deere Indus. Equip. Co.*, 663 So. 2d 900 (Ala. 1995); see *Walton v. Walton*, 409 So. 2d 858 (Ala. Civ. App. 1982).

**Prior Accidents**

Evidence of prior accidents is admissible only if the accidents were not too remote in time, and the conditions and circumstances under which the prior accidents occurred must have been substantially the same as in the subject case. "It is within the discretion of the trial court to limit evidence of other accidents or safety history when such evidence will work to divert the attention of the jury to a greater extent than is the probative worth of such evidence." *Murray v. Alabama Power Co.*, 413 So. 2d 1109 (Ala. 1982).

**Relationship to the Federal Rules of Evidence**

Alabama has modeled its own set of rules, except where a different treatment was deemed justified for Alabama practice, after the Federal Rules of Evidence. The Advisory Committee assumes that cases interpreting the Federal Rules of Evidence will constitute authority for construction of the Alabama Rules of Evidence. *See* ALA. R. EVID. 102.

**Seat Belt and Helmet Use Admissibility**

A) **Seat belts.** Failure to wear a safety belt . . . shall not be considered evidence of contributory negligence and shall not limit the liability of an insurer. ALA. CODE § 32-5B-7 (2008).

B) **Misuse.** However, courts have allowed evidence of misuse of safety belts or helmets, and failure to use reasonable care with regard to that product, to show contributory negligence. *See Gen. Motors Corp. v. Saint*, 646 So.2 d 564 (Ala. 1994).

**Spoliation**

Spoliation is the withholding, hiding, or destruction of evidence relevant to a legal proceeding.

A) **Factors.** Some courts have applied a four factor analysis to address a spoliation-of-the-evidence issue as referenced in *Cincinnati Ins. Co. v. Synergy Gas, Inc.*, 585 So. 2d 822 (Ala. 1991):

1) the importance of the evidence destroyed;
2) the culpability of the offending parties;
3) fundamental fairness; and
4) alternative sources of information.

*See Cooper v. Toshiba Home Tech. Corp.*, 76 F. Supp. 2d 1269 (M.D. Ala. 1999); *Joyner v. B & P Pest Control, Inc.*, 853 So. 2d 991 (Ala. Civ. App. 2002).

The Alabama Supreme Court later added a fifth prong to the above four factor analysis test: (5) the possible effectiveness of other sanctions less severe than dismissal. *Story v. RAJ Prop.*, 909 So. 2d 797 (Ala. 2005).

B) **Inference.** "As a general rule, if the trier of fact finds a party guilty of spoliation, it is authorized to presume or infer that the missing evidence reflected unfavorably on the spoliator's interest. It is sufficient foundation for an inference of the spoliator's guilt or negligence." *Vesta Fire Ins. Corp. v. Milam & Co. Constr.*, 901 So. 2d 84 (Ala. 2004).

C) A party who successfully proves spoliation against the tortfeasor defendant is entitled to the following charge:

> In this case, the plaintiff claims that the defendant is guilty of wrongfully destroying, hiding, concealing, altering, or otherwise wrongfully tampering with material evidence (including attempts to influence a witness's testimony). If you are reasonably satisfied from the evidence that the defendant did or attempted to wrongfully destroy, hide, conceal, alter, or otherwise tamper with material evidence, then that fact may be considered as an inference of defendant's guilt, culpability, or awareness of the defendant's negligence.

1 ALA. PATTERN JURY INSTR. CIV. 13 (2d ed. 2007).

D) **Sanctions.** Spoliation can have special consequences such as sanctions under ALA. R. CIV. P. 37 (2008), when a party frustrates a discovery request by willfully discarding critical evidence subject to a production request. The sanction may be a dismissal of the claim, or a grant for motion for summary judgment. *Vesta Fire Ins. Corp. v. Milam & Co. Constr.*, 901 So. 2d 84 (Ala. 2004).

**Subsequent Remedial Measures**

A) The general rule is that subsequent remedial measures taken by a defendant are inadmissible to show the defendant's antecedent negligence. ALA. R. EVID. 407; *Hyde v. Wages*, 454 So. 2d 926 (Ala. 1984).

B) **Exceptions.** Evidence of subsequent remedial measures is admissible to show "other purposes" such as identity of ownership, to show control of the location, to contradict or impeach the witness, or to reduce the weight of an expert opinion. "Another permissible use may occur where such evidence is offered to establish a condition existing at the time of the accident." *Holland v. First Nat'l Bank of Brewton*, 519 So. 2d 460 (Ala. 1987).

C) **Other purposes.** The admissibility of evidence of subsequent repairs offered for these "other purposes" depends on three factors:

1) Whether the purpose is material, that is, at issue in the case;
2) Whether it is relevant and tends to prove the purpose for which it is offered; and
3) Whether the probative value of the evidence is substantially outweighed by prejudice.

The burden is upon the party seeking to admit evidence to establish these factors. *Holland v. First Nat'l Bank of Brewton*, 519 So. 2d 460 (Ala. 1987).

**Use of Photographs**

A) **Test.** *Jennings v. State*, 513 So. 2d 91 (Ala. Crim. App. 1987) states:

> The test for determining the admissibility of a photograph is whether it is a true and faithful representation of the place or subject it purports to represent as it existed at a time pertinent to the inquiry. Photographs, if relevant, are admissible even though they might have a tendency to inflame the minds of the jury.

B) **Discretionary.** "A photograph is relevant and admissible in order to explain and apply the evidence when it helps the jury to better understand the persons, objects, locale or conditions which are in issue." *Williston v. Ard*, 611 So. 2d 274 (Ala. 1992). However, it remains within the sound discretion of the trial court to rule as to a particular photograph. *Id.*

C) **Standard.** "The ultimate question in determining the admissibility of a photograph, as with all demonstrative evidence, is whether it has a reasonable tendency to prove or disprove some material fact in issue." *Duncan v. State*, 827 So. 2d 838 (Ala. Crim. App. 1999).

## DAMAGES

### Caps on Damages

A) Statutory caps on damages limit the amount of recovery available in certain causes of action. Alabama law does not prescribe statutory caps for economic and noneconomic damages in all tort cases. For example, the jury has discretion to award any amount of punitive damages to a plaintiff prevailing on a wrongful death claim. ALA. CODE § 6-11-21 (2008). The Code of Alabama does, however, set specific limits and rules for verdicts in many cases.

B) Currently, a plaintiff may be awarded noneconomic damages in medical malpractice cases, but "[i]n no action shall the amount of recovery for noneconomic losses, including punitive damages, either to the injured plaintiff, the plaintiff's spouse, or other lawful dependents or any of them together exceed the sum of $400,000." ALA. CODE § 6-5-544(b) (2008). Although awards granted in excess of this amount will be reduced by the trial court, the Code of Alabama forbids the court or either party to instruct a jury that such a verdict may not be rendered. *Id.*

### Calculation of Damages

A) According to Alabama Pattern Jury Instructions, a plaintiff bringing a cause of action for personal injuries may recover for various damages including but not limited to:

1) Past and future medical expenses
2) Loss of earnings
3) Impairment of ability to earn
4) Physical pain and suffering

5) Permanent injuries and disabilities
6) Disfigurement.

1 ALA. PATTERN JURY INSTR. CIV. 11.04 (2d ed. 2007).

B) Personal injury damages are considered either economic or noneconomic. Section 6-5-544(a) of the ALA. CODE defines noneconomic losses as those which "compensate for pain, suffering, inconvenience, physical impairment, disfigurement, loss of consortium and other nonpecuniary damage." *Moore v. Mobile Infirmary Ass'n*, 592 So. 2d 156, 158 (Ala. 1991). See also ALA. CODE 6-5-544(a) (2008). Economic losses can generally be calculated with reference to bills, paychecks, statements, etc. while awards for noneconomic damages require a much more subjective approach.

**Available Items of Personal Injury Damages**

A) **Past medical bills.** Alabama law allows a plaintiff to recover damages for past medical bills which he has paid or is required to pay. 1 ALA. PATTERN JURY INSTR. CIV. 11.09 (2d ed. 2007). The award should reflect those medical expenses which were reasonable and necessary. *Id.*

B) **Future medical bills**. A plaintiff in Alabama may also recover damages for future medical bills reasonably certain to be incurred in the future, including required services and treatment. 1 ALA. PATTERN JURY INSTR. CIV. 11.09 (2d ed. 2007).

C) **Hedonic damages.** Hedonic damages are those which "attempt to compensate for the loss of the pleasure of being alive." BLACK'S LAW DICTIONARY 174 (3d ed. 2007). This form of recovery is not permitted under Alabama law.

D) **Mental distress.** Recovery for damages for mental suffering is permitted where accompanied by physical injury. 1 ALA. PATTERN JURY INSTR. CIV. 11.05 (2d ed. 2007).

E) **Disfigurement.** Alabama recognizes disfigurement as a type of compensatory damage. 1 ALA. PATTERN JURY INSTR. CIV. 11.06 (2d ed. 2007). It may be awarded if the trier of fact determines that the injuries were a proximate result of the incident in question. *Id.* Consideration should be given to the nature, extent, and duration of those injuries. *Id.*

F) **Aggravation of pre-existing injuries.** A plaintiff may recover damages for the aggravation of an injury or health condition that was already in existence at the time of the tort. 1 ALA. PATTERN JURY INSTR. CIV. 11.07 (2d ed. 2007).

G) **Disability.** The Code of Alabama permits recovery for disability for work-related injuries, distinguishing temporary and permanent, as well as, partial and total disability. ALA. CODE. § 25-5-57 (2008).

H) **Past pain and suffering.** There is no fixed monetary standard for pain and suffering damages. 1 ALA. PATTERN JURY INSTR. CIV. 11.05 (2d ed. 2007). If evidence shows that the particular injury was the proximate cause of the plaintiff's pain and suffering, the jury is given discretion to determine fair compensation. *Id.*

I) **Future pain and suffering.** The jury is also permitted to award damages which compensate for future pain and suffering if evidence suggests that the plaintiff's suffering is permanent or reasonably certain to continue. 1 ALA. PATTERN JURY INSTR. CIV. 11.05 (2d ed. 2007).

J) **Loss of society.** In Alabama, a plaintiff may make a claim for loss of consortium of a spouse who has been physically injured. 1 ALA. PATTERN JURY INSTR. CIV. 11.12 (2d ed. 2007). "Consortium is defined as the right of a husband to his wife's company, fellowship, cooperation and assistance in the marital relationship as a partner in the family unit." 1 ALA. PATTERN JURY INSTR. CIV. 11.13 (2d ed. 2007). In the case of bodily injury to a minor child, however, a parent may be awarded compensation for the loss of the child's services, but "[t]he loss of the society of a child . . . cannot form the element of recoverable damages." *Hannon v. Duncan*, 594 So. 2d 85, 93 (Ala. 1992).

K) **Lost income, wages, earnings.** Such an award should reflect the plaintiff's earning capacity, his actual earnings, his daily activities prior to the injury, his inability to continue his occupation, and the amount he would have earned during the time lost but for his disability. 1 ALA. PATTERN JURY INSTR. CIV. 11.10 (2d ed. 2007). In calculating loss of future earnings or earning capacity, Alabama courts apply a below-market discount rate. *J.F.P. Offshore, Inc. v. Diamond*, 600 So. 2d 1002, 1005 (Ala. 1992). The plaintiff's net income is reduced by the estimated market interest rate and again reduced by the "estimated rate of future price inflation." *Id.*

**Loss of Chance Doctrine**

The Loss of Chance Doctrine "provid[es] a claim against a doctor who has engaged in medical malpractice that, although it does not result in a particular injury, decreases or eliminates the chance of surviving or recovering from the preexisting condition for which the doctor was consulted." BLACK'S LAW DICTIONARY 434 (3d ed. 2006). The Alabama Supreme Court has specifically rejected the adoption of this theory. *McAfee v. Baptist Med. Ctr.*, 641 So. 2d 265, 276 (Ala. 1994). Instead, the court insists upon the traditional rules of proximate cause which require "evidence that the negligence probably caused the injury." *Id.* (internal quotation omitted).

**Mitigation**

A) Mitigation of damages "requir[es] a plaintiff, after an injury or breach of contract, to make reasonable efforts to alleviate the effects of the injury or breach." BLACK'S LAW DICTIONARY 463 (3d ed. 2006).

B) **Duty.** The doctrine of mitigation imposes a duty upon the injured party to act with ordinary care to reduce his damages as a reasonably prudent person would under the circumstances. Recovery of damages in Alabama is limited to those which "would have been sustained had such care been exercised." 1 ALA. PATTERN JURY INSTR. CIV. 11.29 (2d ed. 2007). *See Britton v. Doehring*, 242 So. 2d 666 (Ala. 1970).

C) **Property.** The plaintiff's duty to exercise ordinary care in mitigating damages extends not only to personal injuries but to his property as well. *Merrill v. Badgett*, 385 So. 2d 1316, 1218 (Ala. Civ. App. 1980).

D) **Affirmative defense.** Under Alabama law, the defense of failure to mitigate damages must be pleaded as an affirmative defense. *Prudential Ballard Realty Co. v. Weatherly*, 792 So. 2d. 1045, 1048 (Ala. 2000). It is one such defense which falls within Rule 8(c) of the Alabama Rules of Civil Procedure as a "matter constituting an avoidance or affirmative defense." *Id.*

**Punitive Damages**

A) **When awarded.** Under Alabama law, punitive damages may not be awarded in civil actions other than those for wrongful death or "a tort action where it is proven by clear and convincing evidence that the defendant consciously or deliberately engaged in oppression, fraud, wantonness, or malice with regard to the plaintiff." ALA. CODE. 6-11-20(a) (2008).

B) **Standard.** The jury has discretion to award punitive damages if it finds the plaintiff's evidence to be "clear and convincing." 1 ALA. PATTERN JURY INSTR. CIV. 11.03 (2d ed. 2007). Before doing so, the jury must first award compensatory or nominal damages. *Id.*

C) **Insurance.** Alabama courts do not prohibit insurance coverage for punitive damages from one's own misconduct. Since 1935, punitive damages coverage has been included in "bodily injury" coverage under Alabama law. See *Am. Fidelity & Casualty Co. v. Werfel*, 164 So. 383 (Ala. 1935).

D) **Factors.** In *BMW of North America, Inc. v. Gore*, the United States Supreme Court faced the issue of constitutionally excessive punitive damage awards. 701 So. 2d 507, 509 (Ala. 1997). The Court set out three "guideposts" for reviewing courts to use in making this determination:

1) "the degree of reprehensibility of the defendant's conduct;"
2) "the ratio between the plaintiff's award of compensatory damages and the amount of the punitive damages;" and
3) "the difference between the punitive damages award and the civil or criminal sanctions that could be imposed for comparable misconduct."

*Id.*

On remand from the United States Supreme Court, the Alabama Supreme Court found that the 500 to 1 ratio of punitive to compensatory damages in the *BMW* case to be grossly excessive. *Id.* at 513-14. However, the court rejected the idea of adopting a ratio to apply to all cases because doing so "would frustrate the purpose of punitive damages, which is to punish and deter a defendant's misconduct." *Id.* at 513.

E) **Figures.** The Code of Alabama states that caps on punitive damages "shall not apply to actions for wrongful death or for intentional infliction of physical injury." ALA. CODE § 6-11-21 (2008). Since the Legislature's amendment to section 6-11-21 in 1999, there has been a punitive damages cap requiring that no award exceed three times compensatory damages or $500,000.00, whichever is greater. *Id.* The cap for "small business" is decreased to the greater of $50,000.00 or 10% of the net worth of the business. *Id.* If the claim involves "physical injury," the cap is increased, but the award still cannot exceed the greater of $1,500,000.00 or three times compensatory damages. *Id.*

F) **Joint tortfeasors.** In cases involving joint tortfeasors, the statutory cap on punitive damages may apply to one tortfeasor but not another. *Reserve Nat'l Ins. Co. v. Crowell*, 614 So. 2d 1005, 1010 (Ala. 1993). Alabama law states that a tortfeasor acting with a greater degree of culpability deserves greater punishment and will not enjoy the benefit of the statutory cap simply because it is appropriate for the less-culpable tortfeasor. *Id.*

**Recovery and Pre- and Post-Judgment Interest**

A) **Prejudgment interest.** The rate of prejudgment interest is 6 % per annum where no written contract controls the interest rate. *Burgess Mining & Constr. Corp. v. Lees*, 440

So. 2d 321, 338 (Ala. 1983). Otherwise, an 8 % rate applies. *Id. See* ALA. CODE § 8-8-1 (2008). According to section 8-8-8 of the ALA. CODE, "prejudgment interest can be awarded only against 'sums as are certain or are capable of being made certain.'" *First Nat'l Bank, N.A. v. First State Ins. Co.*, 899 F.2d 1045 (11th Cir. 1990). *See* ALA. CODE § 8-8-8 (2008).

B) **Post-judgment interest.** Section 18-1A-211(a) governs the rate of post-judgment interest. It states that "the judgment shall include interest at a rate equal to the most recent weekly average one-year constant maturity yield, as published by the Board of Governors of the Federal Reserve System, upon the unpaid portion of the compensation awarded." ALA. CODE § 12-1A-211(a) (2008). *See Ala. DOT v. Williams*, 2007 Ala. LEXIS 223 (Ala. 2007).

**Recovery of Attorneys Fees**

A) **American rule.** Alabama follows the 'American rule' which states, as a general rule, that the losing party is not required to pay the winning party's attorney fees. *Classroomdirect.com v. Draphix, LLC,* 992 So. 2d 692 (Ala. 2008).

B) **Exceptions.** There are exceptions to this rule. *Id.* For instance, "attorney fees may be recovered if they are provided for by statute or by contract or if they are called for by special equity, such as in proceedings where the attorney's efforts created a 'common fund' out of which fees may be paid." *City of Bessemer v. McClain*, 957 So. 2d 1061, 1078 (Ala. 2006) (quoting *Reynolds v. First Alabama Bank of Montgomery, N.A.*, 471 So. 2d 1238 (Ala. 1985)).

C) **Reasonable compensation.** An appropriate attorney's fee consists of reasonable compensation for the services rendered to his client. *Army Aviation Ctr. Fed. Credit Union v. Poston*, 460 So. 2d 139, 141 (Ala. 1984). In *Peebles v. Miley*, the Alabama Supreme Court listed a number of factors to consider in determining reasonable compensation, including the following: the time and labor devoted to the case, the fee ordinarily charged in the locality, the experience and reputation of the lawyer, and the outcome of the case. *Peebles v. Miley*, 439 So. 2d 137, 140-41 (Ala. 1983).

D) **Discretion.** "The determination of whether an attorney fee is reasonable is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of that discretion." *Ex parte Edwards*, 601 So. 2d 82, 85 (Ala. 1992).

**Settlement Involving Minors**

The Alabama Supreme Court recognizes the unique nature of a proposed settlement involving a minor's claim. *Large v. Hayes*, 534 So. 2d 1101, 1105 (Ala. 1988). "Before such a settlement can be approved [by a probate court], there must be a hearing, with an extensive examination of the facts, to determine whether the settlement is in the best interest of the minor." *Id.* (quoting

*Abernathy v. Colbert County Hosp. Bd.*, 388 So. 2d 1207 (Ala. 1980)). This is the rule even where the guardian is present to represent the minor. *Large*, 534 So. 2d at 1105.

**Taxation of Costs**

A) **Discretionary.** Under Alabama law, taxation of costs is left to the discretion of the trial court. *Classroomdirect.com v. Draphix, LLC,* 992 So. 2d 692 (Ala. 2008).

B) **Motion.** The Alabama Supreme Court has ruled that a party who requests the trial court to reconsider its taxing of costs may file a motion under Rule 59(e) of the Alabama Rules of Civil Procedure. *City of Jasper Civil Serv. Bd. v. Schultz*, 412 So. 2d 818 (Ala. Civ. App. 1982). Rule 59(e) states that "[a] motion to alter, amend, or vacate the judgment shall be filed not later than thirty (30) days after entry of the judgment." ALA. R. CIV. P. 59(e).

C) **Appeal.** "[A] party aggrieved by an award of costs may appeal the propriety of such an award, even where the merits of the underlying case are not before the appellate court." *Garrett v. Whatley*, 694 So. 2d 1390, 1391 (Ala. 1997). The decision of the trial court may be reversed only if abuse of discretion is found. *Birmingham v. Fairfield*, 396 So. 2d 692, 694 (Ala. 1981).

**Unique Damages Issue**

A) **Wrongful death.** Alabama is the only state which denies recovery for compensatory damages in wrongful death claims. Nettles & Latta, *Alabama's Wrongful Death Statute: A Problematic Existence*, 40 ALA. L. REV. 475, 478-79 (1989). Although the state's death statute does not express this rule, the Alabama Supreme Court has interpreted its language in such a way that only punitive damages are permitted. *See Black Belt Wood Co. v. Sessions*, 514 So. 2d 1249, 1260-63 (Ala. 1986). The court has held,

> [w]hile human life is incapable of translation into a compensatory measurement, the amount of an award of punitive damages may be measured by the gravity of the wrong done, the punishment called for by the act of the wrongdoer, and the need to deter similar wrongs in order to preserve human life.

*Estes Health Care Ctrs., Inc. v. Bannerman*, 411 So. 2d 109, 113 (Ala. 1982). Because the goal is prevention of death, the supreme court insists that the statute is "remedial and not penal" in nature. *Industrial Chem. & Fiberglass Corp. v. Chandler*, 547 So. 2d 812, 818 (Ala. 1988).

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