

ALABAMA

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1. What are the venues/areas in your State that are considered dangerous or liberal?

Juries in the middle and western counties of Alabama are typically considered to be liberal with some counties (i.e. Bullock, Lowndes and Wilcox) earning the reputation of being extremely liberal. The counties containing the larger municipalities (i.e. Jefferson [Birmingham], Montgomery, and Mobile) are generally considered moderate, but there is always a chance of getting a jury that leans heavily one way or the other. The northern counties (i.e. Madison, Cullman, Fayette, and Blount) have a reputation of being fairly conservative.

2. Identify any significant trucking verdicts in your State during 2017-2018, both favorable and unfavorable from the trucking company's perspective.

Vazquez v. Saint, 16-900004 (Circuit Court for Blount County, Jan. 26, 2018) (King, J.). Verdict for Plaintiff. Plaintiff, who did not have a valid driver's license, stopped at a yield sign at the intersection of two highways. David Saint, a truck driver for C&E Supply, failed to notice Plaintiff and rear-ended his van. Plaintiff was diagnosed with an L5-S1 disc herniation and underwent a posterior fusion surgery. Plaintiff sued Saint and C&E Supply under theories of negligence, wantonness, and negligent entrustment. C&E denied it had reason to believe Saint was an unsafe driver, and both Defendants attempted to minimize Plaintiff's damages. A jury returned a \$225,000 verdict for the Plaintiff.

Estate of Estrada v. TLSL, et al., No. 12-901013 and *Cabrera v. TLSL, et al.*, No. 13-901988 (Circuit Court for Madison County, April 11, 2017). Verdict for Plaintiffs. Plaintiff Estrada and other co-workers were passengers in a pick-up truck being driven by Arnoldo Moreno en route from Huntsville to a worksite in Tennessee. As Moreno traveled along a highway, the Defendant TLSL driver misjudged the distance of Moreno's vehicle and pulled out in front of him. Moreno collided with the left rear of an empty lowboy trailer and Moreno, Estrada, and a third occupant were killed; a fourth occupant (Plaintiff Cabrera) survived with severe injuries. Evidence revealed that Moreno's vehicle had a pre-impact speed of 86 mph. Plaintiffs Estrada and Cabrera sued Moreno's Estate and Defendant TLSL. At trial, the court applied the substantive law of Mississippi because the wreck occurred in Mississippi. A jury found for the Plaintiffs and apportioned fault 60% to Moreno and 40% to TLSL. The jury

awarded \$2,731,762 in damages (\$731,762 for future lost wages; \$1 million to each of Estrada's two children for loss of companionship) to Plaintiff Estrada and \$696,762 to Plaintiff Cabrera.

Smith v. Gulf Distributing Co. of Mobile (Circuit Court for Mobile County, Feb. 3, 2017) (Stewart, J.). Verdict for Plaintiff. Reed was driving a tractor-trailer owned by Defendant Gulf Distributing Company of Mobile, LLC on the interstate during early evening rush hour. The two cars in front of Reed began to slow down due to traffic, but Reed did not slow down sufficiently and rear-ended the car directly in front of him. The impact caused Reed to cross the median into oncoming traffic. Plaintiff was unable to avoid colliding with Reed and her car became trapped under Reed's truck. Plaintiff sued Reed and Gulf Distributing for negligence and wantonness. The jury awarded Plaintiff \$125,000 for compensatory damages.

3. Are accident animations and/or computer-generated evidence admissible in Alabama?

Computer-generated evidence ("CGE") is generally admissible as demonstrative evidence if it is relevant and properly authenticated and identified. See *Tillis Trucking Co., Inc. v. Moses*, 748 So. 2d 874, 881 (Ala. 1999). CGE must be authenticated through a witness with personal knowledge of the accident or through an expert witness. For example, in *Tillis Trucking*, the plaintiff introduced into evidence a video animation of a fatal trucking accident. *Id.* Although there were no known surviving witnesses to the collision other than the defendant truck driver, the animation was authenticated by an animation expert who prepared the video based on his survey of the accident site, review of photographs and videotapes made by officers at the accident scene, and review of the depositions of the plaintiff's accident reconstruction experts. *Id.* The defendants objected to the animation on the basis that the expert was not properly qualified and relied on facts not in evidence to prepare his animation. *Id.* However, the Court found the expert "was qualified as an expert in computer-generated animation, and the animation was shown, at the time and by later witnesses' testimony, to be based on the evidence and the admissible opinions of the plaintiffs' experts." *Id.*

Rule 403, Ala. R. Evid., often presents the greatest obstacle to introducing CGE at trial where the animation could confuse or mislead the jury. For example, in *Joyner v. B&P Pest Control, Inc.*, the plaintiffs sought to introduce a video animation of water flowing through termite treatment holes and flooding their basement as demonstrative evidence of B&P's negligence in failing to properly plug the treatment holes it drilled in the concrete slab. 853 So. 2d 991, 1001 (Ala. Civ. App. 2002). Although a structural engineer testified that he had taken part in preparing the video animation and that it fairly and accurately depicted the flooding that had occurred in the plaintiffs' home, the trial court concluded that the animation distorted the evidence and refused to admit it. *Id.* On appeal, the Alabama Court of Civil Appeals cited to Rule 403 in upholding the trial court's ruling. *Id.*

4. Are there any significant decisions or trends in Alabama in the past two (2) years regarding (a) retention and spoliation of in-cab videos and (b) admissibility of in-cab videos?

No recent significant decisions have been issued by Alabama courts concerning retention and spoliation of in-cab videos. Although not a video spoliation case, the Supreme Court of

Alabama did recently address the standard of spoliation sanctions, which would be relevant to in-cab video spoliation. In *Hartung Commercial Properties, Inc. v. Buffi's Automotive Equipment and Supply Company, Inc.*, --- So. 3d --- 2018 WL 6427321 (Ala. Dec. 7, 2018), Hartung Commercial Properties, Inc. (“Hartung”) leased an auto-body paint shop on a piece of commercial property to Har-Mar Collisions, Inc., which hired Buffi’s Automotive (“Buffi’s”) to install a paint booth. After the body shop was destroyed in a fire, Hartung sued Buffi’s, alleging its faulty repair of the paint booth caused the fire. After Hartung ordered what remained of the body shop (including the paint booth and all of its electrical components) to be demolished without notifying Buffi’s, the trial court entered summary judgment in favor of Buffi’s based on spoliation of the evidence.

On appeal, the Supreme Court of Alabama recited the five factors that must be weighed in levying sanctions for spoliation: “(1) the importance of the evidence destroyed; (2) the culpability of the offending party; (3) fundamental fairness; (4) alternative sources of the information that would have been available from the evidence destroyed; and (5) the possible effectiveness of other sanctions less severe than dismissal.” *Hartung*, 2018 WL 6427321 at *4. Although Buffi’s established that “every piece of physical evidence relevant to this case was either lost or destroyed,” the Court emphasized that Buffi’s failed to present evidence to support a finding that there was no adequate alternative to the destroyed evidence. *Id.* Critically, the Court distinguished Buffi’s case from others where “the defendants presented expert testimony as to the relative importance of the destroyed evidence and the insufficiency of the alternative sources of information available to the non-spoliation party.” *Id.* at *5. In sum, *Hartung* illustrates the importance of a non-spoliators’ use of expert testimony to establish the absence of adequate alternative sources of information before a court may consider sanctioning spoliation.

There have been no recent significant developments in Alabama concerning the admissibility of in-cab videos or videotape evidence. Alabama courts continue to analyze the admissibility of video footage under either the “pictorial communication” theory or the “silent witness” theory. *Petersen v. State*, --- So. 3d. --- 2019 WL 181145, at *46–47 (Ala. Jan. 11, 2019). The “pictorial communication” theory is that a video is a “graphic portrayal . . . of what a qualified and competent witness sensed at the time in question.” *Id.* at *47. Admissibility under this theory is conditioned on a qualified and competent witness testifying that the “medium accurately and reliably represents what he or she sensed at the time in question.” *Id.* Where no such witness is available, the “silent witness” theory may allow proper authentication of a video if a witness can “explain how the process or mechanism that created the item works and how the process or mechanism ensures reliability.” *Id.*

5. What is Alabama’s applicable law and/or regulation regarding the retention of telematics data, including but not limited to, any identification of the time frames and/or scope for retention of telematics data and any requirement that third party vendors be placed on notice of spoliation/retention letters?

No Alabama statute or regulation specifically governs the retention of telematics data. Moreover, there do not appear to be any published Alabama opinions on the issue of retention of telematics data. Nonetheless, telematics data would likely be subject to Alabama’s general spoliation rules. Although Alabama courts have not specifically addressed whether potential

parties to an action have a general duty to preserve evidence absent a specific demand, it is safe to assume that where litigation is reasonably anticipated, a party should take steps to preserve evidence. The Alabama Supreme Court has recognized that *third parties* have no general duty to preserve evidence unless “(1) the third party voluntarily assumes the duty to preserve evidence; (2) the third party agrees with the plaintiff that it will preserve the evidence; or (3) the plaintiff makes a specific request to the third party to preserve the evidence.” *Killings v. Enter. Leasing Co., Inc.*, 9 So. 3d 1216, 1222 (Ala. 2008).

Moreover, telematics data within electronic data recorders or black boxes would also be subject to the limitations of Rule 37(g), Ala. R. Civ. P., as electronically stored information (“ESI”). Rule 37(g) provides: “Absent exceptional circumstances, a court may not impose sanctions under these rules for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.” In other words, there will be no sanctions for the loss of ESI in the course of the party’s good-faith, regular operation of electronic document maintenance. However, this safe harbor does not permit a party to “exploit the routine operation of its computer system.” *See* Committee Comments to Adoption of Ala. R. Civ. P. 37(g).

It should be noted that the standard of “good faith” under Rule 37(g) “may require a party to take steps to alter the routine operation of the computer system or otherwise preserve appropriate ESI if a duty to preserve exists.” Committee Comments to Adoption of Ala. R. Civ. P. 37(g). It is, therefore, safe to assume that parties should make every effort to preserve telematics data if litigation is anticipated.

6. Is a positive post-accident toxicology result admissible in a civil action in Alabama?

Generally, a post-accident toxicology report may be introduced in a civil action if the proponent establishes a proper chain of custody and all other rules of admissibility are met. The party offering any laboratory test results into evidence has the burden of establishing a “chain of custody without breaks in order to lay a sufficient predicate for admission of evidence.” *Ex parte Holton*, 590 So. 2d 918, 919 (Ala. 1991). In *Swanstrom v. Teledyne Contl. Motors, Inc.*, the Supreme Court of Alabama described the test for determining whether a proper chain of custody has been established as follows: “[t]he record must show each link and also the following with regard to each link’s possession of the item: (1) [the] receipt of the item; (2) [the] ultimate disposition of the item, i.e., transfer, destruction, or retention; and (3) [the] safeguarding and handling of the item between receipt and disposition.” 43 So. 3d 564, 576 (Ala. 2009). If the proponent “fails to identify a link or fails to show for the record any one of the three criteria as to each link, the result is a ‘missing’ link and the item is inadmissible.” *Id.* Also, the Court in *Swanstrom* rejected the argument that the chain-of-custody requirements in a civil action should be less burdensome than the requirements in criminal proceedings. *Id.* (“Indeed, Rule 101, Ala. R. Evid., states that the Alabama Rules of Evidence apply to ‘all proceedings in the courts of the State of Alabama,’ and this Court has equally applied chain-of-custody requirements in civil and criminal cases.”).

7. Is post-accident investigation discoverable by adverse counsel?

The work-product doctrine typically poses the greatest obstacle to the discoverability of a post-accident investigation report. Courts look to a three-part test in determining whether materials are protected by the work-product doctrine: “(1) the materials sought to be protected are documents or tangible things; (2) they were prepared in anticipation of litigation or for trial; and (3) they were prepared by or for a party or a representative of that party.” *Ex parte Meadowbrook Ins. Group, Inc.*, 987 So. 2d 540, 548 (Ala. 2007). If the application of the work-product doctrine is in dispute, the objecting party must make an evidentiary showing to support its claim of privilege. *Id.*

Notably, investigative reports that were not prepared *solely* in anticipation of litigation may nonetheless be protected by the work-product doctrine. In these cases, “[t]he question as to whether . . . investigative reports are work-product when there are several motivating causes, other than anticipated litigation, for preparing them turns on whether it was reasonable for [the preparing party] to assume, in light of the circumstances, that litigation could be expected.” *Ex parte Alabama Dept. of Youth Services*, 927 So. 2d 805, 808 (Ala. 2005) (finding “[t]he gravity and extent of” certain accusations, amid other evidence, supported an anticipation of litigation for purposes of the work-product doctrine); *accord Ex parte Schnitzer Steel Industries, Inc.*, 142 So. 3d 488, 493 (Ala. 2013) (“Here, the evidence before this Court indicates that, although anticipation of litigation may not have been the sole factor for preparing the report, it was a significant factor in Schnitzer Steel’s decision to have the investigative report[] prepared.”).

8. Describe any laws in Alabama that regulate automated driving systems (autonomous vehicles) or platooning.

Alabama’s first law regulating truck platooning was enacted in 2018. Alabama’s Rules of the Road require truck drivers to maintain a certain minimum distance behind other vehicles depending on the truck’s speed. Ala. Code § 32-5A-89. Alabama Laws Act 2018-286 (S.B. 125) amended this statute to exempt “trailing trucks in a truck platoon . . . if the truck platoon is engaged in electronic brake coordination and any other requirement imposed by the Department of Transportation by rule.” Ala. Code § 32-5A-89(d)(1). A “truck platoon,” in turn, is defined as “[a] group of individual commercial trucks traveling in a unified manner at electronically coordinated speeds at following distances that are closer than would be reasonable and prudent without the electronic coordination.” Ala. Code § 32-1-1.1 (79).

In 2016, the Alabama legislature enacted S.J.R. 81 establishing the Joint Legislative Committee to Study Self-Driving Vehicles. The resolution states “[t]he goals of the committee are to study all aspects of self-driving vehicles, including specifically, the issues of public safety and state and local economic impact regarding such vehicles. The study committee shall assess the extent to which existing state legislation may impact the ability for testing of automated vehicles in the state.” It is possible the Alabama legislature will enact laws regulating autonomous vehicles when this committee reports its findings to the legislative leadership.

9. Describe any laws or Court decisions in your State which would preclude a commercial driver from using a hands-free device to have a conversation over a cell phone.

Alabama has not banned or limited the hands-free use of cell phones by commercial drivers.

10. Are there any Court decisions in Alabama precluding Golden Rule and/or Reptile style arguments by Plaintiffs' counsel?

The Supreme Court of Alabama has addressed Golden Rule/Reptile style arguments on a number of occasions. The Court has recognized it is "generally . . . improper to ask the jury to divest themselves of their impartial position and place themselves in the shoes of the plaintiff." *British Gen. Ins. Co. v. Simpson Sales Co.*, 93 So. 2d 763, 768 (Ala. 1957); accord *Beautilite Co., Inc. v. Anthony*, 554 So. 2d 946, 950 (Ala. 1989); *Allen v. Mobile Interstate Piledrivers*, 475 So. 2d 530, 537 (Ala. 1985) ("A request that the jurors put themselves in the place of the plaintiff is an improper argument.").

Alabama courts, however, have made a point not to be "overly restrictive" in applying this general rule. *Walker v. Asbestos Abatement Services, Inc.*, 639 So. 2d 513 (Ala. 1994) (holding that prejudice resulting from reference to jurors' grandchild or child, if any, was not sufficient to require reversal). Accordingly, a bare invitation for jurors to put themselves in the position of a plaintiff will not constitute grounds for reversal on appeal absent evidence that plaintiff's counsel made an appeal to the jurors' passions and feelings. *Allen*, 475 So. 2d at 537 ("A bare invitation for the jurors to put themselves in the place of the plaintiff without an appeal to the jurors' passions and feelings has been held to be nonprejudicial."); *Hayles v. Jeter*, 184 So. 2d 363, 366 (Ala. 1966) ("We do not, however, have before us enough of the argument to say that the bare invitation constituted such a forbidden appeal to the sympathy of the jurors as to prejudice defendant to the extent that this judgment must be reversed.").

However, the Court has found it to be reversible error for a trial court to refuse to set aside a jury verdict where plaintiff's counsel appealed to the jurors' "passion and feelings" in the course of a Golden Rule/Reptile style argument. *Estis Trucking Co., Inc. v. Hammond*, 387 So. 2d 768, 774 (Ala. 1980) ("In the instant case, there was not merely a bare invitation for the jurors to put themselves in the place of the plaintiff. There was more. The argument here presented was an appeal to the jurors' feelings and passion, tantamount to requesting the jurors to hold in favor of the plaintiffs based upon the jurors' sympathy for Mrs. Hammond. A jury verdict reached in favor of any party on the basis of bias, prejudice or sympathy must be set aside."). Further, great discretion is given to the trial court in making the determination. *Magic City Dodge, Inc. v. Odom*, 474 So. 2d 740 (Ala. Civ. App. 1985).

Notably, the Alabama federal courts have further limited the application of the Golden Rule prohibition to arguments related to damages. *Stallworth v. Sourcecorp*, 2006 WL 2331093, at *1 (M.D. Ala. Aug. 10, 2006) (citing *McNely v. Ocala Star-Banner Corp.*, 99 F.3d 1068, 1071 n.3 (11th Cir. 1996) (motion for new trial properly denied where defense counsel invited the jury to put itself in the shoes of the defendant with respect to the reasonableness of the defendant's actions, rather than damages)).

11. Compare and contrast the advantages and disadvantages of Federal Court versus State Court in Alabama.

It is generally perceived in Alabama that federal court is the more advantageous forum for defendants and state court is a more favorable forum for plaintiffs. Generally speaking, federal judges are more amenable to dismissing a case on a dispositive motion than state court judges. Federal judges are less likely to entertain oral argument and will typically make decisions based solely on the parties' briefs. State courts are typically more flexible than federal courts when it comes to scheduling orders and trial settings. While this can sometimes be to the benefit of the parties, it can also lead to cases that linger for years. Litigating in federal court can be more costly than litigating in state courts. This is largely due to strict disclosure requirements and burdensome pretrial requirements. Finally, depending on venue, federal court can be beneficial to defendants in that jurors are drawn from a larger geographic area.

12. How does Alabama handle the admissibility of traffic citations (guilty plea, pleas of no contest, etc.) in subsequent civil litigation?

A mere traffic citation without a conviction is likely not admissible, but a traffic violation conviction is admissible in a civil action to show that the driver did the act for which he was convicted. *See Durham v. Farabee*, 481 So. 2d 885, 887 (Ala. 1985). The driver is free to explain the circumstances of the conviction to the trier of the fact, who will determine what weight to give to the evidence of conviction. *Id.*

Generally, a person's conviction is admissible in a civil action to show a person did the act for which he was convicted or pled guilty if that act is material to issues in the civil action. *Durham*, 481 So. 2d at 886. However, the conviction is inadmissible if an appeal of the conviction is pending or if the conviction is vacated on appeal. *Cups Coal Co., Inc. v. Tennessee River Pulp & Paper Co.*, 519 So. 2d 932, 934 (Ala. 1988). A guilty plea is also inadmissible if it was later withdrawn. Ala. R. Evid. 410(1).

A plea of no contest is inadmissible in a civil proceeding. Ala. R. Evid. 410(2); *Snipes v. State*, 404 So. 2d 106, 109 (Ala. Crim. App. 1981). However, because Alabama law no longer recognizes a plea of no contest, the Alabama Rules of Evidence only exclude evidence of no contest pleas entered in federal or other state courts. *See* Ala. R. Crim. P. 14.2(c); Ala. R. Evid. 410(2).

13. Describe the laws in Alabama that regulate whether medical bills stemming from an accident are recoupable. In other words, can a plaintiff seek to recover the amount charged by the medical provider or the amount paid to the medical provider? Is there a basis for post-verdict reductions or offsets?

Ala. Code § 12-21-45(a) modifies the collateral-source rule through its requirement that "evidence that the plaintiff's medical or hospital expenses have been or will be paid or reimbursed *shall be admissible* as competent evidence." (emphasis added). Section 12-21-45 does not "dictate any particular outcome," but "allows a jury to make its own informed decision as to the effect" of collateral benefits. *Crocker v. Grammer*, 87 So. 3d 1190, 1193 (Ala. Civ.

App. 2011). Because of this, in cases where the medical liens are low, we have recently seen plaintiffs' counsel make the strategic decision not to put evidence of medical bills into evidence.

There is no specific mechanism in Alabama for post-verdict collateral source reductions. Questions of the proper reduction of damages based on payments made by collateral sources are typically for the jury. *See Crocker*, 87 So. 3d at 1193.

14. Describe any statutory caps in Alabama dealing with damage awards.

In addition to constitutional due process safeguards to prevent excessive punitive damage awards, the following punitive damages caps are provided by Ala. Code § 6-11-21:

- Without Physical Injury: three times compensatory damages or \$500,000, whichever is greater. However, if against a small business: either \$50,000 or 10% of the net worth, whichever is greater.
- Physical Injury: Three times compensatory damages or \$1.5 million, whichever is greater.
- Wrongful Death: The punitive damages caps do not apply to wrongful death actions.

Alabama law also imposes the following caps on a damage award against a governmental entity: \$100,000 limit for bodily injury or death of one person; \$300,000 aggregate limit for more than one person's bodily injury or death; and \$100,000 for property damage or loss. Ala. Code § 11-93-2.