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ALABAMA

1. What are the legal considerations in your State governing the admissibility or preventability in utilizing the self-critical analysis privilege and how successful have those efforts been?

While Alabama law recognizes a limited statutory privilege for self-critical documents concerning hospitals, Ala. Code. § 22-21-8, a broader self-critical analysis privilege has not been adopted by Alabama courts. At least one federal litigant has attempted to invoke the self-critical analysis privilege in the employment context, but the court declined to recognize the privilege. *See Freiermuth v. PPG Industries, Inc.*, 218 F.R.D. 694, 698 (N.D. Ala. 2003).

That said, if there is a reasonable anticipation of litigation at the time a self-critical determination is made, any documents reflecting that determination may be entitled to work product protection. Alabama law does not require the anticipation of litigation be the *sole* purpose of the creation of the report for it to be protected as work product. *See Ex parte Schnitzer Steel Industries, Inc.*, 142 So. 3d 488 (Ala. 2013). Such self-critical determinations may not, therefore, be discoverable absent the required showing of substantial need and unavailability to obtain the substantial equivalent by other means. *See* Ala. R. Civ. P. 26(b)(4).

2. Does your State permit discovery of 3rd Party Litigation Funding files and, if so, what are the rules and regulations governing 3rd Party Litigation Funding?

Alabama courts have not addressed the discoverability of documents relating to third-party litigation funding. However, the Alabama Court of Civil Appeals has recognized that third-party litigation funding agreements violate public policy because they are akin to gambling contracts, which are currently illegal in Alabama. Wilson v. Harris, 688 So. 2d 265, 270 (Ala. Civ. App. 1996) (holding such an agreement is "opposed to the public interest because it condones speculation in litigation, makes sport of the judicial process, and tempts the unscrupulous to prey upon the distress of the ignorant and unfortunate."). Likely as a result of the court's holding in Wilson, third-party litigation funding is not prevalent in Alabama, though the Alabama legislature has yet to specifically address the practice.

3. Who travels in your State with respect to a Rule 30(b)(6) witness deposition; the witness or the attorney and why?

The Alabama Rules of Civil Procedure do not require that depositions be held in any particular location, instead leaving it to the party noticing the deposition to specify where the deposition will take place. The Alabama Supreme Court has recognized that "[d]epositions of a corporation through its officers or agents should ordinarily be taken at the corporation's principal place of business, especially when the corporation is a defendant. [ ] There may be circumstances that justify the taking of the deposition somewhere other than

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the corporation's principal place of business." *Ex parte Toyokuni & Co., Ltd.*, 715 So. 2d 786 (Ala. 1998). For example, in *Ex parte Toyokuni*, the Alabama Supreme Court denied a petition for writ of mandamus holding that the trial court did not abuse its discretion by ordering representatives of a Japanese corporation to appear in Alabama for deposition.

4. What are the benefits or detriments in your State by admitting a driver was in the "course and scope" of employment for direct negligence claims?

Although Alabama courts have not taken a position on whether a negligent hiring/supervision/training claim is precluded where the employer admits that the alleged tortfeasor was acting within the line and scope of his employment, the Middle District of Alabama made an "*Erie* prediction" in *Poplin v. Bestway Express*, 286 F. Supp. 2d 1316 (M.D. Ala. 2003) that Alabama would follow the minority rule allowing such a claim to proceed against an employer. *Id.* at 1319. Accordingly, unlike in some states, a claim for negligent hiring/supervision/training could likely co-exist with a claim of direct negligence based on a theory of *respondeat superior* even where an employer admits that the employee was acting within the scope of his employment. As a result, it is unlikely there is any strategic benefit to admitting a driver was acting within the scope and course of employment.

An admission that a driver was acting in the course and scope of employment would, however, satisfy one of the elements necessary to establish *respondeat superior* liability under Alabama law. *See Jessup v. Shaddix*, 154 So. 2d 39, 41 (Ala. 1963) ("[I]t is incumbent upon the plaintiff to show that the act was done within the scope of the servant's employment and was committed in the accomplishment of objects within the line of his duties, or in or about the business or duties assigned to him by his employer."). Accordingly, such an admission would assist a plaintiff in seeking to establish liability against the employer under a direct negligence theory.

5. Please describe any noteworthy nuclear verdicts in your State?

There have not been any recently reported "nuclear" or "runaway jury" trucking-related verdicts. In fact, a recent study from the American Transportation Research Institute concluded Alabama is one of the least plaintiff-friendly states for trucking accidents, finding that 92.3% of the surveyed cases that were tried resulted in a defense verdict. *Understanding the Impact of Nuclear Verdicts on the Trucking Industry*, American Transportation Research Institute, p. 33 (June 2020).

One of the largest recent Alabama verdicts was a $1,250,000 verdict in *Brakefield, et al. v. Studdard*, Case No. 16-902958 (Jefferson County, 11/7/2019). Studdard was in a left-turn lane stopped at a red light when he was rear-ended by Christopher Brakefield, who was driving a Stone Electric Company truck. Brakefield and his passenger, Brandon Smith, were both on duty for Stone Electric Company at the time of the accident. Brakefield and Smith filed suit against Studdard, claiming Studdard pulled into their path and caused the crash. Studdard filed a counterclaim against Brakefield and named Stone Electric Company as a third party defendant on a theory of vicarious liability, alleging that Brakefield had simply rear-ended him while he was stopped at the red light. The jury found for Studdard on Brakefield and Studdard's claims, and found Brakefield and Stone Electric Company liable for traumatic brain injuries suffered by Studdard as a result of the accident. Studdard was awarded $500,000 in compensatory damages, $250,000 in punitive damages against Brakefield, and an additional $500,000 in punitive damages against Stone Electric Company.

6. What are the current legal considerations in terms of obtaining discovery of the amounts actually billed or paid?

Alabama has a modified collateral-source rule that provides that "evidence that the plaintiff's medical or hospital expenses have been or will be paid or reimbursed *shall be admissible* as competent evidence." Ala.

Code § 12-21-45(a) (emphasis added). *But see Crocker v. Grammer*, 87 So. 3d 1190, 1193 (Ala. Civ. App. 2011) (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."). The amount of medical or hospital bills actually paid by a plaintiff would thus ordinarily be discoverable in a personal injury action as "information reasonably calculated to lead to the discovery of admissible evidence." Ala. R. Civ. P. 26(b)(1).

7. How successful have efforts been to obtain the amounts actually charged and accepted by a healthcare provider for certain procedures outside of a personal injury? (e.g. insurance contracts with major providers)

As noted above, Alabama law provides that "evidence that the plaintiff's medical or hospital expenses have been or will be paid or reimbursed shall be admissible as competent evidence." Ala. Code § 12-21-45(a) (emphasis added). Accordingly, information regarding the amount of expenses actually paid for amounts actually charged by a healthcare provider would ordinarily be discoverable. Notably, because of Alabama's modified collateral source rule, we have recently seen plaintiff's counsel make a strategic decision not to put medical bills into evidence.

8. What legal considerations does your State have in determining which jurisdiction applies when an employee is injured in your State?

Alabama courts apply the rule of *lex loci delicti* to workers' compensation actions involving choice of law issues. *N.E. Utilities, Inc. v. Pittman Trucking Co.*, 595 So. 2d 1351, 1353 (Ala. 1992); *Powell v. Sappington*, 495 So.2d 569 (Ala.1986). Under this rule, courts will apply the substantive law of the place of the injury. *Id. Cf. G.F. Kelly Trucking, Inc. v. U.S. Xpress Enterprises, Inc.*, 281 Fed. Appx. 855, 861 (11th Cir. 2008) ("Alabama choice of law rules apply the doctrine of *lex loci delicti* to tort claims, which means that the law of the state in which the injury occurred governs the substantive rights of the injured party.").

9. What is your State's current position and standard in regards to taking pre-suit depositions?

The Alabama Rules of Civil Procedure allow for pre-suit depositions "for the purpose of perpetuating evidence." Ala. R. Civ. P. 27, comm. cmts. However, "[e]ven though the purpose of Alabama's Rule 27 is to perpetuate testimony, it also permits pre-suit discovery for the purpose of investigating and evaluating a potential claim." *In re Lucas*, 2019 WL 6138456, at *3 (S.D. Ala. Aug. 22, 2019), report and recommendation adopted, 2019 WL 6138204 (S.D. Ala. Nov. 19, 2019) (citation and quotations omitted).

A person seeking a pre-suit deposition must file a verified petition for pre-suit discovery in the circuit court of the county of the residence of any expected adverse party. Ala. R. Civ. P. 27(a)(1). The petition must also contain the following information:

(i) That the petitioner expects to be a party to an action cognizable in an Alabama court but is presently unable to bring it or cause it to be brought;

(ii) The subject matter of the expected action and the petitioner's interest therein;

(iii) The facts which the petitioner desires to establish by the proposed testimony and the petitioner's reasons for desiring to perpetuate it;

(iv) The names or a description of the persons the petitioner expects will be adverse parties and their addresses so far as known; and

(v) The names and addresses of the persons to be examined and the substance of the testimony which the petitioner expects to elicit from each person.

Id. "If the court is satisfied that the perpetuation of the testimony may prevent a failure or delay of justice, it shall make an order designating or describing the persons whose depositions may be taken and specifying the

subject matter of the examination and whether the depositions shall be taken upon oral examination or written questions." Ala. R. Civ. P. 27. "Relief under Rule 27 is discretionary with the trial court." Sharrief v. Gerlach, 798 So. 2d 646, 651 (Ala. 2001) (citation omitted).

A deposition taken under Rule 27 "may be used in any action involving the same subject matter subsequently brought in" the State of Alabama in accordance with the rules generally governing the admissibility and use of depositions. Ala. R. Civ. P. 27(a)(3).

10. Does your State have any legal considerations regarding how long a vehicle/tractor-trailer must be held prior to release?

Preserving potential evidence is vital after an accident, particularly if the accident is severe and the parties should know it will likely lead to litigation. A party that destroys or fails to "preserve property for another's use as evidence in pending or reasonably foreseeable litigation" could be subject to spoliation sanctions. Oil Equip. Co. v. Modern Welding Co., 661 Fed. Appx. 646, 652 (11th Cir. 2016). Where litigation is reasonably anticipated, every effort should be made to preserve potentially discoverable evidence.

There is no steadfast rule regarding how long a vehicle must be preserved following an accident. However, before releasing a vehicle or tractor-trailer involved in an accident where litigation is reasonably anticipated, it would be best practice for counsel to place the adverse party on notice of the vehicle's preservation and request that the party advise by a certain date if they wish for the vehicle to remain preserved before it is released. This practice should assist a party in avoiding a potential spoliation claim. Cf. Story v. RAJ Properties, Inc., 909 So. 2d 797, 802–03 (Ala. 2005) (identifying "the culpability of the offending party" as a factor to be considered in considering spoliation sanctions).

11. What is your state's current standard to prove punitive or exemplary damages and is there any cap on same?

Punitive damages may be awarded only where: (i) the trier of fact awarded the plaintiff compensatory or nominal damages; and (ii) the plaintiff "proved by clear and convincing evidence that [the defendant] consciously or deliberately acted toward [plaintiff] with oppression, fraud, wantonness, or malice." 1 Ala. Pattern Jury Instr. Civ. 11.03 (3d ed.). *See Alabama Great S. R. Co. v. Arrington*, 56 So. 78, 79 (Ala. Ct. App. 1911) (no punitive damages absent finding that defendant acted with "fraud, malice, oppression, willfulness, wantonness, recklessness, or gross carelessness, as distinguished from mere simple carelessness.").

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 is unique in that all recoverable damages for wrongful death are considered punitive. *Cain v. Mortgage Realty Co.*, Inc., 723 So. 2d 631, 633 (Ala. 1998) ("In wrongful-death cases, however, all damages are punitive damages.").

12. Has your state mandated Zoom trials? If so, what have the results been and have there been any appeals.

As of February 2021, the Supreme Court of Alabama (which administers and oversees the circuit and district courts of the State of Alabama) has not mandated that trials proceed by Zoom. On March 24, 2020, the Supreme Court issued an Administrative Order allowing for testimony to be taken over audio-video communication technology, though the use of those technologies has been determined on a county-by-

county basis. In Mobile County Circuit Court, for instance, the Court issued an Administrative Order allowing "[e]ach judge . . . [to] have discretion to require that any non-jury court proceeding be conducted by audio conference or video conference." See 4/20/2020 Admin. Order. The Alabama State Bar maintains an updated website of each court's information and orders regarding COVID-19, which is available here: https://www.alabar.org/alabama-state-bar-coronavirus-covid-19-safety-measures/

13. **Has your state had any noteworthy verdicts premised on punitive damages? If so, what kind of evidence has been used to establish the need for punitive damages? Finally, are any such verdicts currently up on appeal?**

The *Brakefield* case discussed in greater length in response to Question No. 5 involved a substantial verdict consisting of $750,000 in punitive damages awarded to the defendant/counterclaim plaintiff who was injured in a rear-end collision—$250,000 against the driver/employee and $500,000 against the employer. Unfortunately, it is unclear from the record in *Brakefield* what evidence was used to support of the punitive damages claim. However, Alabama courts require that claims for punitive damages be supported by "clear and convincing evidence that the defendant consciously or deliberately engaged in . . . wantonness that caused injury to the plaintiff." *Cheshire v. Putman*, 54 So. 3d 336, 342 (Ala. 2010) (internal quotations and citation omitted). "What constitutes wanton misconduct depends on the facts presented in each particular case." *Ex parte Anderson*, 682 So. 2d 467, 470 (Ala. 1996). For example, testimony from a third-party witness observing the defendant was travelling across an intersection "at a very fast speed" when she collided with the plaintiff, coupled with the defendant's testimony that she was familiar with the stretch of the roadway where the accident occurred, was sufficient to raise an inference of wantonness in *Clark v. Black*, 630 So. 2d 1012, 1016 (Ala. 1993). However, evidence that a driver was merely negligent in failing to observe an oncoming vehicle has routinely been found insufficient to support a claim for punitive damages. *E.g.*, *Dorman v. Jackson*, 623 So. 2d 1056, 1058 (Ala. 1993); *Ex parte Anderson*, 682 So. 2d 467, 470 (Ala. 1996).

We are unaware of any noteworthy trucking verdicts premised on punitive damages that are currently on appeal.