FOR MORE INFORMATION

MCDOWELL KNIGHT ROEDDER & SLEDGE, L.L.C.
Mobile, Alabama
www.mcdowellknight.com

Brian P. McCarthy
bmccarthy@mcdowellknight.com

W. Craig Hamilton
chamilton@mcdowellknight.com

Jonathan M. Lieb
jlieb@mcdowellknight.com

HUIE, FERNAMBUCQ & STEWART, LLP
Birmingham, Alabama
www.huielaw.com

Paul F. Malek
pmalek@huielaw.com

J. Bart Cannon
bcannon@huielaw.com

Alabama

1. **What are the statute of limitations for tort and contract actions as they relate to the transportation industry.**

   Alabama law provides a two-year statute of limitations for "[a]ll actions for any injury to the person or rights of another not arising from contract" and 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." Ala. Code § 6-2-38. This encompasses all negligence actions, including vicarious liability, as well as wrongful death actions. Actions based in contract (excluding those under seal) must be commenced within six years. Ala. Code § 6-2-34.

2. **What effects, if any, has the COVID Pandemic had on tolling or extending the statute of limitation for filing a transportation suit and the number of jurors that are sat on a jury trial.**

   Alabama has not extended any statute of limitation, statutory period of repose, or jurisdictional limitation provided for by rule or statute due to the COVID pandemic. Nor has there been any changes in the number of jurors that are sat on a jury trial. Parties and practitioners should visit https://www.alabar.org/alabama-state-bar-coronavirus-covid-19-safety-measures/ for COVID information and resources regarding Alabama courts.

3. **Does your state recognize comparative negligence and if so, explain the law.**

   Alabama is a pure contributory negligence state. As such, contributory negligence is an affirmative and complete defense to a claim based in negligence. *Hawkins v. Simmons*, 295 So. 3d 683, 688 (Ala. Civ. App. 2019). Alabama courts have described contributory negligence as "nothing more than a failure to act as an ordinary prudent person would act with knowledge and appreciation of the dangerous conditions confronting him or her." *Wallace v. Alabama Power Co.*, 497 So. 2d 450, 457 (Ala. 1986). In order to prove contributory negligence, the defendant must show that the party charged: (1) had knowledge of the condition; (2) had an appreciation of the danger under the surrounding circumstances; and (3) failed to exercise reasonable care, by placing himself in the way of danger. *Lemley v. Wilson*, 178 So. 3d 834, 844 (Ala. 2005). Contributory negligence is typically a question for the jury, and, as an affirmative defense, it can be waived if not pleaded. *Campbell v. Kennedy*, 275 So. 3d 507, 511 (Ala. 2018); *Jackson v. Waller*, 410 So. 2d 98, 100 (Ala. Civ. App. 1982). Contributory negligence is not a valid defense to a claim of wantonness. *Hilyer v. Fortier*, 227 So. 3d 13, 24 (Ala. 2017). A child between the ages of 7 and 14 is *prima facie* incapable of contributory negligence, a presumption which can only be overcome by showing the child possesses that

discretion, intelligence, and sensitivity to danger which an ordinary child of 14 years possesses. *King v. South*, 352. So. 2d 1346 (Ala. 1977).

4. **Does your state recognize joint tortfeasor liability and if so, explain the law.**

Alabama law recognizes the doctrine of joint-and-several liability. *See Matkin v. Smith*, 643 So. 2d 949, 951 (Ala. 1994). Where the concurrent negligence of two or more individuals and/or entities combine to directly result in injury to a third party, the negligent parties are jointly and severally liable joint tortfeasors. *Bush v. Alabama Power Co.*, 457 So. 2d 350 (Ala. 1984) The joint tortfeasors may be sued jointly or severally, and a judgment may be secured against all of the tortfeasors. *Matkin*, 643 So. 2d at 951. Each joint tortfeasor is liable for the entire resulting loss to injured party, but when a judgment is wholly satisfied against one joint tortfeasor, that satisfaction discharges the other joint tortfeasors. *Id.*

5. **Are either insurers and/or insureds obligated to provide insurance limit information pre-suit and if so, what is required.**

No, Alabama law does not require disclosure of limits of coverage prior to the filing of a civil action. *See Chapman v. Allstate Ins. Co.*, 370 So. 2d 980, 982 (Ala. 1979) (holding that insurer did not have a duty to disclose policy limits or explain the workings of liability coverage to an adversary that was not its insured prior to the filing of a lawsuit). However, Alabama law does allow discovery of the contents of any insurance agreement by which an insurer "may be liable to satisfy part or all of a judgment that may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment." Ala. R. Civ. P. 26(b)(3). Limits of liability insurance policies are discoverable in personal injury actions under the above rule permitting discovery of the existence and contents of liability policy limits. *Ex parte Badham*, 730 So. 2d 135 (Ala. 1999).

6. **Does your state have any monetary caps on compensatory, exemplary or punitive damages.**

Alabama's punitive damages caps are set forth in Ala. Code § 6-11-21. Generally, the cap is three times the amount of compensatory damages or $500,000, whichever is greater. However, if the case involves physical injury, the cap increases to three times the amount of compensatory damages or $ 1,500,000, whichever is greater. Alabama also provides additional cap for small businesses (those having net worth of $2,000,000 or less) of $50,000 or 10 percent of the business' net worth, whichever is greater.

One key exception for these caps is in wrongful death cases. Ala. Code § 6-11-29 provides that the caps in § 6-11-21 do not "pertain or affect any civil actions for wrongful death." Alabama law is unique in that it treats damages for wrongful death as punitive. *Cain v. Mortgage Realty Co., Inc.*, 723 So. 2d 631, 633 (Ala. 1998)("In wrongful-death cases, however, all damages are punitive damages.").

There are no compensatory damage caps under Alabama law.

7. **Has your state recently implemented any tort reforms which may affect transportation lawsuits or is your state planning to, and if so explain the reforms.**

No.

8. **How many months generally transpire between the filing of a transportation related complaint and a jury trial.**

Generally, about eighteen months. This time frame may vary based on the complexity of the issues in the case, the number of parties, witnesses, and experts, as well as the venue in which the action is pending.

9. When does pre-judgment interest begin accumulating and at what percent rate of interest.

Prejudgment interest rates under Alabama law vary for contract and non-contract actions. For contract actions, prejudgment interest can be awarded where the amount of damages is certain or can be made certain at the time of the breach and shall begin to accrue at the time of the breach. *Miller & Co. v. McCown*, 531 So. 2d 888 (Ala. 1988); Ala. Code § 8-8-8. Interest shall be payable at the rate stated in the contract, provided the rate does not exceed eight percent per annum. *Id.*

"[P]rejudgment interest is allowable at the legal rate [of 6% per annum] in noncontract cases where the damages can be ascertained by mere computation, or where the damages are complete at a given time so as to be capable of determination at such time in accordance with known standards of value." *Nelson v. AmSouth Bank, N.A.*, 622 So. 2d 894, 895 (Ala. 1993). Prejudgment interest in non-contract cases shall begin to accrue on the date of the injury, provided the property destroyed or injured has an ascertainable money value at that time. *Atlanta and Birmingham Air Line Railway v. Brown*, 48 So. 73, 77 (Ala. 1908).

10. What evidence at trial are the parties allowed to enter into evidence concerning medical expense related damages.

Alabama has abrogated the collateral source doctrine, and a defendant may introduce evidence regarding the payment of medical expenses by a third party or the obligation of payment by a third party of such expenses. Ala. Code § 12-21-45. However, under the statute, the plaintiff may also introduce evidence that he is obligated to repay any expenses previously paid by a third party. The plaintiff is not limited solely to those expenses actually paid by a third party, and the determination of the proper effect of such payments on plaintiff's recovery is typically reserved for the jury. *See Crocker v. Grammar*, 87 So. 3d 1190, 1193 (Ala. Civ. App. 2011) ("Section 12–21–45 does not dictate any particular outcome, but, rather, it allows a jury to make its own informed decision as to the effect of third-party payments of medical and hospital expenses on a plaintiff's recovery . . . . In some cases, a jury might adopt the underlying philosophy behind the collateral-source rule that it is unfair for a tortious wrongdoer to receive the benefit of third-party payments . . . while in other cases a jury may decide that it is the plaintiff who would receive an undue windfall if the damages were not reduced to account for the compensation the plaintiff had already received in the form of third-party payments.")(citations and quotations omitted).

11. Does your state recognize a self-critical analysis or similar privilege that shields internal accident investigations from discovery?

Alabama only recognizes the self-critical analysis privilege for medical peer review documents. *See* Ala. Code. § 22-21-8. Therefore, internal accident investigations involving self-critical analysis will generally not be shielded from discovery for that purpose. However, if there is a reasonable anticipation of litigation at the time the claims process is undertaken, the claims file may be protected under Alabama's work product doctrine. 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. Adjuster file materials are protected by the traditional work product doctrine if the materials were "prepared in anticipation of litigation." *Ex parte Nationwide Mut. Fire Ins. Co.*, 898 So. 2d 720, 723 (Ala. 2004).

Whether materials are prepared in anticipation of litigation ultimately depends on the adjuster's own experience and information regarding the prospective litigation at the time the materials are compiled. *See Ex parte Flowers*, 991 So. 2d 218 (Ala. 2008). However, "[t]he fact that a defendant anticipates the contingency

of litigation resulting from an accident or event does not automatically qualify an 'in house' report as work product." *Ex parte State Farm Mut. Auto Ins. Co.*, 761 So. 2d 1000, 1003 (Ala. 2000). Where an "insurer has a separate and independent contractual duty to investigate a claim, the insurer must satisfy the requirements of Rule 26(b)(3), Ala. R. Civ. P., by showing more than simply when a document was prepared. The insurer claiming a work-product privilege must show why each document was prepared and how it was used." *Id*. at 1004 (Lyons, J., concurring). Even if work product, such claim files may be discoverable if the party seeking them makes the required showing of substantial need and unavailability to obtain the substantial equivalent by other means. *See* Ala. R. Civ. P. 26(b)(4).

12. **Does your state allow independent negligence claims against a motor carrier (i.e. negligent hiring, retention, training) if the motor carrier admits that it is vicariously liable for any fault or liability assigned to the driver?**

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. However, the Middle District of Alabama predicted 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.

13. **Does your jurisdiction have an independent claim for spoliation? If not, what are the sanctions or repercussions for spoliation?**

The Supreme Court of Alabama has recognized a claim against a third party for spoliation of evidence under the traditional doctrine of negligence. *Smith v. Atkinson*, 771 So. 2d 429, 432 (Ala. 2000). However, the Court also recognized a shift in the necessary burden of proof compared ordinary negligence claims. *Id.* The Court in *Smith* held that in addition to proving duty, breach, proximate cause, and damage, the plaintiff in a third-party spoliation case "must also show: (1) that the defendant spoliator had actual knowledge of pending or potential litigation; (2) that a duty was imposed upon the defendant through a voluntary undertaking, an agreement, or a specific request; and (3) that the missing evidence was vital to the plaintiff's pending or potential action." *Id.* Once those elements are established, "there arises a rebuttable presumption that but for the fact of the spoliation of evidence the plaintiff would have recovered in the pending or potential litigation; the defendant must overcome that rebuttable presumption or else be liable for damages." *Id.*

As between parties in a pending lawsuit, spoliation may be raised in support of a request for discovery sanctions under Rule 37(b)(2) of the Alabama Rules of Civil Procedure. Under Alabama law, courts consider five factors when determining whether the failure to preserve evidence warrants severe sanctions such as dismissal: "(1) the importance of the evidence destroyed; (2) the culpability of the offending party; (3) fundamental fairness; (4) alternative sources of the information obtainable from the evidence destroyed; and (5) the possible effectiveness of other sanctions less severe than dismissal." *Story v. RAJ Properties, Inc.*, 909

So. 2d 797, 802-803 (Ala. 2005) (citation omitted). Less severe sanctions include the entry of an order that (1) designates or establishes facts relating to the subject of the alleged spoliation, (2) prohibits the violating party from contesting or supporting certain claims or defenses, and/or (3) strikes pleadings or parts thereof. *See* Ala. R. Civ. P. 37(b)(2).