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Alabama

Are preventability determinations and internal accident reports discoverable or admissible in your state? What factors determine discoverability or admissibility?

While Alabama law recognizes a limited statutory privilege for self-critical / quality assurance materials created by health care providers (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. In fact, 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 thus may not 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); *and Ex parte Norfolk S. Ry. Co.*, 897 So. 2d 290 (Ala. 2004) (holding that the railroad was entitled to mandamus relief directing the trial court to set aside its order requiring production of statements given by a conductor to a claims agent regarding the accident which resulted in the decedent's death, as such were prepared in anticipation of litigation and the decedent's surviving spouse failed to show a substantial need coupled with an undue hardship in obtaining the substantial equivalent of the materials by other means).

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 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.

What is the procedure for the resolution of a claim for injuries to a minor in your state? Does the minor's age affect the statute of limitations for a personal injury claim?

Alabama law permits a guardian, conservator, or next friend of a minor plaintiff to

commence an action on the minor's behalf. Ala. Code § 6-5-390; Ala. R. Civ. P. 17(c). However, Alabama courts have held time and again that the guardian, conservator, or next friend has no authority to settle claims on the minor's behalf. *See, e.g., Tennessee C., I. & R. Co. v. Hayes*, 97 Ala. 201 (1983). In fact, although Alabama's Facility of Payment Act authorizes the ***receipt*** of settlement funds belonging to a minor child, it does not authorize the parent to settle or release the claim—it merely authorizes lump sum payments not exceeding $5,000 (or periodic payments not to exceed $3,000 over the course of one year) to be paid to the parent. Ala. Code § 26-2A-6.

A minor will not be bound by a settlement unless it is deemed to be fair and reasonable to the child and approved by a court. *Abernathy v. Colbert Cnty. Hosp. Bd.*, 388 So.2d 1207 (Ala. 1980). Before a settlement of a minor's claim can be approved, "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." *Large v. Hayes*, 534 So. 2d 1101, 1105 (Ala. 1988). To that end, the parties to a settlement agreement typically file a joint petition or motion for *pro ami* settlement, the court appoints a guardian *ad litem* to review and endorse the settlement agreement, and a *pro ami* settlement hearing is conducted. Following the hearing, the court will approve or reject the proposed settlement.

Furthermore, a minor's age affects the statute of limitations for a personal injury claim. Ala. Code § 6-2-8 provides that the statute of limitations for all claims asserted by a minor shall be tolled until the minor reaches the age of majority. In Alabama, the age of majority is 19. Applying this rule in conjunction with the two-year statute of limitations for personal injury claims, a minor has two years from his 19th birthday to file a personal injury claim. Ala. Code § 6-2-8; *see also Elliott v. Navistar, Inc.*, 65 So. 3d 379, 384 (Ala. 2010).

What are the advantages or disadvantages in your State of admitting that a motor carrier is vicariously liable for the fault of its driver in the context of direct negligence claims?

There are no real advantages of a motor carrier's admission that it is vicariously liable for the fault of its driver in a direct negligence claim. 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.

Furthermore, such an admission would likely not preclude the plaintiff from proceeding against the carrier in an action for negligent or wanton hiring, training, and supervision. 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.

What is the standard applied for spoliation of physical and/or documentary evidence in your state?

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).

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*.

Is the amount of medical expenses actually paid by insurance or others (as opposed the amounts billed) discoverable or admissible in your State?

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).

What is the legal standard in your state for obtaining event data recorder ("EDR") data from a vehicle not owned by your client?

There is no legal standard for obtaining EDR from a vehicle not owned by one's client. Parties are free to request downloadable EDR data from vehicles owned by an opposing party, subject of course to the rules and limits on permissible discovery.

What is your state's current standard to prove punitive or exemplary damages against a motor carrier or broker 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 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.").

Has your state had any noteworthy recent punitive damages verdicts? If so, what evidence was admitted supporting issuance of a punitive damages instruction? Finally, are any such verdicts currently on appeal?

Alabama has not seen any noteworthy punitive damages verdicts against trucking companies in recent years. Alabama remains a friendlier state for trucking company defendants. 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).

Does your state permit an expert to testify as to content of the FMCSRs or the applicability of the FMCSRs to a certain set of facts?

Generally speaking, federal safety regulations are admissible in Alabama, and experts are permitted to testify as to the content of those safety regulations. *See, e.g., Alabama Power Co. v. Marine Builders*, 475 So. 2d 168, 177 (Ala. 1985) (citing and discussing cases in which the Alabama Supreme Court approved the admissibility of certain safety regulations "published by federal agencies under the authority of Congress"). The Court has also indicated that an instruction that a jury could consider FMCSRs in determining the standard of care would be appropriate. *Osborne Truck Lines v. Langston*, 454 So. 2d 1317, 1326 (Ala. 1984). However, while the Alabama Supreme Court has not directly addressed the issue of whether an expert may apply the FMCSRs to a particular set of facts, at least one federal district court in Alabama has held that an expert may not testify that a defendant violated the FMCSRs, as it would contravene the "well-established principle that an expert may not testify as to a legal conclusion." *Nicholson v. McCabe*, Case No. CV-02-H-1107-S, 2003 U.S. Dist. LEXIS 27589, at *4 (N.D. Ala. July 18, 2003)

Does your state consider a broker or shipper to be in a "joint venture" or similar agency relationship with a motor carrier for purposes of personal injury or wrongful death claims?

Alabama courts have not addressed the direct question of whether a broker or shipper are deemed to be in a "joint venture" with a motor carrier for purposes of a personal injury or wrongful death claim. Indeed, this will likely be determined on a case-by-case basis. In Alabama, the party alleging the existence of a joint venture bears the burden of proving its existence. The elements of a joint venture are: (1) "a contribution by the parties of money, property, effort, knowledge, skill, or other assets to a common undertaking;" (2) "a joint property interest in the subject matter of the venture and a right to mutual control or management of the enterprise;" (3) "expectation of profits;" (4) "a right to participate in the profits;" and (5) "usually, a limitation of the objective to a single undertaking or *ad hoc* enterprise." *Moore v. Merchants & Planters Bank*, 434 So. 2d 751, 753 (Ala. 1983). Although the party alleging a joint venture need not prove all five elements, "it is generally agreed that . . . there must be a community of interest and a right to joint control." *Id*.

Provide your state's comparative/contributory/pure negligence rule.

Contributory negligence is a complete bar to recovery in negligence claims in Alabama. *See Serio v. Merrell, Inc.*, 941 So. 2d 960 (Ala. 2006). 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).

Provide your state's statute of limitations for personal injury and wrongful death claims.

Alabama has a two-year statute of limitations for personal injury claims. Ala. Code § 6-2-38(l). The Alabama Supreme Court has held that "[a] cause of action accrues when a party suffers an injury or loss or damage entitling him or her to maintain an action." *Nelson v. Estate of Frederick*, 855 So. 2d 1043, 1047 (Ala. 2003). Likewise, Alabama's wrongful death statute requires a wrongful death action to be brought within two years of the date of death. Ala. Code § 6-5-410(d). Importantly, the limitations period provided for in § 6-5-410(d) *is not* subject to tolling provisions. *See, e.g., Ogle v. Gordon*, 706 So. 2d 707, 708 (Ala. 1997).

In your state, who has the authority to file, negotiate, and settle a wrongful death claim and what must that person's relationship to the decedent be?

Ala. Code § 6-5-410 requires a wrongful death action to be filed by the personal representative of the decedent's estate. Otherwise, the trial court may dismiss the action as a nullity. *See, e.g., Ex parte Bio-Medical Applications of Ala., Inc.*, 216 So. 3d 420 (Ala. 2016). For purposes of the statute, a "personal representative" is an executor or an administrator. *Hatas v. Partin*, 175 So. 2d 759 (1965). The personal representative is said to act as a quasi-trustee for those entitled to recover damages arising from the suit itself. *Hernandez v. Hankook Tire America Corp.*, Case No. 2:12-CV-03618-WMA, 2013 U.S. Dist. LEXIS 155505 (N.D. Ala. Oct. 30, 2013).

In counties with a population of less than 400,000, administration of an intestate's estate must be granted to one of the following and in the following order: (1) the decedent's husband or widow, (2) "the next of kin entitled to share in the distribution of the estate," (3) the largest creditor residing in the state, or (4) "any other person as the judge of probate may appoint." Ala. Code. § 43-2-42(a). In counties with a population of more than 400,000, administration of an intestate's estate must be granted to one of the following and in the following order: (1) the decedent's husband or widow, (2) "the next of kin entitled to share in the distribution of the estate," (3) the largest creditor residing in the state, (4) the county or general administrator, or (5) "any other person as the judge of probate may appoint." Ala. Code. § 43-2-42(b).

A person is disqualified from serving as an executor or administrator who "is under the age of 19 years, or who has been convicted of an infamous crime, or who, from intemperance, improvidence or want of understanding, is incompetent to discharge the duties of the trust." Ala. Code § 43-2-22 (a).

Is a plaintiff's failure to wear a seatbelt admissible at trial?

Generally, no. The Alabama Safety Belt Act provides that "[e]ach occupant of a passenger car manufactured with safety belts . . . shall have a safety belt properly fastened about his or her body at all times when the vehicle is in motion." Ala. Code § 32-5B-4. The Safety Belt Act also provides that the "[f]ailure to wear a safety belt in violation of [the Alabama Safety Belt Act] shall not be considered evidence of contributory negligence and shall not limit the liability of an insurer . . . ." Ala. Code § 32-5B-7. Accordingly, a plaintiff's failure to wear a seatbelt is inadmissible at trial to establish the plaintiff's contributory negligence.

In your state, are there any limitations on damages recoverable for plaintiffs who do not have insurance coverage on the vehicle they were operating at the time of the accident? If so, describe the limitation.

There are no limitations on damages recoverable for plaintiffs who do not have insurance coverage on the vehicle they were driving at the time of the accident.

How does your state determine applicable law/choice of law questions in motor vehicle accident cases?

Alabama's choice-of-law analysis regarding substantive matters in tort cases has long been *lex loci delicti*—or the law of the place of the wrong. In other words, an Alabama court will apply the substantive law of the state where the injury occurred in motor vehicle accident cases. *See, e.g., Spencer v. Malone Freight Lines, Inc.*, 292 Ala. 582, 587-90 (1974) (affirming the decision of the trial court to apply Tennessee's wrongful death statute in a case where the plaintiff sued in Alabama for the death of her daughter in a collision in Tennessee).