Alabama Tort and Commercial Law Update

January 1, 2019 to October 30, 2020

By M. Jansen Voss

**Notable Trial Court Decisions**

**Sanctions/Mediation—*Harbin v. Allstate et al*, CV-2017-901688 in the Circuit Court of Madison County, Alabama**

The trial court ordered mediation with representatives of each party with full settlement authority present. However, Allstate's defense counsel was the only person who attended mediation for Allstate, but defense counsel did not have authority to settle the case. Allstate never made any settlement offer or counteroffer during mediation. Just prior to trial, Allstate stipulated to liability. The trial court, citing other instances of Allstate's failure to comply with mediation orders, sanctioned Allstate in the amount of $620,141.36. "[T]he Court has determined that sanctioning Allstate is necessary to impress upon Allstate that all parties to civil litigation in this State should comply with the intended effect of the *Alabama Rules of Civil Procedure* which state that the rules shall be construed and administered to secure the just, speedy and inexpensive determination of every action. *See* Ala. R. Civ. Pro. l (c)."  The case is on appeal before the Alabama Supreme Court.

**Notable Rule Changes**

**Alabama Rules of Appellate Procedure**

* Effective October 1, 2020
* Courier New has been replaced with Cen­tury Schoolbook font in 14-point type.
* Page limits have been eliminated in favor of word counts.
  + A brief in a noncapital case to consist of 14,000 words and a reply brief may not exceed 7,000 words.
  + A supplemental brief or the responsive supple­mental brief, may not exceed 5,000 words.
  + A brief in support of, or in opposition to, an applica­tion for rehearing shall not exceed 3,000 words.
  + Mandamus relief, are capped at 6,000 words.
  + If the court orders an answer to the writ, the answer and the brief, combined, shall not exceed 6,000 words.
  + Motions and responses to motions are limited to 2,000 words.
  + Every appellate brief, petition or mo­tion must contain a “Certif­icate of Compliance”. The certificate must state the number of words used in the document and the type and size of the font utilized.

**Notable Appellate Decisions**

**Default Judgment—*Ex parte Bhones*, 285 So. 3d 740 (Ala. 2019)**

In February 2015, Alvin and Diane Bhones sued Beech Brook Com­panies, LLC, and Travis Peete, the sole member of Beech Brook alleging defective construction of the Bhoneses’ new home. The defendants were served but did not file an answer. The trial court entered a default judgment against the defendants. The defendants filed a motion to set aside the default judgment pursuant to Rule 60 (b) (1) and (6), Ala. R. Civ. P. and the trial court entered an order setting aside the default judgment. The Bhones petitioned for a writ of mandamus.

The Court explained that in considering whether to grant a Rule 60(b)(1) motion to set aside a default judg­ment, a trial court must consider whether the defendant has established excusable neglect, and also consider the factors set out in *Kirtland v. Fort Mor­gan Authority Sewer Service, Inc.*, 524 So. 2d 600 (Ala. 1988): 1) whether the defendant has a meritorious defense; 2) whether the plaintiff will be unfairly prejudiced; and 3) whether the default judgment was a result of the defendant’s own culpable conduct. Here, the defendants did not present evidence of a meritorious defense or that the Bhoneses would not be unduly prejudiced if their default judg­ment was set aside. The Alabama Supreme Court held the defendants were not entitled to have the default judgment set aside.

**Notice of Appearance—*Ex parte Dunbar*, 281 So. 3d 444 (Ala. Civ. App. 2019)**

A notice of appearance by an attorney on behalf of his or her client constitutes a “waiver of service of process.” An amendment of a general notice of appearance does not alter the fact that a general notice had already been filed.

**Deceased Party—*Kelton v. Caldwell*, 280 So. 3d 1062 (Ala. Civ. App. 2019)**

An action filed against an individual who is deceased at the time the action is filed is a nullity. The trial court’s judgment is void. An appeal from a void judgment is due to be dismissed.

**Fictitious party practice—*Ex parte Freudenberger*, 2020 WL 3526361 (Ala. June 30, 2020)**

The personal representative of the estate of the deceased plaintiff filed a wrongful-death action against a medical center, and fictitiously named medical center employees, alleging employees breached applicable standards of care resulting in police removing the deceased plaintiff from the emergency room before she was treated for bacterial meningitis. The plaintiff issued discovery requests with the complaint seeking discovery of information concerning the identities of the fictitiously named employees. The plaintiff also repeatedly requested, through email, that the medical center identify the employees who provided care to the deceased plaintiff. Eleven months after the discovery requests were issued, and after entry of a motion to compel, the medical center finally produced medical records from the deceased plaintiff's hospital stay, along with a list of medical center employees present at the time of the alleged malpractice. By that time the statute of limitations had run. The plaintiff amended her complaint substituting fictitious parties. The substituted medical center employees filed a motion for summary judgment arguing that they had not been named as defendants within the applicable statute of limitations period.

The court noted that in order to avoid the bar of a statute of limitations when a plaintiff amends a complaint to identify a fictitiously named defendant on the original complaint, the plaintiff: (1) must have adequately described the fictitiously named defendant in the original complaint; (2) must have stated a cause of action against the fictitiously named defendant in the body of the original complaint; (3) must have been ignorant of the true identity of the fictitiously named defendant; and (4) must have used due diligence in attempting to discover the true identity of the fictitiously named defendant. The Court further emphasized that the due-diligence requirement applies both before and after the filing of the original complaint and that a plaintiff must similarly exercise due diligence in amending his or her complaint once the true identity of a defendant is discovered.

The Alabama Supreme Court held that the amended complaint substituting Defendants Blanchard, Gulas, and Pruitt for fictitious parties related back to the original complaint. The Court pointed out that the estate's request for production clearly encompassed a communication-control log, which identified the nurses that provided care to the deceased plaintiff, but log was not produced until eleven months after request for production was made, four months after statute of limitations expired, and three months after nurse was substituted as defendant.

The Court held that the amended complaint substituting defendant Russell for a fictitious party did not relate back to the original complaint. "Because none of the allegedly tortious acts described in Miles's complaint adequately describe the act Russell is accused of committing –– telling the security guard he could call the police if he thought it was necessary to do so –– Miles cannot use Rule 9(h) to avoid the statute of limitations and assert an otherwise untimely claim against Russell."

**Service by publication—*Cochran v. Engelland*, 298 So. 3d 1071 (Ala. 2020)**

Rule 4.3(d)(1) requires a plaintiff seeking to effect service by publication to submit an affidavit to the trial court “averring facts showing such avoid­ance,” and Rule 4.3(c) reiterates that this affidavit “must aver specific facts of avoidance” and cautions that “[t]he mere fact of failure of service is not suffi­cient evidence of avoidance.” Conclusory statements that, “[u]nder information and belief, [Pilar] avoided service” do not meet the requirements of Rule 4.3.

**Outbound Forum Selection Clause—*Ex parte Int’l Paper Co.*, 285 So. 3d 753 (Ala. 2019)**

Outbound forum selection claus­es will be upheld in Alabama unless the party challenging the clause can establish: 1) Enforcement of the clause would be unfair on the basis that it was affected by fraud, undue influence or overweening bargaining power; or 2) Enforcement would be unreasonable on the basis that the forum would be seriously inconvenient. The Court also held forum selection clauses may bind nonsignatories that are closely related to the contractual relationship or who are “transaction participants.”

**Venue*—Ex parte Burgess*, 298 So. 3d 1080 (Ala. 2020)**

A ve­hicle driven by Burgess collided with a vehicle driven by Stephens. The accident occurred in Shelby County. Burgess sued Stephens in Jefferson County, alleging negligence and wantonness. Stephens filed a motion for a change of venue under the “interest of justice” prong of Alabama’s forum non conveniens statutes. The trial court entered an order transferring the case to Shelby County. Bur­gess filed a petition for a writ of mandamus. The Alabama Supreme Court issued the writ.

Since Jefferson and Shelby County were both proper venues for the underlying action, the plaintiff’s choice of venue is generally given great deference. In analyz­ing the interest of justice prong, the County to which the trans­fer is sought must have a “strong” connection to the lawsuit, while the county from which the transfer is sought must have a “weak” or “little” connection to the action. The Court assigns “con­siderable” weight to the location where the accident occurs, it is not the sole consideration for determining venue under the interest of justice prong. In this case, although the accident occurred in Shelby County, the defendants still had the burden of demonstrating that Jefferson County had a “weak” or “little” connection to the case. Here, Shelby County’s sole connection to the case was the fact that the acci­dent occurred there. The Court stated the defen­dant had not asserted any additional facts to indicate the overall connection between Shelby County and this case was strong. The Court further noted that all parties resided in Jefferson County, and documents relevant to the negligent en­trustment claim would be located in Jefferson County.

**Venue*—Ex parte Reed*, 295 So. 3d 38 (Ala. 2019)**

A vehi­cle driven by Reed collided with a vehicle driv­en by Watwood in Marshall County. Reed was a resident of Jefferson County and Watwood was a resident of Cullman County. Watwood sued Reed in Jefferson County. Reed filed a motion under Alabama’s *forum non conveniens* statute. Requesting that the action be transferred to Marshall County in the interest of justice. The trial court denied the mo­tion and Reed petitioned for a writ of mandamus.

The Court issued a Writ of Mandamus. Jefferson and Cullman County were proper venues. Two key factors in determining whether the interest-of-justice prong requires a transfer are “the burden of piling court services and resources upon the people of a coun­ty that is not affected by the case” and “the interest of the people of a county to have a case that aris­es in their county tried close to public view in their county.”

Taking into consideration all the facts before it in the pres­ent case, the Court concluded that Marshall Coun­ty’s connection to the underlying action was strong. The accident occurred in Marshall County, the police personnel and emergency personnel who responded to the accident were from Marshall County, and one of the eyewitnesses to the accident was a resident of Marshall County. On the other hand, Jefferson County’s only connection to the action is that the defendant resides there.” Given that nothing mate­rial to the action transpired in Jefferson County, we consider Jefferson County’s connection to the ac­tion to be weak.” Therefore, transfer was warranted under the interest of justice prong of Section 6-3-21.1.

**Venue*—Ex parte Seriana*, 285 So. 3d 747 (Ala. 2019)**

This was a premises liability action. The defendant did not assert improper venue as an affirmative defense in its Answer. Some time later, the defendant raised improper venue. The trial court granted the motion to change venue. The plaintiff filed a petition for writ of mandamus. The Alabama Supreme Court issued the writ and rejected the defendant's argument that it had not waived an objection to venue because it reserved the right to amend its answer, including affir­mative defenses, until full discovery was completed. The Court explained that reserving the right to assert a de­fense in the future is not a sufficient pleading of the de­fense of improper venue.

1. **Venue/Jurisdiction—*Ex parte H.E.O., (M.B.F. v. H.E.O.), 2020 WL 6106924 (Ala. Civ. App. Oct. 16, 2020).***
2. Court of Civil Appeals granted a writ of mandamus and admonished trial courts that a court of improper venue should not order substantive relief when the action is due to be transferred.

**Relation Back/Real Party in Interest—*Pollard v. H.C. P’ship*, 2020 WL 1226488 (Mar. 13, 2020)**

On May 7, 2017, the estate of Young sued Hill Crest alleging Hill Crest caused Young’s death on May 9, 2015 by improperly administering drugs to Young. On May 8, 2017, the probate court appointed Pollard as administrator of Young’s estate. On May 9, 2017, the two-year limitations period expired. On June 15, 2017, the estate filed an amended complaint adding additional claims against Hill Crest. In January 2019, Hill Crest filed a summary judgment motion arguing Pollard was not the personal rep­resentative of Young’s estate when the complaint was filed on May 7, 2017 and lacked the capacity to bring suit. It further argued the relation-back doctrine did not apply because the May 7, 2017 com­plaint was a nullity and there was no properly filed underlying action to which Pollard’s subsequent ap­pointment as personal representative could relate. After a hearing, the trial court entered a summary judgment in favor of Hill Crest. Pollard appealed. The Alabma Supreme Court reversed the trial court's decision.

The Court stated that Alabama Rule of Civil Procedure 17(a), suggests that so long as capacity exists before the limitations period expires, the wife, after being ap­pointed administratrix within the limitations period, may then, as the real party in interest, ratify the com­mencement of the action. Thus, with respect to rati­fication, Rule 17(a) provides: No action shall be dis­missed on the ground it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or sub­stitution of, the real party in interest; and such ratifi­cation, joinder, or substitution shall have the same ef­fect as if the action had been commenced in the name of the real party in interest. The Court recognized that recent cases have held the subsequent appoint­ment of a personal representative did not relate back to the filing of the original complaint. However, those cases involved situations where the appointment of the personal representative did not occur until after the two year limitations had expired.

**Personal jurisdiction—*Ex parte Aladdin Mfg. Corp.*, 2019 WL 6974629 (Ala. Dec. 20, 2019)**

In the complaint, Centre Water alleged Georgia carpet manufacturers released chemicals that contaminated Centre Water’s water-intake site. The defendants moved to dismiss the action, asserting lack of personal jurisdic­tion. The trial court found the defendants conducted activity directed at Alabama, and it was reason­able for an entity placing substances into the water to expect their downstream harm could cause them to be to hauled into court in Alabama. The defendants appealed.

Turning to decisions in other jurisdictions, the Alabama Supreme Court held that continuing to release a substance while knowing it travels to a jurisdiction is considered purposeful direction of efforts toward that jurisdiction. The Court concluded the injury in this case indisputably occurred in Alabama, therefore the tort occurred here.

The Court conducted a minimum contacts analysis, which required it to determine whether the remaining defen­dants purposefully availed themselves of the privilege of conducting activities within Alabama, which could be satisfied by showing that the defendants purposefully directed their actions at Alabama. The Court concluded that the defendants know­ingly discharged chemicals into their industrial wastewater, which traveled to a Georgia municipality's util­ities’ facility, where the defendants knew it was being ineffectively treated. The defendants fur­ther knew the chemicals entered the Coosa River into Alabama. Publicly available EPA reports and published studies demonstrate the defendants had been placed on notice the chemicals were polluting the Coosa River upstream from where the injuries occurred. The trial court's order denying the plaintiff's motion to dismiss was affirmed.

**Recusal/Subject Matter Jurisdiction—*Lawler Mfg. Co., Inc. v. Lawler*, 2020 WL 1482377 (Ala. Mar. 27, 2020)**

The case was assigned to the Presiding Circuit Judge. The Presiding Judge re­cused himself and entered a separate order appointing a district court judge to hear the case as an ex officio circuit judge.

The Presiding Judge later entered an order concerning Lawler Manufacturing's business operations. Lawler Manufacturing moved to dissolve the order. The ex officio judge denied the motion and Lawler Manufacturing appealed.

The Alabama Supreme Court held a presiding judge who recuses himself does not have authority to appoint his successor. The judge can take no further action in the case, not even the action of reassigning the case. When the Presiding Judge recused, he no longer had au­thority to appoint his successor or to enter the order appointing the ex officio judge. The Alabama Supreme Court vacat­ed the Presiding Judge's order appointing the ex officio judge. The Court then explained that because the ex officio judge never had jurisdiction over the case, his orders were void. Because a void judgment will not support an appeal, the appeal was dismissed.

**Scope of arbitration—*Carroll v. Castellanos*, 281 So. 3d 365 (Ala. 2019)**

Dr. Castellanos filed suit against The University of Ala­bama Health Services Foundation and others alleging the de­fendants engaged in a series of actions designed to make his life at UAB so misera­ble that had to leave his employment. The Defendants filed a motion to compel arbitration based on a provision in Dr. Castellanos’ employment contract, which he exe­cuted with UAHSF. The circuit court entered an order compelling arbitration of Dr. Castellanos’ claims against UAHSF and the Board, but denying arbitration of his claims against the individual defendants. The individual defendants appealed.

The Alabama Supreme Court reversed the trial court. The individual defendants were not signatories to the employment contract. However, the employment contract contained an arbitrability clause reserving disputes about arbitra­bility for the arbitrator. “In sum, although questions remain about whether the claims at issue fall within the scope of the arbitration pro­vision and whether the arbitration provision may be used to compel arbitration between a signatory -- Dr. Castel­lanos – and the nonsignatory individual defendants, and although such threshold questions are usually decided by the court, here those questions have been delegated to the arbitrator by virtue of the arbitrability clause.”

**Arbitration*—Wiggins v. Warren Averett, LLC*, 2020 WL 597293 (Ala. Feb. 7, 2020).**

Warren Averett and Eastern Shore entered into an agreement pursuant to which Warren Averett was to provide accounting services to Eastern Shore (“the contract”). The contract included an arbitration clause. In 2017, Wiggins, a physician employed by Eastern Shore, filed a single count complaint alleging “accounting malpractice” against Warren Averett. Warren Averett sought to compel arbitration pursuant to the contract. Wiggins argued the contract applied only to claims made by or on behalf of Eastern Shore against Warren Averett, and not to personal claims of Eastern Shore’s shareholders. The trial court granted the motion to arbitrate and compelled the parties to arbitrate. Wiggins appealed.

The Alabama Supreme Court explained that Wiggins’ argument involved an issue of arbitrability, which includes issues relating to the scope of an arbitration provision. In addition, whether the scope of an arbitration provision applies to nonparties or nonsignatories is also a question of arbitrability. The Court further noted that while a court generally makes the determination of arbitrability, there is an exception when the arbitration provision itself requires that the arbitrator make the decision. The Court explained that when an arbitration provision indicates that AAA rules will apply, it has held that it is clear and unmistakeable that arbitrability decisions are to be made by the arbitrator; this includes the decision whether the arbitration provision may be enforced against a nonsignatory to the contract.

**Arbitrability—*Blanks v. TDS Telecomms., LLC*, 294 So. 3d 761 (Ala. 2019)**

In the Terms of Service, Plaintiffs internet service agreement with TDS contained an arbitration clause**.** After TDS learned the Plaintiffs intend­ed to initiate arbitration, they updated the Terms of Service, providing that the arbi­tration clause did not apply to customers who received service in Alabama. The prior Terms of Service stated that TDS could modify the terms at any time and in any manner.

After the Terms of Ser­vice were updated, the customers initiated arbitration with the AAA. They took the position that the Terms of Service should be read as allowing modification of the arbitration clause only as to disputes that arose af­ter the modification. TDS refused to participate in the arbitration proceedings, and filed an action requesting the trial court to enter a judgment declaring the updated Terms of Service was valid and applicable to the customers’ claims. The customers filed a motion to compel arbitration. The trial court en­tered a judgment denying the motion to compel arbi­tration, and further adjudged the modified Terms of Service was valid and enforceable. The customers appealed.

The Alabama Supreme Court reversed the trial court's order. The Court stated the ques­tion of who is to decide whether a dispute is arbitrable must precede the question of whether a dispute is ar­bitrable. While those questions are typically answered by the courts, they should be sent to an arbitrator if the parties clearly intended an arbitrator to decide the issue of arbitrability. The customers argued that when the arbitration agreement incorporates the AAA rules, as the one here did, the issue of arbitrability should be decided by the arbitrator. The Court agreed. The Court further pointed out that after the trial court entered its judgment in this case, the Unit­ed States Supreme Court decided *Henry Schein, Inc. v. Archer & White Sales, Inc.*, \_\_\_ U.S. \_\_\_, 139 S. Ct. 524 (2019). In *Schein*, the Supreme Court held that, when parties delegate to an arbitrator issues of arbi­trability, courts have no role in determining whether the scope of an arbitration clause is broad enough to cover a particular dispute.

**Parental Immunity—*Curry v. Kelley*, 296 So. 3d 822 (Ala. 2019)**

AC died in foster care. The plaintiff filed suit against Van Gilder and Kelley (foster parents), alleging their negligence and wantonness led to AC’s death. The defendants filed motions for summary judgment arguing that any claim for negligence was barred by the doc­trine of parental immunity and the plaintiff had pre­sented no evidence the defendants acted wantonly. The trial court denied both motions. The defendants filed petitions for writs of mandamus. The Alabama Supreme Court held there was no question the doctrine of parental immunity barred the wrongful death claim to the extent the claim was based on negligence, but not to the extent it was based on wantonness.

**Recreational Use Statute—*Ex parte City of Millbrook*, 2020 WL 1071325 (Ala. Mar. 6, 2020)**

The City was entitled to immunity only if the civic cen­ter came within the definition of “outdoor recreation­al land”. A “building” is ‘outdoor recreational land’ only if it is adjunct to land or water and it facilitates the recreational use of that land or water.” The Court concluded that the City had not es­tablished that the civic center was the kind of build­ing included in the definition of “outdoor recreation­al land."

**Indemnity/Privileged Materials—*Ex parte Dow Corning Ala., Inc.*, 297 So. 3d 373 (Ala. 2019)**

Blue was injured while working at a facility owned by Dow Corning. Blue’s employer was Alabama Electric. Blue sued Dow Corning. The contract between Dow Corning and Alabama Electric contained an indemnity provision and also required Alabama Electric to maintain liability insurance naming Dow Corning as an additional insured.

Dow Corning demanded Alabama Electric and National Trust (Alabama Electric's insurer) provide it with a defense and indemnity in Blue’s personal injury action. That request was denied and Dow Corning's own insurers provided a defense.

Blue’s action was settled. Alabama Electric and National Trust filed an action seeking a judgment declaring they were not responsible for the defense costs incurred by the Dow Corning or for the settlement proceeds paid to Blue. Alabama Electric and National Trust sought to depose Dow Corning seeking information about Dow Corning’s decision to settle Blue’s claims, along with information about the analysis of those claims and litigation strategy, among other things. Dow Corning objected, asserting the subpoenas called for the production of information protected by the attorney client privilege and the work product doctrine. The trial court denied the defendants’ motion for a protective order. The defendants filed a mandamus petition.

The Alabama Supreme Court issued a writ of mandamus**.** The Court concluded that proving or disproving the objective reasonableness and good faith of the settlement in Blue’s personal-injury case did not require the production of attorney-client-privileged materials or materials protected by the work-product doctrine. The Court held that the filings, discovery, documentary evidence, witness testimony, nonprivileged correspondence, and other nonprivileged materials generated in connection with Blue’s personal-injury action could be used to evaluate the Dow defendants’ potential liability to Blue and to prove or disprove whether the settlement was reasonable and entered into in good faith.

**Medical Malpractice causation—*Hamilton v. Scott*, 278 So. 3d 1180 (Ala. 2018)**

The plaintiff sued Dr. Scott for wrongful death of a fetus. The plaintiff argued that if Dr. Scott had followed the standard of care, which required him to refer her to a perinatologist following the February 25, 2005, ultrasound, hydrops would have been detected earlier, an intrauterine transfusion could have been performed, and that procedure would have ameliorated the effects of the fetus' parvovirus infection. The trial court refused to give the plaintiff's better position jury instruction:

*Amy Hamilton must prove to your reasonable satisfaction by substantial evidence that prompt diagnosis and treatment would have placed Tristian in a better position than he was in as a result of inferior medical care. It is not necessary to establish that prompt care could have prevented Tristian's death; rather, Mrs. Hamilton must produce evidence to show that Tristian's condition was adversely affected by the alleged negligence. (Parker v. Collins, 605 So. 2d 824, 827 (Ala. 1992) cited with approval in Hrynkiw v. Trammell, 96 So. 3d 794, 801-802 (Ala. 2012).​*

The proposed instruction relied upon on the *Parker* Court's statement that “the issue of causation in a malpractice case may properly be submitted to the jury where there is evidence that prompt diagnosis and treatment would have placed the patient in a better position than she was in as a result of inferior medical care.” 605 So.2d at 827.

A jury returned a verdict in favor of the defendant and the plaintiff appealed. The Court held: "the trial court erred in failing to give the requested jury instructions espousing Parker's “better-position” principle. We emphasize that, in a wrongful-death case such as this one in which the “better position” principle applies, it remains necessary for the plaintiff to establish that prompt care probably would have prevented the patient's death."

Justice Shaw's dissent in *Hamilton* points out that the negative affect in a wrongful death case is death. So, the "better position" principle is just a convoluted way of saying the plaintiff probably would not have died if the plaintiff had received timely medical care/diagnosis.

**Medical Malpractice Expert Testimony—*Youngblood v. Martin*, 298 So. 3d 1056 (Ala. 2020)**

The plaintiff's expert never testified he was ‘li­censed by the appropriate regulatory board or agency of this or some other state’ pursuant to § 6-5-548(c)(1).

**Respondeat Superior—*Hinkle Metals & Supply Co., Inc. v. Feltman*, 280 So. 3d 1031 (Ala. 2019)**

The fact an employee combines personal activities with the employer’s business does not necessarily signify an action outside the scope of employment. In such a case, the ques­tion whether the employee was acting within the line and scope of his employment is a factual question for the jury.

**Vicari­ous Liability—*Synergies3 Tec Servs., LLC v. Corvo*, 2020 WL 4913636 (Ala. Aug. 21, 2020)**

The Plaintiffs suedMcLaughlin, Castro, DI­RECTV, LLC and Synergies3 Tec Services, LLC asserting claims of conversion and theft of a diamond and $160 cash that, they alleged, had been taken from Corvo’s house on Ono Island when McLaughlin and Castro, employees of Synergies, installed DIRECTV equipment in Corvo’s house.

McLaughlin and Castro failed to answer and default judgments were entered against them, reserving damages for trial. The jury rendered a verdict in favor of the Plaintiff Corvo in the amount of $300,000 and in favor of Plaintiff Bonds in the amount of $65,160. The verdict form indicated that $40,000 was awarded for the diamond, $160 for the cash, $75,000 for mental anguish, and $250,000 as punitive damages.

On appeal, the Court stated the trial court should have entered a judgment as a matter of law in favor of Synergies and DIRECTV on the respondeat superior claim because the employees' alleged theft and conversion were actions outside the line and scope of employment. The Court also held punitive damages were improperly awarded. Since theft and conversion were outside the line and scope of employment and Synergies and DI­RECTV were not vicariously (or directly) liable on those claims, there was no basis for punitive damages.

**Premises Liability—*Pittman v. Hangout in Gulf Shores, LLC*, 293 So. 3d 937 (Ala. Civ. App. 2019)**

"The Hangout’s attempt to warn of any danger that might be presented by the step does not support a con­clusion that it failed to act in a reckless disregard of the consequences that might befall a patron of its establishment.”

**Dram Shop/Wrongful Death*—Wiggins v. Mobile Greyhound Park, LLP,* 294 So. 3d 709 (Ala. 2019)**

A vehicle driven by McMillan struck a vehicle be­ing driven by Wiggins. Wiggins' fiancée Turner, and their child were also in the vehicle. Turner died and Wiggins and the child were injured. McMil­lan was arrested and later pleaded guilty to reckless murder.

Wiggins, in her individu­al capacity, and on behalf of the child and Turner’s estate sued McMillan and Mobile Greyhound Park, LLP. The complaint alleged that MGP sold alcohol to McMillan while he was visibly intoxicated in violation of the Dram Shop Act.

MGR moved to strike Wiggins’ claim for wrongful death, arguing that such claims are not allowed under the Dram Shop Act. The trial court granted the defendants’ motions. Wig­gins appealed. To the extent Wiggins sought to recover damages stemming from Turner’s death under both the Dram Shop Act and the Wrongful Death Act, the Alabama Supreme Court affirmed the trial court’s order granting MGR’s motion to strike Wiggins’s request for damages under the Wrongful Death Act. The Court held Wiggins could recov­er only damages based on Turner’s death under the provisions of the Dram Shop Act.

**Material Term of Contract*—LNM1, LLC v. TP Props., LLC*, 296 So. 3d 792 (Ala. 2019).**

The parties agreed the lease agreement gave TP Properties the right to terminate the lease if LNM1 failed to “substantially comply with any ma­terial provision of this lease.” LNM1 failed to obtain insurance pursuant to the lease terms. The Court concluded LNM1’s failure was a breach “that touched the fundamen­tal purposes of the contract and defeated the object of the parties in making the contract.” Therefore, the breach was material.

**Summary Judgment*—Fazzingo v. Orange*, 280 So. 3d 1057 (Ala. Civ. App. 2019)**

Although the Plaintiff's testimony contained in­consistencies, that is not a basis for enter­ing a judgment as a matter of law. “[A]ny conflicting or contradicting testimony, even her own, is to be resolved by the jury and not by the trial court.” “Any challenge to the facts upon which an expert basis his opinion goes to the weight, rather than the admissibility, of the evidence.” The weight to be assigned to the expert's testimony was a question for the jury, not the trial court.

**Mediation*—Ex parte Culverhouse*, 295 So. 3d 114 (Ala. Civ. App. 2019)**

When a party unilaterally requests mediation the trial court must require that party to bear the costs of said mediation.

**Guardians ad Litem—*Ex parte CityR Eagle Landing, LLC*, 296 So. 3d 288 (Ala. 2019)**

In April 2016, residents of Eagle Landing Apartments sued the owner of the apartment complex arising out of conditions at the apart­ment complex. The residents included adults and minors who were represented in the action by their parents. All the residents were represented by legal counsel. A settlement of the claims of some of the minors was reached and the trial court appointed a guardian ad litem to aid it in determining if the settlement was fair to the minors. The GAL later filed a motion seeking to be appointed as GAL for all the minor residents, not just the ones who had entered into a *pro ami* set­tlement with the defendants. The trial court entered an order appointing the GAL to represent all the minor residents. The defendants petitioned for a writ of mandamus.

The Court noted that Rule 17( c), Ala. R. Civ. P. provides for the appointment of a GAL in certain situations, and provides in part that: The court shall appoint a guardian ad litem (1) for a minor defendant, or (2) for an incompetent person not otherwise represented in an action and may make any other orders it deems proper for the protection of the minor or incompetent person. Here, the minors were not defendants in the cases. The Court held the trial court exceeded its discretion in appoint­ing the guardian ad litem to represent the minor resi­dents when there was no conflict of interest between the minor residents and their parents. “In the present case, with nothing before us to reflect a conflict of interest between any parent and child in­volved as parties in the litigation, and no proposed settlement agreement currently before the trial court for review, there is no need for a guardian ad litem for the remaining minors at this stage of the proceed­ings.

**Guardian Ad Liem—*Ex parte Shinaberry*, 2020 WL 4380963 (Ala. July 31, 2020)**

Shinaberry’s automobile rear-ended an automobile being driven by Guy. Guy’s three minor children and a minor step­child were injured. The children, by and through their parents, sued Shinaberry and her insurer. A settlement was reached. A GAL was appointed for the children for the purpose of determining if the settle­ment was fair to the children. The GAL sought permis­sion to have a physician examine one of the children. However, the GAL failed to communicate with the attorneys for nine months.

A pro ami hearing was finally held well over a year after the settlement. The circuit court approved the settlement: $15,230 to the children after their counsel was paid a fee of $4,470 and the medical ex­penses were satisfied. The GAL was awarded $8,000 based on his affidavit that he worked 32 hours at a rate of $250 per hour. Shinaberry filed an objection to the amount of the GAL’s fee. After a hearing, the circuit court reduced the GAL’s fee to $7,750 because he appeared by telephone at one of the hearings. Shinaberry appealed. The Court of Civil Appeals affirmed without an opinion and Shinberry petitioned the Supreme Court for a writ of certiora­ri. The Alabama Supreme Court reversed the trial court's order.

Rule 17(d), of the Alabama Rules of Civil Procedure governs the use and compensation of guardians ad litem in civ­il cases and requires the assessment of a reasonable fee for his or her legal services. Rule 17(d) does not provide guidance on how to establish a guardian ad litem’s fee, but the Court has applied criteria that may be considered when determining the reasonableness of an attorney fee: (1) [T]he nature and value of the subject matter of the employment; (2) the learning, skill, and labor requisite to its proper discharge; (3) the time consumed; (4) the professional experience and reputation of the attorney; (5) the weight of his responsibilities; (6) the measure of success achieved; (7) the reasonable expenses incurred; (8)whether a fee is fixed or contingent; (9) the nature and length of the professional relationship; (10) the fees custom­arily charged in the locality for similar legal services; (11) the likelihood that a particular employment may preclude other employment; and (12) the time limita­tions imposed by the client or by the circumstances. *Pharmacia Corp. v. McGowan*, 915 So. 2d 549 (Ala. 2004). The Court defers to the trial court’s judgment in an attorney fee case, because it presided over the entire litigation. Nevertheless, a trial court’s order regarding an attorney fee must allow for meaningful appellate review by articulating the decisions made, the reasons supporting those decisions, and how it calculated the attorney fee.

Here the GAL failed to itemize the services he per­formed in his limited role. The GAL stated that he spent 32 hours working on this case; however, he failed to provide the parties and the court with a report giving his recommendation, nor did he indicate how he spent those 32 hours or with whom he spoke or what he reviewed as part of his evaluation. The GAL delayed the parties’ settlement by failing to communicate with the parties’ attorneys for a nine-month period. It also appeared that the GAL took on tasks that were either unnecessary or outside his limited role, and that his fee was almost twice the damages awarded to the minor plaintiffs and almost twice the fee awarded to the attorneys who repre­sented the plaintiffs.

**UM/UIM*—Beeman v. ACCC Ins. Co.*, 283 So. 3d 1235 (Ala. Civ. App. 2019)**

Beeman was injured in an automobile accident. Beeman was driving an auto­mobile insured under an insurance policy purchased by Reese from ACCC Insurance Company. The driver of the other vehicle, LaChance, was uninsured. Beeman sued LaChance for negligence and wantonness. He later added a claim for unin­sured-motorist (“UIM”) benefits from ACCC. The insurer moved to dismiss Beeman’s claim, arguing Reese was the “named insured” under the policy and she had rejected UIM coverage. After a hearing, the tri­al court granted the motion to dismiss.

Reese was the sole applicant of the insurance policy and she specifically rejected UIM coverage. The renewal certificate on that policy indicates the “policyholder” is Reese. Beeman argued he is a “named insured” on the policy since he is listed as a “driver” on the declarations page of the renewal certificate and is an “insured person” un­der the policy. Therefore, Reese’s rejection of UIM coverage is not binding on him.

Under Alabama law, each named insured must reject UIM coverage for himself or herself. After reviewing decisions in other jurisdictions, the Alabama Supreme Court held that listing a person as a "driver" does not make the person a “named insured.”

**UM/UIM/Jury Trial—*Ex parte Allstate Prop. and Cas. Ins. Co.,* 2020 WL 502667 (Ala. Jan. 31, 2020).**

A ve­hicle occupied by Carter was involved in an accident with a vehicle being driven by Walker. Carter sued Walker, and also sued her underinsured motorist carrier, Allstate. In her complaint, Carter demanded a jury trial, and Allstate likewise demanded a jury tri­al in its answer. Allstate opted out of active participation in the litigation. As the trial date approached, Carter and Walker decid­ed they would rather try the case without a jury. All­state, however, demanded a jury trial. The trial court denied Allstate’s demand and set the case for a non­jury trial. Allstate then petitioned for a writ of man­damus. The Court issued a writ of mandamus noting that even when an insurer opts out of an action, it is not without means to protect its interests with respect to liability and damage. Allstate can insist that a jury determine liability and damages and, at the same time, keep its involvement from the jury pursuant to the opt-out procedure adopted in *Lowe.*

**UM/Off-road vehicles/Public Road*-Nationwide Prop. and Cas. Ins. Co. v. Steward, 2020 WL 5582243 (Ala. Sept. 18, 2020).***

Top Trails Off-Highway Vehicle Park was owned and maintained by a public park authority. Visitors to Top Trails paid an admission fee and signed a liability waiver. Two ATVs collided at the intersection of two paved roads within Top Trails. The Plaintiff sued his auto­mobile insurer seeking UM benefits alleging the other ATV involved in the collision was an uninsured motor vehicle. The UM carrier moved for summary judgment, al­leging the ATV was not an uninsured motor vehicle because the UM policy provided that “the term uninsured motor vehicle shall not include…any equipment or vehicle designed for use mainly off public roads except while on public roads.” The plaintiff filed a cross-motion for summary judgment. The trial court denied the UM carrier’s motion and granted the Plaintiff’s motion.

The UM carrier appealed. The Alabama Supreme Court held that the only dispute was whether the roads were public. The plaintiff argued the roads were public because the roads were publically owned, publically maintained using public funds and were open to the public. The UM carrier argued the roads were not public because the roads were not accessible to the pub­lic without paying a fee and signing a waiver. The Court took judicial notice that fees are required to enter many public places such as state parks. The Court also noted the definition of a “public” in the dictionary is “maintained at the public expense and under public control.” The Court held the roads were public roads for the purpose of the UM policies and the ATV was an uninsured motor vehicle.

**UIM Stacking— *Mid-Century Ins. Co. v. Watts*, 2020 WL 5582244 (Ala. Sept. 18, 2020).**

The Alabama Supreme Court concluded that in cases where two or more persons are injured or killed in a sin­gle accident, the per accident limit of liability contained in the policy is the proper coverage limit to be applied. The policy at issue contained a per accident limit of cov­erage pursuant to state statutes. Since the accident involved “two or more persons,” the per accident limit of $100,000 was applicable. Section 32-7-23(c) of the uninsured-motorist statute and § 2a.(2) of the in­surance policy allow the Watts plaintiffs to “stack” the primary coverage of $100,000 for up to two additional coverages, or a total amount of $300,000 in UIM bene­fits. The Plaintiffs could not stack more than three coverages under the UIM statute and the insurance policy.

**Discovery*—Ex parte Willimon*, 299 So. 3d 934 (Ala. 2020)**

The plaintiff, J.N., was a male congregant in the First United Methodist Church of Sylacauga. J.N. filed a lawsuit alleging that a minister had sexually abused him.

J.N. issued notices of deposition for the current and former bishops of the North Alabama Methodist Conference. The bishops moved to quash the notices. The circuit court denied the motions without comment. The bishops petitioned the Supreme Court for a writ of mandamus.

The Alabama Supreme Court denied the bishops' petition for writ of mandamus. The Court refused to adopt the “Apex” rule, which protects high ranking corporate or government officers from depositions in matters which the officers have no unique personal knowledge. The Court held that even the apex rule would not protect the bishops. The trial court could have reasonably concluded that the bishops had superior personal knowledge regarding the handling of Conference matters, including child-sex abuse policies, procedures, and training.

**Spoliation/Punitive Damages—*Imperial Aluminum-Scottsboro, LLC v. Taylor*, 295 So. 3d 51 (Ala. 2019)**

On January 3, 2011, the plaintiff's attorney sent the plaintiff's employer a letter stating that he planned to inspect the paint gun that allegedly caused the plaintiff's injuries and that the employer needed to preserve it. The employer's general manager instructed another employee to put the sprayer up. The plaintiff filed a prod­ucts liability complaint against the manufacturer of the paint sprayer. In January 2013, an attorney for the plaintiff's employer wrote the plaintiff's attorney stating the sprayer in question had been disposed of. The plaintiff filed suit against the plaintiff's employer asserting a third-party spoliation of evidence claim. A bench trial was conducted, and employees testified the sprayer was put up, but that it was not secured where others could not access it. The trial court concluded Imperial lost, destroyed or disposed of the paint sprayer when it knew that to do so would likely destroy the plaintiff’s ability to seek le­gal redress against its manufacturer. The trial court awarded the plaintiff compensatory and punitive damages.

On appeal the Alabama Supreme Court held punitive damages were not warranted. Evidence that Imperial did not securely store the paint sprayer supported a finding that it acted negligently, but the trial court’s finding that Imperial engaged in wanton conduct was not supported by the record.

**Entry of Order/Judgment—*G.C. v. Baldwin Cnty. Dept. of Hum. Res.*, 2020 WL 6106917 (Ala. Civ. App. Oct. 16, 2020).**

Ala. R. Civ. P. 58 provides five methods by which a court may render an order or judgment which include: (a) executing a separate written document; (b) including the order in a judicial opinion; (c) endorsing upon a motion the words “granted.” (d) making a notation in the court records or (e) by execut­ing and transmitting an electronic document to the elec­tronic-filing system. An oral pronouncement of a ruling does not constitute a “rendering” of an order under Rule 58.

**Sufficiency of Verdict—*Bell v. Moore*, 295 So. 3d 705 (Ala. Civ. App. 2019)**

An automobile being operated by Bell collided into the rear end of an automobile being driven by Moore. The total medical charges incurred by Moore were $40,227. Moore admitted his medical insurance company paid most of his medical bills. Moore filed a complaint against Bell. The parties stipulated to lia­bility. No evidence was presented indicating Moore would have to reimburse his health insurer for the amounts it had paid on his behalf but during closing argument, his at­torney argued, without objection, Moore would have to reimburse the health insurer $5,314 if he recovered an award of damages. The jury returned a $40,000 verdict. Moore filed a motion for new trial, asserting the judgment was less than the amount of Moore’s medical bills and failed to account for pain and suffering. The trial court granted the new trial motion and Bell appealed.

The Alabama Supreme Court reversed the trial court's order. Generally, a jury’s verdict in an action where liability has been proven must be in an amount at least as high as the uncontradicted special damages, as well as an amount to compensate for pain and suffering. However, in a case where medical damages are claimed, some of which may have been paid by medical insurance, the amount of the damages recoverable may be less than the total medical expenses incurred. In this case, al­though it was uncontradicted that Moore had incurred $40,227.14 in medical expenses, Moore admitted his health insurer had paid for most of those expenses. The record indicates Moore paid approximately $2,500 in out-of-pocket medical expenses. Even if Moore has to repay his health insurer the amount stated by his counsel during closing argument, that leaves over $30,000 to compensate Moore for future medical expenses and pain and suffering. The trial court exceeded its discretion in setting aside the jury verdict as inadequate and the order granting Moore’s motion for a new trial is due to be reversed.

**Permanent injuries/mortality table—*Hicks v. Allstate Ins. Co.*, 2020 WL 3396011 (Ala. June 19, 2020)**

The trial court exceed­ed its discretion in refusing to admit into evidence the mortality table offered by the plaintiff where evidence of permanent injuries was presented to the jury.

**Juror Qualifications*—Leftwich v. Brewster*, 2020 WL 1647867 (Ala. Apr. 3, 2020)**

At the conclusion of voir dire, Leftwich’s counsel asked that Chad and Melissa Battles be struck from the jury for cause because they were married to each other. The trial court denied that motion and Melissa Battles be­came the foreperson of the jury. Leftwich challenged the trial court’s refusal to grant his challenge for cause to the two married members of the jury panel. He claims that there was an “implied bias” based on their rela­tionship. Ala. Code 1975, §12-16-150 lists 12 catego­ries in which bias will be presumed for a prospective juror. Marriage is not listed among them. Leftwich failed to cite any authority that actually states that spouses should not simultaneously serve on a jury.

**Appeal—*McCarn v. Langan*, 293 So. 3d 383 (Ala. Civ. App. 2019)**

The parties were di­vorced in 2014. In January 2018, the mother filed a modi­fication petition alleging that the father had failed to pay child support as directed by the 2014 divorce judgment. on June 14, 2018, the trial court entered a judgment. On June 20, 2018, the trial court entered a second, identical judgment. The father filed a post-­judgment motion on July 20, 2018, thirty-four days af­ter the trial court entered its judgment. The Court held the notice of appeal was untimely because it was filed more than 42 days from the date of the entry of the initial judgment. The fact that a subsequent judgment was entered does not operate to extend the time for fil­ing an appeal where the subsequent judgment was identical to the first judgment. The appeal was dismissed.