

**NURSING HOME MALPRACTICE IN ALABAMA
SUCSESFUL CASE MANAGEMENT FROM INVESTIGATION TO TRIAL**

TAKING THE CASE TO TRIAL

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A. The Opening Statement

The opening statement is the springboard from which the plaintiff's attorney educates the jury on a nursing home's liability and persuades the jury that a verdict in favor of the plaintiff is the only way to serve justice. While an opening statement has several important goals, the ultimate goal of a successful opening statement is to marshal the significant points of the case, and develop the bond of trust created with the jurors in voir dire into a vehicle through which to express your theory of liability in such a way as to create a paradigm in the juror's minds that the only just and fair resolution of the case is a verdict in favor of the plaintiff. This vehicle is created by (1) conveying a particular theme to the jury from the beginning until the end of trial; and (2) highlighting faults in key defense issues and common defense ploys intended to shift liability away from the nursing home.

1. Developing a Theme

There must be a central theme jurors can relate to which can be used to remind them, throughout the various stages of trial, of why the plaintiff should win. A good theme is developed through mock trials, focus groups, and other informal reviews of the case and is best introduced during voir dire. The following examples are themes commonly used by plaintiff's attorneys in nursing home cases:

a. *Acceptance of responsibility*: the nursing home assumed responsibility for caring for the resident, accepted payment for that responsibility, failed to fulfill that responsibility, and now it should be held responsible for its failure.

b. *Bad Faith*: the nursing home had the resources to provide proper care and accepted payment to provide that care, but failed to do so.

c. *Betrayal of trust*: the family trusted the nursing home to provide proper care for their loved one and the nursing home let them down.

d. *Indifference*: the nursing home ignored numerous signs and warnings, such as prior documentation and medical recommendations, that the resident's physical condition was declining.

In addition, single words such as "greed," "arrogance" and "patient advocate" work well. As part of a nursing home plaintiff's theme, these words are easy to explain, easy for jurors to understand, and tend to push mental "hot buttons" that relate to a nursing home plaintiff's facts.

Lastly, the theme and a summary of the case should be emphasized in the introduction of plaintiff's opening statement to such a degree that if the jury heard nothing else, they would believe justice demands a verdict in the plaintiff's favor.

2. Highlighting Faults in Key Defense Issues

Using the opening statement to expose the jury to fallacies in the defense argument, which should be related again and again to the jury during the trial process, is another critical means by which to focus the jury's state of mind on the key issues of the case as they relate to the plaintiff's theme.

Defense attorneys in nursing home cases often assert some sort of general deniability. Nursing homes will argue that they are not guilty of a breach of the applicable standard of care, and deny that their actions caused the resident's injuries. The defense often supports these assertions using a number of strategies or themes. They may argue, for example, that (1) the plaintiff has not established a causal relationship between the nursing home's acts or omissions and the plaintiff's injuries; (2) the resident would have suffered the injury anyway due to the natural degenerative process of his or her underlying medical condition(s); (3) the resident's family believed the resident received good care; or (4) the resident contributed to the cause or exacerbation of his or her injuries.

The plaintiff's attorney should give the jury an overview of the defense theme, which can be gleaned from discovery and voir dire. This paper will discuss methods to address these arguments.

B. Litigation Techniques Applicable to Nursing Home Cases

In general, the requirements of burden of proof, proximate cause, and expert medical testimony apply to all nursing home cases. Most nursing home cases are governed by the

Alabama Medical Liability Act, *Ala. Code* § 6-5-480 et. seq. (1975) and the Alabama Medical Liability Act of 1987, *Ala. Code* § 6-5-540 et. seq. (1975 and 2000 sup.) (hereinafter "AMLA", collectively). Since expert testimony is generally required to prove negligence in nursing home cases, see *Rosemont, Inc. v. Marshall*, 481 So.2d. 1126 (Ala. 1985), this paper will discuss some helpful strategies in dealing with medical expert testimony.

1. Burden of Proof

Pursuant to *Ala. Code* § 6-5-481(7)(1975), a nursing home is considered a hospital, thus claims such as breach of contract, negligence and wrongful death brought against a nursing home are considered medical malpractice claims governed by AMLA. *Ex parte Northport Health Service, Inc.*, 682 So.2d 52, 55 (Ala. 1996).

Moreover, the focus in an action under AMLA is on the individual practitioner whose specific action is alleged to have fallen below the standard of care. *Husby v. South Alabama Nursing Home, Inc.*, 712 So.2d 750, 753 (Ala.1998).

In order to prevail on a negligence claim governed by AMLA, a plaintiff must produce evidence that establishes: (1) the appropriate standard of care, *Dobbs v. Smith*, 514 So.2d 871 (Ala.1987); (2) the nursing homes deviation from that standard, *Dobbs*, supra; and (3) a proximate causal connection between the act or omission constituting the breach and the injury sustained by the plaintiff. *Ensor v. Wilson*, 519 So.2d 1244 (Ala.1987). See also, *Crowne Investments, Inc. v. Reid*, 740 So.2d 400, 404 (Ala. 1999).

a. *Standard of care*

The standard of care applicable to a nursing home is "... that level of such reasonable care, skill and diligence as other similarly situated health care providers in the same general line of practice, ordinarily have and exercise in like cases." *Ala. Code* § 6-5-548(a)(1975). See *Parker v. Collins*, 605 So.2d 824 (Ala.1992)(discussing the burden of proof, standard of care, and breach of standards under AMLA).

Therefore, a plaintiff in a nursing home case must show that the actions of the nursing home and/or its employees was not in accordance with those of similarly situated nursing homes in the nursing home community at the time of the challenged actions, notwithstanding any contention that such standard was insufficient where reasonable prudence dictated that a stricter standard of care should be met. *Barton v. American Red Cross*, 829 F.Supp. 1290, 1297-98 (M.D.Ala.1993). See also, *Brooks v. Goldhammer*, 608 So.2d 394, 395 (Ala.1992)(citing *Bates v. Meyer*, 565 So.2d 134, 136 (Ala. 1990)).

b. *Breach of the standard of care*

The plaintiff has the burden of proving by substantial evidence that the nursing home failed to maintain a standard of care as set out in § 6-5-548(a), and the jury must be so charged. *Ala. Code* § 6-5-549 (1975). It is not necessary to establish that prompt care could have prevented the injury or death of the resident; rather, the plaintiff must produce evidence to show that his or her condition was adversely affected by the alleged negligence. *Parker v. Collins*, 605 So.2d 824 (Ala.1992). Further, a nursing home may be held liable for the negligent conduct of independent physicians, even though they are neither employees nor agents of the nursing home, on a theory of corporate liability. To do so, however, the plaintiff must show that some underlying

negligent act of the physician caused the injury. *Id.* at 824.

The plaintiff ordinarily must offer expert medical testimony as to what is or is not the proper practice, treatment, and procedure in the particular case of the resident. *McAfee v. Baptist Medical Ctr.*, 641 So.2d 265, 267 (Ala.1994). A lack of expert medical testimony will usually result in a lack of proof of the essential elements to establish the plaintiff's case. *Rosemont, Inc. v. Marshall*, 481 So.2d 1126, 1129 (Ala. 1985)(citing *Parrish v. Spink*, 284 Ala. 263, 224 So.2d 621 (1969)); see also, *Tuscaloosa Orthopedic Appliance Co. v. Wyatt*, 460 So.2d 156 (Ala.1984)(expert testimony was required to determine whether performance of orthotist fell below acceptable standard of care since laymen do not have background and knowledge without expert testimony to understand whether fracture brace had been properly applied). Moreover, once the defendant offers expert testimony establishing a lack of negligence, the defendant is entitled to summary judgment unless the plaintiff counters the defendant's evidence with expert testimony in support of plaintiff's claim. *Swendsen v. Gross*, 530 So.2d 764 (Ala.1988).

Nevertheless, there are several exceptions. In the recent case of *Ex Parte HealthSouth Corporation*, 2002 W.L. 31663618 (Ala.2002), the Alabama Supreme Court reformulated the rule concerning those cases in which expert testimony is not needed. In summary, a plaintiff is not required to offer expert medical testimony as to proper practice, treatment, and procedure where want of skill or lack of it is so apparent as to be within the comprehension of the average layman, and thus requires only common knowledge and experience to be understood. Such cases falling under this particular exception would include those in which a sponge is left in the patient or

where, for example, the wrong leg is operated on or where, as in *Ex Parte HealthSouth*, a call for assistance to a patient was ignored for an unreasonable period of time. The second exception to the rule recognized by the Alabama Supreme Court is those cases in which the plaintiff relies on a recognized standard or authoritative medical text or treatise to prove the alleged breach or is himself or herself a qualified medical expert. *Ex Parte HealthSouth Corporation* is an important decision in that in those cases in which custodial care (as opposed to medical care) is at issue, a plaintiff is no longer required to employ an expert witness to prove that the defendant hospital, doctor or nursing home was negligent. In addition, a plaintiff is not required to offer expert medical testimony as to proper practice, treatment, and procedure where a recognized standard or authoritative medical text or treatise is introduced to prove what is or is not proper practice. *Rosemont*, 481 So.2d at 1130.

2. Proximate Cause

A plaintiff establishes proximate cause by demonstrating that an injury or death was probably caused by the defendant's conduct. *Crowne Investments, Inc. v. Reid*, 740 So.2d 400, 404 (Ala. 1999). In fact, unlike most tort cases in Alabama, in a nursing home case the jury must be specifically charged in their instructions that the alleged malpractice was *probably* the cause of plaintiff's injury or death. *Ala. Code*-§ 6-5-549 (1975)(emphasis added).

In wrongful death cases, the probability of survival test has been rejected and is not required. *Brackett v. Coleman*, 525 So.2d 1372 (Ala. 1988). In addition, testimony

that earlier treatment could possibly have made a difference is insufficient as a matter of law. *Williams v. Springhill Memorial Hospital*, 646 So.2d 1373 (Ala. 1994).

3. Expert Medical Testimony

In *Medlin v. Crosby*, 583 So.2d 1290 (Ala.1991), the Alabama Supreme Court developed a test for determining whether an expert qualifies to testify in an AMLA case. The court said it is necessary to determine (1) the standard of care the plaintiff says the defendant breached; (2) whether the defendant who is alleged to have breached the standard of care is a specialist in the area of care in which the breach is alleged to have occurred; and (3) whether the expert qualifies under the criteria set out in the AMLA statute. *Id.* at 1293.

The question whether a witness is qualified to give an expert opinion is customarily left to the discretion of the trial court, and the trial court's determination will not be disturbed on appeal absent a finding of abuse of discretion. *Bell v. Hart*, 516 So.2d 562, 569 (Ala.1987).

a. *Medical records*

Medical records from the nursing home, physicians, and perhaps hospitals and other healthcare providers are going to be an important part of the case. The opinions of both plaintiff's and defendant's experts will rely heavily on information contained in these records. Other parts of this paper have already discussed the role of medical

records during the pre-trial process, however it is important to remember that these records will also play a key role during trial.

First, plaintiff's attorney should have readily accessible copies of all the relevant medical records during the trial process. For example, plaintiff's medical records may be used to buttress plaintiff's expert testimony that certain procedures and actions that are absent from the nursing home's records prove that something was not done by the facility to help the patient. On cross-examination of defense experts, these records can be an important tool to use in some of the techniques discussed in the next section, such as establishing the basis (or lack thereof) of the expert's opinion and his or her lack of familiarity with the particulars of the case.

If any of the medical records become the crux of the plaintiff's case, they can be blown-up and used as powerful exhibits during key parts of examination, cross-examination, and closing arguments.

(1) Eliminating the determinative value of the resident's chart

Just because a particular treatment or procedure the nursing home alleges was afforded the resident was not annotated in his or her chart does not necessarily mean the act was not performed. Conversely, just because a certain regimen or routine of care appears to be completely and perfectly charted does not mean that the care was given to the resident.

In a case where the defense argues that just because a procedure was not charted does not mean it was not performed, it is important for plaintiff's attorney to correlate

the resident's clinical outcome to their medical chart at the nursing home. For example, exhibits should be presented that correlate the development and/or worsening of the resident's decubitus ulcers to the clinical record showing little to no documentation of turning or repositioning.

In a case where a resident's chart is completely and thoroughly filled in with what appears to be a perfect regimen of care, plaintiff's attorney needs to correlate the resident's outcome to the impossibility, or improbability, of such an outcome occurring in light of the alleged provided care as detailed in the medical chart. In most, cases you will have to rely on both expert and lay witness testimony.

For example, in dehydration cases it is common for a resident's chart to show that s/he received sufficient amounts of fluids on a daily basis. However, the family has stated that the resident looked thirsty and asked for water every time they visited, and their skin looked "spongy." Further, while being treated for an unrelated condition at a local hospital, a hospital nurse may have noted the resident was dehydrated and administered fluids to the resident.

Throughout opening arguments, trial and closing arguments, then, plaintiff's attorney should steer the jury to the obvious conclusion: that where a patient was injured or died from complications related to dehydration, and where the resident was constantly thirsty, had spongy skin, and was believed to be dehydrated on at least one occasion by an independent health care practitioner, it is highly unlikely, if even possible, that the resident was receiving sufficient fluids on a daily basis as annotated in the nursing home's chart.

b. *Cross examination of experts*

Since the outcome of a nursing home abuse case will depend heavily on the weight and credibility the jury assigns to the conflicting expert testimony, an effective cross-examination of defense experts is crucial to keeping the jury focused on the plaintiff's theme of the case. As such, the plaintiff's attorney should consider the following techniques in his or her cross-examination:

(1) Collateral Attack

The purpose of a collateral attack is to obtain critical points to use later in the closing argument. In a collateral attack, the approach should be to demonstrate that the defense's expert witness(es) is either biased or prejudiced, and that his or her resulting lack of objectivity diminishes the weight or effect of his or her opinion. A collateral attack may be achieved by portraying the witness as a "professional witness", as an antagonist to malpractice litigation (by demonstrating said witness has never testified on behalf of a plaintiff), or by showing the witness has some sort of association or affiliation with the defendant beyond his or her compensated services as an expert witness.

It should be kept in mind, however, that a collateral attack is not particularly effective on its own and, in addition, it should be expected that the defense attorney will use the same method with the plaintiff's expert witness(es). It should be used in combination with other cross-examination techniques.

(2) Prior inconsistent statements: If the expert witness has ever written, lectured, or testified frequently on the subject matter of the case, then a prior inconsistent

statement in his or her past writings, lectures, or testimony in other cases should be illuminated on cross-examination very clearly for the jury.

(3) Factual basis of the experts opinion: The cross-examination should establish as many of the key facts upon which the expert's opinion is predicated. The goal in this approach is to elicit from the expert that his or her opinion would be different if certain of the facts upon which his or her opinion is postulated were different. Thus, the expert would essentially be agreeing that if Fact A, which the expert presumed in the formulation of his or her opinion (or as part of a hypothetical posed to him on cross-examination), was untrue and Fact B was substituted in its place, that the standard of care would not have been met. Thereafter, plaintiff's attorney can demonstrate to the jury that Fact B is actually true, or at least that Fact A is not true.

(4) Expert's familiarity with the case: The expert witness will most likely be quite knowledgeable and articulate about the particular subject matter s/he is testifying to in the case. Nevertheless, if s/he is not completely familiar with the specific facts and circumstances of the resident's case, the expert's lack of knowledge about any salient facts or circumstances will serve to diminish both his credibility as a witness and the credibility the jury attributes to the medical principles the witness proffers.

(5) Expert's qualifications and clinical experience: The expert's qualifications are of paramount significance. A good cross-examination should demonstrate whether the expertise of the witness includes a sufficiently specific area or discipline to testify with authority as to what is the proper practice, treatment, or procedure in the resident's specific case. In addition, it is not entirely uncommon for experts to exaggerate or even

fabricate credentials. Exposure of such a practice by a defense expert is worth its weight in gold to the plaintiff's case.

It is also important, again, to take note of the aforementioned fact that the liability test in most nursing home cases will be based on a certain standard of care that is generally exercised among similarly situated providers of care in cases similar to the case at trial. As a result, whether or not the defense expert has adhered to that standard of care is of paramount importance. The credibility of a defense expert would be diminished if it were revealed on cross-examination that s/he personally does not or has not performed the medical act s/he asserts in his or her testimony to be the standard of care utilized by similarly situated facilities.

4. Debunking Key Defense Issues

As mentioned earlier, defendants in nursing home cases will, of course, advance one or more theories of their own. Often, they will attempt to avoid liability by shifting blame for the injury to the plaintiff or plaintiff's decedent, or at least try to mitigate the nursing home's liability and damages. Here are some examples of defense tactics and how to respond:

a. *Intervening circumstance or lack of proximate cause defense*

A common defense ploy is to deny liability or distract the jury's attention from the defendant by pointing to potential liability elsewhere. In nursing home cases, defendants will often assert the following:

"She had a decubitus ulcer, but my client didn't cause the ulcer. It developed at the hospital before she became a resident of my client's facility. Furthermore, she was a diabetic, so her decubitus ulcer was incurable. Furthermore, even if we did what the plaintiff has alleged we did, she would have died anyway because of the natural degenerative process of her preexisting condition."

Other sections of this paper have already discussed pre-trial procedure and discovery in nursing home cases. However, in addressing how to respond to the aforementioned "my client was not the cause of the resident's injury" defense theme, it is important to bring pre-trial procedures up again. If the evidence does in fact suggest that this theme is or may be true, then (using the example above) the plaintiff's attorney will need to include the hospital in the claim. However, if plaintiff's expert(s) believe that the decubitus developed at the nursing home, then testimony from representatives of the hospital will usually be very defensive and thus very effective at pointing the blame back on the nursing home. The only way to be prepared to effectively present such testimony is to have been careful and diligent in conducting depositions and pretrial discovery.

In the above example, to the extent the resident is or was a diabetic, the plaintiff's attorney should present an expert qualified to address the preventable nature of decubitus ulcers. Plaintiff must have someone competent to study the various blood tests that were run. If there was sepsis incident to the ulcers involved in the death of the resident, and it does not match up with the blood culture, this issue must be addressed. This is important because, while plaintiff's attorney may intend to argue that the resident's sepsis was related to a stage four decubitus ulcer on the resident's buttocks, blood cultures may have revealed that the sepsis was related to a urinary tract infection, not the ulcer. While sepsis resulting from an improperly treated urinary tract infection does not void the merits of a

wrongful death claim against a nursing home, it will make a difference in the way the case needs to be presented.

With respect to illnesses or injuries associated with some type of preexisting condition, such as a decubitus ulcer combined with pre-existing diabetes, it is important to obtain all of the resident's prior medical records to get a complete medical history. If the nursing home wants to suggest that diabetes is the reason the patient had a decubitus ulcer, it is important to know what type of diabetes, how bad it was, was it symptomatic, had it been successfully treated, and so forth. Plaintiff will need to have the appropriate testimony from qualified experts who can analyze the prior medical records and draw a distinction between any type of prior illness or injury and the current problem associated with ulcers, sepsis, dehydration, etc.

If, for example, the nursing home wants to suggest that the decubitus ulcer was untreatable because of the natural degenerative process of an ulcer in someone who suffers from diabetes, it is crucial that plaintiff's attorney be familiar with the Omnibus Budget Reconciliation Act of 1987, Pub. L. 100-203 (hereinafter "OBRA"), which provides guidelines on how to prevent and treat decubitus ulcers and other medical conditions commonly suffered by nursing home residents. OBRA mandates that nursing homes seeking Medicaid or Medicare reimbursement must comply with federal regulations pertaining to resident care. If, for instance, the defense is arguing that the resident's ulcers were unavoidable despite the best of care, plaintiff's attorney must examine the resident's medical chart in light of OBRA guidelines to ensure that the

nursing home did provide "the best of care."

b. No real damages defense

Nursing homes will often argue that the resident did not have a long life expectancy and was expected to live the small remainder of his or her life at the nursing home. They will often try to convince the jury that the resident's quality of life was already quite poor before s/he entered the nursing home, the resident suffered from dementia or senility to such a degree that s/he was unaware of the surrounding circumstances, or that the plaintiff never visited the patient in the nursing home anyway so there was no significant loss of companionship.

If the defense raises these types of themes, they will most likely be presented very subtly. It is important to seize upon these subtle implications as if they had been overtly stated by the defense and tell the jury that the quality of life of a nursing home resident is not properly characterized as a "relativism". This can be done effectively in closing arguments:

"The defense is suggesting that the resident's life was worthless simply because she was an old lady! It is inexcusable to cause the premature death of a human being simply because she was not as vibrant and as you and me! Indeed, no one has the right to shorten, restrict, change, or otherwise ignore a nursing home resident's quality of life, no matter what state her quality of life may have been in upon taking residence in ABC Nursing Home."

Again, a medical or mental health expert should be used to provide testimony about elderly quality of life issues and the important role of nursing home residents in the lives of their families and communities.

c. Plaintiff contributed to the injury defense

This is another staple in standard defense responses to nursing home cases. This defense usually starts as a standard nursing home response to questions from the resident's family and friends long before a case or controversy becomes one of a legal nature. In response to inquiries about an injury, nursing homes will often tell the family that their loved one is a problem resident who is combative, refuses to follow directions, refuses to eat or drink, and subverts nursing home safety procedures. Nursing homes will also tell family members that the resident fell, as opposed to being dropped by a staff member, or that the resident feigned taking his or her medication. These excuses are often reasserted in trials.

Again, expert testimony is critical in dealing with these arguments. From a sociological perspective, plaintiff's experts should be able to address the specific lifestyle of the resident. Plaintiff's attorney needs to develop, through expert testimony, a sense of the nursing experience from the resident's perspective. For example, draw a picture for the jury that shows the resident was just trying to live the normal lifestyle that s/he had for most of his or her life, and that because of the nursing home's lack of a developed care plan, required by OBRA, designed to address the resident's lifestyle, and/or the inadequate staffing and attention, nothing was done to address the resident's needs. Further, Plaintiff's attorney may want to stress to the jury that OBRA and other federal laws require sufficient staffing to provide adequate monitoring of nursing home residents. There should always be a sufficient staff-to-resident ratio that affords an adequate monitoring level for the nursing home to provide a safe environment and prevent injury or harm to that its residents.

d. *Reverse sympathy defense*

In cases where the plaintiff is not particularly sympathetic, such as a case where the plaintiff may not have ever visited the resident, thus making it appear as though the plaintiff is simply an opportunist looking for a windfall, the defense may try to take the sympathetic "high-ground" by creating a theme portraying the nursing home as an innocent good Samaritan who tried to provide comfort to a terminal elderly person in their waning years, while the plaintiff and society ignored the resident. Thus, the nursing home is, like the resident, a victim of societal disinterest in the elderly and should not be punished by rewarding the plaintiff for his or her indifference.

To rebuke such a theme, plaintiff's attorney should have an expert address how the societal dilemma of elder care is no excuse for the nursing home providing inadequate health care to the resident while concomitantly trying to avoid their contractual and legal obligations for which they have been well compensated.

In a situation where the plaintiff rarely visited the resident, but really did care about them and is not a "gold-digger", plaintiff's attorney should outline and demonstrate for the jury the family's trust in the nursing home and its medical staff, and the family's lack of sophistication and knowledge.

C. Closing Arguments

It is critical to continue the theme used in the opening statement, and throughout trial, in the closing argument. During closing arguments, all of the specific points,

references and inferences alluded to throughout the trial should be tied together to reinforce plaintiff's theme, plaintiff's theory of liability. Nevertheless, the most important goal of the closing argument is to counter the defense theory(s) advanced during trial and at closing arguments.

1. Common Defense Summation

This paper has already covered common defense themes and how to respond to them. In closing arguments, nursing home defendants often sum up their case with one of several variations of the following argument:

"The resident's injuries (e.g., decubitus ulcers, dehydration, etc.) were the result of the natural degenerative disease process associated with the resident's underlying medical diagnosis. Further, if the nursing home was so bad and provided such bad care, the family would not have left the resident in the facility for so long. Lastly, just because the treatment or observation was not charted (e.g., daily ulcer wound treatment, daily administration of fluids, etc.) does not mean that it was not performed. Thus, the plaintiff's case is based on assumptions and speculation meant to punish this nursing home that provided care in the short remaining time of this elderly resident when no one else was willing to do so."

It is crucial to use the closing argument to take the common thread of the plaintiff's trial theme and bind together all of the plaintiff's major trial points that expose the fallacies in the defense arguments. In addition, demonstrative exhibits, such as blow-up pictures of key medical records and visible physical injuries of the resident, are extremely helpful tools in re-emphasizing some of those key issues.

D. Appellate Litigation Under the Nursing Home Acts

E. Nursing Home Litigation After Tort Reform

The last several years have seen several changes in the scope of discovery allowed in nursing home abuse cases, caps on punitive damages, and the availability of causes of actions other than medical malpractice under AMLA.

1. Scope of discovery under the Alabama Medical Liability Act, § 6-5-551

The Supreme Court of Alabama has made it clear that in an action against a health-care provider, based on acts or omissions in the hiring, training, supervision, retention, or termination of the health-care provider's employees, a plaintiff is entitled to discovery concerning only those acts or omissions specifically detailed and factually described in the complaint and alleged by the plaintiff to render the health care provider liable to the plaintiff. *Ex parte Coosa Valley Health Care Inc.*, 789 So.2d 208 (Ala. 2000) (citing *Ex parte Ridgeview Health Care Center Inc.*, 786 So. 2d 1112, 1116-17 (Ala. 2000)).

However, the court has also held that since negligence claims based on "systemic failure" of a nursing home will not all solely involve care by medical personnel, and, thus, it is likely that the employees to which some of those claims relate would not be named in plaintiff's medical records, requesting a list of employees to identify all individuals who either witnessed or had the opportunity to witness the circumstances, events or occurrences that were relevant to the facts and issues in the plaintiff's case is permissible. *Ex parte Coosa Valley Health Care Inc.*, 789 So.2d at 219.

a. *Ex Parte Ridgeview Healthcare*

The Supreme Court of Alabama, following an amendment to the statute prohibiting any party in a malpractice action against a health care provider from conducting discovery with regard to any other act or omission, vacated a prior ruling allowing broad discovery in nursing home actions and held that AMLA governs claims of negligent or reckless hiring against nursing homes, thereby strictly limiting the discovery available to plaintiffs in elder abuse actions. *Ex parte Ridgeview Health Care Center Inc.*, 786 So. 2d 1112, 1116-17 (Ala. 2000)

In *Ridgeview*, Lima Hayes brought a lawsuit through her son, Billy, as guardian and conservator, against Ridgeview Health Care Center. Lima, an Alzheimer's patient, alleged that Ridgeview negligently allowed her to wander away from the facility, fall from her wheelchair, suffer from dehydration and develop sores on her body. After Lima died, Billy Hayes substituted himself as administrator of her estate and added claims for negligent, reckless and wanton hiring, training, supervision and retention of its staff, wrongful death and breach of contract.

Ruling on a motion to compel discovery, the trial court ordered Ridgeview to respond to 14 requests for production and interrogatories, limiting the order to three years from the date of Lima's alleged injury. Ridgeview had objected to the requests on the ground that discovery of any other acts or omissions is disallowed under *Ala. Code* § 6-5-551 (1975) and that § 22-21-8(b) of the code prohibits discovery of "[a]ll accreditation, quality assurance credentialing and similar materials." *Id.* at 113-14. Ridgeview filed a petition for writ of mandamus challenging the order, in part. According to Ridgeview, the discovery requests seeking information on their liability

insurance coverage was prohibited by § 6-5-548(d) of AMLA. *Id.* at 115. Citing *Ex parte McCollough*, 747 So.2d 887 (Ala. 1999), Hayes countered that he was entitled to such evidence because a negligent hiring claim is "separate and distinct" from a claim for breach of the standard of care. *Id.* at 115.

In *McCollough*, the court held that a nursing home must comply with discovery requests for all personnel records and information regarding any past instances of abuse or neglect in a wrongful death action alleging a claim for negligent hiring, training and supervision of its staff. *Ex parte McCollough*, 747 So.2d at 890. The *McCollough* court found that § 6-5-551 of AMLA, which specifically prohibits the discovery of "pattern and practice" evidence, did not bar the discovery of such evidence because the evidence was directly relevant to the negligent hiring claim. *Id.* at 891.

The Alabama Supreme Court rejected Hayes' reliance on *McCollough*, saying the court did not rule in *McCollough* that a negligent hiring claim was distinct from a breach of standard of care claim; Hayes simply misinterpreted the Court's decision in *McCollough*. *Id.* at 115-16. Moreover, the court said, § 6-5-551 has since been amended to clearly provide that negligent hiring claims are governed by AMLA. The amendment supersedes the holding in *McCollough* that permitted discovery of other acts or omissions to prove allegations of "systemic failure," the court ruled. *Id.* at 116.

Since AMLA governs any discovery in the case, including any discovery related to the negligent hiring claim, the court directed the trial court to vacate any discovery orders requiring production of information related to Ridgeview's insurance coverage.

Id. at 117

The court concluded that that any discovery relating to the negligent hiring claim was limited to those acts or omissions specifically detailed in the complaint and relating to the care rendered to the plaintiff. *Id.* at 117.

b. Ex parte Coosa Valley Health Care

The Alabama Supreme Court subsequently reaffirmed its ruling in *Ex parte Ridgeview* that plaintiffs who assert negligent hiring or systemic failure claims against nursing homes cannot get around the prohibition contained in AMLA against discovery of other acts or omissions evidence. *Ex parte Coosa Valley Health Care Inc.*, 789 So.2d 208 (Ala. 2000).

Citing its recent decision in *Ridgeview*, the court said that *Ala. Code* § 6-5-551 (1975), as amended, limits discovery of acts or omissions to those detailed in the complaint and related to the care rendered to the plaintiff.

In *Coosa Valley*, the nursing home allegedly provided inadequate care to Lucille A. Roper, causing her to suffer from several ailments, including malnutrition, dehydration, sepsis, pressure sores and a urinary tract infection. After the trial court ordered Coosa Valley to comply with several interrogatories and requests for production, the facility filed a writ of mandamus seeking to vacate the order.

While the Supreme Court overturned the orders relating to other acts and omissions evidence, it affirmed the court's other discovery orders. The panel said it was reasonable to require Coosa Valley to produce a list of employees who worked at the facility during the last four years that Roper lived there. Despite a two-year statute

of limitations, the court said that due to the allegations of systemic failure, the facility should be required to produce documentation over a four-year period. It also rejected a claim that "quality assurance information" was privileged.

As a result, a plaintiff is entitled only to discovery concerning acts or omissions specifically detailed and factually described in the complaint when the action is based on acts or omissions in the hiring, training, supervision, retention or termination of the nursing home's employees. However, plaintiff is entitled to discovery of a nursing home's list of employees who worked at the nursing facility during the resident's stay when the plaintiff asserts systemic failure in the complaint.

2. Punitive Damage Caps

In tort actions, punitive damages are awardable only where the plaintiff proves by clear and convincing evidence that the defendant consciously or deliberately engaged in statutorily defined "oppression, fraud, wantonness or malice" with regard to the plaintiff. *Ala. Code* § 6-11-20(a)(1975). An employer or principle, such as a nursing home, is liable for punitive damages for the acts or omissions of its employees or servants only if the plaintiff shows that the employer: (1) knew or should have known of the employees' unfitness; (2) authorized the wrongful conduct; (3) ratified the wrongful conduct; or (4) the wrongful conduct was calculated to or did benefit the employer. *Ala. Code* § 6-11-27(a)(1975).

In wrongful death actions, the only damages recoverable are punitive damages. Evidence of loss of earnings, contributions to family, and loss of enjoyment of life are

inadmissible because they are irrelevant. The amount of damages recoverable depends on the nature of the defendant's act, his or her degree of culpability, and the need for deterring the defendant and others from committing similar wrongful conduct. *Deaton v. Burroughs*, 456 So.2d. 771 (Ala. 1984).

Alabama had a \$400,000 cap on noneconomic compensatory damages, but it was struck down in 1991. *Moore v. Mobile Infirmary Ass'n*, 592 So. 2d 156 (Ala. 1991). A one million dollar cap on wrongful death actions was declared unconstitutional in 1995. See *Smith v. Schulte*, 671 So. 2d 1334, 1343 (Ala. 1995); *Ray v. Anesthesia Ass'n*, 674 So. 2d 525 (Ala. 1995); see also *Henderson v. Alabama Power Co.*, 627 So. 2d 878, 893-94 (Ala. 1993) (holding that the provision of the Alabama Tort Reform Act limiting awards for punitive damages to \$250,000 violated Alabama's constitutional right to trial by jury).

In 1999, the Alabama legislature again passed legislation that capped certain punitive damage awards. In cases involving a business with a net worth of \$2 million or less at the time of the occurrence of the acts or omissions that are the basis of the suit, punitive damages may not exceed \$50,000, or 10 percent of the business' net worth, whichever is greater. *Ala. Code* § 6-11-21(b), (c)(1975). In cases involving multiple defendants, punitive damages may not exceed three times the compensatory damages, or \$500,000, whichever is greater. *Ala. Code* § 6-11-21(a)(1975). In cases involving personal injury, punitive damages are limited to three times the amount of compensatory damages, or \$1.5 million dollars, whichever is greater. *Ala. Code* § 6-11-21(d)(1975).

3. Assault and Battery

In *Collins v. Ashurst*, -- So.2d. --, 2001 WL 1178630 (Ala., Oct. 5, 2001), the Alabama Supreme Court held that AMLA did not preclude a patient from bringing assault and battery and trespass against person claims against a doctor, in addition to bringing a medical malpractice claim, given that AMLA provides a statutory standard of care which governs all actions against health-care providers, and AMLA does not contain language that would lead to the conclusion that the only available cause of action, in contract or in tort, is medical malpractice. *Id.* at 3.

In *Collins*, a patient brought medical malpractice, assault and battery, and trespass to person actions against a doctor, a health clinic, and other fictitiously named defendants, seeking damages for removal of the wrong ovary. The trial court, *inter alia*, struck the assault and battery and trespass to person claims from plaintiff's complaint as barred by AMLA.

On appeal, the Supreme Court said that the definitions section of AMLA, § 6-5-542, which the trial court interpreted to allow only one cause of action, i.e., medical malpractice, envisions both tort claims and contract claims, based on either intentional or unintentional conduct. The court reasoned that since this particular section provides the applicable standard of care that governs all actions against the health-care providers specified in the act, and does not contain language that would lead to the conclusion that the only available cause of action, in contract or in tort, is medical malpractice, the trial court erred in determining that AMLA allows for only one cause of action.

