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**2007 PRODUCT LIABILITY/PERSONAL INJURY UPDATE
SPEECH**

Although the handout goes into several different areas of the legal climate in Alabama, today I only want to discuss a few cases that I believe are some of the more important recent cases that may have long-lasting implications on legal practice in Alabama. I believe that you will agree that these cases are and will continue to be very important for us all.

I. VENUE

There are two very important cases dealing with venue that came out in the past year. *Ex parte Suzuki* and *Ex parte Volvo Trucks North America*.

EX PARTE SUZUKI – 2006WL1046689 (Ala. April 21, 2006)

In this case, the Plaintiff's son was seriously injured in an accident in Choctaw County while using an ATV. The Plaintiff sued Suzuki, the manufacturer of the ATV, and the dealership where he purchased it, under AEMLD, negligence and wantonness. He filed the suit in Choctaw County, where the accident happened. The dealership was located in Mobile County. The defendants filed a motion to transfer venue to Mobile County. The trial court denied the motion and the defendants petitioned for a writ of mandamus asking the Alabama Supreme Court to transfer the action.

The defendants argued that venue in Choctaw County was not allowed under any of the four categories listed in §6-3-7(a). The plaintiff asserted that because “a substantial part of the events or omissions giving rise to the claim” occurred in Choctaw County, i.e. the accident and the injury, pursuant to 6-3-7(a)(1), venue was proper.

The Supreme Court found that, even though the injury occurred in Choctaw County, venue was actually proper in Mobile County, where the dealership was located. The Court determined that while the location where the injury occurred used to be a dispositive fact, the July 1999 amendment to the statute focused the inquiry on the location of the “events or omissions giving rise to the claim.” The Court reasoned that, because the Plaintiff’s complaint alleged the wrongful acts occurred in the design, manufacture, assembly, distribution and sale of the ATV, none of which occurred in Choctaw County, it could not be a proper venue. The Court determined Mobile County was proper venue for this action because the Plaintiff lived there and the defendants do business there.

This opinion was further clarified in *Ex parte Volvo*, a case in which our firm represented the plaintiff.

EX PARTE VOLVO – 2006WL2790040 (Ala. Sept. 26, 2006)

On October 12, 2005, Joseph Freeman, Jr., who was employed by Evergreen Forest Products, was driving a 2004 Volvo tractor trailer. Although he was obeying the speed limit and operating his truck in a safe manner, an

oncoming pickup truck crossed over the centerline of the highway and struck Freeman's Volvo truck near the driver side front tire. As a result of the collision, and despite wearing his seatbelt, Freeman was ejected through the windshield onto the pavement. He survived at the scene, but later died.

Freeman's daughter filed suit against Volvo and the dealership who sold the truck in Montgomery County for a defective seatbelt. The defendants filed a motion to transfer the case to Butler County on the basis of forum non conveniens because the accident occurred there and because it would be more convenient to the witnesses. The trial court denied the motion and the defendants filed a petition of mandamus with the Supreme Court.

In analyzing the issues, the Supreme Court first noted that, in order to transfer the case to Butler County, Butler County must be a proper venue. Applying *Ex parte Suzuki*, the Court determined that Butler County was not a proper venue for the action because none of the wrongful acts of the corporate defendants in designing, manufacturing, and selling the truck and its defective seatbelt occurred there. The Court agreed with the Plaintiff and found that Montgomery County was the proper venue because the sale of the defective seatbelt occurred there.

Prior to these cases, it was generally understood that the location of where the injury occurred was a proper basis for establishing venue in the

county. The reasoning for this understanding was the plain language of Section 6-3-7 (a)(1) –“in the county in which a substantial part of the events or omissions giving rise to the claim occurred.” Parts of the “events” giving rise to “the claim” are the injury and the causation,i.e. the defect causing the injury. Without these, there is no claim. The injury and causation occurs where the accident happened. Nonetheless, these cases ignore these two fundamental elements of “the claim” and hold that it is the “wrongful acts of the corporate defendant” that determines venue under this statute.

As are result of these opinions, in cases that have been pending in courts for two or three years (even more), defendants are filing motions for change of venue citing these opinions as a change in the law to justify what otherwise would clearly be an untimely motion for change of venue. Courts, who have overseen discovery disputes, dispositive motions and other matters for years in a case, are now facing motions that assert the court was never the proper venue. These two opinions will have a significant impact on where cases can and will be filed. It would be wise to read these thoroughly.

STATUTE OF LIMITATIONS

In Cline v. Ashland, Inc., 2007 WL 30070 (Ala. 2007), a 5-4 “no opinion” opinion, the Alabama Supreme Court took away the right of a plaintiff suffering from leukemia to sue on an exposure case by holding the statute of limitations runs from the time the plaintiff was last exposed, not the time when the tort or injury is discovered.

Jack Cline suffered from leukemia caused by his exposure to a toxic substance. The named defendants were either manufacturers or suppliers of benzene products to Cline's employer for over 20 years. Cline was last exposed to benzene in 1987. However, he was not diagnosed with his leukemia until 1999. Cline filed his lawsuit in 2001, within two years of his diagnosis. However, the Supreme Court ruled that the statute of limitations had run because he did not file suit within two years of his last exposure to benzene, even though Cline did not become sick or injured until 1999.

The ruling here effectively eviscerated the right of most Alabama citizens to bring causes of action to our courts where the damages are the results of toxic chemical exposure. In effect, this puts a chill on discussions between the relationship between corporations' legal duties toward the people of Alabama and the right of individual Alabamians to protect themselves from the dangers of fatal chemical exposures.

Justice Harwood, joined by Justices Lyons, Woodall, and Parker, disagreed with the other five justices who voted for the defendant. They correctly felt that Mr. Cline's case should have been allowed to proceed. In his dissenting opinion, Justice Harwood articulates why the majority opinion is unfair and unworkable. Cline survived for over eight years with myelogenous leukemia, while waiting for justice in his lawsuit against the manufacturers of the benzene

products that caused his fatal illness. The statute of limitations enacted by the Alabama Legislature gave Jack two years within which to file his lawsuit after the cause of action accrued. The dissent noted that “the last exposure rule is purely a court-made rule” and that it was well within the Court’s role to “reexamine” the construction of the Garrett decision. The Court did not have to blame the Legislature for the injustice of the majority opinion because the Court did not have to wait upon the Legislature to make legislation when it was a “court made rule” that create it. In fact, the dissent’s opinion honored the public policy that the legislature had declared by “correctly construing the statutory language of “when a cause of action has accrued in accordance with the traditional principles of tort law.

MASTER/SERVANT – RESPONDEAT SUPERIOR

Ware v. Timmons, --- So.2d ----, 2006 WL 1195870 (Ala.2006)

As an attorney, I often see curious and sometimes contradictory rulings. Many times lawyers and even law students read conflicting opinions where a minority decision strongly disagrees with the majority. It is not often however that one finds a case where one of the justices of a court refers to the majority decision as passing strange.

In Ware, Justice See authored an opinion that reversed a \$13.7 million dollar jury verdict in a medical malpractice case. 17-year-old Brandi Timmons died after undergoing elective surgery to correct an overbite when Nurse Hayes,

while being watched by Dr. Ware, decided to remove the breathing tube that was used to counteract the effects of anesthetization. Brandi was disconnected from the equipment that monitored her vital signs and moved. Minutes after she was reconnected to monitoring equipment, she went into cardiac arrest. Brandi's brain suffered irreversible damage caused by events that occurred during her recovery from anesthesia. She later died as a result of the brain damage.

Brandi's mother sued Nurse Hayes; Dr. Ware; and Anesthesiology & Pain Medicine of Montgomery, P.C. for medical malpractice and wrongful death alleging that the treatment Nurse Hayes provided to Brandi during her postoperative recovery fell below the applicable standard of care. Invoking the doctrine of respondeat superior, Timmons alleged that both Dr. Ware, as Nurse Hayes's supervising anesthesiologist, and Anesthesiology & Pain Medicine of Montgomery, P.C., as Nurse Hayes's employer, were vicariously liable for Nurse Hayes's conduct. The defendants' appealed the \$13.7 million dollar trial court verdict.

See's opinion held that an anesthesiologist was not vicariously liable for negligent acts of a nurse anesthetist, as a co-employee. Despite finding that the only rational conclusion to be drawn from the evidence presented at trial was that Nurse Hayes was under the supervision and control of Dr. Ware, See required an additional element, never before included in any of the formulations by the Court of "the ultimate test" for determining loaned-servant status; that it be affirmatively proved that the special master had the right to select the person serving as the

loaned servant. There was a strong, scathing and lengthy dissent in this case by Harwood:

It is passing strange that a matter to which the majority now attaches determinative significance so completely escaped the attention of the defendants, so completely escaped the attention of this Court in all of its prior analyses of the elements of the loaned-servant doctrine, and so completely escaped the attention of this entire Court at oral argument that no Justice asked any question or offered any comment about it.

* * *

The majority opinion ignored the critical distinction between the relationship actually at issue in this case—that of directing anesthesiologist and directed CRNA, on the one hand, and the separate relationship of Dr. Ware and Nurse Hayes as co-employees of the professional corporation, on the other. Their relationship as co-employees is incidental, and totally irrelevant, to their specific relationship at issue in this case of supervising anesthesiologist and supervised CRNA. The majority ignores that fact, however, and elects to proceed on the assumption that it is the co-employee relationship that must be looked to in evaluating the loaned-servant issue.

II. EXPERT TESTIMONY OF ENGINEERS

Hunter v. Board of Water and Sewer Commissioners is significant because it affects the way both plaintiff and defense attorneys enlist experts in our army of witnesses. In this case, expert testimony was offered regarding engineering matters related to City of Mobile Board of Water and Sewer Commission activities. The plaintiffs proffered the testimony of Roger Hicks, an “engineer intern”, in support of their claims. Hicks was certified by the Licensure Board as an “engineer intern”, had 17 years of experience in sewer related matters, and was trained as an engineer. The Water Board opposed Hicks’ testimony and moved to strike it because Hicks was not a licensed “professional engineer.” The Water Board supported its argument by pointing out that “the

practice of engineering”, as set forth by Title 34, Chapter 11, Alabama Code 1975 (“the Licensure Act”), included “testimony.” Therefore, according to the Water Board, regardless of his experience, Hicks was not qualified to testify as to engineering matters because he needed to have an Alabama engineering license in order for him to present “testimony”. The trial court held that the use of the term “testimony” in §34-11-1(7) created an unconstitutionally vague statute. The Water Board appealed.

The Supreme Court reversed the trial court and determined that the Legislature’s Amendment to §34-11-1(7) superimposed the licensing requirement onto Rule 702 of the Alabama Rules of Evidence which governed the admissibility of expert testimony. The Court reasoned that, after the adoption of Act No. 97-683, Ala. Acts 1997, the trial court **“no longer had the discretion to allow testimony on engineering matters unless the witness was a licensed engineer in this State.”** Therefore, it held that any witness giving testimony regarding engineering matters that were contained within the definition of engineering under the Licensure Act must be a licensed engineer in the State of Alabama. Anyone giving testimony falling under that description who is not a licensed engineer commits a Class A misdemeanor under §34-11-15(a).

Hunter threatened to change the use of expert witness testimony statewide regarding engineering matters. It created new hurdles for expert testimony use in the State of Alabama. It suddenly became unclear if police officers could testify about vehicle speeds or if a Fire Marshal could testify about the cause of a fire since those determinations dealt with engineering principles.

Under Hunter, a witness could be renowned nationwide for his expertise in a certain area, but if he was not also licensed in the State of Alabama as an engineer, he could not testify in Alabama about engineering issues.

Recognizing the serious consequences this opinion had on numerous pending product and personal injury cases statewide (not to mention numerous criminal prosecutions where officers or fire marshals or like were going to testify), several attorneys, both trial lawyers and defense lawyers, petitioned the State of Alabama Board of Licensure for Professional Engineers and Land Surveyors Board to issue an Advisory Opinion clarifying the Hunter decision. On August 28th, 2006, the Licensure Board did just that. In its opinion, the Board stated that, as it relates to testimony, the “practice of engineering” is limited to “testimony” related to engineering activities in the State of Alabama, and that a person who is not licensed in engineering would not be prevented from testifying in Alabama about work or design performed outside of Alabama, such as the design of an automobile part or other product designed outside of the State of Alabama. The Board also stated that a person who is not licensed in engineering in Alabama, who is not holding themselves out as an engineer or testifying to engineering issues, would not be prevented from offering opposing testimony should the court declare the opposing expert otherwise qualified.

In an attempt to address the concerns of law enforcement agencies and the State Fire Marshal’s office, several categories of specialization were also set out by the Board that “may be adequately performed by persons that are not

educated, trained, or experienced in the engineering field, or licensed to practice in Alabama.”

Under the given definitions, the Board is of the opinion that the areas of ballistics, crime scene analysis, blood spatter analysis, vehicular accident investigation, human factors, biomedical/biomechanics, and fire investigations clearly do not require engineering education, training, and experience to be adequately performed, and the Board does not identify these areas as “engineering” within the definition given by the Alabama Legislature unless the proposed expert is claiming to base his or her analysis strictly on their engineering education and engineering experience.

Anyone with questions about the applicability of §34-11-1 to proffered testimony can request an advisory opinion from the State Board of Licensure for Professional Engineers and Land Surveyors regarding said testimony. Counsel may also request a determination from the presiding judge in any case regarding the applicability of the prohibition of engineering testimony to specific testimony offered. So long as the testimony is consistent with that permitted in the Board’s advisory opinion, it should be permitted. However, resolution of the problems created by Hunter is still not within our grasp.

After the Advisory Board Opinion was released, counsel for defendants and plaintiffs across the state began a campaign for clarification of Hunter’s implications on the daily practice of law. They employed several tactics with mixed results. Orders from various trial courts interpreted the ruling in different ways. Some courts allowed expert testimony after making determinations that the proffered testimony was not in violation of §34-11-1, while other courts declined to make that determination under the same facts and circumstances.

In a Dekalb County case, counsel for both parties requested the trial court prior to trial to determine if certain expert witnesses testifying in the case would be held in violation of §34-11-1 or not. Based on evidence presented regarding the testimony, the Court held that the prohibition against engineering testimony found in §34-11-1(7) was not applicable to the testimony as long as the testimony was consistent with that permitted in the advisory opinion.

In contrast a similar request was made in a Cleburne County case. Defendants requested that the Court declare that certain expert witnesses testifying in the case would not be held in violation of §34-11-1 or §34-11-14 in light of the recent advisory opinion. The Court responded to that request with a powerful order detailing the controversy before the Court, and the Court's view on that controversy.

As much as the Court would like to accommodate the request, it is axiomatic that a court cannot, absent proper controversy before it, opine, advise or declare as to the nature and extent of a statute, especially one that carries criminal sanctions. Additionally this Court has serious reservations as to whether the State Licensure Board has like legal authority. It, the Court assumes, cannot immunize anyone from prosecution even though the possibility of such would be remote at best.

The legal system of Alabama has been served up with a controversy not of its own making that has the potential of bringing certain litigation in this state to an abrupt halt. How the controversy is resolved is yet to be fully seen.

The Court would suggest that any expert whose testimony appears to fall within the definition of engineering simply apply for temporary licensure in Alabama. If the application is rejected as not warranted, then the witness has done all he or she could do to comply with Alabama law; if issued, there is no question remaining. This Court is in the business of initially determining or passing upon the *bona fides* of an expert witness's testimony and not whether he/she is violating some ridiculous definition assigned to the definition of "engineering" by the Alabama Legislature clearly to

protect the professional turf of its own citizen-engineers from “outsiders”.

How the Hunter controversy will be resolved is yet to be seen.

III. ARBITRATION

The Alabama Supreme Court has handed down a very important arbitration decision recently in a nursing home case, *Noland Health Services, Inc. v. Wright*. . The case of Peter Wright, suing as the Administrator of the Estate of Dorothy Willis, against Noland Health Services, was decided last month by the high court. In that case, the court ruled that an arbitration provision in a nursing home admission contract is invalid where the actual resident or a "legally appointed" representative of the resident didn't sign the admission agreement. As lawyers who handle nursing home cases know full well that circumstance is quite common in nursing home admissions. The very last place where arbitration should be forced on a person or a family is in a nursing home setting.

In March 2004, Dorothy Willis, an elderly woman afflicted with dementia, was admitted, pursuant to a written agreement, to a nursing home owned by Noland. The agreement defined the terms “legal representative” and “responsible party” and contained an arbitration provision. Her daughter-in-law, Vicky Willis, signed for Dorothy as her “responsible party.” During her stay, Dorothy fell twice and eventually died. Before then, Dorothy filed suit along with Vicky as her “next friend.” So after her death, Noland moved to force arbitration, but the administrator of Dorothy's estate, Peter Wright, amended the complaint from the

original suit to include wrongful death. The trial court denied Noland's motion and the decision was affirmed on appeal.

Wright's winning argument against Noland's motion was that although Vicky acted as Dorothy's responsible party, her signature was ineffective to bind Dorothy to the agreement. The Court recognized that Vicky did not sign Dorothy's name in any purported capacity. One of the applicable rules here is that "one who purports to act merely as a 'next friend' of an incompetent is wholly without authority to make any contract that would bind her or her estate." The Court also noted that Noland provided no cases to support its position that a nonsignatory personal representative is bound to arbitrate a medical malpractice action over injuries and wrongful death of a nonsignatory decedent.

The majority opinion recognized the reality of elderly folks in nursing homes. A person seeking admission to a nursing home is usually in no condition to make a determination of whether to sign a forced arbitration agreement. Actually, in most cases, the arbitration clause is never even mentioned to the resident or the family by the nursing home. Hopefully, this decision sets a trend on arbitration, not only in nursing home cases, but in consumer transactions generally.

IV. RECENT SUBROGATION DECISION FROM THE ALABAMA SUPREME COURT

Trott V. Brinks Inc., No 1050895 (Ala. May 4, 2007)

On a certified question from the United States District Court for the Northern District of Alabama, the Alabama Supreme Court ruled in a recent decision that the worker's compensation carrier for an employer is not entitled to

reimbursement from the third party tortfeasor for medicals paid on behalf of employee who later died. In Trott, Ronald Trott worked for Brinks, Inc. While riding in the back of a Brinks armored truck, the truck rolled over and Trott was severely injured. He survived for over a month, but ultimately died as a result of injuries in the accident. His wife filed a wrongful death suit against the manufacturer of the seatbelt that was in the armored truck. The widow alleged that her husband was wearing the seatbelt at the time of the accident but it unlatched during the rollover causing his death.

While Trott was alive, his worker comp carrier paid his medical bills which totaled \$415,098. The carrier intervened in the wrongful death suit asserting that it was entitled to subrogation on any recovery by the plaintiff in the action. The plaintiff obviously objected and argued that subrogation is not allowed in a wrongful death action where the sole recovery is punitive damages. The federal court certified the question to the Alabama Supreme Court.

The Court found in favor of the plaintiff in holding that the workers comp. carrier was not entitled to subrogation on any recovery under the wrongful death statute. The Court reasoned that Ala. Code 25-5-11 speaks of the employer's (including the insurer of the employer) right to "subrogation," and because subrogation is equitable, the rights available to the subrogee are no greater than that possessed by the subrogor (the employee). Since the action is in wrongful death, only punitive damages are recoverable. Thus, the subrogor (the employee or his estate) may not recover medical benefits at all. As a result,

medical benefits are not the subject of “subrogation” under the worker comp statute. This is a very good opinion.