TORT LAW UPDATE

MONTGOMERY COUNTY BAR ASSOCIATION
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I. INTRODUCTION

1999 was an interesting year for tort law. Of course, the biggest and most notable thing that occurred in the legal world was the passage of the 1999 Tort Reform Package. The tort reform bills not only placed caps on punitive damages for some types of cases, but it also changed venue and class action laws. While the Governor and the Legislature was tackling the tort reform, our Supreme Court was busily addressing other issues from medical malpractice to anti-trust. They even ventured into the area of mental anguish damages. This paper simply seeks to summarize a few of the more noteworthy cases issued in 1999, as well as, to briefly recap the new tort reform bills.

A. EVIDENCE – MEDICAL MALPRACTICE

1. *Gipson v. Younes,* 724 So. 2d 530 (Ala.Civ.App. 1998).

Patricia Gipson, the plaintiff, was injured at work. She consulted Dr. Henry Younes for pain management. Dr. Younes performed a surgical block on her which resulted in a permanent spinal cord injury and partial paralysis. The plaintiff sued the defendant alleging medical malpractice. The case went to trial and the jury returned a verdict in favor of Dr. Younes. The plaintiff appealed arguing that the trial court erred by granting the defendant's motion in limine and excluding evidence indicating that Dr. Younes had twice failed the Medical Board Certification exams for the medical specialty of anesthesiology and pain management. The trial court ruled that, under Rule 403 of the Alabama Rules of Evidence, the prejudicial value far outweighed the probative value.

On appeal, the Court of Civil Appeals found that the physician's failing of the board certification test was irrelevant to the issues of his negligence in the medical malpractice. However, Dr. Younes had also testified as an expert in the case. The court stated that when a physician

testifies as an expert, the fact that he has failed a board certification exam is relevant to his credibility as an expert. Nonetheless, the Court of Civil Appeals affirmed the trial court's ruling reaffirming the principle that the trial judge has "substantial discretion" as to questions a party is allowed to ask of an expert witness. "The scope and extent of cross-examination is vested in the trial court's sound discretion, and this court will not reverse on the basis of the trial court's rulings regarding cross-examination unless an abuse of discretion has occurred." When reviewing a Rule 403 determination, an appellate court's task is not to reweigh the prejudicial and probative elements of the evidence, but rather to determine the trial court clearly abused its discretion in excluding the evidence. Accordingly, the court held that the trial court had not abused its discretion in disallowing the evidence that the defendant failed his board certified exams.

2. *Ex parte Dr. Andrew Burch,* 730 So. 2d 143 (Ala. 1999).

The plaintiff filed a wrongful death action against Dr. Andrew Burch and Springfield Memorial Hospital for the death of his son. In this Petition for Writ of Mandamus, Dr. Burch sought a review of the trial court's motion in limine which would have allowed the chairman of the hospital's surgical review committee to testify as to statements Dr. Burch made to that committee about the plaintiff's son's death which were inconsistent with Dr. Burch's deposition in the medical malpractice action. What is interesting about this case is that it was the co-defendant hospital which sought to introduce the evidence, not the plaintiff.

During the course of discovery, the litigation strategy of the hospital and that of Dr. Burch diverged. The hospital and Dr. Burch had different views about what information on the patient's status was communicated to Dr. Burch by hospital personnel during the morning of the day the patient died. There was also disagreement as to when Dr. Burch decided surgery was needed. As a result, the hospital indicated to the trial court that it was going to call members of the review committee, which had convened a couple of weeks after the death for the purpose of reviewing and

evaluating Dr. Burch's performance in the case of the deceased patient. Dr. Burch apparently appeared before that committee and discussed reasons for making the decisions he made in the course of treatment.

In the medical malpractice action, once the hospital made known its intent to call as a witness the chairman of that review committee, Dr. Burch immediately sought a motion in limine under § 22-21-8, Alabama's Peer Review statute, which prevents certain types of evidence from being introduced at trial that was the subject of a hospital internal review and quality assurance procedures. The trial court was going to prevent the hospital from entering into evidence any minutes from that surgical review committee meeting, however, it was going to allow the hospital to call Dr. Spires, the chairman of that committee, to testify as to statements made by Dr. Burch at that meeting which were inconsistent with his deposition. Dr. Burch immediately filed a petition for writ of mandamus on the trial court's order.

The Alabama Supreme Court granted Dr. Burch's petition for writ of mandamus, upholding the privilege granted by § 22-21-8. The Supreme Court noted that the express language of the statute was unambiguous and clearly protected from discovery any information obtained from Dr. Burch during the committee meeting. The court rejected the hospital's argument that evidence of prior inconsistent statements was admissible under Rules of Evidence 103 and 613, notwithstanding any privilege created by § 22-21-8. The Supreme Court noted that if Dr. Spires had participated in the care of the patient or if he had independent knowledge of the events leading to the patient's death, this code section would not prohibit him from testifying on the basis of his own independent knowledge. However, since Dr. Spires had no independent knowledge or information other than what he heard at the peer review committee meeting, then his testimony would not be admissible under § 22-21-8. Thus, the court granted the petition for mandamus.

3. *Ex parte Pfizer,* 1999, WL 357415 (Ala. June 4, 1999).

In this case, the defendant, Pfizer, petitioned for a writ of mandamus requesting the court to vacate two rulings the trial court made denying discovery which was sought by Pfizer. The plaintiff was a minor who had a circumcision performed on him by Dr. Thomas at the Atmore Community Hospital. The medical device used by Dr. Thomas in performing the circumcision was manufactured by the defendant Pfizer. After the procedure was performed, infection set in and the plaintiff subsequently had three-fourths of his penis removed. The minor then filed suit against Dr. Thomas and Atmore Community Hospital, alleging medical malpractice and against Pfizer alleging products liability claims.

During the course of discovery, Pfizer sought to discover evidence of other similar acts or omissions by Dr. Thomas. The hospital and the physician objected arguing that Alabama's Medical Liability Act prohibited discovery of these materials. The trial court denied Pfizer's discovery requests.

The Alabama Supreme Court granted Pfizer's petition for writ of mandamus, noting that under § 6-5-551, a plaintiff was prohibited from conducting discovery with regard to any act or omission. However, because it was not the plaintiff, but a co-defendant seeking discovery of this information, the court held that § 6-5-551 was inapplicable and the records sought were discoverable.

4. Ex *parte McCollough,* 1999 WL 6946 (Ala. January 8, 1999).

The administratrix of the decedent's estate brought a medical liability action against the Dalraida Nursing Home. In her complaint, the plaintiff alleged that the death of her grandmother was caused by wrongful conduct on the part of the defendant nursing home and the administrator of the nursing home. The complaint not only alleged wrongful death, but also contained counts for negligent and wanton hiring, training, supervision and monitoring of the nursing care personnel. In her discovery to the nursing home, the plaintiff sought previous and subsequent incidents that were

substantially similar to the incident made the basis of lawsuit. The trial court granted the nursing home's protective order and the plaintiff filed a petition for writ of mandamus.

At issue again was § 6-5-551 of the Alabama Medical Liability Act which purportedly prohibited the plaintiff from conducting discovery regarding "any other act or omission or from introducing at trial evidence of any other act or omission." In its analysis of this statute, the Supreme Court noted that the discovery sought by the plaintiff was not "pattern and practice evidence," but was instead sought for "the sake of showing negligence, wantonness, willfulness, or breach of contractual duty to provide adequate care by Dalraida Health Center in its hiring, training, staffing, etc., which negligence, wantonness, willfulness, or breach, the plaintiff alleges proximately caused the death of her grandmother." The court stated that, in order to prove a negligent and wanton hiring, training, supervision and staffing case, the plaintiff would have to prove facts that gave the defendant notice or knowledge of the inadequacies of its procedures and its staffing. "Our point is that the notice or knowledge of incompetence that is an element of negligent entrustment is similar to the allegations of Dalraida's notice or knowledge of the alleged incompetence of its staff, or of the inadequacy of its own safeguards, which allegations form an element of some of Ms. McCollough's claims." The court held that the degree of culpability of the nursing home's conduct would be directly related to the number of similar incidents, because a large number of similar incident that can be traced to the alleged "systematic failure" would tend to show wanton or even willful disregard for the safety of the persons entrusted to the defendant's care. Thus, the requested discovery is directly relevant to the wrongs alleged in the plaintiff's complaint. Therefore, the court held that the discovery request were discoverable within the terms of § 6-5-551.

B. COMMERCIAL LITIGATION – ANTITRUST LAWS

1. *Abbott Laboratories v. Durrett,* 1999 WL 424338 (Ala. June 25, 1999).

Owners of independent drug stores brought anti-trust actions against drug manufacturers, drug wholesalers, HMO's, and mail order companies alleging that they entered into a conspiracy to control the price of brand name prescription drugs that were shipped from companies out of state into Alabama. Specifically, the plaintiffs, individual owners of independent drug stores in Greene and Dallas counties, filed this action on behalf of themselves and seeking to represent a class consisting of similarly situated independent retail pharmacists in Alabama who purchased brand name prescription drugs from the defendant manufacturers and defendant wholesalers at illegally high prices dictated by the discriminatory pricing scheme set by the defendant manufacturers. The plaintiffs allege that they were injured as a result of the conspiracy by being forced to pay the manufacturers and the wholesalers more for the drugs than was paid to those companies by the mail order companies and the HMOs, which are alleged to have been "favored purchasers" and an integral part of the price-fixing scheme.

The issue on appeal was whether Alabama Code § 6-5-60, which is Alabama's Antitrust Statute, provided a cause of action for damages where the alleged transactions involved interstate commerce, as opposed to intrastate commerce. The Supreme Court concluded that Alabama's Antitrust Statutes were inapplicable where the transaction at issue involved interstate commerce. The court held that Alabama's antitrust statute "regulate monopolistic activities that occur within this state—within the geographic boundaries—even if such activities fall within the scope of the commerce clause of the Constitution of the United States." The court discussed the complete history of Alabama's antitrust statute. It noted that Alabama's antitrust statutes were enacted at a time when Congress deemed to have exclusive authority to regulate interstate commerce and when a federal antitrust statute was already in effect. The court also noted that the original wording of the statues repeatedly included references to "within the state" and that Alabama appellate courts have consistently interpreted the statute to govern only intrastate commerce. Therefore, since the

plaintiff's claims involved interstate commerce, there was no cause of action under § 6-5-60. See also, ***Archer Daniels Midland Co. v. 7-Up Bottling Co. of Jasper, Inc.***, 1999 WL 424336 (Ala. June 25, 1999). This is the companion case to ***Abbott Laboratories***.

C. SET-OFF

1. *Goldsen v. Simpson*, No. 2980326 (Ala.Civ.App. December 10, 1999).

Simpson was injured in a three-car collision when a vehicle driven by Goldsen struck a vehicle being driven by a third party. The third party vehicle then struck the Simpson's vehicle. Simpson settled her claim against the third party for $20,000, which represented the policy limits. Simpson then sued Goldsen alleging negligence and wantonness.

At trial, the jury returned a verdict finding that the third party was not negligent. The jury further found that Goldsen was negligent and awarded damages in the amount of approximately $76,000 to Simpson. In his post-trial motion, Goldsen sought to set off the $20,000 settlement with the third party against the $76,000 jury verdict. The trial court denied the motion and Goldsen appealed.

Goldsen argued that he should be entitled to set off the amount of settlement with the third party against the verdict because, if he is not allowed to do this, Simpson will recover more money than the jury determined was the full extent of her injuries. Simpson, on the other hand, argued that the jury verdict exonerating the third party from any liability established that the third party was not a joint tort feasor with Goldsen and, therefore, Goldsen was not entitled to deduct the settlement amount. The court found that this was a case of first impression in Alabama. It then goes through an exhaustive review of the law of other states and found that there was a split of authority among the jurisdictions. The majority view was that the amount of settlement should be credited against the jury verdict. However, the court held that "after weighing the legal arguments and policy considerations on each side of the issue, we conclude that the minority rule disallowing a set-off is

the better reasoned position." The court stated that it was "preferable to award the plaintiff for successful negotiation of her claim rather than to benefit the only party found liable for the plaintiff's injuries."

D. DAMAGES—MENTAL ANGUISH

1. *Daniels v. East Alabama Paving Co.*, 1999 WL 357410 (Ala. June 4, 1999).

This case arose out of a single vehicle accident that occurred on Interstate 85 in Macon County. It involved ten members of the Daniels family. At the time of the accident, Interstate 85 was being resurfaced. The driver of the Daniels vehicle lost control of the car, which resulted in the death of three-year old Stephanie and various injuries to the remaining family members. The plaintiff sued EAPI, which was the contractor in charge of resurfacing the highway, for negligence and wantonness in creating a dangerous and hazardous condition. At trial, the trial court entered a judgment as a matter of law on the wantonness counts and submitted the wrongful death claim and the negligence counts to the jury. The jury returned $5 million on the wrongful death count, and awarded seven of the plaintiff's compensatory damages that greatly exceeded their actual medical expenses. On post-trial motions, the trial court ordered remittitur on all of the awards. Although the trial court expressly found that the verdict was not the result of bias or prejudice, it nonetheless determined that the verdicts were shockingly excessive and must be reduced and ordered remittitur against the plaintiffs.

On appeal, the Supreme Court noted that the verdict clearly included amounts for emotional distress resulting from the death of the three-year old. In overturning the trial court's remittitur, the court reasoned that:

> In the absence of a flawed verdict, however, a comparison of jury verdicts in similar cases is not the standard for determining whether a jury verdict should be reduced. The trial court must first determine that the verdict is flawed. . . . A review of a jury

> verdict for compensatory damages on the ground of excessiveness must focus on the plaintiff (as victim) and asks what the evidence supports in terms of the damages suffered by the plaintiff. In the absence of a flawed verdict, there is no statutory authority to invade the providence of the jury in awarding compensatory damages . . . . This court has long held that there is no fixed standard for ascertainment of compensatory damages recoverable . . . for physical pain and mental suffering and that the amount of such an award is left to the sound discretion of the jury, subject only to correction by the court for clear abuse or passionate exercise of that discretion.

The court emphasized the fact that the Daniels were more than mere bystanders, they were persons who were either physically injured or were within the "zone of danger" of the risk of injury. The court found that the plaintiffs were the category of persons entitled to recover damages for negligently inflicted mental anguish. The court also reiterated that the ***Hammond/Green Oil*** factors were not appropriate for the review of an award of compensatory damages for excessiveness, but only applied to punitive damages. In reviewing compensatory damages, the focus should be on whether the plaintiff had been properly compensated. Thus, the Supreme Court reversed the trial court's order on remittiturs and remanded the case for entry of judgment based on the original jury awards.

2. *Alabama Power Co. v. Murray*, 1999 WL 588279 (Ala. August 6, 1999).

In this case, the plaintiffs, Mr. and Mrs. Murray, sued Alabama Power alleging that the defendant had negligently caused a surge of electrical power from the transmission lines to come into the electrical circuitry of the plaintiff's home and caused a fire that destroyed their home. Although the Murrays claimed no physical injury as a result of the alleged negligence by the defendant, they claim to have suffered mental anguish and property loss which totaled approximately $36,000. The jury returned a $150,000 verdict for each plaintiff. The defendant appealed.

The Supreme Court upheld the verdict reiterating the long-standing law that allows recovery for damage or harm resulting from the negligent infliction of emotional distress. In analyzing the

emotional distress suffered by the Murrays, the Supreme Court noted that the plaintiffs awoke to find their home on fire and had to escape through thick smoke and soot. After leaving their home, the plaintiffs stood in the street with very little clothing on and watched everything burn. Therefore, since the Murrays were inside the "zone of danger," they were entitled to recover mental anguish.

However, the court noted that Mr. Murray's mental distress did not indicate his mental anguish was as severe as his wife's mental anguish. Therefore, the court affirmed the judgment as to Mrs. Murray's award of $150,000 but ordered a remittitur of Mr. Murray's award to the amount of $84,000. The court rejected the defendant's contention that corresponding physical injury was necessary to allow recovery of compensatory damages for emotional distress in a negligence action.

3. *White Consolidated Industries v. Wilkerson*, 1999 WL 236498 (Ala. April 23, 1999).

This case is factually similar to ***Murray***. After a fire destroyed their house, the plaintiff sued the manufacturer of an air conditioning unit which allegedly caused the fire. The difference between this case and ***Murray*** is that the plaintiffs here were away from their home at the time of the fire and never sustained any physical injuries. The Supreme Court held that a breach of duty under the Extended Manufacturer's Liability Doctrine does not allow recovery for damages for mental anguish where the failure to design and manufacture a reasonably safe product has caused no physical injury. The court further ruled that the plaintiffs were outside the "zone of danger" when their house burned, and therefore, the trial court had erred when it allowed the jury to consider the plaintiffs' claim of damages for mental anguish.

4. *Delchamps v. Bryant*, 1999 WL 236499 (Ala., April 23, 1999).

In this case, the plaintiff sued Delchamps for malicious prosecution after the store continued to seek prosecution of the plaintiff even after Delchamps learned the plaintiff had an alibi, i.e., he was in jail in Bullock Count on the day the shoplifting allegedly occurred. A jury returned a verdict in favor of the plaintiff for $400,000—which was all compensatory damages. The plaintiff did not

seek punitive damages. Delchamps appealed. Among other issues raised, Delchamps argued that the damage award was excessive, not supported by the evidence, and should be remitted.

The plaintiff's mental anguish evidence consisted of having to pay attorneys' fees, he was placed under arrest and jailed, he had to tell his probation officer (obviously he was worried about how it would affect his probation status), he was facing a minimum of 10 years in jail if convicted, and he was humiliated. Plaintiff argued that this was more than sufficient evidence to justify the verdict.

The Supreme Court held that despite this evidence, the plaintiff presented no evidence of the gravity of his mental anguish. The plaintiff only testified that it had been "hard" and he was "humiliated." The Court found that the plaintiff failed to testify in "significant detail" about his mental anguish. The Court also noted that the plaintiff's anguish was of limited duration and was not the type of anguish that would last for years, such as the loss of a loved one. The Court stated that it gives "stricter scrutiny" to mental anguish awards where the victim has offered little or no evidence concerning the degree of anguish that was suffered. Accordingly, the Court reduced the award from $400,000 to $100,000.

E. 1999 TORT REFORM PACKAGE

As you know, the Alabama Legislature and the Governor passed three bills which have commonly been referred to as the "tort reform package." These three bills affect the areas of venue, class actions, and caps on punitive damages. What follows is a brief synopsis of these bills:

1. **Venue--**Section 6-3-7 now provides that venue in civil actions is appropriate in the following forums: (1) the county in which the incident occurred; (2) in the county of the corporation's principal office in the state; or (3) in the county in which the plaintiff resided at the time of the incident if such corporation does business by agent in the county of the plaintiff's residence; or (4) if subdivisions 1, 2, or 3, do not apply, in any county in which the

corporation was doing business by agent at the time of the accrual of the cause of the action.

2. **Class Actions—**Section 6-5-640 through section 6-5-642 codifies the new rules on class actions. These sections basically eliminate immediate certification of class actions by setting up a procedure of appeals from either a certification or decertification order. In essence, the bills codify much of the language and practice established through Supreme Court opinions over the past few years.

3. **Punitive Damages Caps—**Section 6-11-21 establishes the caps on punitive damages for various actions. This section applies to all civil actions except wrongful death. For actions not involving physical injury, the statute establishes a cap on punitive damages of three times compensatory damages or $500,000, whichever is greater. A small business exception, defined as a business with net worth of less than $2 million, caps punitive damages at $50,000 or 10% of the net worth of the company, whichever is greater.

   For an action involving physical injury, the statute establishes a cap on punitive damages at three times compensatory damages or $1.5 million, whichever is greater. The bill does not contain any elimination of damages for mental anguish and no aggregate cap for multiple plaintiffs. Further, the caps reflected in this bill will be adjusted every three years at the annual rate of the consumer price index. A jury may also not be instructed nor informed of the applicable caps on its case. This section also does not apply to class actions.

(For your convenience, I have attached copies of the new statutes contained in the 1999 tort reform package.)