

**NUTS AND BOLTS
OF A
WHEELS CASE**

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INTRODUCTION

This paper does not purport to be an all encompassing paper on preparing a wheels case for trial, but is a limited overview of issues you may come across during the course of litigating a wheels case that you may find useful in your practice.

CLIENT INTERVIEW

Probably one of the most important tasks a lawyer should do himself is to interview the Plaintiff in a personal injury case. These should not be delegated to a secretary or legal assistant. The lawyer who would be handling the case should do a thorough job of obtaining the essential information. This is an opportunity for your client to tell his complete story and not the abbreviated edition he or she told the police officer at the scene or the insurance adjuster whom he/she may have spoken to by telephone. This is your opportunity to ask those crucial questions which need to be asked prior to taking the case and to discuss any possible defenses or problems with your client.

INVESTIGATION

This is very crucial, because usually by the time the client comes to see you, the insurance adjuster has already spoken to your client, witnesses, taken photographs, and been to the scene where the wreck occurred trying to find anything else that is of importance.

It is so important to tie down the witnesses' story as early as possible and record their statements.

This can be done a number of ways: lawyer, investigator, or by court reporter. You should be taking photographs of the scene where the wreck occurred and photographs of the automobiles involved.

Also, you may want to videotape the scene or do a videotape to recreate what happened. You should meet with the law enforcement officer at the scene if possible. Get him to explain what he did in his investigation of the wreck and where he found evidence, debris or other evidence.

Also, check with the investigating officer to see if he has any field notes. Sometimes the information is on the officer's field notes that are not reflected on the Uniform Traffic Accident Report.

POTENTIAL DEFENDANTS

1. County Government

- A. Section 6-5-20 – presentment of claim – plaintiff has twelve months from the date of accrual to file or present his claim. Healthcare Authority vs. Madison County, 601 S.2d. 459 (Ala.1992).
- B. County Sheriffs and Deputies – 11th Amendment of the Constitution prohibits suits for damages against Alabama Sheriffs and Deputies (1992 ND Ala.). Sanders vs. Miller, 837 F. Supp. 1106.

County Sheriffs and Deputies are immune from the suits in their official capacity as constitutional officers, See Wright vs. Bailey , 611 So.2d. 300 (Ala. 1992) and Drain vs. Odom , 631 So.2d 971 (Ala. 1994), Deputy Sheriff alter ego of Sheriff.

CITY MUNICIPALITIES

- A. Section 11-47-23 – Presentment of Tort Claims Within Six Months from Date of Accrual.
- B. Section 11-47-192 – Requires a Filing of a Sworn Statement Setting Forth Factual Basis and Itemization of Damages.
- C. Section 11-47-190 – The Standard of Conduct for Municipality.
- D. Section 11-93-2 – Damage Cap of \$100,000.00 Per Person Per Occurrence for a total of \$300,000.00 aggregate. There is an exception you plead a 42 U.S.C. 1983 Claim you are not bound by these limits. See Patrick vs. City of Florala (1992 MD. Ala.) 793 F. Supp. 301.

COMMON CARRIER

Truck cases – 49 U.S.C. 14102(a)(4) creates an irrebuttable presumption that the lessee is an employer of the lessor. The statute was created to avoid the liability issue where truck companies would lease out to “independent contractors”. See Portugal vs. Colonial Refrigerator Transportation, 494 F.2d. 89(1974, CA 4 SC) and Ryder vs. UTF Carriers, 719 F.Supp. 4055 (1989 WD. VA.)

UNINSURED MOTORIST CASES

- 1. Always give written notice to the carrier immediately if there is a potential claim under the uninsured/underinsured motorist provision of the policy.
- 2. UM Carrier opts out-

- A. a tort-feasor can file a motion to tax costs against the UM carrier;
- B. add the UM carrier as a real party in interests since they have paid the tort feasons limits. See Rule 17, Alabama Rules of Civil Procedure;
- C. Death of a tort-feasor has UM carrier filed a notice of claim against the tort-feasor's estate? Six months claim statute.

DEATH CASES

The wrongful death action for adult is under Section 6-5-410 – and for minors Section 6-5-390.

When the wrongful death involves the adult, usually the executor or administrator is a proper party to bring the action. When there is no spouse of the deceased, look to S43-8-42, Code of Alabama for the party to bring the action.

In the death of a minor, usually one of the parents has the right to bring the action. Either parent may join the other's action. (See Lee vs. Lee, 535 So. 2d 145 (Ala. 1988). If neither parent does not commence action within six months, then action may be commenced by personal representative. Ex parte Jordan, 592 So.2d 579 (Ala. 1992).

If the deceased happens to die in the line and scope of his employment, the action may be brought by the dependent(s), see Section 25-5-11. There are total dependents, 25-5-62 and there are partial dependents Section 25-5-64.

DAMAGES

Injury and death. The death of an injured Plaintiff does not abate his injury claim, will still have an injury claim as long as the personal injury action was filed prior to the

time of the Plaintiff's death. King vs. National Spa and Pool Institute , 607 So. 2d 1241 (Ala. 1992).

DISCOVERY

Since Alabama has adopted the Federal Rules of Civil Procedure, under Rule 26(b)(2), Plaintiff is now allowed to discover the insurance policy limits of the Defendant.

BURDEN OF PROOF

Ex parte Perry Gradford 1997 WL 187118 (Ala) (4-18-97).

The substantial evidence rule pertains only to "rulings by the Court" on the sufficiency of the evidence as presented by motions for summary judgment and motions or judgments as a matter of law.

A question of law is for the Court to decide; the Court answers those questions when it rules on the Defendant's Motion for directed verdict at the close of all the evidence.

In that opinion, Justice Almon says the substantial evidence rule has no place in jury deliberation because the charge has a tendency to mislead and confuse the jury. The jury might well understand "substantial evidence" to mean "more than a preponderance of the evidence".

The Court also found that the jury instruction on wantonness was in error when the Court charged that the jury had to find the Plaintiff had presented clear and convincing evidence.

The Court went on to say the "clear and convincing evidence" standard was only to an award of punitive damages.

SUBROGATION

A. Powell vs., Blue Cross and Blue Shield of Alabama , 581 So.2d 777 (Ala. 1992).

B. ERISA

- 1) Insurance Plan – adopt Powell ruling;
- 2) Self-funded Plan

The question becomes what law should the Court adopt as the federal common law. The majority common law rule precludes an insurer from exercising a right of reimbursement until the insured's entire loss has been paid. Sanders vs. Scheideler, 816 F.Supp. 1338, 1346 (W.D.Wis. 1993). Sargeant vs. Int'l Union of Operating Eng's , 746 F. Supp. 241 (D.Conn. 1990); Murzyn vs. Amoco Corp., 925 F.Supp.594 (N.D. Ind. 1995); Barnes vs. Ind. Auto Dealers, 64 F. 3d 1389, 1395 (9th Cir. 1995). These Courts have accepted the make whole doctrine as the federal common law. This is generally the accepted rule in the absence of a clear contract provision to the contrary. That rule is supported by substantial authority and it is consistent with ERISA's purpose of protected participants in the employee benefit plans. Also, see Marshall vs. Employers Health Ins. Co., 927 F.Supp. 1068, 1074 (M.D. Tenn. 1996).

There is a split of decisions among the district courts, and I could not find an 11th Circuit or Alabama District Court case that has adopted the Powell ruling, as federal common law.

I have in the past convinced healthcare providers under the ERISA plans to reduce the amount of their subrogation lien based on the fact that I believe I

had a strong argument for the Court to adopt the Powell decision as the federal common law.

- C. Section 27-21A-30(b) – allows HMO statutory cause of action against tortfeasor, not Plaintiff. Dees vs. Primehealth, 894 F.Supp. 1549 (S.D. Ala. 1995). Magistrate Steel found the Powell method to determine if Plaintiff was “made-whole”, that scheme would “frustrate plan administrator’s continuing obligation to calculate uniform benefits levels nationwide.”
- D. C.H.A.M.P.U.S. (Civil Health Medical Program of Uniform Service), the Federal Medical Recovery Act, 42 U.S.C.2651(a) states: “...The U.S. shall have the right to recover from a third party’s, the reasonable value of care and treatment.

The three methods of recovery are:

- A. Subrogation;
- B. Intervention; or,
- C. Independent Action.

Palmer vs. Sterling Drug, Inc., (1972 E.D.P.A.) 343 F.Supp. 692; Thomas vs. Shelton, 740 F.2d 478 (7th Cir. 1984).

The U.S. Government has no right of subrogation for uninsured or underinsured benefits. Geico vs. Andujar, (1991, D.C. Kan.) 773 F.Supp. 282.

- E. Medicaid, s22-6-6, Code of Alabama (1975).

If you have a Medicaid lien, that lien can be reduced by equitable principles, pursuant to Powell decision; Smith vs. Alabama Medicaid Agency, 461 So. 2d 817 (Ala.Civ.App.1984).

F. Medicare – 42 U.S.C. 1395Y(2)(B) ii. This section gives the...”United States’ right to bring an independent action against any entity...” 42 U.S.C. 1395Y(2)(b)iii – subrogation - ...”the U.S. shall be subrogated...”

Claim by the United States for reimbursement is paramount to all other claims. Casualty Reciprocal Exchange vs. Johnson (1992 ED. LA) CCH Medicare – Medicaid Guide, Section 40955.

The U.S. is not always entitled to full recovery (pro rata share) see Waters vs. Farmer’s Texas County Mutual Insurance Company (1993 S.D. Tex.) MMRR Section 53.

G. Workmen’s Compensation Carrier – they have no right of subrogation against uninsured or underinsured benefits. H&H Wood vs. Monticello, 668 So. 2d 38 (Ala. 1993).

FEDERAL TORT CLAIM ACT (FTCA)

1. File Form 95 – Limited to the amount you claim in the form 95 presented to the proper agency. The agency or government has six months to respond to your claim before you can file an action in the U.S. District Court.
2. FTCA claims are non-jury;
3. Attorney fees are 20% if settled at the administrative level and the maximum of 25% after the complaint has been filed.

BANKRUPTCY

If you have a Defendant who files bankruptcy after you have filed your lawsuit, and that Defendant has insurance proceeds which could pay or satisfy any judgment against the Defendant. File a motion to lift any stay under Section 11 U.S.C. 362.

This can be done by you, or you may have to hire a lawyer in the area where the bankruptcy petition is pending. You need to check the local rules in that particular district.

I have fought a good fight, I have finished my course, I

Have kept the faith. II Timothy 4:7