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2006 CIVIL LAW UPDATE

I realize this is a "Civil Law" update. But, there have been a few developments that apply generally to all lawyers that I would like to discuss and that I think are important.

A. CHANGES IN THE LAW THAT INDIRECTLY EFFECT THE CIVIL PRACTICE

I. Alabama now has a reciprocity rule.

On September 13, 2006, the Alabama Supreme Court entered an order amending Rule III of the Alabama Rules Governing Admission. This rule was proposed to the Court by the Board of Bar Commissioners last spring. The rule essentially provides that any lawyer who has actively practiced five of the previous six years and becomes a current resident of Alabama or certifies his intention to maintain an office for the primary practice of law in Alabama, may be admitted without examination so long as the state in which the applicant is licensed grants similar privileges to applicants from Alabama. As a side note, Justice Parker dissented from the Supreme Court's order approving the rule change, without opinion.

II. The Alabama State Bar now requires in-house counsel for corporations to Register with the State Bar, and pay fees.

Under the new rule change, an In-House Counsel is someone who works for a corporate entity and is licensed to practice in another state but not licensed to practice law in the state of Alabama. The in-house counsel must register with the Alabama State Bar and pay the same fees as other members of the Bar. The house counsel can provide legal services in Alabama to the business organization in which they are registered however their services shall be limited to giving legal advice to the directors, officers and employees of the organization with respect to the business and affairs of that organization. The counsel is allowed to negotiate and document matters of that organization. The counsel may represent the organization in its dealings with any administrative agency or commission that has jurisdiction over the organization. However, in-house counsel cannot make an appearance as counsel in any court, administrative tribunal, agency or commission unless rules in such entities authorize such action. In order for the in-house counsel to be allowed to register in Alabama the counsel must not be subject to any disciplinary proceeding for professional misconduct nor can they have been permanently denied admission to practice in another jurisdiction based upon character or fitness at the time they apply for this registration. The in-house counsel must also agree to abide by the Alabama Rules of Professional Conduct.

III. Judge Sue Bell Cobb Wins the Race for Chief Justice.

I realize a lot has already been said about this race in the newspaper and other publications. We will gave to all wait and see if Judge Cobb's judicial philosophy changes the direction of the Court in any substantive way. However, I do think that at least the perception among many lawyers is that the court will be more likely to respect the province of the jury and not be as quick to reverse reasonable awards. As many of you know, the current Supreme Court has reversed over 90% of the monetary damage awards rendered by juries. Another result may be that some lawyers are willing to take some cases they may not otherwise consider, especially in the area of products liability. I have spoken to a few lawyers in the past that believe they have a meritorious case that they could win at trial but did not believe the Alabama Supreme Court would ever let them keep a reasonable award. In those situations, a lawyer is faced with spending great sums of money to work up a case only to have a great likelihood of not being able to keep an award for his or her client.

Another development that may or may not, make a difference on how cases are decided is that the new divisions within the Court will be realigned. As many of you know, each case before the Supreme Court is randomly assigned to one of two existing panels of four associate judges, with the Chief Judge sitting on both panels. Each panel will review and discuss the cases to see if a consensus exists. The new divisions are:

Chief Judge Sue Bell Cobb

Justice Harold See	Justice Champ Lyons, Jr.
Justice Tom Woodall	Justice Lyn Stuart
Justice Patti Smith	Justice Mike Bolin
Justice Tom Parker	Justice Glenn Murdock

IV. The Democratic Takeover of both houses of Congress.

This will probably have more of an impact in the practice of civil law than most people realize. First, many of the powerful corporate interest groups have been trying for the last six years to get federal preemption of many state law causes of action. This means that certain corporations would not be subject to state liability laws and could not be sued in state court. In some cases, there have been attempts to avoid liability altogether by getting certain federal regulatory agency to enter governing rules that if a corporation meets certain minimal federal standards, that is the extent of their duty owed to society. The first example we saw of this was when the Office of the Comptroller of the Currency (also known as the "OCC") entered an administrative regulation, without any legislative input, that said they had the exclusive right to regulate nationally-charted banks and that states cannot attempt to impose any additional liability. More recently, we have seen various energy companies attempt to gain sweeping immunity from the

Environmental Protection Agency and the pharmaceutical industry attempting to gain immunity via the Homeland Security Department. The pharmaceutical industry's argument was that if they face civil damages awards, should a national tragedy ever occur, they may not be able to provide cures to whatever diseases may be released on the population. Now that the Democrats control both houses of Congress, it is unlikely that many of these immunity or preemption proposals will get passed. To the extent an executive agency attempts to unilaterally impose an unnecessary rule change, they will most assuredly get called before Congress and/or have their funding threatened.

B. CHANGES IN ALABAMA LAW – NON-JUDICIAL OPINIONS

I. Uniform Residential Landlord and Tenant Act.

One needed change that was a long-time in coming was the enactment Uniform Residential Landlord and Tenant Act. This law has drastically changed the legal relationship between *residential* tenants and landlords. This relationship has been governed by antiquated common law principles that did not take into account the unique nature of the landlord-tenant relationship. Under the old system, the tenant had little or no rights and certainly had little bargaining power to make a landlord keep the premises in the condition agreed upon, or even in a habitable condition. The Act regulates security deposits, damages and cost associated with enforcing the terms of the lease. It is important to note that this was a piece of legislation that was largely supported by both landlords and interest groups representing tenants.

II. Assault & Battery.

An amendment, effective June 1, 2006, was adopted as to Sections 13A-3-20 and 13A-3-23, *Alabama* Code, relating to justifiable use of defensive force and deadly physical force. The legislation provides immunity from civil legal action (as well as criminal action) for persons justified to use lawful force and deadly physical force in self-protection or the protection of others in certain specified circumstances. Such force may be used against a person intruding in a dwelling, residence, vehicle, or federally licensed nuclear power facility. The legislation removes the duty to retreat for a person using force or deadly physical force under certain circumstances. A legal presumption is established that one using deadly physical force is justified in using it in self-defense or the defense of another if that person reasonably believes that another person is using or about to use unlawful deadly physical force, using or about physical force against the occupant of a dwelling while committing or attempting to commit a burglary, kidnapping, rape or sodomy, or in the process of unlawfully and forcefully entering a dwelling, residence, occupied vehicle, or federally licensed nuclear power facility, or is removing or has forcibly removed a person against his or her will from a dwelling or vehicle when the person had a legal right to be there, and provided that the person using deadly physical force knows or has reason to believe that an unlawful or forcible entry or an unlawful or

forcible act is occurring. The legal presumption for justification does not apply if the person against whom force is used has a right to be in or is a lawful resident of the residence or vehicle, and if there is no injunction or protection in effect, or the person sought to be removed is a child or a grandchild, or otherwise in the lawful custody of the person against whom force is used; or the person who uses force is engaged an unlawful activity or the person against whom force is used is a law enforcement officer engaged in the performance of duties.

III. State Bar refines their opinion concerning when it is permissible to contact an opposing party's employees.

The new opinion appears to slightly relax the rule allowing a lawyer to contact employees (and ex-employees) of an opposing party. The Comments to Rule 4.2 of the Alabama Rules of Professional Conduct states that:

> In the case of an organization, this Rule prohibits communications by a lawyer for one party concerning the matter in representation with persons having a managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization.

This rule has historically been read to apply broadly to extend to all managerial employees. However, under the revised opinion, under certain facts, an attorney may speak to some managerial employees if their statements would not constitute an admission on behalf of the company and they were not directly involved in the conduct causing the occurrence at issue. For a more detailed understanding of this rule change, Tony McClain, the State Bar's General Counsel, has written an article detailing the differences in this month's *The Alabama Lawyer*.

C. CHANGES IN ALABAMA LAW – JUDICIAL OPINIONS

I. Negligence and Wantonness.

A. *Bailey* v. *Faulkner,* So. ___2d _____,2006 Ala. LEXIS 2 (Ala. Jan. 6,2006) reversed a judgment for $67,000 compensatory damages and $1.61 7 million in punitive damages that had been entered in favor of a husband against a pastor who engaged in a consensual, sexual relationship with the husband's wife after commencing marital counseling for the couple. In an opinion written by Justice Woodall, the court

held that Alabama's 1935 statutory abolition of "heart balm" torts or alienation of affections actions required dismissal of the husband's claims.

Section 6-5-33 1, *Alabama Code*, provides "There shall be no civil claims for alienation of affections, criminal conversation, or seduction of any female person of the age of 19 years or over." The husband couched his claims in terms of negligence and wantonness, rather than alienation of affections, and did not allege intentional torts. The court agreed with the pastor's arguments that the husband's claims amounted to, in reality, a claim for alienation of affections under the guise of negligent or wanton marital counseling. The court stated that the husband's actual theory of the case was that the pastor's illicit relationship with the wife destroyed his marriage, and that the damages flowed from the pastor's intentional conduct. He admitted at trial all his damage stemmed from the divorce that followed the counseling and sexual relationship between the wife and pastor, and that the husband initiated the divorce action because there was no way he "could get over the lies." The court characterized the case as not about negligence or wantonness, but about intentional conduct.

A special concurrence by Justice Lyons stated that he was "holding my nose" in voting with the majority, and that stare decisis required the holding. He urged that the legislature amend **§** 6-5-33 1 so as to permit an action against one who has assumed a duty toward a husband and wife with respect to the status of their marital relationship and thereafter had sexual contact with one of the parties during the existence of the marital relationship.

Justice Parker's special concurrence states that the judicial branch must respect statutes enacted by the legislature in conformity with the constitution, even when a court has grave doubts about the propriety of the statute. His opinion also states that the nature of church and state as distinct spheres of government preclude state oversight of the nature and limits of authority for pastoral counseling, which belongs to the jurisdiction of the church.

B. In *Sears v. PHP of Alabama, Inc.*, F.Supp. 2d , 2006 U.S. Dist. LEXIS 18460 (M.D. Ala. Apr. 10,2006) The court denied a motion for summary judgment as to negligent supervision claims arising out of verbal and physical sex harassment toward plaintiff, an employee at a PHP group home, by a fellow employee (Atkins) who was responsible for housekeeping and cleaning work. Plaintiff presented evidence that the defendant employer failed to prevent Atkins from repeating his sexual harassment and by failing to properly train him so as to prevent his harassing behavior. The court also discussed the claim of negligent retention:

"Alabama law recognizes the tort of negligent retention which makes an employer liable to its employees for the negligent acts of a co-employee." . . . Pursuant to Alabama law, an employer may be held liable for an employee's tortuous conduct on a negligent retention theory when the employer "knows or should know" that its employee "is a person unworthy, by habits, temperament, or nature, to deal with the persons invited to the premises by the employer." . . . Where the evidence establishes a breach of the

employer's duty not to retain an unfit employee, as described above, and that breach proximately causes the plaintiffs injuries, a plaintiff can recover on a state law negligent retention claim.

Plaintiffs' evidence demonstrated that a reasonable jury could conclude that Atkins was an unworthy employee, in that, notwithstanding actual notice of the harassment, the employer initially took no measures to rectify the harassment; when it finally acted on plaintiffs' second complaint, the measures were inadequate and the harassment resumed a short time after Atkins was moved to a different shift.

C. A first impression issue was determined in *Coffey v. Moore*, __So. 2d __, 2006, Ala. LEXIS 152 (Ala. July 14,2006), that of whether the status of a vehicle owner may change during a road trip so that the owner becomes the guest. Coffey rented a vehicle to drive to Florida to visit her daughter, and asked her friend Moore to accompany her on the trip. (For purposes of these facts, a bailee, a person who rented a vehicle, and owner, were considered the same). Coffey and Moore each paid their own personal expenses. Moore did not contribute to any of the expenses in the operation of the vehicle. Moore volunteered to drive if Coffey became tired. On the return trip, Moore was driving while Coffey was asleep in the back seat, and, while attempting to change lanes, lost control of the vehicle, causing it to overturn, and injuring Coffey. Coffey sued Moore, who argued that Coffey was a "guest" under the guest statute and that she could not recover for negligence. (The parties had stipulated Moore was not liable for any willful or wanton misconduct.) The trial court granted summary judgment for Moore, but the Alabama Supreme Court, in an opinion written by Justice Parker, reversed. The court discussed the purpose of the guest statute, and the "generous" host as the intended beneficiary, noting that only a host can offer a ride to a guest, so the intended beneficiary of the statute is clearly the host, and not the guest. Moore argued that because Coffey received no payment, conferred or received no benefit, and was on a purely social trip with Moore, Coffey was properly classified as a "guest" and is precluded from recovering damages. Moore emphasized that the wording of the guest statute designates the owner, the operator, or the person responsible for the operation of the vehicle as immune from liability on civil claims alleging negligence, and argued that such wording indicates that the status of owner and guest may change during the course of the road trip. The court held:

> We find the reasoning in Crider and in American Law Reports to be persuasive and the arguments of Moore and Metropolitan to be without merit. Moore and Metropolitan rely on the assumption that the status of a guest may change from a guest into an "owner, operator or person responsible for the operation of a motor vehicle" under the statute merely by virtue of the guest's taking the wheel to spell the driver. Similarly, they assume that an "owner" may become a "guest" by virtue of falling asleep in the backseat of the car while another is driving. Although this approach of changeable status may seem helpful to assign

> liability in certain circumstances, in other circumstances it could make a consistent standard for liability impossible. For example, it could be impossible to pinpoint just when a change in status occurred, and thus liability attached, such as when an accident occurs while the vehicle was parked and the two parties were changing places. Consequently, under the circumstances of this case, we hold that Moore's classification as a guest under Alabama's guest statute was determined at the inception of the journey, and the simple act of changing drivers did nothing to affect or alter this classification.

D. In *Board of Water & Sewer Commissioners v. Hunter*, __So. 2d __, 2006 Ala. LEXIS 175 (Ala. July 28,2006) the Court considered a 1997 amendment to § 34-1 1-1 (7), *Alabama* Code, which included the term "testimony" within the definition of "the practice of engineering." The Water Board successfully argued that a "engineer intern" proffered by plaintiff as an expert, who was not licensed as a professional engineer, was not qualified to testify as to engineering matters at issue in the case. Plaintiff unsuccessfully attacked the constitutionality of this 1997 legislation. The court held the 1997 Act 97-683 did not violate Article IVY *5* 45 (the "single subject rule") and was not unconstitutionally vague.

II. Uninsured Motorist Coverage.

A. In *Continental Cas. Co. v. Pinkston*, __So. 2d __, 2006 Ala. LEXIS 86 (Ala., April 28,2006) Pinkston was involved in an automobile accident while in the course of his employment with Meadow Gold Dairy. The Pinkstons sued Roper, the driver of the other vehicle involved in the accident and later amended their complaint adding Continental as Meadow Gold's fleet insurance carrier. In the amended complaint, the Pinkstons also alleged Roper was an uninsured/underinsured driver and that Continental provided uninsured/underinsured insurance. Continental admits that they provide certain uninsured underinsured coverage for the vehicle that Pinkston was driving but that the coverage is limited. Pinkston settled with Roper for the limits of Roper's policy. The limit of Continental's policy is $1,000,000 but is subject to stacking which in essence makes the limit $3,000,000. The Continental policy contained the following limitation, "We will not pay for any element of 'loss' if a person is entitled to receive payment for the same element of 'loss' under any workers' compensation, disability benefits or similar law." When the accident occurred, Meadow Gold also had a worker's compensation insurance policy issued by Continental.

Continental moved for a partial summary judgment declaring that the maximum benefits that the Pinkstons are entitled to is $60,000. It was recognized by both parties that the exclusion could not operate to deny Pinkston the minimum statutorily provided amount of $20,000, or $60,000 stacked. Continental's main contention was that the

exclusion did not operate to deny Pinkston the statutory minimum but does operate to limit recovery to the statutory minimum. The trial court denied Continental's partial summary judgment but certified the question of "When a policy exclusion is found to be ineffective to exclude statutorily required uninsured and underinsured motorist coverage, what is the limit of uninsured and underinsured motorist coverage that applies under the policy-the statutorily required minimum amount or an amount equal to the limits contained in the policy?"

The Supreme Court stated that "When an exclusion in a policy is more restrictive than the uninsured/underinsured-motorist statute, the exclusion is void and unenforceable." A limitation in a policy that purports to reduce the amount payable under the uninsured1underinsured motorist provision by the amount of worker's compensation benefits is ineffective to reduce the uninsured/underinsured motorist benefits below the statutory minimum. However, Continental argued that the exclusion did limit the coverage to the statutory minimum. The court here declined to decide whether an insurer can limit its liability for amounts in excess of the statutory minimum of uninsured/underinsured-motorist coverage. The court reasoned that the exclusion in question here did not, by its plain language, provide a blanket limitation of $60,000 as Continental argues. Pinkston argued that the only portion of their loss covered by worker's compensation was medical expenses and that in order to apply the exclusion, the amount of workers compensation would have to be determined first. While the court refused to explicitly side with either party, it did state that "Given the language of the workers' compensation limitation of the policy, it appears that, even if we were to agree with Continental that a workers' compensation limitation may properly exclude uninsured-motorist coverage beyond the statutorily required amount of coverage, the workers' compensation limitation in the Continental policy is not, in effect, an aggregate $60,000 "cap" on Continental's total liability, as Continental contends.

III. Products Liability.

In *Harris Moran Seed Co. v. Phillips*, -So. 2d -,(Ala. Civ. App. 2006) considered a first impression issue of whether a vertical non-privity purchaser who has suffered only economic loss could recover from a remote seller or manufacturer under a theory that the purchaser is a third-party beneficiary of a contract containing the manufacturer's express warranty to a dealer or intermediate seller. The court answered in the affirmative, holding that the trial court properly submitted to the jury contract claims by farmers premised on a "true to type" express warranty concerning tomato seeds made by a manufacturer to a dealer. The court also considered arguments by plaintiff farmers that the economic loss rule did not apply to tort claims based on problems with tomato seeds purchased from defendant seed company. The farmers argued that the defective product did not "injure itself '. Rather, they contended that the purchased product (seeds) was used to produce another product (tomatoes) with the injury not affecting the

purchased product but the resulting product. The court rejected this argument, and held that JML was properly entered against the farmers' tort claims.

IV. Medical Malpractice.

A. *Ex parte Mendel*, __So. 2d __, 2006 Ala. LEXIS 100 (Ala., May 12,2006) held that a patient could obtain discovery from a dentist, notwithstanding *5* 6-5-55 1, about his previous suspensions and/or revocations of his license to practice dentistry, to the extent the information reflected multiple suspensions and/or revocations, and provided that it related to negligence or professional incompetence in the practice of dentistry; this ruling was based on the patient's lack-of-informed-consent claim, expressly premised on the dentist's alleged failure to inform or disclose to her that his license to practice dentistry had been suspended and/or revoked on multiple occasions. The court held, however, that the trial court erred in ordering the State Dental Board to produce records, as such discovery would be barred by § 6-5-333(b) Alabama Code.

B. *Ware v. Timmons*, __So. 2d __, 2006 Ala. LEXIS 94 (Ala. May 5,2006) reversed a $13.7 million dollar judgment in a medical malpractice case. The central issue was whether an anesthesiologist, Dr. Ware, was liable for a nurse's conduct under the doctrine of respondeat superior, where both were employed by Anesthesiology & Pain Medicine of Montgomery, P.C. The majority opinion, written by Justice See, agreed with Dr. Ware that Dr. Ware and the nurse were co-employees, and that Dr. Ware having a reserved right of control over the nurse's conduct was not dispositive. An instruction by the trial court that Dr. Ware was responsible for the acts and omission of the nurse was found erroneous. The majority opinion stated that the charge would have been correct only if plaintiff had introduced evidence of what it described as "both elements" of respondeat superior, namely, that Dr. Ware and the nurse had voluntarily entered into their relationship and that Dr. Ware possessed the reserved right of control. The evidence indicated that the right of selection of a nurse anesthetist (to assist Dr. Ware during the surgery) resided in Anesthesiology & Pain Medicine of Montgomery, P.C. The majority also rejected the plaintiffs argument based on § 10-4-390(a), *Alabama Code*, which provides that every individual who renders professional services as an employee of a domestic or professional corporation shall be liable for any negligent or wrongful act or omission in which he personally participates. Plaintiff argued this statute, in abrogation of the common law of respondeat superior, imposes on supervisors who are professionals practicing in a professional corporation vicarious liability for the conduct of their subordinates.

A lengthy dissent was written by Justice Harwood, joined by Justices Lyons, Woodall, and Parker. Justice Harwood stated that his research revealed that the principle stated in the majority opinion - that an employer must have the right to select the sub-agent - had never before today been stated by an Alabama appellate court to have any role in determining whether there exists a direct loaned-servant relationship. In the many cases over the years in which the criteria and pre-requisites of the loaned-servant

relationship had been examined, the court never before saw fit to include "the right to select" among the factors that should be considered.

V. Legal malpractice.

Denbo v. DeBray, __So. 2d __, 2006 Ala. LEXIS 140 (Ala. June 30, 2006) discussed a "split" of authority in Alabama case law about when the statute of limitations for a legal malpractice action would begin to run. The court stated:

> In its thorough and thoughtful order granting the defendants' summary-judgment motion, the trial court acknowledged the apparent "split of authority" in our caselaw concerning when the statute of limitations for a legal-malpractice action will begin to run, referring both to the "occurrence" approach of *Ex parte Panell*, and what the trial court referred to as the "damage" approach of *Michael v. Beasley*, 583 So. 2d 245 (Ala. 1991). As did this Court in *Floyd v. Massey & Stotser*, the trial judge concluded that it was unnecessary to elect between the two approaches because, he reasoned, the limitations period would pose a bar under either scenario, given the undisputed facts of the case. Responding to the defendants' motion to alter, amend, or vacate its summary judgment order, the trial court expanded upon its original rationale in an amendment to its order, but otherwise denied the motion.

The Supreme Court agreed with the trial court that, under either approach, the claim was time barred.

VI. Governmental Immunity.

In *Blackwood v. City of Hanceville*, __So. 2d __,2006 Ala. LEXIS 20 (Ala., Feb. 3, 2006) considered the first impression issue: what is the effect on the immunity afforded peace officers by § 6-5-338(a) of the conditions and limitations imposed on emergency vehicle drivers by § 32-5A-7(b)(3) and (d), *Alabama Code*. There was evidence that a police officer was traveling between 91 and 101 mph, with lights and siren activated, during an emergency run, when he lost control, went into the opposing lanes of traffic, and collided with an automobile occupied by plaintiff. The court found the officer and the city were not entitled to immunity under § 6-5-338, and that summary judgment in their favor was error. The court observed that the officer's conduct did not fit in any category of conduct recognized by *Cranman* as immune, and saw no necessity in reconciling any differences between the language of § 6-5-338(a) and the *Cranman* restatement.

VII. Business Torts.

Scrushy v. Tucker, __So. 2d__, 2006 Ala. LEXIS 230 (Ala. Aug. 25, 2006) affirmed a partial summary judgment in a shareholder's derivative suit holding that Richard Scrushy, former CEO of HealthSouth, was unjustly enriched. The court affirmed a judgment of approximately $47 million, notwithstanding Scrushy's contention that the necessary elements of unjust enrichment were not proven. The court did not decide whether Delaware or Alabama law applied, because the law in each state was substantially the same. To prevail on a claim of unjust enrichment, the plaintiff must show that the defendant holds money, which in equity and good conscience, belongs to the plaintiff or holds money which was improperly paid to defendant because of mistake or fraud. Plaintiff showed that Scrushy was unjust enriched by the payment of bonuses, which were the result of vast accounting fraud perpetrated upon HealthSouth and its shareholders, and that equity and good conscience required restitution in the form of repayment of those bonuses. Though for purposes of this judgment, the parties stipulated that Scrushy did not participate in and was not responsible for any of the criminal activities that resulted in falsification of financial statements, Scrushy did not dispute that the financial information originally filed by HealthSouth, upon which the bonuses were based, were inaccurate and unreliable.