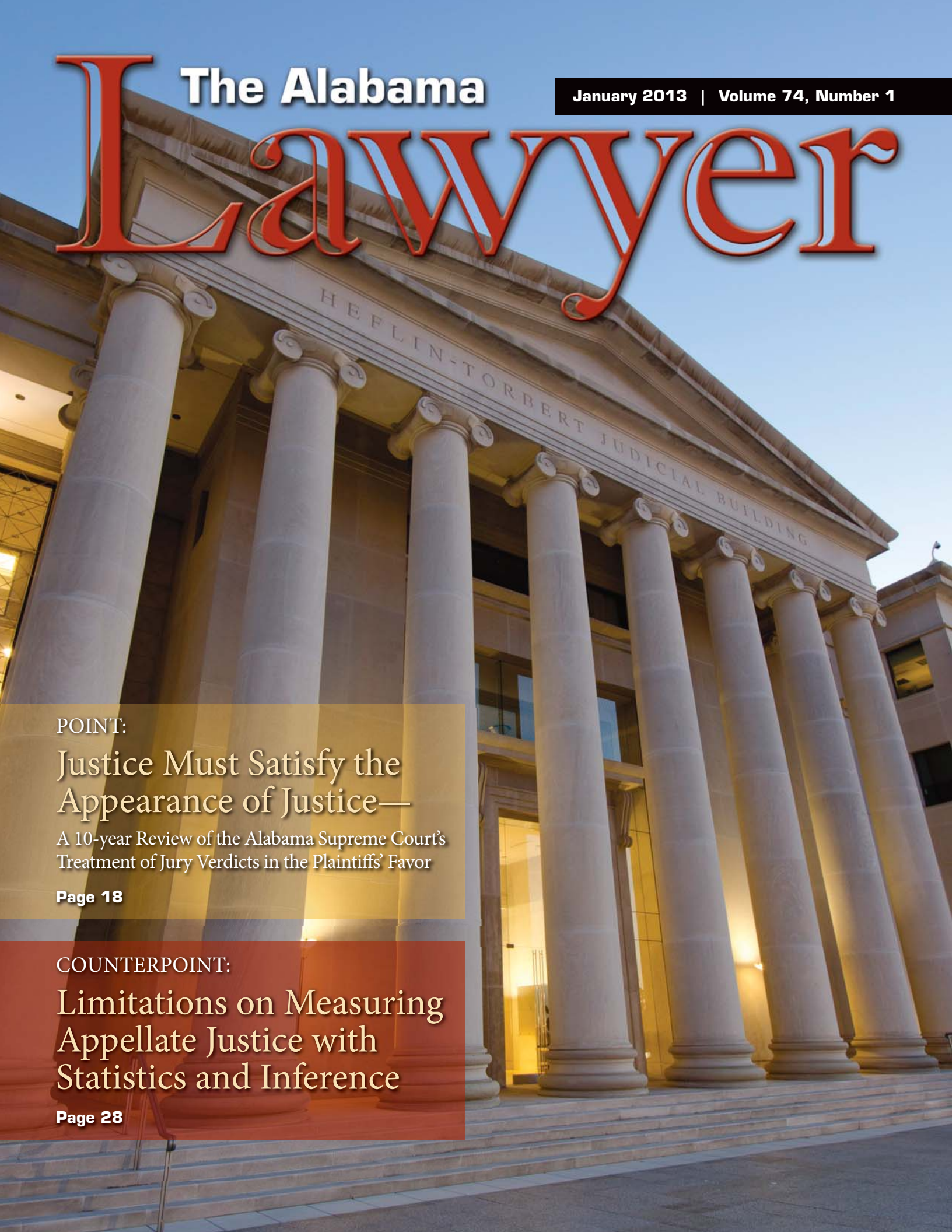
The Alabama Lawyer

January 2013 | Volume 74, Number 1



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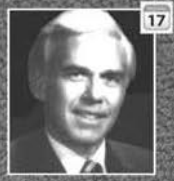
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2013 SPRING CALENDAR

CLE ALABAMA
Advancing your practice

FEBRUARY 8
Banking Law
Embassy Suites Hoover Hotel, Birmingham

MARCH 1
Elder Law: Everything You Always Wanted to Know About Medicaid
The University of Alabama School of Law, Tuscaloosa

APRIL 19
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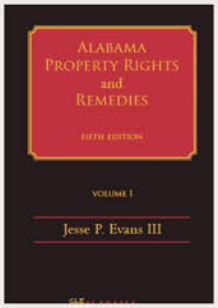
ALABAMA PROPERTY RIGHTS AND REMEDIES *By Jesse P. Evans III, author*

ALABAMA PROPERTY RIGHTS AND REMEDIES has long been known as one of the leading works on Alabama Real Property law. This comprehensive work covers an array of real property litigation topics, including most of the common rights and remedies that attorneys will encounter in their practice. The work is divided into five parts with twenty-eight chapters. Part One contains introductory material relating to the background of Alabama real property law, estates in land, conveyancing, the recording acts and a chapter on easements. Part Two deals with establishing ownership, possession and use, and covers adverse possession, quieting title, partition, boundaries and reformation and specific performance of contracts. Part Three has chapters on remedies and actions involving possession, including ejectment, forcible entry, and unlawful detainer, and an overview of the residential landlord and tenant act, nuisance, trespass and slander of title. Rights and remedies that involve a debtor-creditor relationship, such as judgment liens, fraudulent transfers, various liens, and mortgages are covered in Part Four. Part Five has chapters on eminent domain, public improvements, zoning, and dedication, vacation and subdivision regulation. Tables and an index are included.



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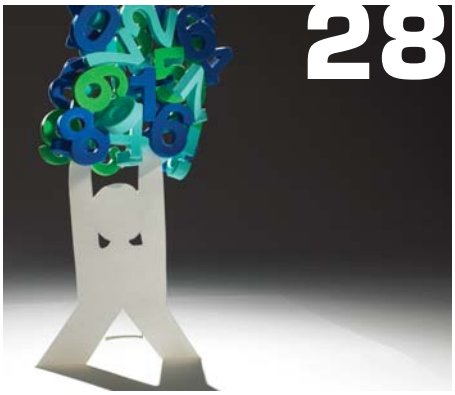

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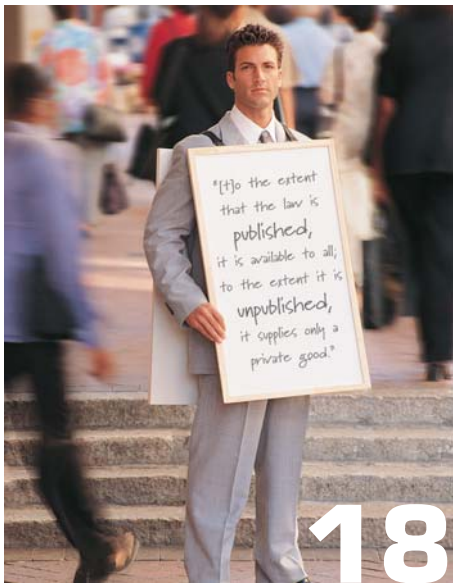

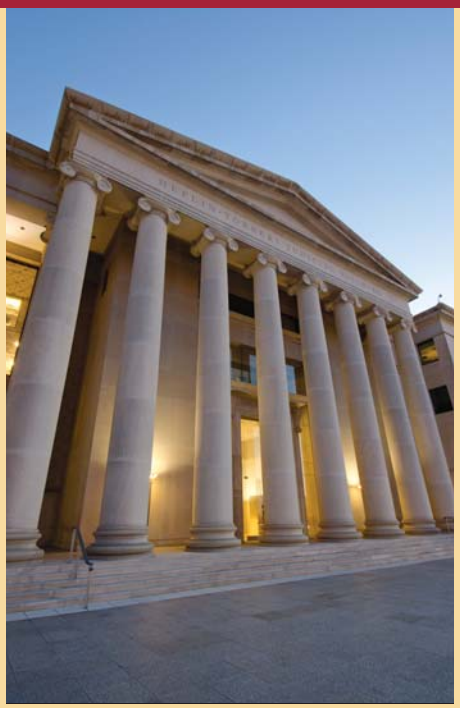

ON THE COVER

The Heflin-Torbert Judicial Building in Montgomery at dusk

–Photo by Robert Fouts, Fouts Commercial Photography, Montgomery, *www.photofouts.com*

FEATURES

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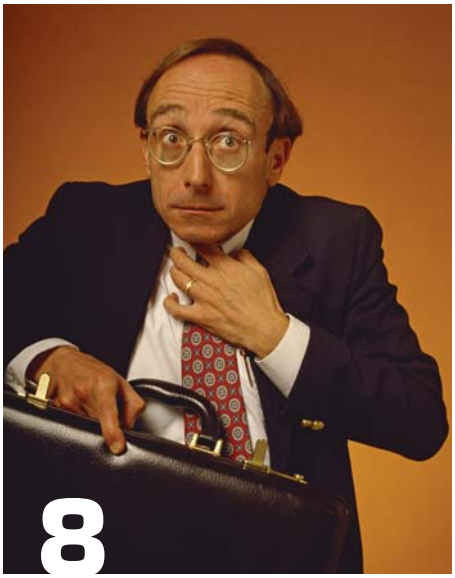

COLUMNS

CONTRIBUTORS

Marc James Ayers *is a partner with Bradley Arant Boult Cummings LLP's appellate litigation group in Birmingham. He served as chair of the Appellate Practice Section of the Alabama State Bar from 2008-2010. Ayers previously served as clerk (1998-99) and staff attorney (2001-04) for Alabama Supreme Court Associate Justice J. Gorman Houston, Jr. He is a member of the Appellate Committee of the Editorial Board of* The Alabama Lawyer.

The ***Honorable Ben H. Brooks, III*** *served as state senator from south Mobile County from 2006 through December 2012 and as co-chair of the state Senate Judiciary Committee. He was the lead sponsor of SB187 which passed as Act No. 2011-629. In November 2012, Brooks was elected to be a Mobile County Circuit Judge and was sworn into office in January 2013. He is a 1983 graduate of the University of Alabama School of Law.*

K. Megan Brooks *is an attorney in the Mobile office of Hand Arendall. She is a 2010 graduate,* summa cum laude*, of the University of Alabama School of Law where she served as a notes editor on the* Alabama Law Review*, and was inducted into the Order of the Coif.*

Rhonda P. Chambers *is associated with Taylor & Taylor in Birmingham. She is a graduate of Judson College and Cumberland School of Law. For more than 20 years, her practice has focused exclusively on appellate matters. Chambers has authored or co-authored several articles on appellate law topics and has been a frequent lecturer on appellate matters. She has been the chair of the Standing Committee on the Alabama Rules of Appellate Procedure for more than 10 years.*

William N. "Bill" Clark *is a partner with Redden, Mills & Clark LLP in Birmingham. He is past president of both the Alabama State Bar and the Birmingham Bar Association, and is also a fellow in the American College of Trial Lawyers.*

William E. Shreve, Jr. *is counsel with Phelps Dunbar LLP in Mobile. He graduated from Davidson College and the University of Alabama School of Law. He is a member of the Appellate Practice and Insurance Coverage committees of the ABA's Litigation Section, the ABA's Council of Appellate Lawyers, the Amicus Curiae Committee of the Alabama Defense Lawyers Association, the Appellate Practice Section of the Alabama State Bar, and the Mobile Bar Association's Appellate Practice Committee.*

Phillip W. McCallum
pwm@mmlaw.net

Wimps Need Not Apply

Back in my wrestling days, my favorite t-shirt was one that read "Wimps Need Not Apply." It had a picture of the famous "Nike" swoosh overlaid on a pair of wrestling shoes. Even now, 30 years later, it is still a cherished possession in our house and it gives me a chuckle to watch my kids wrangle over who gets to wear it. I know it's not the tattered shirt that is meaningful, but what the shirt represents. While wrestling may have seemed difficult many years ago, in hindsight, it pales in comparison to many of the challenges we face individually and collectively in the legal profession. John Wayne once said, "Courage is being scared to death but saddling up anyway."

Perhaps today, more so than ever, our profession has been put to the test. Many younger lawyers are confronted with a difficult job market, while also burdened with hefty student loans. Established lawyers are seeing increased competition at times when many of their clients are struggling and have become more demanding than ever. And, the Alabama court system has faced a severe funding crisis that threatens the ability of many lawyers to earn a living.

Yet, a great number of my friends in our profession have seen the challenges facing us as opportunities, and appear to be as content and successful as ever. These folks relish their work and seem to really understand their roles personally and professionally.

In preparing for my role as president this year, I was excited about all the fabulous things I would accomplish for the legal community. The more that I thought and planned, however, the more overwhelmed I became with the task at hand. My excitement and enthusiasm started giving way to stress and anxiety. Feeling a little wimpy, I turned to my good friend Tony McLain, state bar general counsel, for advice. "P-Mac," Tony said, "don't get bogged down with coming up with too many projects to save the world. Enjoy the ride because your year as bar president will define you–you will not define your presidency." Tony understood, especially during these times, that the best laid plans are often disrupted by those unforeseen issues that inevitably arise and demand responsible leadership. We definitely have been very fortunate in our profession to have had the right people "saddling up" in these difficult times and here are just a few examples of such leaders and their leadership moments.


Spruell

Alyce Spruell, during her presidency, was confronted with the devastating tornados that struck Alabama on April 27, 2011. Her response was remarkable, if not heroic. Alyce led efforts to activate and engage our state's Volunteer Lawyers programs to spring into action quickly and efficiently to provide legal help to those in need. Under her leadership, thousands of Alabamians received assistance at the time they needed it the most.

Her post-presidency leadership efforts have been equally extraordinary and incredibly selfless. Rather than returning to her thriving law practice, Alyce chose to continue to assist the legal profession by serving as Chief Justice Malone's legal advisor and, thereafter, as director of the Administrative Office of Courts. Alyce strongly believes that access to our court system should be open to all on a fair and equitable basis, and has "saddled up" to accomplish this.


Pratt

Jim Pratt was faced with a funding crisis during his presidency. Last spring, we all watched as financial disaster threatened to jeopardize the operations of Alabama's state court system. If not for Jim's excellent leadership skills and the relationships he had developed for the bar over the past few years in the legislature, courthouses could have been closed, jury trials could have been delayed or curtailed and we could have lost more than 40 percent of the court's administrative staff. In fact, Jim's tireless efforts to mediate virtually every recent tough issue before the legislature have been so well received and appreciated that both the senate and the house of representatives passed resolutions commending him for "exemplary professional achievement and dedicated public service." In fact, there are many in the statehouse who endearingly and teasingly refer to Jim as the 36th State Senator.


Malone

Chief Justice Charles "Chuck" Malone's tenure may have been short, but his efforts were extraordinary.[1] After being called upon to leave the bench as a circuit judge in Tuscaloosa County to serve as Governor Bentley's Chief of Staff, Judge Malone was appointed in 2011 to serve the remainder of Chief Justice Sue Bell Cobb's term. He willingly did so with full knowledge that he would be inheriting a financially-strapped court system that was being confronted with further severe funding cuts. Chief Justice Malone courageously fought to obtain funding for the third branch of our government, adopting the mantra "no courts, no justice, no freedom." He did more than talk. He declined state-paid security and transportation, choosing instead to drive himself in his own car. He demanded transparency in court budgeting so lawmakers could understand what the state was funding or, perhaps more accurately, what it was not funding. The chief justice used skillful diplomacy at a time when many were advocating litigation to obtain necessary funding. Chief Justice Malone is a humble giant who "saddled up" during Alabama's time of need.

No one ever promised us that the practice of law or leadership would be easy. In the words of my favorite old t-shirt, wimps need not apply. But, these are paths we have chosen to take so let's make the most out of our opportunities. See you on the wrestling mat called "life!" | AL

Endnote

1. Please take a moment to read the "Executive Director's Report" in this issue for a full account of Chief Justice Malone's efforts on behalf of the court system.

SHH... BEST-KEPT SECRET IN THE BAR

Lawyer Referral Service

I think one of the most underutilized resources in our state bar is the Lawyer Referral Service, and I chose to highlight this significant program because it is a wonderful resource for lawyers at a very good price.


Dunn

Last year, the Alabama State Bar Lawyer Referral Service received over 9,000 calls requesting referrals to attorneys. All callers are first screened by the LRS staff before a referral is made to an attorney; in other words, they actually speak to someone in person. **John Dunn**, who has 10 years of telephone customer assistance and was recently hired to handle the lawyer referral line for the Alabama State Bar, is quite vigilant in spending time with the caller and has told me, "I'm just not going to waste an attorney's time."

The cost to join the Lawyer Referral Service is $100 per year. Members can select the types of cases they will handle and can limit or increase geographic areas they will practice. The Lawyer Referral Service advertises in the Yellow Pages in almost every county in Alabama, as well as online, to reach higher-end potential clients who are seeking lawyers online. They also provide bookmarks with the LRS phone number and purpose to all public libraries in the state, as well as brochures explaining the service to each circuit clerk who requests them.

Once you join the program, you will receive your referrals via e-mail (unless you choose otherwise) within minutes of the potential client calling the Lawyer Referral Service, or within one business day if sent by U.S. Mail.

I am a member of the Lawyer Referral Service and intend to be indefinitely. As Laura Calloway, director of the program, states, "The Lawyer Referral Service is the most cost-effective, not to mention the most hassle-free, client development effort any lawyer can undertake." | AL

Keith B. Norman
keith.norman@alabar.org

Before a recent Bar Commissioners' meeting, Chief Justice Charles Malone (second from left) visited with Commissioner Ashley Swink, President Phillip McCallum and Commissioner Sam Irby.

Chief Justice Charles Malone: Steward of Alabama's Court System

As the Alabama Supreme Court's 31st chief justice, Charles "Chuck" Malone's abbreviated term was not the shortest on record,[1] but for the brief time he served, it may have been the most critical for the courts. What he did was help preserve the judicial system by convincing the legislature to raise filing fees to supplement the court system's ravaged budget. The fact that he was able to orchestrate this feat was nothing short of remarkable. Without his leadership encouraging all the judicial system's stakeholders to join together during last year's legislative session to support a fee increase, another round of planned cuts to the judicial system's 2013 budget would have forced layoffs of more than 500 court personnel which would have crippled our state courts. Courts across the state would have had to severely curtail operations, including indefinitely delaying processing cases and holding trials.[2]

Extensive experience

Governor Bentley could not have chosen anyone better equipped to step in as the head of the judicial system to deal with this funding crisis following Chief Justice Sue Bell Cobb's resignation. Not only did Chuck have 20 years of experience in private practice, but that experience was overlaid with 10 years on the bench as a circuit judge for Tuscaloosa County, many of those as presiding judge. In addition, he served as an adjunct law professor at the University of Alabama School of Law, taught in the university's School of Commerce and Business and spent eight years as a law enforcement academy instructor. As the consummate public servant, Chuck answered the call in January 2011 from his friend, Robert Bentley, to leave his circuit judgeship and become the governor's chief of staff. With his many years of private practice, service as a circuit

judge, teaching experience and position as the governor's chief of staff, Chuck was ideally suited to take on the biggest challenge of his career–chief justice of a woefully underfunded court system with dire prospects of more cuts to come.

Consummate public servant

Few people would have been willing to accept this position and undertake the extraordinary challenges facing the judicial system. In the true spirit of public service, though, Chuck once again accepted the governor's call to duty and hit the ground running as chief justice on August 1, 2011. At every opportunity, the new chief justice pressed his teaching and lawyering skills into action, both to explain the need and to advocate for adequate funding for the state's court system. In addition, he worked diligently with court officials and court staff across the state to keep the courts operating despite the severely reduced funding of the 2012 budget that took effect one month after his appointment. Speaking to civic clubs, citizen groups and local bar associations, the chief justice emphasized the necessity of adequate funding for the court system and why it was important to businesses and citizens alike to have access to *their* courts. He explained how sustained cuts of court funding have a negative effect on the state's economy, noting that when businesses are thinking of locating in Alabama, they want to know three things: the integrity of the state's infrastructure, the status of public education and if the court system is working as it should.

Good steward of public funds

While serving as chief justice, Chuck worked tirelessly with court personnel to further streamline and improve the court system's efficiency in order to save money wherever possible. This included the mandate of e-filing in all state courts. He also took the personal step of saving money for the court system by refusing the use of a state vehicle and a state security officer to travel with him when making public appearances. His actions demonstrated to the public that every effort was being made to ensure that the third branch of government was a good steward of public funds at all levels.

Chief Justice Malone knew that increasing court fees that were already too high was not a palatable way to respond to the funding crisis. He recognized, however, that it was the only way to avert another round of even deeper budget cuts for fiscal year 2013. These cuts would have further weakened the courts to the point that they would barely be able to operate. The chief justice's affability, in combination with a razor-sharp mind, stood him in good stead with our state's legislative leaders who were not otherwise predisposed to raise fees of any kind. His leadership of key stakeholders, including judges, district attorneys, court clerks and lawyers, allowed the legal profession and court to speak with one voice and make a convincing case for the chronically underfunded judicial system.

Leadership and advocacy

Timing, circumstance and reaction are critical elements for successfully meeting a challenge. Following earlier years of significant budget reductions as well as a crippling cut looming for the 2013 budget year, Chuck Malone was the right person at the right time to lead the court system. Responding with leadership and advocacy on behalf of the court system helped convince an otherwise reluctant legislature of the need to address the judicial system's financial plight. For keeping the courts open and operating, Chief Justice Malone deserves the praise and gratitude of the public and the profession. While adequate funding for our court system will continue to be a struggle in the immediate future, it is clear that Chief Justice Chuck Malone helped avert a financial disaster that could have permanently impaired our courts. | AL

Endnotes

1. Chief justices Henry Hitchcock and Arthur Hopkins served one year or less.
2. Please refer to the "Executive Director's Report" in *The Alabama Lawyer* (November 2012).

Gregory H. Hawley
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We Are Listening!

In the July issue of *The Alabama Lawyer*, we published an article on products liability and contributory negligence. Though we editors did not fully appreciate it at the time, the article was not written purely as a "current state of the law" article but, instead, had a defense advocate's tone–much like an excellent brief. After publication, we received an immediate response from the plaintiff's bar, requesting "equal time." A responsive article on the same legal issue appeared in the November issue.

Several months ago, we received an article from a member of the Appellate Law Committee of the Editorial Board–a critique of the Alabama Supreme Court's recent treatment of plaintiffs' punitive damage verdicts. The article is a critique from the point of view of an appellate lawyer from a plaintiffs' law firm. Rather than publishing the article and awaiting a response from the defense bar, we turned to another member of the Appellate Committee–an appellate lawyer from a defense firm–to try to achieve a balance of viewpoints. In other words, we learned a lesson after the July issue. In this issue we provide two articles in the same publication to provide two points of view about the supreme court's treatment of punitive damage verdicts. We hope you enjoy both pieces.

Note: *The Alabama Lawyer* does not plan to become a forum for future point-counterpoint publications for the plaintiffs' bar and defense bar. We will leave most of the advocacy pieces to the various publications of the respective bars. | AL

SAVE THE DATE

JULY 17-20 2013

Alabama State Bar Annual Meeting Grand Hotel Marriott Resort, Golf Club & Spa, Point Clear, Alabama All the cool kids will be in Point Clear. Will your kids be there? While you attend the annual meeting and earn a year's worth of quality CLE credit, your family will be having a blast! And for anyone who's over the age of 30 there will be the usual cocktail parties, a Presidential reception, informal networking opportunities, law school alumni gatherings and more. Let out your "inner child." Plan to attend the annual meeting.

ALABAMA STATE BAR
415 Dexter Avenue
Montgomery, Alabama 36104

Client Security Fund Annual Assessment

The Alabama State Bar is authorized to assess each lawyer $25 who, on January 1 of each year, holds:

- A regular membership to practice law in the state of Alabama
- A special membership to the Alabama State Bar
- Is registered as authorized house counsel
- Is admitted pro hac vice ($25 per application)

This month (January 2013), bar members will receive a reminder notice by e-mail with payment instructions. Bar members who *do not* have an e-mail address will receive notice by regular mail. Payment instructions for the 2013 Client Security Fund Annual Assessment are available at *www.alabar.org*.

A lawyer who **fails to pay by March 31** of a particular year the assessed annual fee pursuant to Rule VIII shall be deemed to be not in compliance with these rules. Such a lawyer **is subject to suspension** pursuant to Rule 9 of the *Alabama Rules of Disciplinary Procedure*.

Any person admitted to practice in the state of Alabama who upon attaining the age of 65 years and has elected to retire from the practice of law may claim exemption from any assessment under these rules by notifying the Client Security Fund Coordinator of the Alabama State Bar at (334) 269-1515 or *laurie.blazer@alabar.org*.

Notice of Election and Electronic Balloting

Notice is given here pursuant to the *Alabama State Bar Rules Governing Election and Selection of President-elect and Board of Bar Commissioners*.

Bar commissioners will be elected by those lawyers with their principal offices in the following circuits:

1st Judicial Circuit
3rd Judicial Circuit
5th Judicial Circuit
6th Judicial Circuit, Place 1
7th Judicial Circuit
10th Judicial Circuit, Place 3
10th Judicial Circuit, Place 6
13th Judicial Circuit, Place 3
13th Judicial Circuit, Place 4
14th Judicial Circuit
15th Judicial Circuit, Place 1
15th Judicial Circuit, Place 3
15th Judicial Circuit, Place 4
23rd Judicial Circuit, Place 3
25th Judicial Circuit
26th Judicial Circuit
28th Judicial Circuit, Place 1
32nd Judicial Circuit
37th Judicial Circuit

Additional commissioners will be elected for each 300 members of the state bar with principal offices therein. New commissioner positions for these and the remaining circuits will be determined by a census on March 1, 2013 and vacancies certified by the secretary no later than March 15, 2013. All terms will be for three years.

Nominations may be made by petition bearing the signatures of five members in good standing with principal offices in the circuit in which the election will be held or by the candidate's written declaration of candidacy. PDF or fax versions may be sent electronically to the secretary as follows:

Keith B. Norman
Secretary, Alabama State Bar
P. O. Box 671, Montgomery, AL 36101
keith.norman@alabar.org
Fax: (334) 517-2171

Either paper or electronic nomination forms must be received by the secretary no later than 5 p.m. on the last Friday in April (April 26, 2013).

As soon as practical after May 1, 2013, members will be notified by e-mail with a link to the Alabama State Bar website that includes an electronic ballot. *Members who do not have Internet access should notify the secretary in writing on or before May 1 requesting a paper ballot.* A single written request will be sufficient for all elections, including runoffs and contested president-elect races during this election cycle. Ballots must be voted and received by the Alabama State Bar by 5 p.m. on the third Friday in May (May 17, 2013). Election rules and petitions are available at *www.alabar.org*.

At-Large Commissioners

At-large commissioners will be elected for the following place numbers: 2, 5 and 8. Petitions for these positions, which are elected by the Board of Bar Commissioners, are due by April 1, 2013. A petition form to qualify for these positions is available at *www.alabar.org*.

Continued from page 15

Public Notice for Appointment of New Magistrate Judge

The Judicial Conference of the United States has authorized the appointment of a full-time United States Magistrate Judge for the Northern District of Alabama in Birmingham, Alabama.

The duties of the position are demanding and wide-ranging. The basic authority of a United States Magistrate Judge is specified in 28 U.S.C. § 636. The duties of a magistrate judge in the Northern District of Alabama and the qualifications for applicants can be found at *www.alnd.uscourts.gov.*

A merit selection panel composed of attorneys and other members of the community will review all applicants and recommend to the district judges in confidence the five persons it considers best qualified. The court will make the appointment following an FBI full-field investigation and an IRS tax check of the applicant selected by the court for appointment. An affirmative effort will be made to give due consideration to all qualified applicants without regard to race, color, age (40 and over), gender, religion, national origin, or disability. The current annual salary of the position is $160,080. The term of office is eight years.

The application form is available at *www.alnd.uscourts.gov*. The application should be mailed to:

Sharon Harris
Clerk of Court
Northern District of Alabama
1729 Fifth Avenue North
Birmingham, AL 35203.

Applications must be submitted only by applicants personally and **must be received by January 31, 2013.**

All applications will be kept confidential, unless the applicant consents to disclosure, and all applications will be examined only by members of the merit selection panel and the judges of the district court. The panel's deliberations will remain confidential.

Alabama Lawyers' Hall of Fame

May is traditionally the month when new members are inducted into the Alabama Lawyers' Hall of Fame located at the state judicial building. The idea for a Hall of Fame first appeared in the year 2000 when Montgomery attorney Terry Brown wrote ASB President Sam Rumore with a proposal that the former supreme court building, adjacent to the state bar building and vacant at that time, should be turned into a museum memorializing the many great lawyers in the history of Alabama.

The implementation of the idea of an Alabama Lawyers' Hall of Fame originated during the term of state bar President Fred Gray. He appointed a task force to study the concept, set up guidelines and then provide a recommendation to the Board of Bar Commissioners. The committee report was approved in 2003 and the first induction took place for the year 2004. Since then, 35 lawyers have become members of the Hall of Fame. The five newest members were inducted May 4, 2012.

A 12-member selection committee, consisting of the immediate past president of the Alabama State Bar, a member appointed by the chief justice, one member appointed by each of the three presiding federal District Court judges of Alabama, four members appointed by the Board of Bar Commissioners, the director of the Alabama Department of Archives and History, the chair of the Alabama Bench and Bar Historical Society, and the executive secretary of the Alabama State Bar, meets annually to consider the nominees and make selections for induction.

Inductees to the Alabama Lawyers' Hall of Fame must have had a distinguished career in the law. This could be demonstrated through many different forms of achievement, leadership, service, mentorship, political courage, or professional success. Each inductee must have been deceased at least two years at the time of their selection. Also, each year, at least one of the inductees must have been deceased a minimum of 100 years in order to give due recognition to historic figures as well as the more recent lawyers of the state.

The selection committee actively solicits suggestions from members of the bar and the general public for the nomination of inductees, both historic figures and present-day lawyers. Great lawyers cannot be chosen if they have not been nominated. Nominations can be made throughout the year by downloading the form from *www.alabar.org* and submitting the requested information. Plaques commemorating the inductees are located in the lower rotunda of the Judicial Building, and profiles of all inductees are found at *www.alabar.org*. | AL

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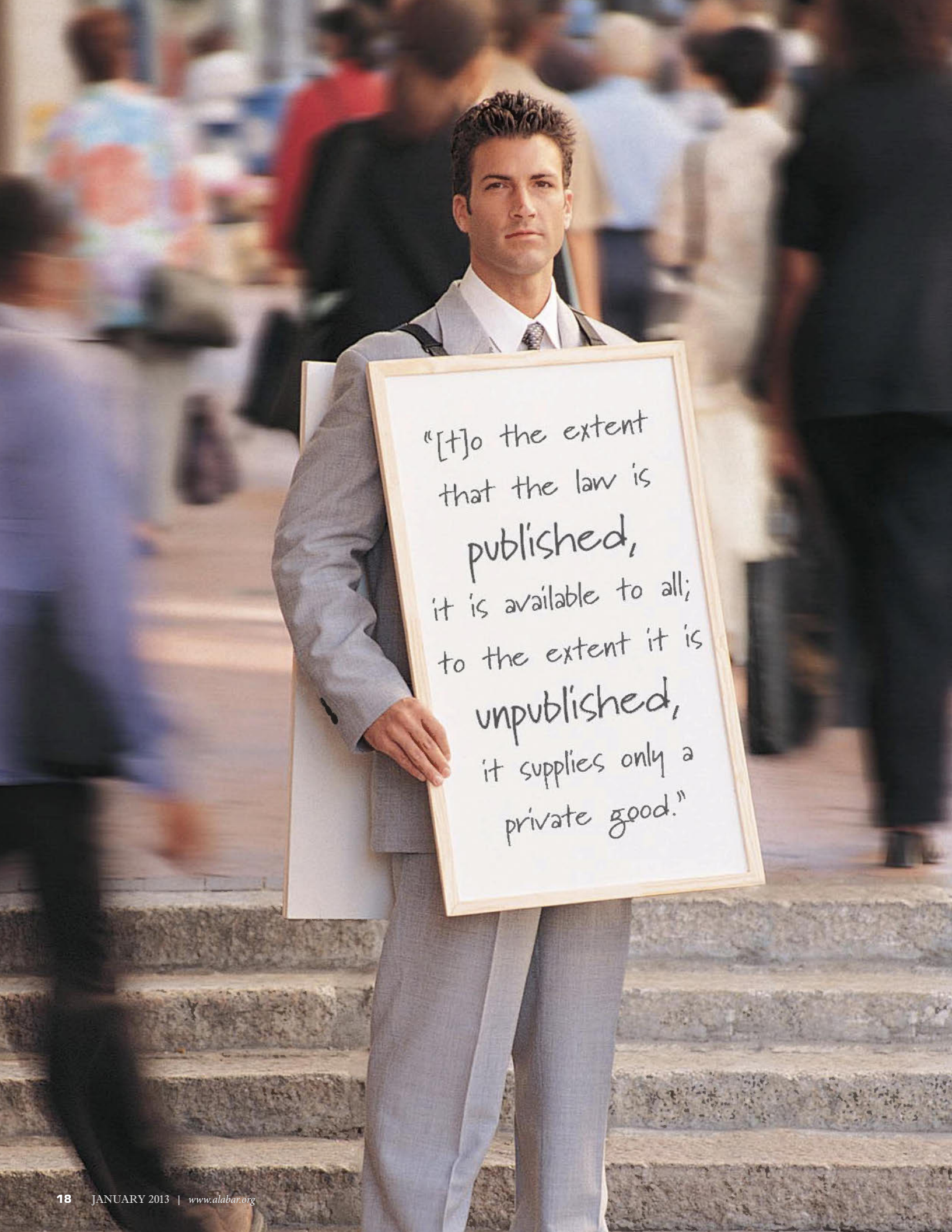
"[t]o the extent
that the law is
published,
it is available to all;
to the extent it is
unpublished,
it supplies only a
private good."

POINT:

Justice Must Satisfy the Appearance of Justice–

A 10-year Review of the Alabama Supreme Court's Treatment of Jury Verdicts in the Plaintiffs' Favor[1]

By Rhonda P. Chambers

A day in the life of an appellate lawyer is sometimes as lonely as it was for the Maytag repairman.[2] Fifteen years ago, appellate lawyers were shackled to the law library between the book stacks and volumes of a record on appeal waiting for the phone to ring. The supreme court clerk's office would call Friday morning to advise of the results in your case on appeal. Forever etched in my mind is, "This is Norma from the supreme court clerk's office calling on the case of ...." You would have to ask that the clerk's office fax a copy of the opinion if you wanted to see it before your mail was delivered Monday. The clerk's office could not fax the opinion until after 1 p.m.

Now, thanks to modern technology, we can work anywhere there is a computer. The record on appeal is available electronically. Every Friday at 10 a.m., like clockwork, I find myself reviewing all of the cases released by the Alabama Supreme Court. I get an email letting me know that the cases have been released, and I can download directly to the link for the case release list. I can read the cases on my computer, phone or iPad from anywhere.

Because of this technology, it is not difficult to create charts to track the Alabama Supreme Court's treatment of plaintiffs' jury verdicts. This article is based upon a 10-year snapshot of the Alabama Supreme Court's treatment of plaintiffs' jury verdicts.

In the 1954 United States Supreme Court opinion, *Offutt v. United States*, 348 U.S. 11, 14 (1954), Mr. Justice Frankfurter stated that "justice must satisfy the appearance of justice." Chief Judge Howard T. Markey, the only person to have served as a sitting judge or by designation as a judge on all of the United States federal appellate courts, said that the "appearance of justice is today seen not as separate from, but as an integral part of justice itself.... It simply is not enough that justice be actually done. *It must be seen to have been done*."[3] The question then is what do we see when we review the past 10 years of Alabama Supreme Court opinions?

Affirming Judgments Entered on a Jury Verdict without An Opinion


EXTRA
FINAL
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Atom tests 'affected IQ'
WIFE-STEALING HORSE
Pioneer heads for the unknown

When the supreme court or the court of civil appeals affirms a judgment without an opinion, in its order of affirmance, the court designates the case as a "no-opinion" case.

Ala. R. App. P. 53 was adopted in 1993. The Rule was an attempt to allow the civil appellate courts to dispose of cases in a much faster and more efficient manner and to reduce the number of opinions being written.[4] Rule 53(a) states that the supreme court or the court of civil appeals may affirm a judgment or order of a trial court without an opinion in one of six limited circumstances[5] and if the court determines that an opinion in the case would serve no significant precedential purpose. The Rule only provides for summary affirmances without an opinion. It does not provide for a summary reversal without an opinion.

An affirmance without an opinion is appropriate in certain circumstances. In many instances only a sufficiency-of-the-evidence question is involved, or an application of well-settled law–of importance to the parties but of no precedential value–and this kind of appeal may well lend itself to an affirmance without opinion. In other instances, the court may feel that the result below was proper but for the wrong reasons or for different reasons than those argued. In some cases, some or all members of the court may feel an appeal raises a troublesome legal issue of general interest but that the record on appeal is too confusing or inadequate to present the issue for a considered written opinion, and the court chooses to wait for another appeal. In such cases, if the result is nevertheless proper, affirmance without an opinion may be used.

When the supreme court or the court of civil appeals affirms a judgment without an opinion, in its order of affirmance, the court designates the case as a "no-opinion" case. Also, in its order of affirmance, the court cites section (a)(1) of Rule 53 and that subpart of section (a)(2) relied on in its decision to write no opinion. The reporter of decisions publishes all opinions of the supreme court and the court of civil appeals in the official reports of Alabama decisions, but the text of an order of affirmance in a "no-opinion" case is not published in the official reports. *Ala. R. App. P.* 53(c).

If in a "No Opinion" case a justice writes a special opinion, however, either concurring with or dissenting from the action of the court, the reporter of decisions publishes that special opinion, along with a statement indicating the action to which the special opinion is addressed. An example of this is the medical malpractice case, *Springhill Hospital, Inc. v. Dixon*, 883 So. 2d 159 (Ala. 2003). In that case, a Mobile County jury returned a verdict of $175,000 past compensatory damages, $62,000 future compensatory damages and $345,000 punitive damages against the hospital. The hospital appealed, and a per curiam court affirmed the case without an opinion. Justice See wrote a dissent in which Justice Brown and Justice Stuart joined. Because of the written dissent, the public was able to see the amount of the jury's verdict.[6]

An affirmed no-opinion case has no precedential value and cannot be cited in arguments or briefs except for the purpose of establishing the application of the doctrine of law of the case, res judicata, collateral estoppel, double jeopardy or procedural bar. *Ala. R. App. P.* 53(e). A recent case that was affirmed in a 9-0 decision without an opinion was *Lanier Health Services v. Coulter*, (Ms. 190716, Dec. 16, 2011). In that case, a Chambers County jury returned a $1.75 million wrongful death verdict against the hospital. The only way the public knew about the appellate result in this case since it was affirmed without an opinion was because it was reported in the press. The newspaper reported that "it was the first appellate decision in Alabama upholding the legal principle that a hospital's staff must go up the chain of command to obtain safe care when a doctor has failed to do so."[7] This was a great result for the plaintiff in the case, but, unfortunately, since the court decided the case without a written opinion, this important legal principle does not have any precedential value. It has been said that "[t]o the extent that the law is published, it is available to all; to the extent it is unpublished, it supplies only a private good."[8]

Importance of Written Opinions

Full, well-reasoned written opinions serve a variety of functions. They are informative as to the reasoning behind the court's decision. They also educate the bar, the lower courts and the public at large. They provide guidance to the lower courts and also to lawyers on how to best counsel their clients. They can be used by attorneys to predict and plan what the court may decide. Furthermore, they help to ensure that the appellate court has made the correct decision. Finally, a well-reasoned opinion is one way to guarantee equal justice to the public and to satisfy the perception of justice. Without an adequate explanation, a dissatisfied litigant who receives an affirmance without an opinion may jump to the conclusion that the court did not write an opinion to conceal the rationale for its decision for some improper reason. There are concerns that an affirmance without an opinion practice does not treat everyone equally and fairly.

The court has indicated that it does not appreciate criticism about its no-opinion affirmances. For example, in *S.B. v. St. James*

Sch., 959 So. 2d 72 (Ala. 2006), the court originally affirmed the summary judgment without an opinion. The appellant filed an application for rehearing urging the court to change its mind and reverse the summary judgment. The appellant also complained about the court's Rule 53 affirmance without an opinion. The court denied the rehearing but stated in a written opinion:

> This court originally affirmed the summary judgments of the trial court in the underlying case without an opinion. The decision to affirm the judgments of the trial court without an opinion was made because an opinion in this case would add little precedential value to the areas of the law discussed, and this court concluded, after reviewing the record and the contentions of the parties, that the trial court's judgment was entered without error of law. See Rule 53(a)(1) and (a)(2)(F), *Ala. R. App. P.* In addition, because of the sensitive nature of the facts of this case, this court did not want to subject the families involved to the further embarrassment and humiliation that might be brought about by a published opinion. However, counsel for the appellants strongly criticized this court in the applications for rehearing filed in these appeals for failing to issue a published opinion; therefore, this court has reconsidered its decision not to release a published opinion in this case, withdraws its no-opinion affirmance ... and substitutes the following opinion therefor.

959 So. 2d at 79.

Also, in the case of *Dennis v. Northcutt*, 923 So. 2d 275 (Ala. 2005), the court affirmed the trial court's summary judgment without an opinion. In his application for rehearing, the appellant made the following statement about the court's issuance of a no-opinion affirmance in the case:

> A reasonable inference could be fairly drawn … that this Court's decision to affirm the summary judgment entered in favor of [Northcutt] by the specially appointed acting circuit judge in this action … with "NO OPINION" (without citing any controlling existing precedent) was due to this Court's unwillingness to embarrass the retired Chief Justice by reversing the second summary judgment entered by him in this action.

923 So. 2d at 278. The court stated that the appellant's assertion was erroneous. Nonetheless, the court withdrew its no-opinion affirmance, substituted a written opinion and denied the application for rehearing.

The federal appellate rules are dramatically different than Alabama's appellate rules in this regard. There is always a written opinion in every case. The issue is whether that written opinion is published. *Fed. R. App. P.* 32.1 is a fairly new appellate rule adopted effective January 1, 2007, addressing the citation of judicial opinions, orders, judgments or other written dispositions

The importance of a written opinion from the Alabama Supreme Court is evident by the inability to obtain certiorari review in the United States Supreme Court if there is not a written opinion.

that have been designated by a federal court as "unpublished," "not for publication," "non-precedential," "not precedent," or the like. *Fed. R. App. P.* 32.1(a) states that "[a] court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been: (I) designated as 'unpublished,' 'not for publication,' 'non-precedential,' 'not precedent,' or the like; and (ii) issued on or after January 1, 2007." FED. R. APP. P. 32.1(b) states that "[i]f a party cites a federal judicial opinion, order, judgment, or other written disposition that is not available in a publicly accessible electronic database, the party must file and serve a copy of that opinion, order, judgment, or disposition with the brief or other paper in which it is cited."

The terms "unpublished" and "not for publication" are misnomers; while an opinion of a federal court of appeals may bear such a designation, these opinions can be found easily both on the Internet and in bound volumes. On the Internet, unpublished opinions are available not only from the subscription services offered by West and Lexis, but also on the website of each circuit. That is not true with the Alabama Supreme Court's no-opinion affirmances.

Rule 32.1 is extremely limited. It does not require any court to issue an unpublished opinion or forbid any court from doing so. It does not dictate the circumstances under which a court may choose to designate an opinion as "unpublished" or specify the procedure that a court must follow in making that determination. It says nothing about what effect a court must give to one of its unpublished opinions or to the unpublished opinions of another court. Rule 32.1 addresses only the citation of federal judicial dispositions that have been designated as "unpublished" or "non-precedential"–whether or not those dispositions have been published in some way or are precedential in some sense.

The United States Supreme Court has commented several times on the procedure of not publishing opinions. *United States v. Edge Broadcasting Co.*, 509 U.S. 418 (1993), involved the broadcasting of commercials for lotteries where the Court reversed on First Amendment free-speech grounds. Incredibly, neither the district nor appellate court opinions were published. Justice White, writing for the majority, "deem[ed] it remarkable and unusual that although the Fourth Circuit Court of Appeals affirmed a judgment that an Act of Congress was unconstitutional as applied, the court found it appropriate to announce its judgment in an unpublished per curiam opinion." *Id.* at 425, fn. 3. Similarly, Justice Stevens, in *County of Los Angeles v. Kling*, 474 U.S. 936, 937, n.1 (1985)(Stevens, J., dissenting), criticized the Ninth Circuit's decision not to publish an opinion as "plainly wrong" and equated such a decision to "a rule spawning a body of secret law."

The importance of a written opinion from the Alabama Supreme Court is evident by the inability to obtain certiorari review in the United States Supreme Court if there is not a written opinion. It is a threshold procedural requirement for certiorari review that a federal question was presented to the state courts. *Yee v. Escondido*, 503 U.S. 519, 533 (1992). Obviously, the petitioner cannot meet that requirement if the state court has affirmed the judgment without writing an opinion. *Stembridge v. Georgia*, 343 U.S. 541, 547 (1952)("Where the highest court of the state delivers no opinion and it appears that the judgment might have rested upon a nonfederal ground, this Court will not take jurisdiction to review the judgment."). This was the argument made in opposition to the petition for writ of certiorari in the Alabama case of *Cline v. Ashland, Inc.*, 2006 U.S. Briefs 61280 7-8 (U.S. May 1, 2007)("There is absolutely no mention of the federal due process issue in any of the concurrences or in the dissent to the no opinion affirmance of the Supreme Court of Alabama. Under the circumstances, Petitioner has failed to meet her burden of demonstrating that the question presented in this Court was presented to the court below or that the court below actually decided the question."). The Supreme Court denied certiorari. *Cline v. Ashland, Inc.*, 551 U.S. 1103 (2007).

The only Alabama no-opinion affirmance where the United States Supreme Court granted certiorari since the adoption of *Ala. R. App. P.* 53 in 1992 was the state franchise tax case of *South Cent. Bell Tel. Co. v. Ala.*, 526 U.S. 160 (U.S. 1999). In granting the petition for writ of certiorari and reversing the Alabama Supreme Court, the United States Supreme Court noted:

> The Alabama Supreme Court affirmed the trial court by a vote of 5 to 4. The majority's decision cited *Reynolds Metals* and a procedural rule regarding summary dispositions and simply said, "PER CURIAM. AFFIRMED. NO OPINION." *South Central Bell v. Alabama*, 711 So. 2d 1005 (1998). One justice concurred specially to say that by requesting that their case be held in abeyance until *Reynolds Metals* was resolved, the *Bell* plaintiffs had agreed to be bound by [that case] (opinion of Maddox, J.). Three dissenters wrote that given the differences between this case and *Reynolds Metals* (e.g., different tax years, different plaintiffs), res judicata could not bind the *Bell* plaintiffs. 711 So. 2d at 1008 (opinion of See, J.). On the merits, the dissenters concluded that the franchise tax violated the Commerce Clause. One other justice dissented without opinion.

526 U.S. at 164-165 (some citations omitted).

There are no statistics on the number of cases that have been affirmed without an opinion by the Alabama Supreme Court. Because the decisions are not published, there is no way to determine the statistics on cases affirmed without opinion. Thus, we cannot determine the number of plaintiffs' jury verdicts that have been affirmed without an opinion. It appears, however, that the

use of Rule 53 no-opinion affirmances has increased significantly in the past 19 years.[9]

Why is it important to the plaintiff that the court is affirming jury verdicts without an opinion if the court is nonetheless upholding the verdict? A win is a win, right? It is because it simply is not enough that justice be actually done. It must be seen to have been done. What we can see is that over the past 10 years in which the court has written opinions addressing plaintiffs' jury verdicts, the court has reversed the verdicts more than 72 percent of the time. An opinion is a declaration of law which must be followed in subsequent cases. Inherent in every judicial decision is a declaration and interpretation of a general principle or rule of law. Because so many jury verdicts may have been affirmed without an opinion in the past 10 years, there have been few opinions with precedential value in the plaintiffs' favor. It undermines a fundamental principle of Anglo-American jurisprudence–the doctrine of stare decisis.

Decline of Civil Jury Trials

A related development is that the number of civil jury trials is declining. Despite growing numbers of judges, pending cases and dispositions, the civil jury trial in Alabama is vanishing. There are many possible reasons for this, any number of which could be devoted to an entire article in and of itself. For many years, the Administrative Office of Courts ("AOC") has published the Alabama Judicial System Annual Report, containing a description of the Alabama court system along with statistics on its operation based on data collected from court clerks throughout the state.[10] According to the AOC, there are 41 judicial circuits in Alabama and 144 trial judges.

TABLE 1–Number of Civil Jury Trials and Dispositions, 2002-2011

YEAR	JURY TRIALS	DISPOSITIONS
2002	677	49,651
2003	685	49,913
2004	597	49,432
2005	528	48,783
2006	507	47,018
2007	445	46,394
2008	461	49,365
2009	445	52,984
2010	414	51,270
2011	393	49,166
TEN-YEAR TOTAL	**5,152**	**493,976**

The AOC Annual Reports indicate that there were 677 civil jury trials in 2002. In 10 years, the number of jury trials has dwindled in 2011 to 393. Of the 49,651 cases disposed of in 2002, 1.4 percent of the 677 cases were decided by a jury trial. By 2011, the number of disposed cases had dropped to 49,166, but only 0.80 percent of the 393 cases were decided by a jury trial. That is a 42 percent decrease in 10 years. The 10-year total number of civil jury trials is 5,151. That amounts to an average of three and a half trials each year per judge.

Alabama Supreme Court's Treatment of Plaintiffs' Jury Verdicts

Over the past decade, the Alabama Supreme Court has issued 146 written opinions reviewing plaintiffs' jury verdicts. In only 44 of the 146 cases did the jury's verdict survive on appeal.[11] One hundred and two of the plaintiffs' jury verdicts were reversed–a whopping 72 percent average over 10 years. There was never a year when there were more affirmances than reversals.

TABLE 2–Alabama Supreme Court's Treatment of Plaintiffs' Jury Verdicts, 2002-2011

YEAR	TOTAL WRITTEN OPINIONS–PLAINTIFFS' JURY VERDICTS	AFFIRMED[12]	REVERSED[13]
2002	16	5	11
2003	29	10[14]	19
2004	16	5	11[15]
2005	18	1	17[16]
2006	11	4	7
2007	12	4	8[17]
2008	10	5	5[18]
2009	14	5	9
2010	9	4	5[19]
2011	11	1	10[20]
2002-2011	**146**	**44**	**102**

The success rates for plaintiffs on appeal in 2002 and 2003 were comparably poor: in 2002 only five verdicts were affirmed[21] and 11 verdicts were reversed,[23] whereas in 2003, 10 verdicts were affirmed[22] and 19 verdicts were reversed.[24] In 2004, the court wrote 16 opinions, five of which affirmed the jury's verdict[25] and 11 of which reversed the jury's verdict.[26] The year 2005 was dreadful for jury verdicts. The court wrote 18 opinions. Only one jury verdict was affirmed[27] and 17 jury verdicts were reversed.[28] In 2006, four verdicts were affirmed[29] and eight verdicts were reversed.[30]

In 2007, 12 opinions were written. Four verdicts were affirmed[31] and eight verdicts were reversed.[32] The year 2008 was even. Five jury verdicts were affirmed[33] and five jury verdicts were reversed. [34] In 2009, five jury verdicts were affirmed[35] and nine jury verdicts were reversed.[36] In 2010, three jury verdicts were affirmed[37] and five jury verdicts were reversed.[38] The survival rate for jury verdicts was the worst in 2011. The court wrote 11 opinions and only one jury verdict was affirmed.[39] Ten of the 11 jury verdicts were reversed.[40] The year 2012 has started in the same manner as 2011 ended. Through June 22, 2012, the court has released three written opinions dealing with jury verdicts in the plaintiff's favor. One of the jury verdicts was affirmed,[41] and two of the jury verdicts were reversed.[42]

TABLE 3–Highest Jury Verdict Affirmed by Cause of Action and Highest Jury Verdict Reversed by Cause of Action

YEAR	HIGHEST AFFIRMED–TYPE	HIGHEST REVERSED–TYPE
2002	$6.25 million–negligence–*Hornaday Truck Line, Inc. v. Meadows,* 847 So. 2d 908 (Ala. 2002)	$91 million ($87.7 million compensatory and $3.42 million punitive)–fraud and breach of contract–*Exxon Corp. v. Dept. of Conservation & Natural Resources,* 859 So. 2d 1096 (Ala. 2002)
2003	$6 million–wrongful death–*Mack Trucks v. Witherspoon,* 867 So. 2d 07 (Ala. 2003)	$82 million ($22 million compensatory and $60 million punitive)–negligence and wantonness–*GMC v. Jernigan,* 883 So. 2d 646 (Ala. 2003)
2004	$2,912,043–breach of contract–*Continental Casualty Co. v. Plantation Pipe,* 902 So. 2d 36 (Ala. 2004)	$23.4 million ($3.4 million compensatory and $20 million punitive)–fraud–*Hunt Petroleum v. State,* 901 So. 2d 1 (Ala. 2004)
2005	$765,920–medical malpractice–*Lloyd Noland Hospital v. Durham,* 906 So. 2d 157 (Ala. 2005)	$5.5 million–fraud and breach of contract–*Alfa Life Ins. Co. v. Jackson,* 906 So. 2d 143 (Ala. 2005)
2006	$350,000–fraud–*Cochran v. Ward,* 935 So. 2d 1169 (Ala. 2006)	$27 million ($19.5 million compensatory and $7.5 million punitive)–breach of fiduciary duty–*Systrends v. Group 8760,* 959 So. 2d 1052 (Ala. 2006)
2007	$8.9 million–breach of contract–*International Paper v. Madison Oslin, Inc.*, 985 So. 2d 879 (Ala. 2007)	$3.6 billion ($100 million compensatory and $3.5 billion punitive)–breach of contract and fraud–*Exxon Mobil Corp. v. Alabama Dept. of Conservation,* 986 So. 2d 1093 (Ala. 2007)
2008	$1.5 million–negligence and wantonness–*Southeastern Envtl. Infrastructure v. Rivers*, 12 So.3d 32 (Ala. 2008)	$7.6 million ($2.1 million compensatory and $5.5 million punitive)–breach of contract, fraud and negligence–*Southland Bank v. A&A Drywall*, 21 So.3d 1196 (Ala. 2008)
2009	$750,000–breach of fiduciary duty–*Line v. Ventura,* 38 So. 3d 1 (Ala. 2009)	$160 million ($40 million compensatory and $120 million punitive)–fraud and breach of contract–*SmithKline v. State,* 41 So.3d 15 (Ala. 2009)
2010	$2 million–medical malpractice–*Miller v. Bailey,* 60 So.3d 857 (Ala. 2010)	$1.65 million–negligence and wantonness–*Cheshire v. Putman,* 54 So.3d 336 (Ala. 2010)
2011	$3 million–medical malpractice, assault and outrage–*O'Rear v. B.H.*, 69 So.3d 106 (Ala. 2011)	$8.6 million ($2.1 million compensatory and $6.5 million punitive)–breach of contract and fraud–*GE Capital Aviation v. Pemco,* 2011 Ala. LEXIS 288 (Ala. 2011)
2012	$2.15 million–medical malpractice–*Hrynkiw v. Trammell,* 2012 Ala. LEXIS 59 (Ala. 2012)	$3.69 million–workers' compensation outrage–*Attenta, Inc. v. Calhoun,* 2012 Ala. LEXIS 65 (Ala. 2012)

There have been 19 different justices serving on the Alabama Supreme Court over the past 10 years. In reviewing publicly available information, it is evident that in recent years that the justices on the court are not writing as many opinions dealing with civil jury verdicts. For example, there were 29 written opinions in 2003 addressing plaintiffs' jury verdicts, but only 11 in 2011.

The court lost one of its most prolific opinion writers in 2011 and lost another in 2012. Justice Champ Lyons retired in 2011. Over the past 10 years, he wrote 16 opinions that addressed jury verdicts in the plaintiffs' favor. Justice Tom Woodall retired in 2012. He has written the most supreme court opinions in the past 10 years. He has written 23 opinions that addressed jury verdicts in the plaintiffs' favor.

Also, over the past 10 years, there have been 18 per curiam opinions written dealing with jury verdicts. Twelve of those jury verdicts were reversed. Six of the jury verdicts were affirmed. The highest verdict that was affirmed in a per curiam opinion was the $25 million wrongful death verdict in *Mack Trucks v. Witherspoon*, 867 So. 2d 307 (Ala. 2003) that was affirmed conditionally upon plaintiffs' acceptance of a remittitur to $6 million. The highest verdict that was reversed in a per curiam opinion was the $4.2 billion verdict in *Exxon Corp. v. Dep't of Conservation and Natural Resources*, 859 So. 2d 1096 (Ala. 2002) ($87.7 million compensatory and $3.42 billion punitive).

Over the past 10 years, 23 fraud jury verdicts were reversed (with two being affirmed), 26 negligence verdicts were reversed (with eight being affirmed), 11 medical malpractice verdicts were reversed (with nine being affirmed) and five retaliatory discharge verdicts were reversed (with only one being affirmed).

Conclusion

"It is what it is."[43] Unquestionably, some jury verdicts in the plaintiffs' favor are due to be reversed, but some jury verdicts in the plaintiffs' favor are due to be affirmed with a written opinion. We only know what we see, and based on a review of the last 10 years, it appears that the Alabama Supreme Court issues opinions to uphold plaintiffs' jury verdicts in only one of every four cases that come before the court. | AL

Endnotes

1. The analysis of the data collected and conclusions reached are solely those of the author, as are any errors made. The raw data is available on the author's website, *www.taylorlawyers.com/articles*.
2. For those of you not old enough to remember, in the late 1960s, Maytag ran a commercial regarding the dependability of its appliances. The commercial showed the Maytag repairman lonely and waiting on the phone to ring.
3. Chief Judge Howard T. Markey, *The Delicate Dichotomies of Judicial Ethics*, 101 F.R.D. 373, 380 (1984)(emphasis added).
4. Court Comment on 1993 Adoption of *Ala. R. App. P.* 53.
5. The six circumstances are: (1) the judgment or order appealed from is based on findings of fact that are not clearly, plainly or palpably erroneous; (2) the evidence adequately supports the jury verdict on which the judgment or order is based; (3) in a nonjury case in which the judge has made no specific findings of fact, the evidence would support those findings that would have been necessary to support the judgment or order; (4) the order of an administrative agency is sufficiently supported by the evidence in the record; (5) the appeal is from a summary judgment, a judgment on the pleadings or a judgment based on a directed verdict, and that judgment is supported by the record; or (6) the court, after a

review of the record and the contentions of the parties, concludes that the judgment or order was entered without an error of law. *Ala. R. App. P.* 53(a)(2).

6. The only affirmance without an opinion in a case involving a jury verdict that I have been personally involved in was in 2004. It was reported because Justice See dissented in part. In *SCI Ala. Funeral Servs. v. Beauchamp*, 893 So. 2d 352 (Ala. 2004), the funeral home mishandled and misidentified plaintiffs' family member and another body. The other person's body was placed in plaintiffs' family member's casket and presented to the family for graveside viewing. A Jefferson County jury awarded $275,000 in compensatory damages and $1 million in punitive damages. Justice See dissented from the affirmance of the trial court's holding that the conduct of the funeral home satisfied the elements of the tort of outrage. He also dissented from the affirmance of the punitive damages award, which he considered to be excessive. The case is not included in the 2004 affirmed list because the dissent does not state the amount of the jury verdict.
7. Russell Hubbard, *Alabama Supreme Court Upholds Wrongful Death Jury Award Against Hospital*, B'HAM NEWS, Feb. 18, 2012.
8. Gilbert S. Merritt, *Judges on Judging: The Decision-Making Process in Federal Courts of Appeals*, 51 OHIO ST. L.J. 1385, 1392 (1990). *But see* Boyce F. Martin, Jr., *Judges on Judging: In Defense of Unpublished Opinions*, 60 OHIO ST. L.J. 177 (1999).
9. A review of the Alabama Supreme Court's release list on March 9, 2012 showed that 11 cases were affirmed without an opinion. The court released only two written opinions. On April 6, 2012, the court's release list showed that 12 cases were affirmed without an opinion. On that day, the court released only three written opinions. Finally, on June 15, 2012, the court's release list showed that 11 cases were affirmed without an opinion and only two written opinions were released. Over this three-week period, a total of 41 civil cases were decided. Opinions were written in 17 percent of those cases.
10. The annual reports are available on the Administrative Office of Court's website, *www.alacourt.gov/publications.aspx*.
11. Also, in the interest of full disclosure, five of the 102 cases reversed in the past 10 years were either jury verdicts secured by my firm or cases where I was retained on appeal. Those cases are *Walmart v. Smitherman*, 872 So. 2d 833 (Ala. 2003)(reversing a $100,000 jury verdict), *Alfa Life Ins. Co. v. Green*, 881 So. 2d 987 (Ala. 2003)(reversing a $1.2 million jury verdict), *Alfa Life Ins. Co. v. Jackson*, 906 So. 2d 143 (Ala. 2005)(reversing a $5.5 million jury verdict), *Prattville Memorial Chapel v. Parker*, 10 So.3d 546 (Ala. 2008)(reversing a $1.05 million jury verdict), and *Southland Bank v. A&A Drywall*, 21 So.3d 1196 (Ala. 2008)(reversing a $7.6 million jury verdict). I have not had a single jury verdict upheld on appeal in a written decision in the past 10 years.
12. "Affirmed" refers to an upholding of the amount of the jury's verdict. In my survey, affirmed in part, reversed in part may fall in an affirmed category if the majority of the jury's verdict is upheld.
13. "Reversed" means the supreme court eliminated the entire jury verdict amount, which may not be the same as the trial court judgment. It includes a ruling reversing the amount and remanding for further proceedings, as well as a ruling reversing and rendering the judgment. Also, in my survey reversed in part, affirmed in part may fall in a reversed category if the majority of the jury's verdict is reversed.
14. Included in the affirmed list in 2003 is *Industrial Technologies, Inc. v. Jacobs Bank*, 872 So. 2d 819 (Ala. 2003). The jury returned a verdict of $148,000 in compensatory damages and $250,000 in punitive damages. The trial court vacated the punitive damage award. The supreme court affirmed the compensatory verdict and reversed and remanded the case for the trial court to reinstate the punitive damage award.
15. Two cases that were reversed in part and affirmed in part are included in the reversed list in 2004. In *State Farm v. Nix*, 888 So. 2d 489 (Ala. 2004), the jury returned a $15,325 compensatory and $200,000 punitive damage award in the plaintiff's favor on his fraud and negligent failure to procure claims. The trial court remitted the punitive award to $76,627. On appeal, the court affirmed the compensatory award and reversed and rendered the punitive award. In *Regions Bank v. Plott*, 897 So. 2d 239 (Ala. 2004), the court reversed and rendered the $70,000 and $15,000 compensatory damage awards in a husband's and wife's favor on a false-light claim. The court dismissed the bank's appeal on plaintiffs' intrusion on seclusion claim as moot.
16. Included in the 2005 reversed list are three cases that were reversed in part and affirmed in part. The first is *Alfa Life Ins. Corp. v. Jackson*, 906 So. 2d 143 (Ala. 2005). The court reversed and rendered the $5.5 million fraud verdict but remanded for a new trial on the breach of contract claim. The second case is *Morgan Keegan v. Cunningham*, 918 So. 2d 897 (Ala. 2005). In that case, the court affirmed a $10,000 compensatory verdict but reversed a $50,000 punitive verdict. The third case is *Southtrust v. Donely*, 925 So. 2d 934 (Ala. 2005). The court reversed the $125,000 punitive damage award and affirmed the $51,090 compensatory award.
17. Included in the reversed list in 2007 is *Exxon Mobil Corp. v. Ala. Dept. of Conservation*, 986 So. 2d 1093 (Ala. 2007). In that case, the court affirmed the $51,907,634 compensatory award for breach of contract but reversed the $3.5 billion punitive award.
18. Included in the reversed list in 2008 is *Prattville Memorial Chapel v. Parker*, 10 So.3d 546 (Ala. 2008). The court reversed and rendered the $1.05 million fraud claim but affirmed the $30,000 breach of contract claim.

19. Included in the reversed list in 2010 is *Ross v. Rosen-Rager*, 67 So.3d 29 (Ala. 2010). In that case, the jury returned a $30,000 compensatory damage award and a $350,000 punitive damage award in a trespass and ejectment action.

20. Included in the reversed list in 2011 is *Stephens v. Fines Recycling*, 2011 Ala. LEXIS 226 (Ala. 2011). In that case, the jury returned a $438,855 net verdict in the plaintiff's favor. The appeal from the jury verdict was dismissed because it was from a non-final judgment.

21. Jury verdicts affirmed in 2002 were: *Lathan Roof America, Inc. v. Hairston*, 828 So. 2d 262 (Ala. 2002)($500,000); *National Ins. Assoc. v. Sockwell*, 829 So. 2d 111 (Ala. 2002)($201,000 compensatory and $600,000 punitive); *Liberty Nat'l Life Ins. Co. v. Daugherty*, 840 So. 2d 152 (Ala. 2002)($300,000); *Hornady Truck Line, Inc. v. Meadows*, 847 So. 2d 908 (Ala. 2002)($6.25 million); *Byrd, Inc. v. Bentley*, 850 So. 2d 232 (Ala. 2002)($1.35 million).

22. Jury verdicts reversed in 2002 were: *Lincoln Log Home Enter., Inc. v. Autrey*, 836 So. 2d 804 (Ala. 2002)($505,000 compensatory and $600,000 punitive); *City of Birmingham v. Sutherland*, 834 So. 2d 755 (Ala. 2002)($115,000); *H.R.H. Metals, Inc. v. Miller*, 833 So. 2d 18 (Ala. 2002)($6.6 million); *State Farm Fire & Casualty Co. v. Shady Grove Baptist Church*, 838 So. 2d 1039 (Ala. 2002)($128,800); *Jim Walter Homes, Inc. v. Nicholas*, 843 So. 2d 133 (Ala. 2002)($50,000 compensatory and $50,000 punitive); *Serra Chevrolet, Inc. v. Edwards Chevrolet, Inc.*, 850 So. 2d 259 (Ala. 2002)($9 million and attorney's fees of $2.83 million); *Johnson v. Stewart*, 854 So. 2d 544 (Ala. 2002)($1 dollar compensatory and $1 million punitive; trial court remitted punitive to $500,000); *Wood v. Phillips*, 849 So. 2d 951 (Ala. 2002)(jury verdict amount not disclosed); *Alabama Power Co. v. Aldridge*, 854 So. 2d 554 (Ala. 2002)($250,000 compensatory and $250,000 punitive); *Exxon Corp. v. Dep't of Conservation and Natural Resources*, 859 So. 2d 1096 (Ala. 2002)($87.7 million compensatory and $3.42 billion punitive); *Parsons v. Aaron*, 849 So. 2d 932 (Ala. 2002)($107,000 compensatory and $60,000 punitive).

23. Jury verdicts affirmed in 2003 were: *Mitchell v. Folmar & Associates*, 854 So. 2d 1115 (Ala. 2003)($51,918 compensatory and $103,836 punitive); *Mack Trucks v. Witherspoon*, 867 So. 2d 307 (Ala. 2003)($25 million; affirmed conditionally upon acceptance of remittitur to $6 million); *Industrial Technologies, Inc. v. Jacobs Bank*, 872 So. 2d 819 (Ala. 2003)($148,000 compensatory and $250,000 punitive; trial court vacated punitive; affirmed in part and reversed and remanded for reinstatement of punitive award); *Winter Int'l Corp. v. Common Sense*, 863 So. 2d 1088 (Ala. 2003)($375,565); *Springhill Hospital v. Dixon*, 883 So. 2d 159 (Ala. 2003)($175,000 past compensatory, $62,000 future compensatory and $345,000 punitive; affirmed without opinion but with dissent by Justice See); *Akins Funeral Home v. Miller*, 878 So. 2d 267 (Ala. 2003)($200,000 compensatory and $150,000 punitive); *Southern Pine Elec. Coop. v. Birch*, 878 So. 2d 1120 (Ala. 2003)($20,000 compensatory and $75,000 punitive); *Mobile Infirmary v. Hodgen*, 884 So. 2d 801 (Ala. 2003)($0 compensatory and $2.25 million punitive; affirmed conditionally upon acceptance of remittitur to $1.5 million); *Harrelson v. R.J.*, 882 So. 2d 317 (Ala. 2003)($15,000 compensatory and $75,000 punitive); *Shiv-Ram v. McCaleb*, 892 So. 2d 299 (Ala. 2003)($176,572 compensatory and $500,000 punitive).

24. The jury verdicts reversed in 2003 were: *ATS, Inc. v. Beddingfield*, 878 So. 2d 1131 (Ala. 2003)($9.5 million compensatory and $15 million punitive); *Walmart v. Smitherman,* 872 So. 2d 833 (Ala. 2003)($100,000); *Butler v. Town of Argo*, 871 So. 2d 1 (Ala. 2003)($375,000 compensatory and $125,000 punitive); *AL Great So. R.R. v. Johnson*, 874 So. 2d 517 (Ala. 2003)($750,000); *Waddell & Reed v. United Investors Life Ins. Co.*, 875 So. 2d 1143 (Ala. 2003)($50 million); *Petty-Fitzmaurice v. Steen*, 871 So. 2d 771 (Ala. 2003)($3.43 million); *Tyson Foods v. McCollum*, 881 So. 2d 976 (Ala. 2003)(verdict amount unspecified); *Alfa Life Ins. Co. v. Green*, 881 So. 2d 987 (Ala. 2003) ($300,000 compensatory and $3 million punitive; trial court remitted punitive to $900,000); *Eagle Products v. Glasscock*, 822 So. 2d 280 (Ala. 2003)($506,000); *Ex parte Bender Shipbuilding*, 879 So. 2d 577 (Ala. 2003)($40,000); *East Al. Behavioral Med. Ctr. v. Chancey*, 883 So. 2d 162 (Ala. 2003)($1 million compensatory and $495,000 punitive); *LaFarge Bldg. Materials v. Stribling*, 880 So. 2d 415 (Ala. 2003)($500,000 compensatory and $1.5 million punitive); *John Deere Const. v. England*, 883 So. 2d 173 (Ala. 2003)($289,000 compensatory and $1.5 million punitive; trial court remitted punitive to $867,000); *Coca-Cola Bottling v. Hollander*, 885 So. 2d 125 (Ala. 2003)($150,000 compensatory and $250,000 punitive); *Conference America v. Telecommunications Coop. Network*, 885 So. 2d 772 (Ala. 2003)($1,007,499); *GMC v. Jernigan*, 883 So. 2d 646 (Ala. 2003)($22 million compensatory and $100 million punitive; trial court remitted punitive to $60 million); *Dolgencorp, Inc. v. Hall*, 890 So. 2d 98 (Ala. 2003)($100,000); *DCH Healthcare v. Duckworth*, 883 So. 2d 1214 (Ala. 2003)($350,000); *Breaux v. Thurston*, 888 So. 2d 1208 (Ala. 2003)($300,000).

25. The jury verdicts affirmed in 2004 were: *Thompson Properties v. Birmingham Hide & Tallow*, 897 So. 2d 248 (Ala. 2004)($194,000); *George H. Lanier Mem'l Hosp. v. Andrews*, 901 So. 2d 714 (Ala. 2004)($200,000); *Continental Casualty Co. v. Plantation Pipe*, 902 So. 2d 36 (Ala. 2004)($2,912,043); *Flint Construction v. Hall*, 904 So. 2d 236 (Ala. 2004)($400,000 compensatory and $200,000 punitive); *Patterson v. Liberty Nat'l Life Ins. Co.*, 903 So. 2d 769 (Ala. 2004)($50,000).

26. The jury verdicts reversed in 2004 were: *Liberty Nat'l Life Ins. Co. v. Ingram*, 887 So. 2d 222 (Ala. 2004)($200,000 compensatory and $3 million punitive; remitted by trial court to $60,000 compensatory and $180,000 punitive); *Delta Health Group v. Stafford*, 887 So. 2d 887 (Ala. 2004)($200,000 compensatory and $200,000 punitive); *Hunt Petroleum v. State*, 901 So. 2d 1 (Ala. 2004)($3.4 million compensatory and $20 million punitive); *Brackin v. Trimmier Law Firm*, 897 So. 2d 207 (Ala. 2004)($800,000 compensatory and $200,000 punitive); *New Addition Club v. Vaughn*, 903 So. 2d 68 (Ala. 2004)($240,000); *Tom's Foods v. Carn*, 896 So. 2d 443 (Ala. 2004)($500,000 compensatory and $4 million punitive; trial court remitted punitive to $750,000); *Alabama Power Co. v. Moore*, 899 So. 2d 975 (Ala. 2004)($1 million compensatory and $2 million punitive); *Nationwide Mutual Ins. v. Pabon*, 903 So. 2d 759 (Ala. 2004)($365,300; trial court remitted to $294,135); *Houserman v. Garrett*, 902 So. 2d 670 (Ala. 2004)($200,000); *State Farm v. Nix*, 888 So. 2d 489 (Ala. 2004)($215,325); *Regions Bank v. Plott*, 897 So. 2d 239 (Ala. 2004)($85,000).

27. The only case affirmed in 2005 was *Lloyd Noland Hospital v. Durham*, 906 So. 2d 157 (Ala. 2005)($765,920).

28. The cases reversed in 2005 were: *Alfa Life Ins. Corp. v. Jackson*, 906 So. 2d 143 (Ala. 2005)($5.5 million; reduced by supreme court to $400,000 on original submission; reduced to $30,000 on rehearing); *Ferguson v. Baptist Health System*, 910 So. 2d 85 (Ala. 2005)($1 million); *Keibler-Thompson v. Steading*, 907 So. 2d 435 (Ala. 2005)($500,000); *Riscorp v. Norman*, 915 So. 2d 1142 (Ala. 2005)($3 million); *City of Mobile v. Cooks*, 915 So. 2d 29 (Ala. 2005)($32,500); *Fox Alarm Co. v. Wadsworth*, 913 So. 2d 1070 (Ala. 2005)($200,000); *Tenn Tom Building v. Olen Nicholas & Copeland*, 908 So. 2d 230 (Ala. 2005)($518,000); *Webb Wheel v. Hanvey*, 922 So. 2d 865 (Ala. 2005)($480,000); *Parker Building v. Lightsey*, 925 So. 2d 927 (Ala. 2005)($1.6 million); *AmSouth v. Tice*, 923 So. 2d 1060 (Ala. 2005)($342,206); *Southtrust v. Donely*, 925 So. 2d 934 (Ala. 2005)($176,090); *Black v. Comer*, 920 So. 2d 1083 (Ala.

2005)($150,000); *City of Crossville v. Haynes*, 925 So. 2d 944 (Ala. 2005)($550,000; remitted by trial court to $100,000); *State Farm v. Williams*, 926 So. 2d 1008 (Ala. 2005)($94,600); *Freightliner v. Whatley Contract Carriers*, 932 So. 2d 883 (Ala. 2005)($440,000 compensatory and $750,000 punitive); *Zanaty v. Williams*, 935 So. 2d 1163 (Ala. 2005)($104,000); *Morgan Keegan v. Cunningham*, 918 So. 2d 897 (Ala. 2005)($60,000).

29. The only four cases affirmed in 2006 were: *Boles v. Parris*, 952 So. 2d 364 (Ala. 1006)($1.275 million); *Cochran v. Ward*, 935 So. 2d 1169 (Ala. 2006)($350,000); *Tolar Construction v. Kean Electric*, 944 So. 2d 138 (Ala. 2006)($88,000); *Ex parte Howell Engineering & Surveying, Inc.*, 981 So. 2d 413 (Ala. 2006)($618,634).

30. The cases reversed in 2006 were: *Bailey v. Faulkner*, 940 So. 2d 247 (Ala. 2006)($1.6 million); *Ware v. Timmons*, 954 So. 2d 545 (Ala. 2006)($13.7 million); *Davis v. Hanson Aggregates SE*, 952 So. 2d 330 (Ala. 2006)(unknown amount of jury verdict); *State Farm v. Alexander*, 950 So. 2d 267 (Ala. 2006)($200,000); *Beiersdoerfer v. Hilb, Rogal & Hamilton*, 953 So. 2d 1196 (Ala. 2006)($1.25 million); *Systrends v. Group 8760*, 959 So. 2d 1052 (Ala. 2006)($19.5 million and $7.55 million); *Jones Food Co. v. Shipman*, 981 So. 2d 355 (Ala. 2006)($300,000).

31. The cases affirmed in 2007 were: *Mobile Infirmary v. Tyler*, 981 So. 2d 1077 (Ala. 2007)($5.5 million); *International Paper v. Madison Oslin, Inc.*, 985 So. 2d 879 (Ala. 2007)($8.9 million); *Jimmy Day Plumbing & Heating, Inc. v. Smith*, 964 So. 2d 1 (Ala. 2007)($1.5 million); *Kult v. Kelly*, 987 So. 2d 551 (Ala. 2007)($100,000).

32. The cases reversed in 2007 were: *Edwards v. Allied Home Mortgage Capital*, 962 So. 2d 194 (Ala. 2007)($513,972); *City of Birmingham v. Brown*, 969 So. 2d 910 (Ala. 2007)($100,000); *Price v. Ragland*, 966 So. 2d 246 (Ala. 2007)($400,000 compensatory and $700,000 punitive; trial court remitted punitive award to $0); *H&S Homes v. McDonald*, 978 So. 2d 692 (Ala. 2007)($40,000 compensatory and $400,000 punitive); *Long v. Wade*, 980 So. 2d 378 (Ala. 2007)($3.85 million); *Exxon Mobil v. Ala. Dept. of Conservation*, 986 So. 2d 1093 (Ala. 2007)($100 million compensatory and $11.8 billion punitive; trial court remitted punitive to $3.5 billion); *Blue Circle Cement v. Phillips*, 989 So. 2d 1025 (Ala. 2007)($200,000 compensatory and $2 million punitive; trial court remitted punitive to $800,000); *Carraway Methodist v. Wise*, 986 So. 2d 387 (Ala. 2007)($2 million).

33. The cases affirmed in 2008 were: *Slack v. Stream*, 988 So. 2d 516 (Ala. 2008)($210,000 compensatory and $450,000 punitive); *Baldwin Co. Elec. Membership Coop. v. City of Fairhope*, 999 So. 2d 448 (Ala. 2008)($295,945); *Classroomdirect.com v. Draphix*, 992 So. 2d 692 (Ala. 2008)($444,758); *Southeastern Envtl. Infrastructure v. Rivers*, 12 So.3d 32 (Ala. 2008)($1.1 million compensatory and $400,000 punitive); *Choksi v. Shah*, 8 So.3d 288 (Ala. 2008)($910,729).

34. The cases reversed in 2008 were: *Springhill Hospital v. Larrimore*, 5 So.3d 513 (Ala. 2008)($4 million); *AmerUs Life v. Smith*, 5 So.3d 1200 (Ala. 2008)($2.5 million compensatory and $4 million punitive); *City of Birmingham v. Major*, 9 So.3d 470 (Ala. 2008)($500,000); *Prattville Memorial Chapel v. Parker*, 10 So.3d 546 (Ala. 2008)($80,000 compensatory and $1 million punitive); *Southland Bank v. A&A Drywall*, 21 So.3d 1196 (Ala. 2008)($2.1 million compensatory and $5.5 million punitive).

35. The cases affirmed in 2009 were: *Line v. Ventura*, 38 So.3d 1 (Ala. 2009)($200,000 compensatory and $550,000 punitive); *Black v. Comer*, 38 So.3d 16 (Ala. 2009)($350,000); *Quore v. Bradford Bldg.*, 25 So.3d 1136 (Ala. 2009)($196,937); *Crews v. McLing*, 38 So.3d 688 (Ala. 2009)($67,235); *Sverdrup v. Robinson*, 36 So.3d 34 (Ala. 2009)($78,000).

36. The cases reversed in 2009 were: *Crutcher v. Williams*, 12 So.3d 631 (Ala. 2009)($145,000); *Mobile Gas Corp. v. Robinson*, 20 So.3d 770 (Ala. 2009)($3.45 million); *Cooks Pest Control v. Rebar*, 28 So.3d 716 (Ala. 2009)($100,000 compensatory and $3 million punitive; punitive reduced by trial court to $500,000); *Dolgencorp, Inc. v. Taylor*, 28 So.3d 737 (Ala. 2009)($255,000); *Mobile OB-GYN v. Baggett*, 25 So.3d 1129 (Ala. 2009)($5 million); *Smith v. Wachovia Bank*, 33 So.3d 1191 (Ala. 2009)($668,779); *Novartis v. State*, 41 So.3d 15 (Ala. 2009)($33.25 million); *AstraZeneca, LP v. State*, 41 So.3d 15 (Ala. 2009)($40 million compensatory and $175 million punitive; punitive award reduced by trial court to $120 million); *SmithKline v. State*, 41 So.3d 15 (Ala. 2009)($33.25 million); *Smith v. Wachovia Bank*, 33 So.3d 1191 (Ala. 2009)($668,779).

37. The cases affirmed in 2010 were: *Arthur v. Bolen*, 41 So.3d 745 (Ala. 2010)($150,000); *CSX Transportation v. Miller*, 46 So.3d 434 (Ala. 2010)($450,000); *Miller v. Bailey*, 60 So.3d 857 (Ala. 2010)($2 million).

38. The cases reversed in 2010 were: *G.UB.MK Constructors v. Garner*, 44 So.3d 479 (Ala. 2010)($525,000); *Hartford Ins. v. Reed*, 57 So.3d 742 (Ala. 2010)($729,052); *Cheshire v. Putman*, 54 So.3d 336 (Ala. 2010)($150,000 compensatory and $1.5 million punitive); *Galaxy Cable v. Davis*, 58 So.3d 93 (Ala. 2010)($30,000 compensatory and $120,000 punitive); *Ross v. Rosen-Rager*, 67 So.3d 29 (Ala. 2010)($13,343 compensatory and $350,000 punitive); *Jones Express, Inc. v. Jackson*, 86 So.3d 298 (Ala. 2010)(*on rehearing ex mero motu*; $600,000 compensatory and $100,000 punitive).

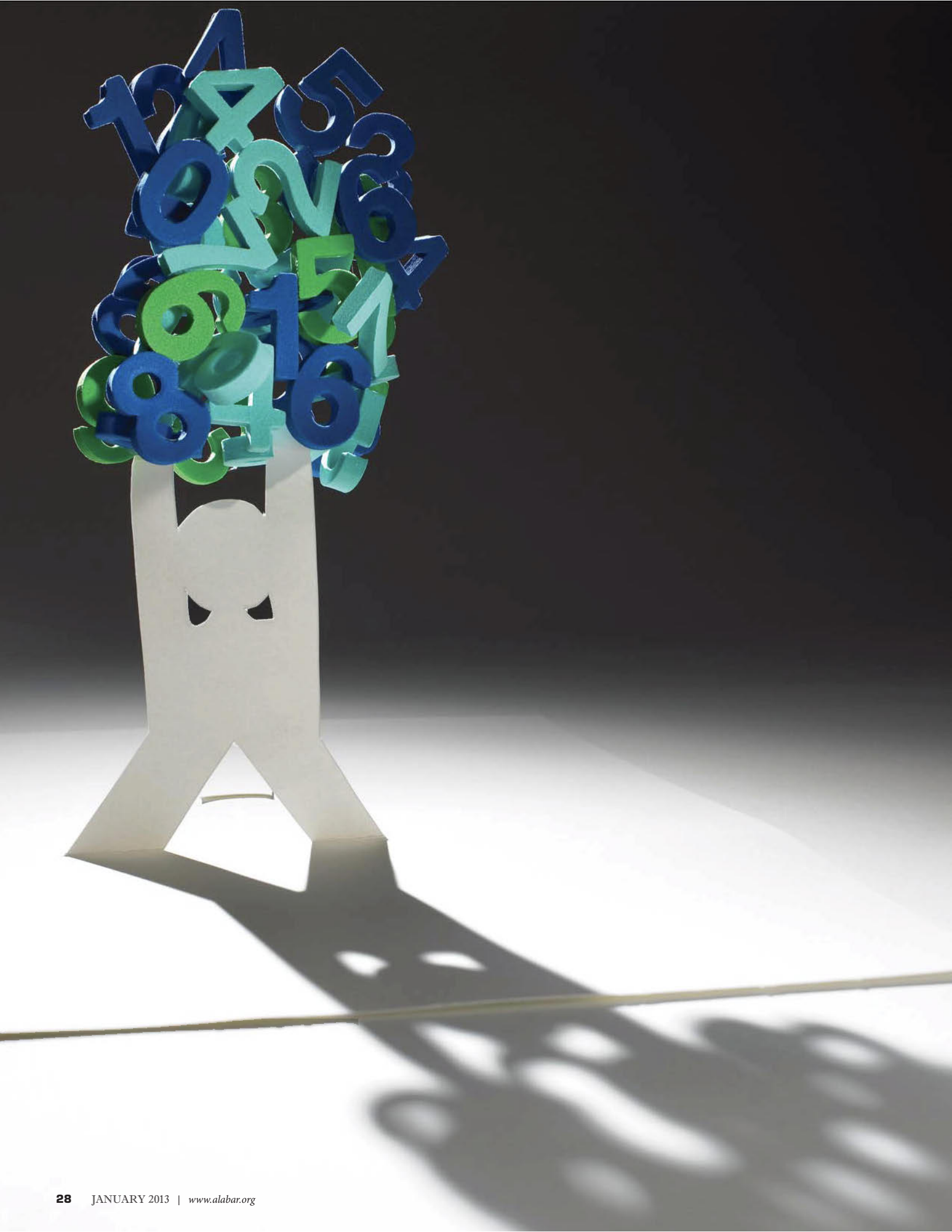
39. The only jury verdict affirmed in 2011 was *O'Rear v. B.H.*, 69 So.3d 106 (Ala. 2011)($1 million compensatory and $2 million punitive). It was a medical malpractice, outrage and assault case against an uninsured doctor.

40. The cases reversed in 2011 were: *Health Care Authority for Baptist Health v. Davis*, (Ms. 1090084, 2011 Ala. LEXIS 17, Jan. 14, 2011)(Ala. 2011)($3 million)(pending on rehearing); *Ford Motor Co. v. Duckett*, 70 So.3d 1177 (Ala. 2011)($8.5 million); *Norfolk So. Ry. v. Johnson*, 75 So.3d 624 (Ala. 2011)($1.5 million compensatory and $3 million punitive); *Federal Credit, Inc. v. Fuller*, 72 So.3d 5 (Ala. 2011)($25,000 compensatory and $35,000 punitive); *Nationwide Mutual Ins. Co. v. J-Mar S Machine Pump*, 73 So.3d 1248 (Ala. 2011)($416,466); *Crestview Funeral Home v. Gilmer*, 79 So.3d 585 (Ala. 2011)($416,466); *Lafarge North America v. Nord*, 86 So.3d 326 (Ala. 2011)($125,000 compensatory and $75,000 punitive); *Stephens v. Fines Recycling*, 84 So.3d 867 (Ala. 2011)($438,855 net); *Springhill Hospitals v. Critopoulos*, (Ms. 1090946, 2011 Ala. LEXIS 194, Nov. 10, 2011)(Ala. 2011)($300,000); *GE Capital Aviation v. Pemco*, (Ms. 1090350, 2011 Ala. LEXIS 228, Dec. 12, 2011)($2.14 million compensatory and $6.5 million punitive). The court also reversed and rendered a $500,000 verdict ($380,000 compensatory and $120,000 punitive) that was entered in the plaintiff's favor in a fraud case that was tried nonjury in *Lawson v. Harris Culinary Enterprises, LLC*, 83 So.3dd 483 (Ala. 2011).

41. *Hrynkiw v. Trammell*, 2012 Ala. LEXIS 59 (Ala. 2012)($2.15 million medical malpractice).

42. *Heisz v. Galt Industries, Inc.*, 2012 Ala. LEXIS 2 (Ala. 2012)(Heisz for $54,684 on a contract claim, Galt for $720,678 on contract and fraud claims and Plath for $48,893 on contract and fraud claims); *Attenta, Inc. v. Calhoun*, 2012 Ala. LEXIS 65 (Ala. 2012)($3.69 million).

43. Phrase meaning that a circumstance should be accepted at face value. In other words, right, wrong or indifferent, this is the situation.



COUNTERPOINT:

Limitations on Measuring Appellate Justice with Statistics And Inference

By Marc James Ayers

The "rule of law," rather than the "rule of men," is a notion of paramount importance in Alabama. Indeed, it is expressly enshrined in our constitution and is the basis for our strong doctrine of separation of powers.[1] The justices of the Alabama Supreme Court take a solemn oath to support that principle, and are directly accountable to the citizens of the state of Alabama in that regard. Accordingly, members of our judiciary–like all of our public officials–should (and do) welcome honest, constructive criticism concerning adherence to the rule of law, as long as that criticism is properly supported with facts and analysis.

In her article on page 18, "POINT: *Justice Must Satisfy the Appearance of Justice–A 10-Year Review of the Alabama Supreme Court's Treatment of Jury Verdicts in the Plaintiffs' Favor*," Rhonda Chambers–an excellent, experienced appellate attorney–offers some thought-provoking inferences and statistics concerning the decision-making practices of the Alabama Supreme Court over the last 10 years. The focus of Chambers's argument is that certain practices–or inferred practices–of the court might lead the public to perceive that the court has been attempting to hinder the work of plaintiffs' counsel over that time. However, her analysis raises questions concerning her use of raw statistics–as opposed to a case-by-case, rationale-by-rationale analysis–in measuring "justice," and concerning the proper remedy if there ever is something of a crisis in the public's perception of Alabama's appellate courts.

Chambers's article, however, presents no valid basis to conclude that the court has in any way acted with bias toward any group, and the use of statistics, such as raw reversal rates, provides little, if any, basis to support such inferences and conclusions. If the Alabama Supreme Court is to be criticized, then that criticism should be based on a case-by-case basis, where the particular facts and legal rationales can be analyzed.

There is no basis to infer misuse of the "no-opinion" affirmance.

The Chambers article begins with a helpful discussion of the history and

proper use of Alabama Rule of Appellate Procedure 53, which, beginning in 1993, allowed the Alabama Supreme Court and Court of Civil Appeals to affirm a judgment without opinion under certain circumstances. While she concedes that there are no recorded statistics regarding the Alabama Supreme Court's use of the no-opinion affirmance, Chambers clearly feels that that device *could* be misused to "conceal" otherwise helpful published decisions–such as decisions favorable to plaintiffs in Alabama–from view. Chambers presents no evidence that this has been done by the court, but, instead, focuses on stressing the various merits of published decisions as compared to the no-opinion device.

There is no doubt that published opinions often provide many benefits to the bench, bar and the general public, as Chambers correctly observes. Indeed, many of us who primarily practice before the appellate courts have had cases where we would have rather had a published opinion instead of a no-opinion affirmance. However, the value of published opinions must be balanced with, among other things, the equally well-established notion that "justice delayed is justice denied." Especially given the large caseload carried by Alabama's appellate courts, many have welcomed the use of the no-opinion affirmance in moving cases through the court's docket, as that practice makes a significant difference in the time it takes for an appeal to wind its way to conclusion. Even though Alabama's appellate courts generally do an excellent job in moving cases through their dockets, parties sometimes grumble that it takes too long to get a decision. The appellate courts, therefore, are sometimes unfairly caught between two sets of conflicting complaints. (This dynamic is also often seen with criticisms that the appellate courts do not hear oral argument in a sufficient number of cases, which competes with the notion that clients and counsel often want a decision more quickly and at less cost.)

…the value of published opinions must be balanced with, among other things, the equally well-established notion that "justice delayed is justice denied."

Again, there are no statistics concerning the use of the "no opinion" affirmance from which any kind of analysis might be done. However, even if such general statistics were available, it is unlikely that such raw data would, by itself, allow for many valid conclusions, because that data would not provide the kind of case-specific detail required to inform that analysis. There are often numerous factors that go into the decision to affirm without opinion, some of which the parties are not contemplating. Regardless, case-specific criticism is clearly the most–and perhaps the only–helpful or informative criticism available, because without case-specific details there is almost no way to determine whether a no-opinion affirmance was truly appropriate.

Even if it could be shown that appeals from jury verdicts have a higher rate of no-opinion affirmances, that would not, by itself, support any negative inferences about the court's practices, as there are any number of reasons why a no-opinion affirmance is proper in particular kinds of cases. For example, some appeals from jury verdicts may be, upon further review, simply efforts to reweigh the evidence or second-guess credibility determinations. In many such cases, no-opinion affirmances might be more appropriate. For example, our firm, Bradley Arant Boult Cummings, recently defended against an appeal of a judgment on a *defense* verdict in a medical malpractice case, where, in our view, the appellant essentially asked the court to reweigh the evidence in a manner contrary to the proper standard of review, and the court affirmed without opinion. *Rutherford v. University of Ala. Health Servs. Found., P.C.*, [Ms. 1100837, Apr. 6, 2012] (table).

Chambers states that the Alabama Supreme Court "has indicated that it does not appreciate criticism about its no-opinion affirmances." However, that conclusion does not seem to follow from the two decisions cited as examples of such non-appreciation: *S.B. v. St. James Sch.*, 959 So. 2d 72 (Ala. 2006), and *Dennis v. Northcutt*, 923 So. 2d 275 (Ala. 2005). Instead, in those decisions, the court actually responded to the parties' criticisms by issuing opinions. Furthermore, in *S.B.*, the court made clear that a major factor in the decision to issue a no-opinion affirmance was to spare the party embarrassment, given the "sensitive nature of the facts of this case" (a seemingly commendable decision under the circumstances). 959 So. 2d at 79. If anything, those cases indicate that the court is willing to revisit the decision to affirm without opinion, even when being criticized for reasons it may not find persuasive.[2]

As a contrast to Alabama's practice, Chambers praises the federal practice of releasing "unpublished" decisions. This approach is not unfamiliar to Alabama's appellate courts–in fact, it is somewhat commonly used by the court of criminal appeals. This is an idea worthy of further discussion, and one that the Alabama

appellate courts could consider, if the additional costs and time were outweighed by the overall benefits. One consideration, however, is that releasing "unpublished" opinions could lead to difficulties determining the precedential weight of those decisions. For instance, most federal courts regard unpublished opinions as non-precedential.[3] Thus, while Alabama could certainly consider moving to an "unpublished opinion" scheme, that would not necessarily assist the bench and bar, as such opinions might still lack the precedential effect that Chambers suggests would be useful. In short, one should not quickly assume that, when all relevant considerations are balanced, the implementation of the federal practice would be superior to the current use of no-opinion affirmances.

What can be "seen" from raw reversal rates of jury verdicts? Not much

Another aspect of Chambers's argument is her statistical analysis of reversal rates of judgments entered on jury verdicts for plaintiffs. The fundamental problem with this kind of analysis, however, is that it begs the question: What is a "proper" or acceptable reversal rate for plaintiffs' jury verdicts in any particular year or time frame–Ten percent? Fifty percent? One hundred percent? Of course, there is no answer to this question because there is no "proper reversal rate." It all depends on the particulars of the cases at issue. In year X, perhaps none of the cases should be reversed, while in year Y, perhaps half or all of them should be. Without a case-specific analysis, examining reversal rates is simply not helpful.

Another issue is the selected time frame. Why examine only the last 10 years? What is the "correct" time frame to analyze in order to determine whether there is a lack of "perceived justice"–Ten years? 25, 50 or 75 years? In any event, examining reversal rates in 10-year (or other time frame) blocks–and perhaps comparing those rates to earlier time frames–would also not shed much light, for the same reason. For example, if reversal rates go up, what does that mean? Does it mean that the court has now adopted a skewed philosophy of appellate jurisprudence and is acting contrary to its proper role? Or, perhaps, does it mean that the court utilized the wrong standard 10 years ago and is now remedying that error?[4] Of course, it might not mean either of those things, as the change in reversal rates might simply be connected to new developments in the law (for example, the court might be responding to a change in the law stemming from new United States Supreme Court precedent), new legal theories of liability, philosophical changes among the *trial* court bench or any number of other possible causes. The only way to reach any valid conclusions would be through a case-by-case, rationale-by-rationale analysis.

Accordingly, unless specific decisions and rationales are identified and analyzed, one should be hesitant to make inferences or reach conclusions about what one "sees" in the current practices and philosophy of the Alabama Supreme Court–especially inferences of some kind of coordinated effort to undermine or hinder the plaintiffs' bar. While admittedly easy to state here, such a notion is completely contrary to our experiences over several years (some of which were within the last 10 years) as judicial staff at the Alabama Supreme Court.

How would we know whether there is a "crisis of perception" concerning the Alabama appellate courts, and what would be the solution?

Chambers's criticism regarding the current practices of, and treatment of plaintiffs' jury verdicts by, the Alabama Supreme Court stems from a concern that, in the words of Justice Frankfurter, "justice must satisfy the appearance of justice." (Or, stated another way in the words of Chief Judge Markey, "[i]t simply is not enough that justice be actually done. It must be seen to have been done."). In other words, the concern is that there might arise something of a crisis of perception among the citizens of Alabama that their appellate judges are biased or are otherwise not correctly doing their jobs. This concern raises the question as to what is the proper remedy in the event that the general public ever believes that appellate judges are not taking seriously their constitutional and moral duty to judge cases fairly and to treat all parties equally so that the rule of law will be properly maintained.

As stated above, there has been presented no actual evidence that our supreme court justices have engaged in any such misconduct over the past 10 years, and no statistics have been offered that could

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The appellate courts cannot control whether observers correctly perceive and understand any of the court's operations, standards of review, etc. Indeed, even where the courts write full opinions, those opinions are often criticized by some person or group as being wrong or unjust in some way, often based upon numerous misunderstandings of law, fact or both.

possibly support such an inference. As previously stated, raw statistics about the use of no-opinion affirmances and reversal rates tell us nothing about the propriety of the court's actions in individual cases. It is beyond dispute that there are numerous factors that go into the use of the no-opinion affirmances, the decline in the number of jury trials and the affirmance/reversal rates in any particular year.

Furthermore, the principle that *actual* justice without the *perception* of justice is not good enough has its merits, but also has its limits. The appellate courts cannot control whether observers correctly perceive and understand any of the court's operations, standards of review, etc. Indeed, even where the courts write full opinions, those opinions are often criticized by *some* person or group as being wrong or unjust in some way, often based upon numerous misunderstandings of law, fact or both. What is of *primary* importance is, of course, *actual* justice.

In any event, assuming for the sake of argument that the general public ever perceived the appellate courts as being biased (in any direction), those citizens directly hold the remedy: the vote. Unlike some other states, in Alabama the vote of the citizens is not only a powerful tool to bring immediate change to any perceived bias, it also is a helpful barometer in determining whether there *actually is* any "crisis of perception" among the citizens (the relevant group here) that has percolated in any given time period.[5] Accordingly, if the concern is with the Alabama citizens' perception of their appellate judges, then one should be able to look to the voting trends of those citizens to determine where their confidence lies. | AL

Endnotes

1. *See* Art. III, § 43, Ala. Const. 1901.
2. The court did not change its ruling by reversing the judgment in either *Northcutt* or *S.B.*; it merely published those decisions as written opinions.
3. *See, e.g.*, 11th Cir. R. 36-2 ("Unpublished opinions are not binding precedent but they may be cited as persuasive authority"); *Suntree Techs., Inc. v. Ecosense Intern., Inc.*, 693 F.3d 1338, 1349 n.1 (11th Cir. 2012); 9th Cir. R. 36-3(a) ("Unpublished dispositions and orders of this Court are not precedent"); *M2 Software, Inc. v. Madacy Entm't*, 421 F.3d 1073, 1086 (9th Cir. 2005).
4. Raising, perhaps, a more interesting philosophical question: What was the "golden age" of the Alabama Supreme Court–the Livingston Court, the Torbert Court, the Cobb Court, etc.?
5. Reliance on the vote to test whether such "crises" concerning the judiciary are being felt among the general public is not only intuitive, it is not new. For example, studies have often been cited showing "concern" among some majority of citizens about the effect of money raised and spent in their state's judicial elections. However, when asked, typically those same groups strongly supported holding on to the right to elect their judges, notwithstanding the candidates' need to raise and spend money in those elections. In other words, there may have been a general concern that fundraising in judicial elections could result in some discomfort or problems, but that concern did not create a "crisis of perception" in their system of electing judges such that the public was willing to give up the right to elect their judges. Such public sentiment, whether right or wrong, appears to parallel Churchill's famous line about democracy: "Democracy is the worst form of government, except for all those other forms that have been tried from time to time."

(Photograph by FOUTS COMMERCIAL PHOTOGRAPHY, Montgomery, photofouts@aol.com)

Alabama State Bar

FALL 2012 Admittees

STATISTICS OF INTEREST

Number sitting for exam	**510**
Number certified to Supreme Court of Alabama	**359**
Certification rate*	**70.4 percent**

CERTIFICATION PERCENTAGES

University of Alabama School of Law	**91.4 percent**
Birmingham School of Law	**37.2 percent**
Cumberland School of Law	**91.7 percent**
Jones School of Law	**88.9 percent**
Miles College of Law	**8.6 percent**

**Includes only those successfully passing bar exam and MPRE*

For full exam statistics for the July 2012 exam, go to *www.alabar.org/admissions/files/stats0712detail.pdf.*

Alabama State Bar

FALL 2012 Admittees

Abbott, Heidi Victoria
Adams, James Hunter
Adams, Tyler James
Allen, Evan Gregory
Almond, Michael Brent
Anderson, Lauren Weber
Andrews, Jr., Bruce Warren
Archer, II, Jon Charles
Archer, Lindsey Beddingfield
Austin, Benita Jenkins
Baker, Jr., Bruce Alan
Baker, Jr., John Payne
Barley, Matthew Austin
Barnett, Steven Drew
Barron, Vaughn Wayne
Beavers, Emily Diane
Begor, Katherine JoAnn
Beling, Jonathan Edward
Bell, Kimberly Lockhart
Bell, Shandria Necole
Blackburn, Jr., Daniel Grant
Blackerby, Benjamin Vinson
Blevins, Tiffany Danielle
Boller, Mary Allie Elizabeth
Bolt, Weathers Preston
Bonsi, Sesie Kofi
Boulter, Andrew Edward
Bowen, Stephen Lane
Bowman, Gregory Caleb
Box, Haley Dawn
Brannon, Tyler Hamilton
Britt, Joseph Roye
Brown, Michael Wayne
Brown, Ruby Chandrica
Bryant, Robert Dale
Bucak, Brittney Lynn
Buchanan, Charles Todd
Burkard, Daniel Lawrence
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Burleson, Michael Raymond
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Bussey, Sarah Boyd
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Chapman, Stefanie Ann
Chastain, Benjamin Downey
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Chinigo, Hillary Lynn
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Cobb, Richard Maury
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Davidson, Benton Joseph
Davis, Bobby Lendell
Davis, Donald Tatum
Day, Jennifer Elizabeth
DeFatta, Philip Michael
DeLuca, April Hare
Demyan, Brandon John
Denham, James Howard
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Doss, Justina Rachel Davis
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Drake, Robin Shontia
Drum, David William
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Evans, Jennifer Leigh
Evans, Matthew Dail
Evans, Maurine Cambria
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Robinson, Kasey Maria
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Thomas, Daniel Hubert
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Tolar, Reid Gregory
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Traylor, Brenton Wade
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Tucker, Brandon Lee
Tucker, Rachael Claire
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Turner, IV, William Bomar
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Wallace, George Nicholas
Walter, Kirk Daniel
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Williams, Daniel Blake
Williamson, Margaret Lee
Wilson, Katelyn Hayes
Wisda, Matthew Stephen
Wolfe, Meredith Dawn
Woods, Lauren Elizabeth
Yancey, Lydia Ruth
Yarbrough, Meagan Hillary
Yarbrough, Paige Pritchett
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Young, Amanda Elizabeth Adcock
Zarzour, Jessica Breanne Stanley

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Admittee and father

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Admittee and father

5. **Grant Blackburn** (2012) and Daniel G. Blackburn (1982)
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Admittee and uncle

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Admittee and fiancé

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Admittee and brother

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Admittee and father

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Admittee and mother

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Admittee, father and mother

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Co-admittees and father-in-law/uncle

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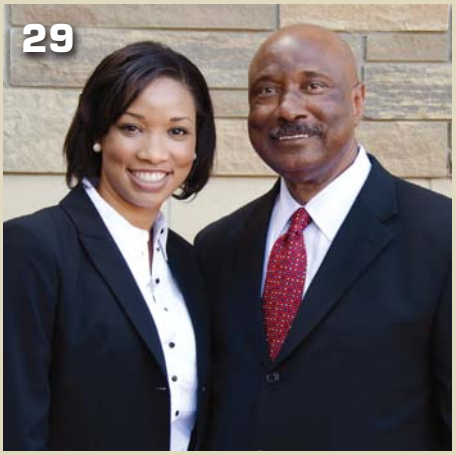
Admittee, father, cousin, cousin, and uncle

LAWYERS IN THE FAMILY



27. **Evan Allen** (2012) and Greg Allen (1983)
Admittee and father

28. **Mary Gibson Lindblom** (2012) and Phillip A. Gibson (1996)
Admittee and father

29. **Kristen Gillis** (2012) and H. Lewis Gillis (1976)
Admittee and father

30. **Bill Gunter** (2012), **Annie Gunter** (2012) and Will Gunter (1979)
Brother and sister co-admittees and father

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32. **Keren Emma McElvy** (2012) and J. Douglas McElvy (1971)
Admittee and father

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Sister and brother co-admittees, father and stepmother

LAWYERS IN THE FAMILY

34. **Jorja B. Loftin** (2012), F. Patrick Loftin (1986), Sam E. Loftin (1976), J. Heath Loftin (2007), and Jada P. Loftin (2007)
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Admittee and father

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Admittee and mother

46. **Sarah Beth Ritchey** (2012), Joseph T. Ritchey (1981) and Robert M. Ritchey (1985)
Admittee, father and cousin

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Mother and admittee

48. **Bert P. Noojin, Jr.,** (2012), Bert P. Noojin (1978) and Edward J. Noojin, Jr. (2004)
Admittee, father and uncle


IN GOD WE TRUST

Alabama's Version of *Daubert*—A Legislative History

By the Honorable Ben H. Brooks, III and K. Megan Brooks

In 2011, the Alabama Legislature adopted legislation that changed the way in which Alabama courts evaluate the admissibility of expert testimony. This legislation, coupled with the Alabama Supreme Court's amendment to Rule 702 of the *Alabama Rules of Evidence*, moved Alabama from the common law's *Frye* test and replaced it with a *Daubert*-based admissibility standard. The new law and the amended Rule 702 became effective January 1, 2012.

In adopting legislation to require *Daubert*-based admissibility principles to be applied in Alabama courts, the goals of the Alabama Legislature were simple: promote the reliability of evidence and promote truth in the Alabama justice system.

The new Alabama statute is not identical to the current federal standard. In an article published in the May 2012 issue of *The Alabama Lawyer,* Professor Robert J. Goodwin described the new Alabama standard as "*Daubert*-based."[1]

This article will not seek to outline an academic analysis of the law in Alabama. Rather, the thrust of this article will be to give the reader some insight into the legislative process which led to the adoption of Alabama's *Daubert* statute in the form it was adopted.

Before the changes were adopted in 2011, Alabama courts had imposed two tests to the admissibility of expert evidence. First, under the former *Alabama Rule of Evidence* 702, general expert testimony was admissible if it would "assist the trier of fact." If expert testimony met that initial burden, but was also deemed to be "scientific evidence" or "novel scientific evidence,"[2] Alabama courts asked the additional question–whether the expert's opinion was "generally accepted" in the applicable scientific field.[3] The *Frye* opinion was issued by the Court of Appeals for the District of Columbia in 1923.

In 1993, the United States Supreme Court issued its decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). In that decision, the Court held that the old *Frye* test should no longer be used in federal court when

expert testimony amounted to "scientific evidence."[4] Instead, the Court held that if expert testimony is "scientific" then it must be shown to be "relevant" and "reliable."[5] The *Daubert* opinion listed a number of factors to consider in resolving the reliability issue.[6]

Two other decisions significantly expanded the *Daubert* holding. First, in 1997, the United States Supreme Court held that a trial court could examine the nexus between the expert's conclusions and the proffered factual basis for the conclusions.[7] Second, in its decision in *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147 (1999) the United States Supreme Court expanded the *Daubert* holding to apply to all Rule 702 experts, not just "scientific experts." *Federal Rule of Evidence* 702 thereafter incorporated the *Daubert* standard.

Despite these opinions in 1993, 1997 and 1999, Alabama courts were still applying the *Frye* standard in 2011 to experts testifying on matters of "scientific evidence." Over the years, parties on appeal raised the issue of the adoption of the *Daubert* standard, but the appellate courts declined to decide the issue.[8]

In drafting and sponsoring the *Daubert* bill, the sponsors believed that adopting a *Daubert* standard would promote the interests of the courts in pursuing a more reliable, credible and just process.

There was ample precedent for addressing expert evidence standards through legislation. For instance, in 1994, the Alabama legislature adopted the *Daubert* standard for DNA evidence.[9] Further, in 2007, the legislature specified the licensing standard for the admissibility of engineering experts.[10] Also, the statutes governing medical malpractice actions contain their own standards for the admissibility of medical expert testimony.[11]

Accordingly, the original version of the "*Daubert* bill" was filed March 9, 2011. The text of the original version of the bill was influenced by *Federal Rule of Evidence* 702, and would have adopted a pure version of the United States Supreme Court standard as announced in *Daubert* and expanded by *Joiner* and *Kumho Tires*.

The bill was assigned to the Senate Judiciary Committee. Over the course of a number of weeks, as the bill moved through the committee, many knowledgeable and diverse "constituents" voiced their opinions about the move to a *Daubert* standard. Those who voiced their opinions included Alabama judges, district attorneys and lawyers–both civil and criminal practitioners.

In drafting and sponsoring the *Daubert* bill, the sponsors believed that adopting a *Daubert* standard would promote the interests of the courts in pursuing a more reliable, credible and just process.

The deliberations over the bill included a vigorous discussion on April 1, 2011 at the University of Alabama School of Law between the bill sponsor, members of the Advisory Committee on the *Alabama Rules of Evidence* and state bar President-elect Jim Pratt, who provided valuable insights. Retired Justice Bernard Harwood chaired the Advisory Committee, which also included Professor Robert Goodwin and Dean Charles Gamble.

Professor Goodwin's contributions–academic and otherwise–were also invaluable. During discussions, he confirmed that about 30 states had adopted a *Daubert* or "hybrid *Daubert*" standard. He also provided the participants with options for language to be considered for the final version of the Alabama statute.

The process of discussing the elements of the bill and working through ideas for amendment and improvement was at all times professional and positive. The role of our state bar in mediating and facilitating the discussions cannot be overstated.

After the significant informal debate, a revised bill was offered that ultimately passed both houses. The final version of the bill obtained passage June 1, 2011 and was signed by Governor Bentley June 9, 2011. For comparison, the original text of this bill and the text of the bill as enacted are both found at *www.alabar.org*.

These statutory changes were later incorporated into Alabama's new version of Rule 702 of the *Alabama Rules of Evidence*.

It is obvious that the final version of the bill is different from that originally introduced. The final version reflected a number of the ideas that arose during the informal dialogue about the proposal. The differences include:

1. The final version effectively limits the application of the *Daubert* standard (the criteria under subparts (b)(1)-(3)) to "scientific evidence" as defined in Act 2011-629. This is defined in the Act as "expert testimony based on a scientific theory, principle, methodology, or procedure."[12] Consideration was given to providing additional definitions of "scientific evidence" beyond that in the statute, but most agreed that this was better left to the Alabama court system to develop.

   It should be noted that during the drafting of the final version, consideration was also given to the fact that Alabama had already developed substantial case law defining "scientific evidence" relative to the *Frye* standard. In his article, Professor Goodwin states "[p]revious Alabama case law developed under the *Frye* standard will remain instructive–if not controlling–for determining whether expert testimony is scientific and subject to

Rule 702(b)'s *Daubert*-based admissibility standard." [13]

2. The statute as passed expressly confirmed that domestic relations cases, child support cases, juvenile cases and probate cases are *not* subject to Alabama's version of the *Daubert* standard.
3. The final version expressly amended *Alabama Code* Section 12-21-160 whereas the original version did not.
4. The final version confirmed that it superseded any inconsistent rules in the *Alabama Rules of Evidence*, the *Alabama Rules of Criminal Procedure* or the *Alabama Rules of Civil Procedure*.
5. The effective date for *all* affected cases was restricted to those civil cases filed on or after January 1, 2012 and those criminal cases where the defendant was arrested on or after January 1, 2012.

The process of offering, amending and passing this statute is a testament to the professionalism of Alabama's legal profession. The efforts exemplified the state bar's "Lawyer's Creed" wherein we have all committed to " . . . strive to keep our business a profession and our profession a calling in the spirit of public service" and committed to "strive to improve the law and our legal system . . . ." [14] | AL

Endnotes

1. For an excellent analysis comparing Alabama's version of the old *Frye* standard to Alabama's new "*Daubert*-based" standard, see Professor Robert J. Goodwin, *An Overview of Alabama's New* Daubert*-Based Admissibility Standard*, 73 ALA. LAW. 196 (2012).
2. *See, e.g.*, *Swanstrom v. Teledyne Continental Motors, Inc.*, 43 So. 3d 564, 580 (Ala. 2009); *Ex parte Perry*, 586 So. 2d 242, 247 (Ala. 1991).
3. *See Ex parte Perry*, 586 So. 2d at 247.
4. *Daubert*, 509 U.S. at 586-89.
5. *Id.* at 589.
6. *Id.* at 593-95.
7. *General Electric Co. v. Joiner*, 522 U. S. 136, 146-47 (1997).
8. *Stay v. Keller Industries, Inc.*, 823 So. 2d 623, 625-26 (Ala. 2001) (finding that the expert evidence in a product liability case did not meet either the *Frye* or *Daubert* standard); *Vesta Fire Ins. Corp. v. Milam & Co. Const., Inc.*, 901 So. 2d 84, 106 (Ala. 2004) (declining to adopt *Daubert* under the circumstances of the case because it found that the defendants were not challenging the validity of scientific principles relating to electrical engineering, but instead were challenging that the expert's conclusions were improperly speculative and without evidentiary foundation); *Barber v. State*, 952 So. 2d 393 (Ala. Crim. App. 2005).
9. ALA. CODE § 36-18-30.
10. *Id.* at § 34-11-1(7).
11. *Id.* at § 6-5-548(e).
12. Act 2011-629 (emphasis added).
13. Goodwin, *supra* note 1, at 199.
14. Alabama State Bar Lawyer's Creed.

Exploring Wantonness

By William E. Shreve, Jr.

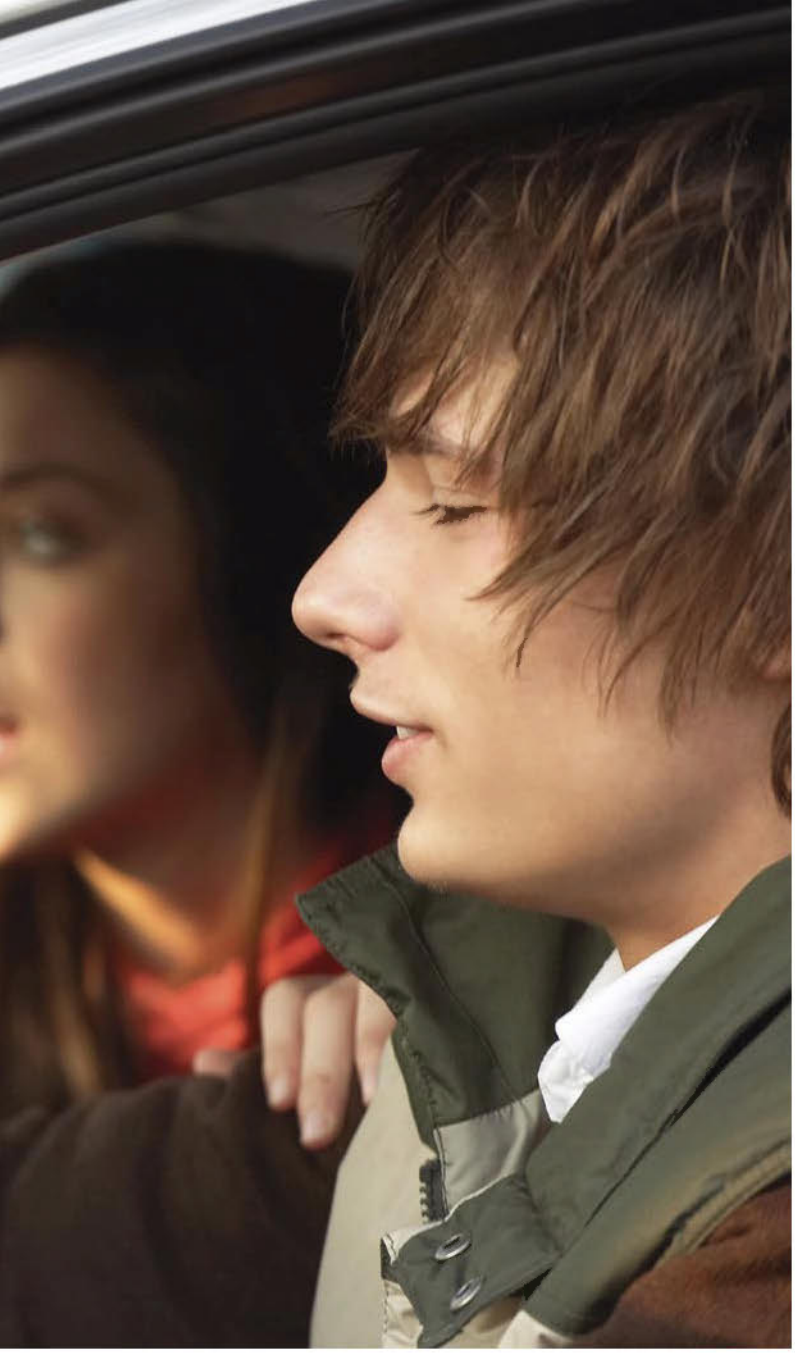
Claims of wantonness are common in civil litigation,

but it seems that few articles on this tort have appeared in Alabama publications. A Westlaw search for titles that include "wanton" or "wantonness" discloses only one article, dealing with the statute of limitations.[1]

This article will attempt to fill the gap by covering the main substantive and procedural issues involved in wantonness. You may find some of this law surprising. Did you know there is a rebuttable presumption against wantonness when the defendant's conduct endangered the defendant as well as the plaintiff? That a court or jury cannot properly find that a defendant's act was both negligent and wanton? That a defendant who did not act negligently may still be found to have acted wantonly? That it is possible for a plaintiff to prove wantonness but not be entitled to punitive damages? This article addresses these and other aspects of wantonness.

Elements of wantonness

Wantonness is a common-law tort for which a plaintiff can recover compensatory damages, and potentially, punitive damages. *See Tillman v. R.J. Reynolds Tobacco Co.*, 871 So. 2d 28, 35 (Ala. 2003); *Hamme v. CSI*



Transp., Inc., 621 So. 2d 281, 282-84 (Ala. 1993). It shares four elements with negligence: (1) the existence of a duty; (2) a breach of that duty; (3) damage to the plaintiff; and (4) proximate cause. *See Edmonson v. Cooper Cameron Corp.*, 374 F. Supp. 2d 1103, 1106 (M.D. Ala. 2005); *Carter v. Chrysler Corp.,* 743 So. 2d 456, 463 (Ala. Civ. App. 1998).

What distinguishes wantonness from negligence is the defendant's state of mind at the time of the breach. *See Ex parte Essary*, 992 So. 2d 5, 9 (Ala. 2007). Negligence does not require any particular mental state but is "usually characterized as an inattention, thoughtlessness,…heedlessness," or "inadverten[ce]." *Id.* (internal quotation marks omitted). Wantonness, on the other hand, requires "[1] the *conscious* doing of some act or the *conscious* omission of some duty [2] *with knowledge of the existing conditions* and [3] *while conscious that* from the doing of that act or by the omission of that duty *injury will likely or probably result.*" *Senn v. Alabama Gas Corp.*, 619 So. 2d 1320, 1324 (Ala. 1993) (emphasis and numerals added).

A. Conscious act or omission

"Conscious" means "perceiving, apprehending, or noticing with a degree of controlled thought or observation: capable of or marked by thought, will, design, or perception." *Berry v. Fife*, 590 So. 2d 884, 885 (Ala. 1991) (quoting *Webster's New Collegiate Dictionary* 239 (1981)). Thus, the defendant must have realized and intended what he did or did not do. This is not to say the defendant must have intended to injure anyone, only that the act or omission itself "must be done consciously and intentionally." *Joseph v. Staggs*, 519 So. 2d 952, 954 (Ala. 1988) (internal quotation marks omitted). *See also Ex parte Capstone Bldg. Corp.*, 96 So. 3d 77, 96 (Ala. 2012) (Murdock, J., concurring) ("[w]antonness entails the intent to do an *act,* but not the intent to produce the *consequence* or injury") (emphasis in original).

In the case of an omission, the defendant "must have been conscious…that [he was] omitting to use the means at hand which the circumstances reasonably required to avert the injury." *Alabama G.S.R. Co. v. Burgess*, 114 Ala. 587, 22 So. 169, 171 (1897). An omission that "resulted from [a] want of skill, or other unintentional causes," may be negligent but does not constitute wantonness. *Id.* For example, in *Copeland ex rel. Copeland v. Pike Liberal Arts School*, 553 So. 2d 100 (Ala. 1989), a school headmaster failed to attend and supervise a club-initiation ceremony during which a student was injured. *Id.* at 101, 104. The court held that the school's headmaster committed no conscious, wanton omission, because the ceremony "was on Saturday night and he [the headmaster] *forgot* about it." *Id.* at 104 (emphasis added).

Furthermore, if the defendant "in good faith…did what he thought was best," then he did not act wantonly, no matter "how far he may have failed in skill, or erred in judgment, or what mere inadvertence or negligence may have caused him to do." *Highland Ave. & B.R. Co. v. Swope,* 115 Ala. 287, 22 So. 174, 180 (1897). Hence, in a case where a traffic light changed from green to red as a driver approached an intersection, and the driver "tried to put her foot on the brake pedal" but "missed and hit the clutch pedal," causing an accident, the court stated the facts showed "*inadvertence* on the part of the driver," not wantonness. *George v. Champion Ins. Co.*, 591 So. 2d 852, 854 (Ala. 1991) (emphasis added).

B. Knowledge of existing conditions

The defendant must have acted or failed to act while having knowledge of the conditions that created a danger and that called for the exercise of care to avoid injury. *See Hornady Truck Line, Inc. v. Meadows*, 847 So. 2d 908, 912-16 (Ala. 2002); *Sellers v. Sexton*, 576 So. 2d 172, 173, 175 (Ala. 1991). Such knowledge can be shown by direct evidence or by "circumstances from which the fact of knowledge is a reasonable inference." *Hamme*, 621 So. 2d at 283.

The specific conditions of which the defendant must have had knowledge of course vary from case to case. In premises liability cases, these conditions usually include the defect in the premises and the expected presence of persons who would encounter the defect. *See, e.g., Kmart Corp. v. Peak*, 757 So. 2d 1138, 1140-41, 1144-45 (Ala. 1999); *Price v. Macon County Greyhound Park, Inc.*, 87 So. 3d 553, 558 (Ala. Civ. App. 2011). In a car-accident case, they may include road and weather conditions and the positions and speeds of the defendant's vehicle and other vehicles. *See, e.g., Hornady Truck Line*, 847 So. 2d at 912-16; *Dickey v. Russell*, 268 Ala. 267, 105 So. 2d 649, 651 (1958). In products liability cases, they can include the product defect and the manner or environment in

which the seller expected that consumers would use the product. *See Sears, Roebuck & Co. v. Harris,* 630 So. 2d 1018, 1032 (Ala. 1993); *Caterpillar, Inc. v. Hightower*, 605 So. 2d 1193, 1195-96 (Ala. 1992), *overruled on other grounds*, *Life Ins. Co. of Ga. v. Smith*, 719 So. 2d 797 (Ala. 1998); *Ray v. Ford Motor Co.*, 792 F. Supp. 2d 1274, 1284-85 (M.D. Ala. 2011).

To demonstrate wantonness, it is not necessary that the defendant know "that a person is within the zone made dangerous by his conduct; it is enough that he knows a strong possibility exists that others may rightfully come within the zone." *Joseph*, 519 So. 2d at 954. It is also not always necessary that the defendant have actual knowledge of the injury-causing condition. *See Galaxy Cable, Inc. v. Davis*, 58 So. 3d 93, 101 (Ala. 2010). A defendant who fails to discover and remedy a dangerous condition may have other knowledge such that this failure itself constitutes or is the result of wantonness. *See Lance, Inc. v. Ramanauskas*, 731 So. 2d 1204, 1209-1210, 1212 (Ala. 1999).

To demonstrate wantonness, it is not necessary that the defendant know "that a person is within the zone made dangerous by his conduct; it is enough that he knows a strong possibility exists that others may rightfully come within the zone."

In *Lance*, a child was "electrocuted while attempting to purchase a snack from an ungrounded electric vending machine owned and maintained by Lance, Inc., a distributor of vending machines." *Id.*, 731 So. 2d at 1207. The vending machine was located at a motel. *Id.* Lance was unaware of the defect in the motel's electrical receptacle that caused the machine to be ungrounded. Lance argued that its lack of "knowledge of existing conditions" precluded liability for wantonness. *Id.* at 1212.

The court "view[ed] the question of Lance's knowledge differently," and stated "the critical question [was] whether [Lance] knew the necessity for testing electrical receptacles to which its vending machines are connected for adequate grounding at facilities such as the motel." *Id.* There was evidence that Lance "was aware, as early as 1979, of the significance of the shocking hazard of its vending machines," that Lance's safety manual "require[d] that the installer verify that the electrical receptacle into which the machine is plugged is properly grounded," that "the possibility of injuries from ungrounded equipment was 'well known,'" that "anyone in the business of installing electrical equipment would know to ensure that its equipment is properly grounded," and that it would be "unsafe" to "assume that electric receptacles in older buildings such as the [motel] were properly grounded." *Id.* at 1209-10. The court decided this evidence was sufficient to infer that Lance knew the necessity for testing, making wantonness a jury question. *Id.* at 1212. *See also Yamaha Motor Co. v. Thornton*, 579 So. 2d 619, 623-24 (Ala. 1991) (finding sufficient evidence of wantonness where motorcycle manufacturer "never performed any system safety engineering" on a particular model of motorcycle and as a result "did not identify the hazard" that caused the subject accident and "took no action to eliminate [the hazard] from the design or to protect against it").

On the other hand, "mere negligence in the failure to have… knowledge" of existing conditions will not support wantonness. *Graves v. Wildsmith*, 278 Ala. 228, 177 So. 2d 448, 452 (1965) (internal quotation marks omitted). In *Graves*, the defendant-driver was unaware that a motorcyclist was following behind her car. *Id.*, 177 So. 2d at 451. Without giving any turn signal or looking in her rearview mirror, the defendant "veered her automobile several feet to the left near the center line and then turned to the right" onto another road. *Id.* The motorcyclist had to slam on his brakes, the motorcycle skidded, and the motorcyclist was injured. *Id.* The court held that since the defendant did not know the motorcyclist was behind her, and since there was nothing to show "the frequency of the use of the road at the point of collision and at the hour of the day that it occurred" (i.e., nothing showing that someone was likely to be in the zone of danger), there was no evidence the defendant "had knowledge that conditions existed which would make her conduct dangerous and likely to result in injury." *Id.* at 451-53.

C. Consciousness of likely injury

When the defendant acted or failed to act, he must have had knowledge of conditions *and* consciousness that injury would likely result. *See Essary*, 992 So. 2d at 9. An act or omission with knowledge of conditions but without such consciousness is not wanton. *See Id.* at 12; *Fomby v. Popwell*, 695 So. 2d 628, 634 (Ala. Civ. App. 1996) (defendant knew of conditions but was not "aware that these conditions were dangerous"); *Stallworth v. Illinois Cent. Gulf RR*, 690 F.2d 858, 863 (11th Cir. 1982) ("knowledge of the inclement weather is insufficient if [defendant] was not conscious of the harm that would likely occur"); *Louisville & N.R. Co. v. Brown*, 121 Ala. 221, 25 So. 609, 611 (1899) (defendant may know of conditions "and yet act only negligently…in respect of the peril"); *Holman v. Brady*, 241 Ala. 487, 3 So. 2d 30, 31 (1941) (negligence in failing to have consciousness of likely injury is not wantonness).

Nonetheless, consciousness of probable injury does not have to be shown by direct evidence but may be inferred from circumstances. *See Stallworth*, 690 F.2d at 863; *Jinwright v. Werner Enters., Inc.*, 607 F. Supp. 2d 1274, 1276 (M.D. Ala. 2009). And the fact-finder "may, in a proper case, infer such consciousness…from [the defendant's] knowledge of the existing perilous conditions." *Louisville & N.R. Co.*, 25 So. at 611. *See Treadway v. Brantley*, 437 So. 2d 93, 97 (Ala. 1983) (where defendant-driver "crossed over into [plaintiff's] lane of travel with knowledge that [plaintiff's car]

was approaching and with knowledge of the condition of the road," jury could infer that defendant's actions "were done consciously and with knowledge that injury would likely or probably result"); *Montgomery Light & Traction Co. v. Riverside Co.*, 8 Ala. App. 509, 62 So. 311, 313 (1913); *Sellers*, 576 So. 2d at 173-75; *Allen v. Hill*, 758 So. 2d 574, 576 (Ala. Civ. App. 2000); *cf. Mead Coated Board, Inc. v. Dempsey*, 644 So. 2d 872, 875-76 (Ala. 1994) (inference from OSHA regulations and testimony about safety practices).

The requisite consciousness is of a "*likely* or *probable* risk of injury," not merely of "a real, or 'appreciable,' risk." *Scharff v. Wyeth*, 2011 WL 4361634, *20 (M.D. Ala. Sept. 19, 2011) (emphasis added). This is "one of the key differences between a negligence claim and a wantonness claim." *Id.* That an injury was "foreseeable" is not enough for wantonness, *see Rodgers v. Shaver Manufacturing Co.*, 993 F. Supp. 1428, 1439 (M.D. Ala. 1998), nor is it sufficient that the defendant was aware his action "would entail more risks than not taking the action," *Salter v. Westra*, 904 F.2d 1517, 1526-27 (11th Cir. 1990). Wantonness requires consciousness that an act or omission "does not merely increase risk of injury" but "makes injury 'likely' or 'probable.'" *Toole v. McClintock*, 999 F.2d 1430, 1435 (11th Cir. 1993).

McGehee v. Harris, 416 So. 2d 729 (Ala. 1982), vividly illustrates this requirement. An accident occurred when the defendant backed her car out of a driveway into the path of an oncoming motorcycle. *Id.* at 730. The defendant first saw the motorcycle a short distance away after it crested a hill, and perceived there "might be" a collision, thought there was "a chance" of one, and knew this was a "possibility." *Id.* at 731-32. The court held that the defendant's consciousness of "[t]he mere 'possibility,' or 'chance,' that there 'might be' a collision" did "not rise to an awareness that injury 'would likely or probably result.'" *Id.* at 732.

Presumption against wantonness where the defendant was also endangered

In *Ex parte Essary*, 992 So. 2d 5 (Ala. 2007), the court applied what amounts to a rebuttable presumption against wantonness where the defendant put himself in harm's way along with the plaintiff. The defendant-driver slowed to a "rolling stop" at an intersection, attempted to cross between two moving vehicles, and did not make it; the second vehicle collided with the defendant's in the intersection. *Id.* at 7-8, 10, 12. A plaintiff testified the defendant "was attempting to 'shoot through the gap,' between the lead vehicle and the vehicle [plaintiff] was driving." *Id.* at 10. There was no direct evidence the defendant was conscious of likely injury. The court found insufficient evidence of wantonness, stating:

> *[T]he risk of injury to [the defendant] himself was as real as any risk of injury to the plaintiffs.* Absent some evidence of impaired judgment, such as from the consumption of alcohol, *we do not expect an individual to engage in self-destructive behavior. See Griffin Lumber Co. v. Harper,* 252 Ala. 93, 95, 39 So. 2d 399, 401 (1949) ("There is a rebuttable presumption recognized by the law that every person in possession of his normal faculties in a situation known to be dangerous to himself, will give heed to instincts of safety and self-preservation to exercise ordinary care for his own personal protection. It is founded on a law of nature and has [as] its motive the fear of pain or death. *Atlantic Coast Line R. Co. v. Wetherington*, 245 Ala. 313(9), 16 So. 2d 720 [(1944)].").
>
> The facts here presented do not establish any basis from which to conclude that [the defendant] was not possessed of his normal faculties, such as from voluntary intoxication, rendering him indifferent to the risk of injury to himself when crossing the intersection if he collided with another vehicle. Nor is the act as described by [plaintiff] so inherently reckless that we might otherwise impute to [the defendant] a depravity consistent with disregard of instincts of safety and self-preservation. We therefore conclude that, as a matter of law, the *plaintiffs failed to offer substantial evidence indicating that [the defendant] was conscious that injury would likely or probably result from his actions.*
>
> *Id.* at 12 (emphasis added).

A federal court summarized *Essary's* presumption as follows: "Essentially, because wantonness requires knowledge that the conduct is likely to result in harm, if the behavior at issue is similarly likely to harm the *perpetrator* (as it is, for example, in most cases involving car accidents)," courts "will presume that, given their understanding of human nature, people would not consciously engage in conduct so openly harmful to themselves." *Jinwright*, 607 F. Supp. 2d at 1276-77 (emphasis in original). The presumption "thus prevents a circumstantial inference of wantonness unless there is reason to believe that the defendant was suffering from 'impaired judgment' or if the conduct was so 'inherently reckless' that it would signal the kind of 'depravity consistent with disregard of instincts of safety and self-preservation.'" *Id.* at 1277.

In *Johnson v. Baldwin*, 584 F. Supp. 2d 1322 (M.D. Ala. 2008), the court ruled that the presumption was rebutted. The defendant stopped her car on Interstate 85, shifted to reverse, and drove backwards in the middle of the interstate. *Id.* at 1324. The court "applie[d] *Essary's* second exception, which includes conduct that is 'so inherently reckless' as to indicate the kind of 'depravity' from which the court could impute a disregard for the normal instincts of self-preservation." *Id.* at 1328. The court stated that "[d]riving backwards on a high-speed, interstate highway like I-85 is certainly conduct of the highest degree of recklessness," and that "[o]ne engaging in that behavior knowingly would certainly display the kind of disregard for self-preservation that would rebut the usual presumption against that kind of mental state." *Id.*

To date, it appears the presumption in *Essary* has only been applied in car-accident cases, but its terms do not limit it to such cases. The reasoning underlying the presumption would apply in any type of case where the defendant's conduct put the defendant in danger.

Wantonness without negligence?

The Alabama Supreme Court has stated that wantonness is "not merely a higher degree of culpability than negligence." *Lynn Strickland Sales & Serv., Inc. v. Aero-Lane Fabricators, Inc.*, 510

So. 2d 142, 145 (Ala. 1987), *overruled on other grounds, Alfa Mut. Ins. Co. v. Roush*, 723 So. 2d 1250 (Ala. 1998). Instead, because of the different states of mind involved in negligence and wantonness, the two are "qualitatively different tort concepts of actionable culpability," as "unmixable as oil and water." *Lynn Strickland*, 510 So. 2d at 145-46 (quoting in part from Dooley's *Modern Tort Law* § 4.22, at 117 (1982)). In other words, negligence and wantonness are "distinct causes of action." *Ex parte Jackson*, 737 So. 2d 452, 455 (Ala. 1999).

What is perhaps surprising is that negligence and wantonness are "mutually exclusive." *Cook v. Branick Mfg., Inc.*, 736 F.2d 1442, 1448 (11th Cir. 1984). This means that "[w]antonness and negligence cannot exist in the same act or omission." *Thompson v. White*, 274 Ala. 413, 149 So. 2d 797, 804 (1963). Thus, a defendant "cannot be both simply negligent and wanton at one and the same time by virtue of the same act. He is one or the other, if either." *Western Union Tel. Co. v. Gorman*, 237 Ala. 146, 185 So. 743, 745 (1938). *See also Thompson*, 149 So. 2d at 804 (one who is guilty of wantonness "is not guilty of negligence").

As a result of this mutual exclusivity, and perhaps even more surprising, a verdict or judgment for the defendant on negligence does not preclude a verdict or judgment *against* the defendant *for wantonness. See Lynn Strickland*, 510 So. 2d at 147 ("A jury could find wanton misconduct on the part of an individual, even though it does not find that that individual's conduct was negligent."); *Crocker v. Lee*, 261 Ala. 439, 74 So. 2d 429, 433 (1954) ("that the defendant was not guilty of negligence would not preclude a finding that he was guilty of… wanton[ness]"); *Green v. Leatherwood*, 727 So. 2d 92, 93 (Ala. Civ. App. 1998); *James v. Sellers*, 54 Ala. App. 599, 311 So. 2d 320, 321-22 (1975). Consequently, when a plaintiff alleges negligence and wantonness, and the trial court errs in granting judgment as a matter of law ("JML") for the defendant on wantonness, a subsequent verdict for the defendant on negligence does not render the error in granting the JML harmless. *See Cook*, 736 F.2d at 1448 ("[A]lthough intuition might suggest otherwise, [Alabama] courts have held that an erroneous [JML] on the issue of wantonness is not cured by a jury's finding that the defendant was not negligent."); *Lynn Strickland*, 510 So. 2d at 145-47; *Canida v. U.S. Reduction Co.*, 294 Ala. 193, 314 So. 2d 279 (1975); *James*, 311 So. 2d at 320-22.

This view has not been unanimous. In *Lynn Strickland*, Justice Houston dissented, stating that negligence "is *conduct*…which falls below the standard established by law for the protection of others against unreasonable risk of harm," and that negligence does not require proof that such conduct "be accompanied by any particular state of mind." *Id.*, 510 So. 2d at 148 (emphasis in original). Justice Houston then wrote:

> In several federal cases applying Alabama law, defendants have successfully used statistical evidence to prove that injuries were unlikely and that the defendants therefore could not have been conscious of probable injury.

Since I view negligence as conduct, I would hold that the same action or inaction which constitutes negligence also constitutes wantonness if the tort feasor is conscious of his inaction or action and is conscious that by such inaction or action injury will likely or probably result.

I would also affirm the judgment of the trial court [granting JML for the defendant on wantonness] and hold that where there is no affirmative defense, such as contributory negligence [to which a defense verdict on negligence could be attributed], and a jury finds for a defendant on a negligence count, this Court will infer that the jury found the absence of that conduct. In this case, since the same facts that supported the negligence count were relied on by [the plaintiff] to support the wantonness count, this Court should infer that if the wantonness count had been presented to the jury, the jury would have found for [the defendant] on that count, as it did on the negligence count. Therefore, any error in [granting JML] in favor of [the defendant] on the wantonness count was harmless….

Id. at 149. Two justices joined Justice Houston's dissent, and another justice also dissented on the basis that the trial court's error in granting JML on wantonness was harmless. *Id.* at 151.

In contrast, the majority's opinion in *Lynn Strickland* is based on the view that a jury deciding negligence makes a finding concerning the defendant's state of mind ("inattention," "thoughtlessness," "heedlessness," etc.). *See id.*, 510 So. 2d at 145-47. Yet under Alabama's pattern jury instructions, the jury is instructed only that the plaintiff must prove that the defendant "was negligent," that the plaintiff "was harmed," and that the defendant's negligence "was a cause of [plaintiff's] harm"; that "[n]egligence is the failure to use reasonable care to prevent harm"; and that "[a] person's conduct is negligent when [he] either does something that a reasonably prudent person would not do in a similar situation, or [he] fails to do something that a reasonably prudent person would have done in a similar situation." APJI-Civil 28.00, 28.01 (Westlaw 2011). The jury ordinarily receives no instruction to find whether the defendant was inattentive, thoughtless, heedless, or acted with any other state of mind.

Juries are presumed to follow the court's instructions unless there is evidence to the contrary. *See Wootten v. Ivey*, 877 So. 2d 585, 590 (Ala. 2003). Therefore, given the pattern instructions on negligence, and assuming no affirmative defense is involved, a verdict for the defendant necessarily means that the jury found that the defendant did not breach a duty, or that the plaintiff was not harmed, or that the defendant's conduct did not cause the harm. Because a plaintiff must prove a breach of duty, harm, and causation to recover for wantonness, *see Edmonson*, 374 F. Supp.

2d at 1106, any of these findings would also defeat a claim for wantonness. *Cf. Dolgencorp, Inc. v. Taylor*, 28 So. 3d 737, 745-46 (Ala. 2009) (because plaintiff's negligence claim failed for lack of a duty, "her wantonness claim must also fail"). Under these circumstances, then, any error in granting JML for a defendant on wantonness should be considered harmless when the jury renders a verdict for the defendant on negligence.

Evidence of existence or absence of wantonness

Any evidence making it more or less likely that, when the defendant acted or failed to act, he knew of existing conditions and was conscious of likely injury, is relevant to wantonness. Among many examples of such evidence are the defendant's knowledge or lack of knowledge of prior accidents, and statistical evidence of the likelihood of injury.

A defendant's "knowledge of a prior accident" caused by the same condition, activity, or product made the basis of the plaintiff's claim "is some evidence that the defendant consciously disregarded a known danger." *Lakeman v. Otis Elevator Co.*, 930 F.2d 1547, 1553 (11th Cir. 1991). *See, e.g., Mitchell v. Moore*, 406 So. 2d 347, 353 (Ala. 1981) (that defendants "had notice of another fall in the same location, before [the plaintiff's fall]," coupled with lack of evidence "that [defendants] ever attempted to investigate or remedy the defect causing the injury," supported wantonness); *Sears, Roebuck & Co.*, 630 So. 2d at 1032; *Harco Drugs, Inc. v. Holloway*, 669 So. 2d 878, 881 (Ala. 1995). However, "notice of prior injuries does not automatically create a jury question on wantonness." *Richards v. Michelin Tire Corp.*, 21 F.3d 1048, 1058 (11th Cir. 1994), *cert. denied*, 513 U.S. 1111 (1995). Other evidence may show that the plaintiff's injury was still unlikely, or that instead of ignoring the situation, the defendant tried to prevent injury. *See Richards*, 21 F.3d at 1058-59; *Wal-Mart Stores, Inc. v. Thompson*, 726 So. 2d 651, 653-55 (Ala. 1998). Or, the plaintiff may fail to show that the prior injury actually resulted from the same cause. *See Berness v. Regency Square Assocs., Ltd.*, 514 So. 2d 1346, 1350 (Ala. 1987).

That a defendant had no knowledge of prior accidents is some evidence the defendant did not act wantonly. *See Cessna Aircraft Co. v. Trzcinski*, 682 So. 2d 17, 22 (Ala. 1996) ("there was no evidence that the harnesses were prone to the kind of failure experienced by [the plaintiff], or that there had been any reports of similar incidents in the past"); *Blizzard v. Food Giant Supermkts., Inc.*, 196 F. Supp. 2d 1202, 1209 (M.D. Ala. 2002); *Coca-Cola Bottling Co. United, Inc. v. Stripling*, 622 So. 2d 882, 886 (Ala. 1993). Such lack of knowledge is not necessarily dispositive, however. *See Lakeman*, 930 F.2d at 1553 ("we are unaware of any [Alabama] decision [holding] that knowledge of a prior accident is required" for wantonness).

In several federal cases applying Alabama law, defendants have successfully used statistical evidence to prove that injuries were unlikely and that the defendants therefore could not have been conscious of probable injury. In *Toole*, 999 F.2d 1430, the evidence "showed that the actual incidence of [breast] implant ruptures from closed capsulotomies is probably slightly less than one percent," demonstrating that "rupture is no 'likely' event." *Id.* at 1435 (emphasis omitted). In *Richards*, 21 F.3d 1048, involving a tire that exploded when the plaintiff attempted to mount the tire on a mismatched rim, the court stated that "the actual incidence of mismatches was roughly one in millions," that the defendant "knew of only four other mismatch incidents," and that "it cannot be said that mismatch explosions are likely or that the failure to warn [plaintiff] of the risks of mismatches made such explosions likely." *Id.* at 1058. *See also Scharff*, 2011 WL 4361634, *16-21 (granting summary judgment for defendant on wantonness, citing statistical evidence that drug at issue was unlikely to cause cancer).

Defenses to wantonness

Wantonness was long held subject to the two-year statute of limitations at *Ala. Code* § 6-2-38(*l*). *See Ex parte Capstone Bldg. Corp.*, 96 So. 3d 77, 82 (Ala. 2012). Then, in the personal-injury case of *McKenzie v. Killian*, 887 So. 2d 861 (Ala. 2004), the court held that the six-year statute for "[a]ctions for any trespass to person or liberty," § 6-2-34(1), applied to wantonness. *McKenzie*, 887 So. 2d at 863, 870. In *Capstone*, the court overruled *McKenzie* and reaffirmed that wantonness is subject to the two-year statute. *Capstone*, 96 So. 3d at 88. Since claimants may have relied on *McKenzie*, the *Capstone* court also stated that "litigants whose causes of action accrued on or before June 3, 2011, the date of the original issuance by this Court of its opinion in this case," would "have two years from that date to bring their action, unless and to the extent that the time for filing their action under the six-year limitations period announced in *McKenzie* would expire sooner." *Capstone*, 96 So. 3d at 91.

A plaintiff cannot recover for wantonness if his injuries "were a direct result of [his] knowing and intentional participation in a crime involving moral turpitude," *Oden v. Pepsi Cola Bottling Co.*, 621 So. 2d 953, 954-55 (Ala. 1993), or if the plaintiff and defendant were *in pari delicto* (equally guilty in breach of the law), *Ex parte W.D.J.*, 785 So. 2d 390, 392-93 (Ala. 2000). Self-defense is also a defense to wantonness. *See Hargress v. City of Montgomery*, 479 So. 2d 1137, 1139-41 (Ala. 1985).

Contributory negligence and assumption of risk are not defenses to wantonness. *See Sims v. Crates*, 789 So. 2d 220, 225-27 (Ala. 2000). There is no defense of "contributory wantonness." *See Thrasher v. Darnell*, 275 Ala. 570, 156 So. 2d 922, 925 (1963).

While it could certainly affect a defendant's knowledge or consciousness, voluntary intoxication is also not a defense. To the contrary, a defendant's intoxication can be evidence of wantonness. *See, e.g., Inge v. Nelson*, 564 So. 2d 906, 907 (Ala. 1990); *Crovo v. Aetna Cas. & Surety Co.*, 336 So. 2d 1083, 1085 (Ala. 1976); *Barrett v. McFerren*, 231 Ala. 382, 165 So. 226 (1936); *Stamp v. Jackson*, 887 So. 2d 274, 279-80 (Ala. Civ. App. 2003). "[I]f intoxication renders [a person] reckless or indifferent to the consequences, and he fails to exercise due care, such failure will not be excused because superinduced by intoxication," since "[t]he law exacts from one voluntarily intoxicated the same care as it would from a sober person of ordinary prudence." *Hamilton v. Kinsey*, 337 So. 2d 344, 346 (Ala. 1976) (addressing effect of plaintiff's intoxication on contributory negligence).

Burdens of production and proof for claim of wantonness

To submit a wantonness claim to the jury, and to be able to recover compensatory damages on that claim, the plaintiff must produce "substantial evidence" of wantonness. *See Ala. Code* § 12-21-12(a); *Hobart Corp. v. Scoggins*, 776 So. 2d 56, 60, 66 (Ala. 2000); *Senn*, 619 So. 2d at 1324. Substantial evidence means "evidence of such quality and weight that reasonable and fair-minded persons in the exercise of impartial judgment might reach different conclusions as to the existence of the fact sought to be proven." § 12-21-12(d).

To obtain a verdict for wantonness and recover compensatory damages, the plaintiff must prove the claim to the jury's reasonable satisfaction. *See Ex parte Gradford*, 699 So. 2d 149, 150-53 (Ala. 1997); APJI-Civil 8.00 and 29.00 (Westlaw 2011).

Punitive damages for wantonness

If the plaintiff prevails on a wantonness claim and the jury awards compensatory or nominal damages, punitive damages are potentially recoverable. *See Powell v. Piggly Wiggly Ala. Distrib. Co.*, 60 So. 3d 921, 927 (Ala. Civ. App. 2010); *Life Ins. Co.*, 719 So. 2d at 806.

Ala. Code § 6-11-20(a) states that outside wrongful-death cases, punitive damages may only be awarded "in a tort action where it is proven by clear and convincing evidence that the defendant *consciously or deliberately engaged in* oppression, fraud, *wantonness*, or malice with regard to the plaintiff" (emphasis added).[2] Section 6-11-20(b)(3) defines "wantonness" as "[c]onduct which is carried on with a reckless or conscious disregard of the rights or safety of others."

Hence, the plaintiff must show that the defendant "consciously or deliberately engaged in" "[c]onduct which was carried on with a reckless or conscious disregard for the rights or safety of others." Conscious or deliberate conduct is equivalent to the conscious-act-or-omission element of wantonness at common law, and "carried on with a reckless or conscious disregard for the rights or safety of others" apparently incorporates the knowledge-of-conditions and consciousness-of-likely-injury elements. *See Richards*, 21 F.3d at 1057 (§ 6-11-20(b)(3) "codif[ies] [the] common law standard of wantonness"); *Coca-Cola Bottling Co.*, 622 So. 2d at 884-85 (statutory definition is "similar to" description of common-law wantonness in *Lynn Strickland*, 510 So. 2d at 145); *Id*. at 146 (common-law wantonness "is sometimes expressed in terms of 'reckless disregard of the safety of another'") (quoting Dooley's *Modern Tort Law* § 4.22).

Accordingly, courts have generally treated statutory wantonness as nothing more or less than common-law wantonness. When deciding cases on punitive damages for wantonness under § 6-11-20, courts have cited authorities on common-law wantonness. *See, e.g., Cheshire v. Putman*, 54 So. 3d 336, 341-45 (Ala. 2010); *Hobart Corp.*, 776 So. 2d at 58-59; *Ferguson v. Baptist Health Sys., Inc.*, 910 So. 2d 85, 91-95 (Ala. 2005); *Vaughn v. Butler*, 664 So. 2d 225, 229-30 (Ala. Civ. App. 1995); *Toole*, 999 F.2d at 1435. Conversely, courts have cited the statutory definition when ruling on common-law-wantonness claims. *See, e.g., Boyd v. Sears, Roebuck & Co.*, 642 So. 2d 949, 950-51 (Ala. 1994); *Clark v. Kindley*, 10 So. 3d 1005, 1008 (Ala. Civ. App. 2007); *Jinwright*, 607 F. Supp. 2d at 1275-76.

Burdens of production and proof to recover punitive damages for wantonness

Under § 6-11-20(a), a plaintiff must prove wantonness by clear and convincing evidence to recover punitive damages (except in wrongful-death cases).[3] Section 6-11-20(b)(4) defines "clear and convincing evidence" as "[e]vidence that, when weighed against evidence in opposition, will produce in the mind of the trier of fact a firm conviction as to each essential element of the claim and a high probability as to the correctness of the conclusion." It also explains that "[p]roof by clear and convincing evidence requires a level of proof greater than a preponderance of the evidence or the substantial weight of the evidence, but less than beyond a reasonable doubt."

Thus, when a plaintiff seeks compensatory and punitive damages for wantonness, the court should instruct the jury on two burdens of proof: (1) That the plaintiff must prove his claim of wantonness to the jury's reasonable satisfaction, upon which the plaintiff is entitled to compensatory damages, *see* APJI-Civil 8.00, 11.00 and 29.00 (Westlaw 2011), and (2) that if the plaintiff has proved wantonness by clear and convincing evidence, the jury may also award punitive damages, *see* APJI-Civil 11.03. Since the burdens are different, it is possible for a plaintiff to produce substantial evidence of wantonness, prove it to the jury's reasonable satisfaction and recover compensatory damages, yet fail to prove wantonness by clear and convincing evidence and not be able to recover punitive damages. *See Hobart Corp.*, 776 So. 2d at 58-66; *Senn*, 619 So. 2d at 1324.

Section 6-11-20 is clear concerning the plaintiff's burden of proof to the jury. The case law is confusing, however, as to whether and how this statute impacts the procedures and burdens of production on motions for judgment as a matter of law and for summary judgment.

A. Does the court weigh the evidence on a motion for JML as to punitive damages?

In cases tried to a jury, the defendant can challenge the sufficiency of the plaintiff's evidence by moving for judgment as a matter of law under *Ala. R. Civ. P.* 50.[4] Based on § 6-11-20, the standard for JML on punitive damages for wantonness is "whether there was evidence of such quality and weight that a jury of reasonable and fair-minded persons could find by clear and convincing evidence that the defendant consciously or deliberately engaged in" wantonness. *Ex parte Norwood Hodges Motor Co.*, 680 So. 2d 245, 249 (Ala. 1996). An appellate court applies this same standard when reviewing a trial court's ruling on the issue. *See Shiv-Ram, Inc. v. McCaleb*, 892 So. 2d 299, 313 (Ala. 2003).

The Alabama Supreme Court has said that when a defendant moves for JML on punitive damages, "[i]t is *not the trial court's*

function…to weigh the evidence" but to view it "in a light most favorable to" the plaintiff, and that if in so viewing the evidence "the judge reasonably can conclude that a jury could find the facts in favor of the [plaintiff] and that the jury could be firmly convinced of that decision *after considering the evidence in opposition*, then the judge should deny the [defendant's] motion." *Cessna Aircraft Co.*, 682 So. 2d at 19 (emphasis added). This seems to embody a contradiction. To determine whether the jury could be firmly convinced "after considering the evidence in opposition," the *court* must consider the evidence in opposition, and it is unclear how a court can do this without "weigh[ing] the evidence." In fact, the supreme court stated in another case that "[u]nder § 6-11-20(b)(4), these factors [evidence tending to disprove wantonness] *must be weighed* in opposition to the evidence presented by [the plaintiff]," and that "*[h]aving so weighed them*, we conclude that [plaintiff] failed to present *clear and convincing evidence [of wantonness]*." *Hobart Corp., 776 So. 2d at 60 (some emphasis added, other emphasis omitted); see also Hunt Petroleum Corp. v. State, 901 So. 2d 1, 18 (Ala. 2004) (Houston, J., concurring) ("[W]*hen evaluating the propriety of punitive damages…, we are required to weigh the conflicting evidence.").

B. Does § 6-11-20 apply on summary judgment?

When a plaintiff asserts a claim (such as wantonness) that permits recovery of compensatory and punitive damages, and the defendant moves for summary judgment on that claim, the plaintiff need only produce substantial evidence, not clear and convincing evidence, to avoid summary judgment. *See Hines v. Riverside Chevrolet-Olds, Inc.*, 655 So. 2d 909, 924-26 (Ala. 1994), *overruled on other grounds, State Farm Fire & Cas. Co. v. Owen*, 729 So. 2d 834 (Ala. 1998). The *Hines* court explained that "a claim of wantonness is not a 'claim of punitive damages'; rather, it is a claim on which, under our law, a trier of fact has the authority in its discretion to impose punitive damages." *Id.*, 655 So. 2d at 925. The court also stated, "the question whether there is clear and convincing evidence of wrongful conduct that will support an award of punitive damages does not arise until the trial," and that "§ 6-11-20 does not apply to determine whether, in opposition to a motion for a summary judgment, the plaintiff has presented sufficient evidence creating a genuine issue of fact as to one or more elements of a claim." *Hines*, 655 So. 2d at 925-26. These statements led courts to conclude that "§ 6-11-20 is irrelevant in regard to motions for summary judgment," *Boudousquie v. Marriott Management Services, Inc.*, 669 So. 2d 998, 1001 (Ala. Civ. App. 1995), and that under Alabama law "a court may not deny a claim for punitive damages prior to trial," *Graham v. First Union National Bank*, 18 F. Supp. 2d 1310, 1319 (M.D. Ala. 1998).

These conclusions are probably incorrect. Alabama law permits a defendant to challenge particular damages, including punitive damages, by motion for partial summary judgment. *See Jefferies v. Bush*, 608 So. 2d 361, 363 (Ala. 1992); *Willingham v. United Ins. Co. of Am.*, 642 So. 2d 428, 429-30 (Ala. 1994); *Wellcraft Marine v. Zarzour*, 577 So. 2d 414, 416, 419 (Ala. 1990); *Katopodis v. Pope*, 542 So. 2d 1229, 1230 (Ala. 1989). Therefore, the issue of punitive damages can and does arise before trial when a defendant specifically moves for summary judgment on those damages. And logically, when the defendant argues in such a motion that the evidence is insufficient to support punitive damages, the court should apply the clear-and-convincing-evidence standard, just as it does when a defendant makes this argument in a motion for JML. *See Durbin v. B.W. Capps & Son, Inc.*, 522 So. 2d 766, 767 (Ala. 1988) (summary-judgment motion is in effect a pretrial motion for JML, to be granted "whenever the same state of proofs would justify a [JML] for [the movant] at trial") (quoting J. Hoffman & W. Schroeder, Burdens of Proof, *38 Ala. L. Rev. 31, 37 (1986)*); *Norwood Hodges*, 680 So. 2d at 252 n.2 (Houston, J., concurring) ("It would certainly make no sense to apply the substantial evidence standard to a punitive damages claim at the summary judgment stage, and then to apply the clear and convincing evidence standard to that same claim at the [JML] stage."). Prior to *Hines*, the supreme court *did* apply the clear-and-convincing-evidence standard when reviewing summary judgments on wantonness claims to the extent the claims sought punitive damages. *See Berry*, 590 So. 2d at 885, 887; *Baker v. Pi Kappa Phi Fraternity*, 628 So. 2d 423, 425 (Ala. 1993).

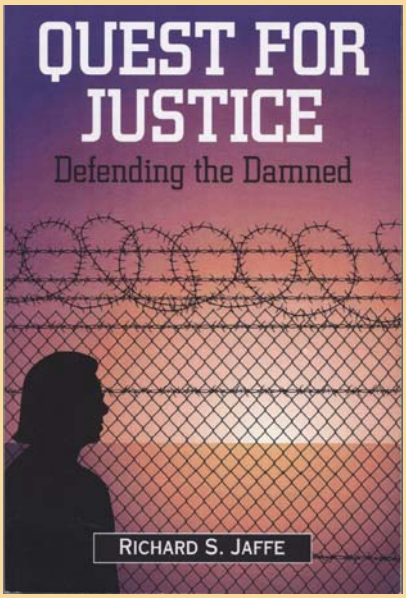
Applying the substantial-evidence rule is appropriate when a defendant moves for summary judgment on the plaintiff's *claim* for wantonness–that is, on the common-law cause of action itself–without specifically challenging recoverability of punitive damages. *Cf. Hines*, 655 So. 2d at 925-26. When the defendant moves for summary judgment on punitive damages in particular, though, the clear-and-convincing-evidence standard should apply. *See Berry*, 590 So. 2d at 885, 887; *Baker*, 628 So. 2d at 425; *cf. Hobart Corp.*, 776 So. 2d at 58-66. If the defendant moves for summary judgment on punitive damages and also on the claim for wantonness, the clear-and-convincing-evidence standard should apply to the former and the substantial-evidence rule to the latter. *See id.*

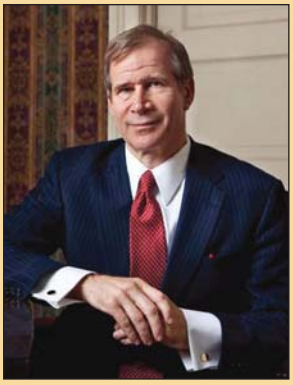
Conclusion

There are probably hundreds of cases deciding whether conduct was wanton, and courts have not always expounded or consistently applied the law. Hence, any summary of the law of wantonness, including this one, will necessarily be imperfect and incomplete. Nevertheless, the general principles summarized in this article are reasonably clear. | AL

Endnotes

1. Christopher L. Yeilding and Conrad Anderson, IV, *Alabama Supreme Court Clarifies Statute of Limitations for Wantonness*, 72 Ala. Law. 480 (2011).
2. Damages for wrongful death in Alabama are punitive only, recoverable when the plaintiff proves a claim to the jury's reasonable satisfaction. *See Campbell v. Williams*, 638 So. 2d 804, 808-12 (Ala. 1994); *Plant v. R.L. Reid, Inc.*, 365 So. 2d 305, 307 (Ala. 1978).
3. See note 2.
4. In order to preserve for appeal an argument that the defendant was entitled to JML based on insufficiency of the plaintiff's evidence, defendants generally must move for JML on this ground at the close of the evidence, and then renew the motion after judgment. *See Ala. R. Civ. P.* 50(a), -(b); *Sears, Roebuck & Co.*, 630 So. 2d at 1025, 1031. Also, defendants usually must file the motion at the close of the evidence as a prerequisite to asserting the insufficiency-of-evidence ground in the post-judgment motion. *See Powell v. Vanzant*, 557 So. 2d 1225, 1227 (Ala. 1990). Notwithstanding, under current Alabama law, the defendant need only file a post-judgment motion for JML asserting a lack of clear and convincing evidence supporting punitive damages for wantonness. *See Sears, Roebuck & Co.*, 630 So. 2d at 1031-32. Though certainly permitted to do so, the defendant is not required to also move for JML on this issue at the close of the evidence to preserve it for appeal or to assert it in a post-judgment motion. *Id.*





Richard S. Jaffe

Quest for Justice
Defending the Damned

By Richard S. Jaffe

Reviewed By William N. Clark

Inside view

Reading Richard Jaffe's story of his fascinating legal career provides valuable insights into how a young lawyer, beginning as an assistant prosecutor and then moving to private practice handling mostly appointed cases, developed into an outstanding trial lawyer. Every young lawyer aspiring to become the next Clarence Darrow should read this book. It will also be of interest to more experienced lawyers and laymen alike who want an inside view of our criminal justice system from a true professional.

Many lawyers hold the legendary attorney Clarence Darrow as the ultimate example of a great trial lawyer and Jaffe does so in his book. When Darrow himself faced criminal charges, he was represented by California lawyer Earl Rogers. Rogers was careful to point out that he was not a "criminal lawyer," because in that context the word "criminal" was an adjective. He preferred to describe himself as a "lawyer who represented citizens accused of crime." Unfortunately, today some lawyers do see themselves as "criminal" lawyers, in another sense, i.e., lawyers who represent criminals, rather than lawyers who represent citizens accused of crime. Perhaps it is that view that causes some lawyers who call themselves "criminal" lawyers to rarely try criminal cases. Richard Jaffe certainly does not fall into the latter category.

Certain steps to follow

Jaffe is the epitome of how a lawyer should evaluate every case–beginning by establishing a relationship with his client, diligently gathering all of the facts, carefully researching the law and then reaching a decision in discussion with the client whether the state or federal government can prove its case beyond a reasonable doubt. Too often, lawyers fail to recognize what Jaffe so ably describes in his book: For the rule of law to prevail, zealous advocates are critical–lawyers who understand that in a criminal case there is absolutely no burden on the defendant. Some lawyers would argue that everyone understands that principle, but the high number of guilty pleas in our current criminal justice system suggests otherwise.

Intelligent, creative, effective

As a young lawyer, Jaffe built his reputation as an effective trial lawyer by representing indigent citizens accused of crime. A number of "not guilty" verdicts led Judge William Cole to give Jaffe the nickname "Lucky," but it was not luck that was the key to Jaffe's success–it was his innate intelligence and creativity, hard work and genuine belief in the rule of law. Richard Jaffe's description of various trials in which he defended persons accused of crime offers a thorough and interesting look at how the rule of law is protected in our criminal courts when zealous defense counsel do their job.

Jaffe's description of the vagaries of a criminal trial will not be new to lawyers who regularly practice in that area, but will serve to educate young lawyers, other lawyers who do not practice criminal law and the general reader to the challenges, heartaches, frustrations and excitement in representing a person accused of a criminal offense, particularly one where death is the ultimate penalty.

Jaffe has demonstrated, perhaps more than anyone else in this country, how zealous and diligent preparation is crucial to success, and how the death penalty process can frighteningly result in innocent people being convicted and sentenced to die. The book describes Jaffe's extraordinary efforts which led to the exoneration of several death penalty clients. His success in that area is a truly remarkable accomplishment which serves as a sound argument as to why the death penalty should be abolished or, at the very least, thoroughly reviewed. Efforts in Alabama to obtain a moratorium on the death penalty while a thorough study is done have met with absolute "stone-walling" by our last two governors and attorneys general. Perhaps Jaffe's book will be an incentive for our legislative and executive branches to take some positive steps to remedy this archaic punishment which most of the rest of the world has already abolished.

Notorious client

One of the most notorious of Richard Jaffe's clients was Eric Rudolph, who was charged in Birmingham with causing a bomb to explode at the New Woman All Women Health Care Clinic, resulting in the death of an off-duty Birmingham police officer and devastating injuries to a nurse, Emily Lyons–in Jaffe's words, "shattering her body, blinding her in one eye and permanently maiming her. Today, more than 20 surgeries later, she still lives in constant pain and unimaginable trauma."

Zealous advocate

It was that person accused of capital murder whom Jaffe was appointed to represent in the federal District Court in Birmingham. Jaffe's description of his relationship with Rudolph and his commitment to following all the requirements expected of a zealous advocate present an excellent example to any lawyer seeking to provide effective representation to a client who is accused of a heinous crime. Jaffe outlines the role that a lawyer must play where it appears a guilty plea is inevitable. It is critical for the lawyer to know every aspect of the defendant's life and background to use in mitigation at sentencing. Jaffe states it well: "In death-penalty work, we seek to undercover pivotal points when our clients' lives took a turn, they made decisions or something happened to them that changed their lives immensely and irrevocably." Jaffe followed that guidance in representing Eric Rudolph, and his skillful preparation and his relationship with Rudolph resulted in Rudolph's avoiding the death penalty and pleading guilty, receiving four consecutive life sentences without parole.

Jaffe acknowledges and describes another problem, however, that often arises in high profile indigent defense death penalty cases, i.e., conflicts among lawyers and the client. In this case, nationally renowned public defender Judy Clark became involved in the case and issues arose which made it difficult for Jaffe to remain on Rudolph's legal team. Consequently, he and his staff withdrew before the plea was entered.

"Liberty's Last Champions"

Throughout the book, Jaffe describes the excitement and satisfaction that every criminal defense lawyer has when the jury foreperson utters the magic words, "Not guilty." It is a feeling which is difficult to describe, but often begins with the words, "Thank God"–not as an exclamation, but as a prayer. Alabama is fortunate to have Richard Jaffe as a skilled and dedicated advocate. He sets a fine example for young lawyers seeking to become one of "Liberty's Last Champions," as the National Association of Criminal Defense Lawyers describes its members. | AL

Dayton Foster Hale, Sr.

Dayton Foster Hale, Sr.

Dayton Foster Hale, Sr. died July 6, 2012 at his home in Tuscaloosa at the age of 85.

Surviving were Dayton's sons, Dayton F. Hale, Jr. (University of Alabama, J.D. 1979) and Wright W. Hale (University of Alabama, J.D. 1978), and a daughter, Susan Hale Prout (Norton); daughter-in-law Charlotte Hale (wife of Dayton F. Hale, Jr., University of Alabama, J.D. 1978), grandchildren Dayton F. Hale, III (Cumberland, J.D. 2012) and his wife Sharon Rhett Hale, Frances Hale Pruett (William Radford), James W. Hale, Christopher T. Pow and Harrison Deal Pow, and two great-grandchildren. Dayton was preceded in death by his wife Frances and his grandchild, Lorraine Hale Williams.

Dayton graduated from Marion Military Institute in 1943 and was commissioned through the Navy V-12 program as an ensign, and was in the Pacific Theatre when WWII ended. He earned an undergraduate degree in business at the University of Alabama in 1949. After return to active duty during the Korean conflict, he obtained his law degree from the university in 1956.

The descendant of Tuscaloosa County pioneers, he built upon a legacy that included service and success in every area of the community: business, education, ministry and the law. His legal work was primarily in real estate and natural resources. He was an active promoter of and investor in the development of natural gas in the Black Warrior Basin, and coal and methane in Alabama.

He enriched the lives of those around him with his wit and compassion. He charmed as an instrumentalist and vocalist, and as a dancer, sailor, poet and outdoorsman. He filled many places of service in Tuscaloosa, including every lay office at Covenant Presbyterian Church and chair of the United Way Campaign and of the Tuscaloosa Preservation Society. In the larger community, he served as president of the Alabama Savings and Loan Association and of the Alabama Association of Kiwanis Clubs.

—Isaac P. Espy, Espy, Nettles, Scogin & Brantley PC, Tuscaloosa

Adams, Lewie Henry, Jr.
Columbia
Admitted: 1949
Died: October 23, 2012

Becker, Lauren Lynn
Atlanta
Admitted: 1980
Died: July 17, 2012

Deas, Thomas Allen
Theodore
Admitted: 1967
Died: October 12, 2012

Fulton, Roberta Marshall Leatherwood
Pt. Townsend, WA
Admitted: 1984
Died: July 13, 2012

Gilbert, Don J.
Alexander City
Admitted: 1995
Died: October 23, 2012

Hamlett, James Darrington
Montgomery
Admitted: 1992
Died: October 11, 2012

Leitman, Eddie
Birmingham
Admitted: 1966
Died: October 22, 2012

Little, Donald Blair
Montgomery
Admitted: 1994
Died: October 12, 2012

McCoy, Ronald C., MD
Birmingham
Admitted: 1997
Died: November 11, 2012

McGriff, Don Arthur
Fairhope
Admitted: 2006
Died: October 2, 2012

Miller, Tony George
Birmingham
Admitted: 1980
Died: October 9, 2012

Nichols, Margaret Howard MacGregor
Columbus, OH
Admitted: 1949
Died: August 25, 2012

Solomon, William Redding
Birmingham
Admitted: 2008
Died: September 22, 2012

Tyson, Hon. John C., III
Montgomery
Admitted: 1951
Died: November 2, 2012

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- CoreVault
- EasySoft
- Rocket Matter
- Ruby Receptionists

Wilson F. Green

By Wilson F. Green

Wilson F. Green *is a partner in Fleenor & Green LLP in Tuscaloosa. He is a* summa cum laude *graduate of the University of Alabama School of Law and a former law clerk to the Hon. Robert B. Propst, United States District Court for the Northern District of Alabama. From 2000-09, Green served as adjunct professor at the law school, where he taught courses in class actions and complex litigation. He represents consumers and businesses in consumer and commercial litigation.*

Marc A. Starrett

By Marc A. Starrett

Marc A. Starrett *is an assistant attorney general for the State of Alabama and represents the state in criminal appeals and habeas corpus in all state and federal courts. He is a graduate of the University of Alabama School of Law. Starrett served as staff attorney to Justice Kenneth Ingram and Justice Mark Kennedy on the Alabama Supreme Court, and was engaged in civil and criminal practice in Montgomery before appointment to the Office of the Attorney General. Among other cases for the office, Starrett successfully prosecuted Bobby Frank Cherry on appeal from his murder convictions for the 1963 bombing of Birmingham's Sixteenth Street Baptist Church.*

Below are the summaries of recent civil and criminal decisions of note from the Alabama and federal courts.

RECENT CIVIL DECISIONS

From the Alabama Supreme Court

Medical Malpractice; Veil-Piercing

***Hill v. Fairfield Nursing & Rehab. Center LLC*, No. 1090549 (Ala. Oct. 19, 2012)**

Hill, a nursing home patient, sued nursing home operator LLC and parent/owner LLCs for claims under the AMLA, arising from Hill's breaking a leg while being moved from bed by CNA. At summary judgment, Hill supported claims against parent/owner LLCs using evidence that operator was operating a 190-bed facility, that parent/owner LLCs operated 30-plus nursing homes across the country using single-venue LLCs, and that operator LLC carried only $25,000 in liability insurance. Trial court granted summary judgment to parent/owner LLCs on veil-piercing claims, and case proceeded to trial as against the operator LLC. At trial, Hill offered nursing expert on issue of standard of care for use by CNA in transitioning patient to and from bed. Operator moved for JML on basis that expert testimony was insufficient because (1) the proper standard for patient movement was a physical therapist (PT) standard, as to which expert was not qualified to opine as a "similarly situated health care provider," and (2) expert had not established controlling causal standard for linking breach of standard to broken leg. Trial court granted JML to operator. The supreme court reversed 8-1 on all claims. Writing for the court, Justice Murdock concluded (1) the proper standard of care was a nursing standard,

because the healthcare provider in issue was a CNA and not a PT; (2) there was substantial evidence of causation in light of the totality of the testimony concerning whether the breach of the standard probably caused the fall leading to the leg-break and (3) there was sufficient evidence of the factors supporting veil-piercing to create a triable issue in equity (to be decided by the court, not a jury) on whether the corporate veil should be pierced. Justice Stuart dissented.

Fraudulent Transfer Act; Veil-Piercing

***Peacock Timber Transport Inc. v. BP Holding LLC*, No. 1110348 (Ala. Oct. 19, 2012)**

Peacock, a judgment creditor of BP, brought action against BP and other related entities (Blount Parrish *et al*), contending that transfer of $500,000 from BP to Diamond (another entity controlled by Blount Parrish) was fraudulent under the Alabama Fraudulent Transfer Act, *Ala. Code* § 8-9A-1 *et seq*. Defendants contended that the $500,000 paid to BP was actually paid to Blount Parrish, a bond firm, for work done for benefit of Jefferson County, and that Blount Parrish simply used BP as a "conduit" through which the payment was made and then transferred out. Peacock contended that, regardless of the purpose of the money, the money constituted "property" of BP within the AFTA, and that further evidence of BP's ownership of the funds lay in the promissory note given by Diamond in BP's favor after BP transferred the funds to Diamond. The trial court granted summary judgment to BP on the basis that the funds were not payable to BP. The supreme court reversed, reasoning that there was a dispute of fact, particularly in light of the promissory note, as to whether the funds were property of BP within the AFTA, and also reversed summary judgment on veil-piercing (but without much discussion of that latter point). The court also rejected BP's alternative statute of limitations argument under the AFTA, reasoning that the claims were not brought under section 8-9A-5, but rather 8-9A-4, as to which there was a four-year limitation period.

Continued from page 61

Negligence; Constructive Notice

***Black Warrior Elec. Mem. Corp. v. McCarter*, No. 1110745 (Ala. Oct. 19, 2012)**

McCarter, working for APAC on a road construction project, was electrocuted when a pole he was using to lift an electrical line over operations charged through the pole. He sued BW (the owner of the line), contending that the lines were hanging below the height mandated by the National Electrical Safety Code. Jury returned a verdict for McCarter. The supreme court reversed. The court reasoned that, because power providers are not subject to strict liability, the proper standard for assessing the duty of BW was to determine whether BW had actual or constructive notice of the defective height in the line at the time of the accident. The height of the line at the time of the accident was hotly disputed at trial; however, there was no evidence from which actual or constructive notice of the height problem could be inferred, and plaintiff's proof of same was based on an impermissible stacking of inferences.

Venue; Non-Resident Defendant

***Ex parte Green*, No. 1110779 (Ala. Oct. 19, 2012)**

Conecuh County residents sued Conecuh County defendant and individual from Pensacola, Florida in Monroe County, based on assault and battery allegedly occurring in Conecuh County. Defendants moved for transfer to Conecuh County based on improper venue, which the trial court granted. Plaintiffs petitioned for mandamus. The supreme court granted the writ and directed that the transfer order be vacated, reasoning that as to non-resident defendant, venue would be proper in any county of the state, and therefore venue was proper in Monroe County.

Riparian Rights

***Schramm v. Spottswood*, No. 1110794 (Ala. Oct. 19, 2012)**

In dispute concerning owner's building of a pier which would potentially conflict with regulations of the Department of Conservation and Natural Resources, DNCR granted a pier permit to a landowner because enforcing the regulatory setback requirement would infringe upon the general common-law right held by all owners of riparian property to be able to "wharf out" to waters of a reasonable navigational depth. The court held that this common-law right has in fact been recognized in most jurisdictions, including Alabama. *Cove Properties, Inc. v. Walter Trent Marina, Inc.*, 796 So. 2d 322, 326-27 (Ala. Civ. App. 1999), reversed in part on other grounds, 796 So. 2d 331 (Ala. 2000). The court concluded that DNCR's decision to allow the pier was not clearly unreasonable.

Standing; Non-Profits

***Boys & Girls Clubs of South Alabama, Inc. v. Fairhope-Point Clear Rotary Youth Programs, Inc.*, No. 1110843 (Ala. Oct. 19, 2012)**

Under the Alabama Non-Profit Corporations Act, in particular § 10A-3-2.44, *Ala. Code* 1975, plaintiffs lacked standing to challenge certain of a non-profit corporation's transactions, and, therefore, the judgment was required to be vacated for lack of subject matter jurisdiction (standing is jurisdictional).

Banking; UCC Article 3

***Braden Furniture v. Union State Bank*, No. 1110943 (Ala. Oct. 19, 2012)**

Issue: whether provisions in the Alabama Uniform Commercial Code ("the UCC") displace common-law claims of negligence and wantonness when a drawer seeks to recover from a depository bank the loss of payment for unauthorized checks. (Braden Furniture's employee misappropriated funds from Braden accounts and wrote checks from company which she then deposited into her USB account.) Held: Yes, common-law claims are displaced by UCC Article 3 on these facts. The court reasoned that "Braden Furniture's common-law claims are based upon Union State Bank's alleged acceptance of unauthorized checks and Union State Bank's presentment of those improperly payable checks to Braden Furniture's bank for payment. Because the UCC provides that transactions such as these are governed by the relationship between the drawee bank and its customer, and between the drawee bank and the depository/collecting bank, to allow Braden Furniture's common-law claims of negligence and wantonness to proceed would create rights, duties and liabilities inconsistent with those set forth in the UCC."

Jury Trial Waiver Provisions

***Ex parte BancorpSouth Bank*, No. 1111209 (Ala. Oct. 19, 2012)**

Bank sought to strike guarantor's jury demand on the basis of a written jury trial waiver provision in the guaranty agreement. Evidence showed that guarantor had business and law degrees and had guaranteed over 20 other loans; that guaranty agreement was two pages and the jury waiver was not inconspicuous, and that jury waiver covered all claims "in any way connected with" the guaranty agreement. The trial court denied the motion to strike, and bank petitioned for mandamus. The supreme court granted the writ, holding that the waiver was enforceable under the three-factor test of *Gaylord Department Stores of Alabama v. Stephens*, 404 So. 2d 586, 588 (Ala. 1981): (1) whether the waiver is buried deep

in a long contract; (2) whether the bargaining power of the parties is equal; and (3) whether the waiver was intelligently and knowingly made. In particular, the court refused to hold that presence in a form contract evinced such unequal power as to be dispositive of other countervailing factors. The court also held that "connected with" language was sufficiently broad to cover dispute in issue.

Section 14 Immunity

***Ex parte Phenix City Bd. of Educ.*, No. 1111308 (Ala. Oct. 19, 2012)**

Under *Ex parte Montgomery County Bd. of Educ.*, 88 So. 3d 837, 841 (Ala. 2012) and other authority, municipal school boards are agencies of the state and therefore entitled to section 14 immunity from claims for money damages.

State Immunity

***Ex parte Thomas*, No. 1111294 (Ala. Oct. 26, 2012)**

The court granted mandamus relief in part to the Commissioner of the Department of Corrections and the department itself, in class action brought by correctional officers seeking money damages arising from allegedly improper denial of overtime pay. Commissioner and DOC were entitled to Section 14 immunity in action for money damages. The court denied mandamus relief to the Alabama Corrections Institute Finance Authority and to Thomas, as vice president of ACIFA, because under prior authority ACIFA is not entitled to state immunity.

From the Court of Civil Appeals

Same-Sex Marriages; Adoption

***In re Adoption of K.R.S.*, No. 2110722 (Ala. Civ. App. Oct. 12, 2012)**

Same-sex couple was married in California during the time such marriages were legal, in the window before Proposition 8 became the law of that state. One partner was biological mother of minor. Couple moved to Alabama, whereupon

Continued from page 63

non-maternal partner sought to adopt the minor under *Ala. Code* § 26-10A-27, claiming that she was the "spouse" (for purposes of the statute) of the biological mother. The probate court ruled against the spouse, and spouse appealed. The court of civil appeals affirmed. The court reasoned that Alabama does not recognize same-sex marriage: "Section 30-1-19, known as the 'Alabama Marriage Protection Act,' provides that '[m]arriage is inherently a unique relationship between a man and a woman' and that '[a] marriage contracted between individuals of the same sex is invalid in this state.'" § 30-1-19(b). In addition, same-sex marriages that are valid in other states are not recognized in Alabama under *Ala. Code* § 30-1-19(e). The court also noted that the federal Defense of Marriage Act does not require one state to give full faith and credit to marriages from another state. (Ed.: the United States Supreme Court has just accepted *certiorari* on a number of cases concerning same-sex marriage, including one concerning the constitutionality of DOMA; a decision in those cases, expected later this term, may impact the continued viability of this decision).

Evidence

***Hornaday Transp. LLC v. Fluellen*, No. 2100939 (Ala. Civ. App. Oct. 26, 2012)**

In workers' compensation death-benefits action, the court held that an EMS report containing hearsay statements of bystanders made to EMS personnel regarding decedent's death were admissible under *Ala. R. Evid.* 803(4), pursuant to the rule of *McKenna v. St.* Joseph *Hospital*, 557 A.2d 854 (R.I. 1989), a case cited with approval in Gamble's *McElroy's Alabama Evidence*. Autopsy report was also admissible as a business record under Alabama law.

Substitution of Parties

***Carter v. Carter*, No. 2110907 (Ala. Civ. App. Nov. 2, 2012)**

Under Alabama law, when a suggestion of death is not filed in the trial court, the six-month period for the substitution of parties under Rule 25 is not triggered, and the action cannot be properly dismissed for the failure to substitute parties.

From the Eleventh Circuit

Arbitration; Waiver

***Garcia v. Wachovia Corp.*, No. 11-16029 (11th Cir. Oct. 26, 2012)**

In another class action arising from the overdraft fee MDL, the Court affirmed the district court's denial of arbitration. The district court had twice invited Wells Fargo to move to compel arbitration, first in November 2009 and again in April 2010, but Wells Fargo declined those invitations. A year later, Wells Fargo reversed course and moved to compel arbitration soon after the Supreme Court's decision in *AT&T Mobility LLC v. Concepcion*, __ U.S. __, 131 S. Ct. 1740, 1753 (2011). The district court denied the motion based on waiver. Wells Fargo argues that it did not waive its right to compel arbitration because it would have been futile to move to compel arbitration before the Supreme Court decided *Concepcion*. The Eleventh Circuit concluded that *Concepcion* established no new law and, thus, affirmed the waiver finding.

RECENT CRIMINAL DECISIONS

From the Court of Criminal Appeals

Rule 404(B)

***Scott v. State*, CR-08-1747, 2012 WL 4757901 (Ala. Crim. App. Oct. 5, 2012)**

Among other holdings, the court found that "prior bad acts" evidence of two previous fires was admissible to prove the defendant's motive, identity and common plan in setting the fire that resulted in her son's death.

Juvenile *Miranda* Rights

***Ward v. State*, CR-10-1137, 2012 WL 4475325 (Ala. Crim. App. Sept. 28, 2012)**

The law enforcement officer's failure to instruct a juvenile regarding his "juvenile *Miranda*" rights under *Alabama Code* § 12-15-202 to contact his parent, legal guardian or custodian during custodial interrogation rendered the juvenile's statement inadmissible.

Community Notification Act

***Acra v. State*, CR-10-1581, 2012 WL 4475326 (Ala. Crim. App. Sept. 28, 2012)**

The defendant's *Ala.R.Crim.P.* Rule 32 claim regarding the constitutionality of his conviction under the Community Notification Act was sufficient to require a hearing, due to subsequent caselaw declaring the Act unconstitutional as applied to indigent homeless sex offenders. That holding applied retroactively to the defendant.

Indictments

***Adams v. State*, CR-11-0427, 2012 WL 4475327 (Ala. Crim. App. Sept. 28, 2012)**

The court reversed the defendant's conviction of first-degree methamphetamine manufacturing under *Alabama Code* (1975) § 13A-12-218, because his indictment charged him only with second-degree methamphetamine manufacturing under § 13A-12-217. It held that "a defendant is entitled to be informed in the indictment as to which conditions of § 13A-12-218 he must defend."

Indictments; Limitations Period

***Money v. State*, CR-11-0468, 2012 WL 4475332 (Ala. Crim. App. Sept. 28, 2012)**

The expiration of the 12-month limitation period for misdemeanor prosecutions before the defendant's indictment required reversal of his conviction of the misdemeanor offense of criminally negligent homicide.

From the Eleventh Circuit

Habeas Corpus; Ineffective Assistance

***Lawrence v. Fla. Dept. Corr.*, No. 10-13862, 2012 WL 5314113 (11th Cir. Oct. 30, 2012)**

Affirming the denial of habeas relief, the Court concluded that defense counsel did not render ineffective assistance by not seeking a competency hearing. Noting that the determination of ineffectiveness is objective, it found that counsel's "own admission of deficient performance…is not to be afforded much, if any, weight." The Court also found no merit to the defendant's claim that he was incompetent during his guilty plea.

Habeas Corpus; Ineffective Assistance

***Evans v. Fla. Dept. Corr.*, No. 11-14498, 2012 WL 5200326 (11th Cir. Oct. 23, 2012)**

The defendant was not entitled to habeas relief on claims that his Sixth Amendment rights were violated by the closure of the courtroom during voir dire, by the Florida jury advisory sentencing system and by his counsel's alleged ineffectiveness in not calling certain witnesses at trial. | AL

Notices

- **Janine Marie Burrell**, whose whereabouts are unknown, must answer the Alabama State Bar's formal disciplinary charges within 28 days of January 15, 2013 or, thereafter, the charges contained therein shall be deemed admitted and appropriate discipline shall be imposed against her in ASB No. 2012-341, before the Disciplinary Board of the Alabama State Bar.
- **Garfield Woodrow Ivey, Jr**., whose whereabouts are unknown, must answer the Alabama State Bar's formal disciplinary charges within 28 days of January 15, 2013 or, thereafter, the charges contained therein shall be deemed admitted and appropriate discipline shall be imposed against him in ASB nos. 2011-1944, 2012-428, 2012-496, 2012-497, and 2012-550, before the Disciplinary Board of the Alabama State Bar.

Transfers to Disability Inactive Status

- Huntsville attorney **James Kenneth Brabston** was transferred to disability inactive status by order of the Supreme Court of Alabama. The supreme court entered its order based upon the August 13, 2012 order of Panel II of the Disciplinary Board of the Alabama State Bar in response to a petition to transfer to disability inactive status filed by the Office of General Counsel, pursuant to Brabston's written request seeking same. [Rule 27(c), Pet. No. 2012-1429]
- Lanett attorney **William Lawrence Nix** was transferred to disability inactive status by order of the Supreme Court of Alabama. The supreme court entered its order based upon the August 16, 2012 order of Panel I of the Disciplinary Board of the Alabama State Bar in response to a petition to transfer to disability inactive status filed by the Office of General Counsel, pursuant to Nix's written request seeking same. [Rule 27(c), Pet. No. 2012-1533]
- Decatur attorney **Joseph Benjamin Powell** was transferred to disability inactive status by order of the Supreme Court of Alabama, effective August 13, 2012. The supreme court entered its order based upon the August 13, 2012 order of Panel II of the Disciplinary Board of the Alabama State Bar in response to a petition to transfer to disability inactive status filed by the Office of General Counsel, pursuant to Powell's written request seeking same. [Rule 27(c), Pet. No. 2012-1501]

Suspensions

- On August 1, 2012, the Supreme Court of Alabama entered an order suspending Birmingham attorney **David Elliott Hodges** for 90 days, effective September 29, 2012. The suspension was entered based upon the order filed July 16, 2012 by the Disciplinary Board of the Alabama State Bar, Panel I, accepting the conditional guilty plea of Hodges to violations of rules 1.4(a), 1.4(b) and 1.15(d), *Ala. R. Prof. C.* Hodges admitted he failed to reasonably communicate with clients and failed to render a full accounting of his clients' property. [ASB No. 2009-2069(A)]

- Birmingham attorney **Robert Lee Kreitlein** was suspended from the practice of law in Alabama for three years, effective September 14, 2012, the imposition of which was deferred pending a two-year probationary period. On September 14, 2012, the Disciplinary Commission accepted Kreitlein's conditional guilty plea to violations of rules 1.1, 1.3, 1.4(a), 1.4(b), 1.15, 1.16(d), 5.3(a), 5.3(c), 5.5(a)(2), 8.1(b), 8.4(a), 8.4(c), and 8.4(g), *Ala. R. Prof. C.* Kreitlein associated with Review Legal Research and the National Inmate Defense Association (NIDA) as a supervising attorney in 2008. He was recruited and hired by Tony Alexander who represented himself to be Florida-licensed attorney. Clients were obtained primarily through referrals from Review Legal Research, which was an entity operated by Alexander in conjunction with the NIDA, through which representation of clients was accomplished. Alexander was not a lawyer. He was using Review Legal Research and the NIDA as a scheme to defraud inmates and their families of attorney fees. In July 2009, Alexander was arrested for writing bad checks. His arrest and all attendant circumstances were sufficient cause for Kreitlein to know, have reason to know or inquire

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about Alexander's status as an attorney in the State of Alabama and into other matters regarding Alexander's operation of the NIDA. Kreitlein failed to take reasonable remedial action following Alexander's arrest and continued to practice, sometimes under the auspices of the NIDA, and sometimes as a solo practitioner. As a result of the foregoing, numerous grievances were filed with the Alabama State Bar. During the course of the bar's investigation of these grievances, Kreitlein either failed to respond or, in some cases, did not promptly respond to repeated requests for information from a disciplinary authority. [ASB No. 09-1766(A) *et al*]

- Daphne attorney **John William Parker** was suspended from the practice of law in Alabama by order of the Alabama Supreme Court for 91 days, effective February 24, 2012. The supreme court entered its order based upon the decision of the Disciplinary Board, Panel III, of the Alabama State Bar wherein Parker was found guilty of violating rules 1.1, 1.3, 1.4(a), 1.4(b), 1.15(a), 1.15(b), 1.15(j), 8.1(a), 8.1(b), and 8.4 (a), (c) and (g), *Ala. R. Prof. C.*

  In ASB No. 10-1093, Parker admitted and plead guilty to violations of rules 1.1, 1.3, 1.4(a), 1.4(b), 8.1(a), and 8.4(a), (c) and (g), *Ala. R. Prof. C.* Parker was retained to represent a client in a case involving a right-of-way and inverse condemnation against Mobile County. Summary judgment was granted in favor of the defendant on November 24, 2004. Parker timely filed a post-judgment motion, which was denied on January 28, 2005. Thereafter, the client had difficulty reaching Parker. Parker untimely filed a notice of appeal in the client's case and it was dismissed as untimely filed. Parker did not communicate with the client concerning her case; did not communicate with her regarding the appeal and his failure to timely file notice of appeal and/or the dismissal of the appeal; made material misrepresentations of facts to the client concerning her case; omitted material facts regarding the status of her case; and made material misrepresentations of fact to the investigators during the course of the investigation of the bar grievance filed against him.

  In ASB nos. 10-1596, 11-380, 11-1329, 11-1539, 11-1566, and 11-1613, Parker pled guilty to violations of rules 1.15(a), 1.15(b), 1.15(j), 8.1(b), and 8.4(a) and (g), *Ala. R. Prof. C.* From October 4, 2010 through September 16, 2011, multiple checks totaling $21,323.75 drawn on Parker's trust account caused overdrafts due to insufficient funds. Parker did not properly manage and account for trust account transactions and co-mingled client trust funds with other client trust funds, attorney funds, third-party funds and personal funds. [ASB nos. 10-1093, 10-1596, 11-380, 11-1329, 11-1539, 11-1566, and 11-1613]

- The Supreme Court of Alabama adopted the September 17, 2012 order of the Alabama State Bar Disciplinary Commission suspending Birmingham attorney **Gregg Lee Smith** from the practice of law in Alabama for 91 days, effective August 5, 2012. On September 10, 2012, Smith entered a conditional guilty plea in several matters. In ASB nos. 2008-1271(A) and 2012-850 and CSP nos. 2012-447 and 2012-1424, Smith admitted to violations of rules 1.6, 1.7, 1.8(b), 1.9, and 1.16, *Ala. R. Prof. C.* Smith also admitted to violations of rules 8.1(b) and 8.4(g), *Ala. R. Prof. C.*, in ASB No. 2012-850; rules 1.3, 1.4(a) and 8.1(b), in CSP No. 2012-447; and Rule 5.5(a)(1), *Ala. R. Prof. C.*, in CSP No. 2012-1424. Smith admitted to a breach of confidential information, willful neglect, failure to communicate, failure to respond to the bar in disciplinary matters, and the continued practice of law while his law license was suspended. [ASB nos. 2008-1271(A) and 2012-850; CSP nos. 2012-447 and 2012-1424; and Rule 20(a), Pet. No. 2012-1126]

Public Reprimand

- Birmingham attorney **Tyrus Bernard Sturgis** was ordered to receive a public reprimand without general publication for violations of rules 1.15(c) and 8.4(g), *Ala. R. Prof. C.* A review of Sturgis's trust account records demonstrated that he had repeatedly made personal payments directly from his trust account. It did not appear, however, that any client funds were used to make personal payments from the trust account. Rather, Sturgis improperly deposited earned attorney's fees into the trust account and failed to transfer the earned fees from the trust account into his operating or personal account. In addition, Sturgis failed to label his trust account as either "Trust Account," "Fiduciary Account" or "Escrow Account," as required by Rule 1.15(a), *Ala. R. Prof. C.* The Disciplinary Commission also ordered Sturgis to enroll in and complete the Practice Management Assistance Program within six months of the date of the order on conditional guilty plea. [ASB No. 2011-1975] | AL

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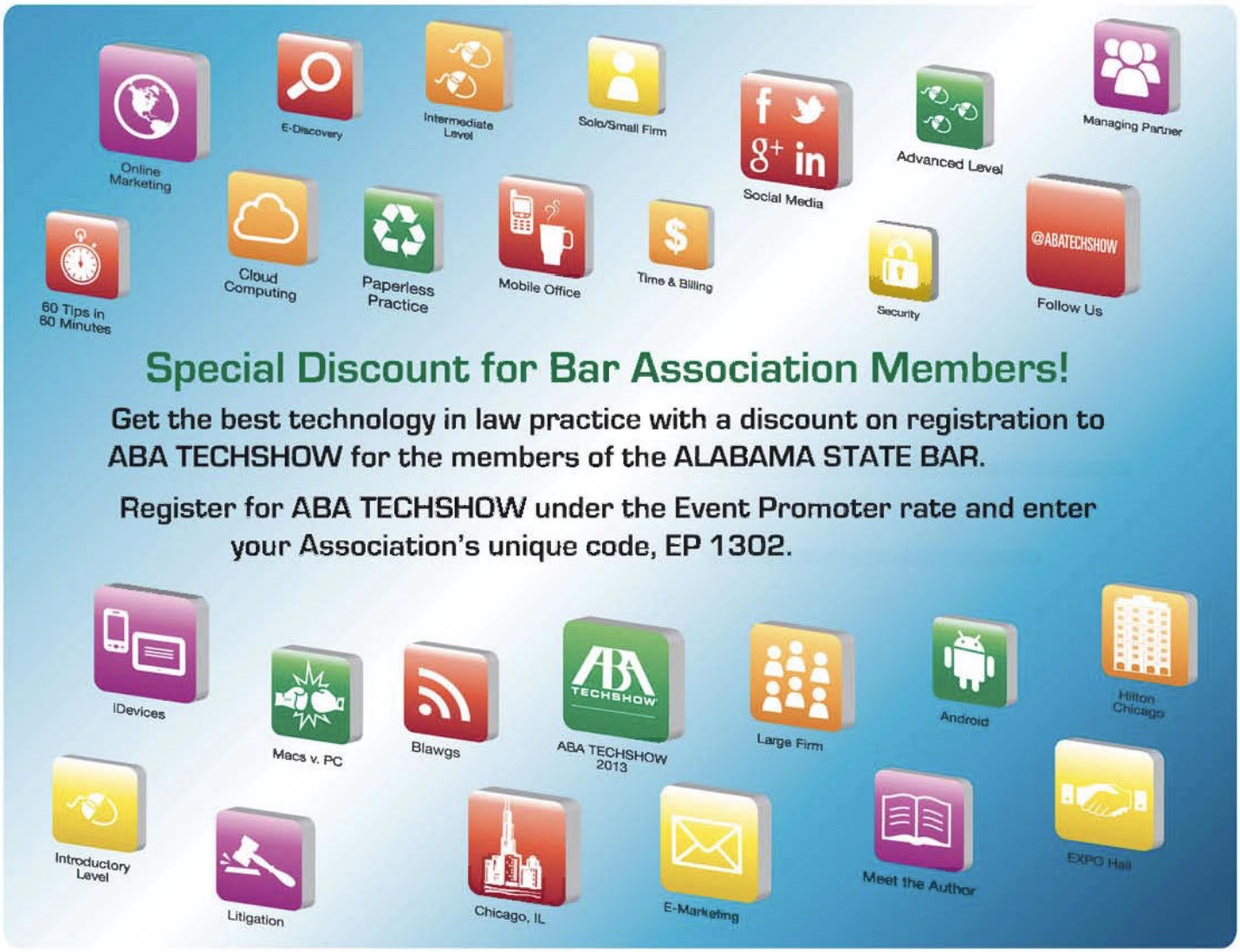

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J. Anthony McLain

Imputed Disqualification of Law Firms When Non-Lawyer Employees Change Firms

QUESTION:

In formal opinions RO-91-01 and RO-91-28, the Disciplinary Commission of the Alabama State Bar held, in substance, that conflicts of interest resulting from non-lawyer employees changing law firms can be overcome by building a "Chinese wall" to screen the newly hired employee from involvement with any matter on which the employee worked while employed at his or her old firm. In recent years, however, an increasing number of jurisdictions have concluded that such screening procedures are ineffective when a non-lawyer employee has obtained confidential information concerning the matter in litigation. Consideration of the positions taken by these jurisdictions calls into question the factual and ethical validity of the rationale upon which these two opinions were predicated and the Disciplinary Commission has, therefore, determined that the conclusions reached therein should be reconsidered.

ANSWER:

A non-lawyer employee who changes law firms must be held to the same standards as a lawyer in determining whether a conflict of interest exists. A firm which hires a non-lawyer employee previously employed by opposing counsel in pending litigation would have a conflict of interest and must therefore be disqualified if, during the course of the previous employment, the employee acquired confidential information concerning the case.

DISCUSSION:

In some jurisdictions the "Chinese wall" cure for conflicts resulting from changing firms has been applied to lawyers as well as non-lawyers. The Alabama Supreme Court, however, has taken the position that the "Chinese wall" concept should not apply to practicing lawyers. In *Roberts v. Hutchins*, 572 So.2d 1231 (Ala. 1990), the court held, by way of dicta, that the "Chinese wall" could not provide an effective screen to attorneys in private practice but should apply only to government or other publicly employed attorneys. 572 So. 2d 1231, 1234 at n. 3.

More significantly, in 1990, the Alabama State Bar proposed, and the Alabama Supreme Court adopted, the *Alabama Rules of Professional Conduct*, which became effective January 1, 1991. Rule 1.10(b) of the *Rules of Professional Conduct* governs conflicts of interest on the part of a firm which employs an attorney previously employed by opposing counsel in ongoing litigation and provides, in substance, that an attorney with confidential information about a former client has a conflict of interest which precludes representation by the firm. The rule makes no mention of, or provision for, any type of "Chinese wall" screening process.

Based upon the above, the Office of General Counsel and the Disciplinary Commission have consistently held that such conflicts on the part of an attorney cannot be cured or overcome by erection of a "Chinese wall" or any other type of screening procedure. The Disciplinary Commission refused, however, to disallow the "Chinese wall" concept in addressing conflicts of interest which can result when a non-lawyer changes law firms.

Continued from page 71

In recent years, various jurisdictions have begun to question the effectiveness of screening procedures when a non-lawyer employee who changes firms is in possession of confidential information concerning the matter in litigation. One of the first jurisdictions to reject screening and to hold non-lawyer employees to the same standard as lawyers was the U.S. District Court for the Western District of Missouri. In *Williams v. Trans World Airlines, Inc.,* 588 F. Supp. 1037 (W. D. Mo. 1984), the court made the following statement:

> "Non-lawyer personnel are widely used by lawyers to assist in rendering legal services. Paralegals, investigators, and secretaries must have ready access to client confidences in order to assist their attorney employers. If information provided by a client in confidence to an attorney for the purpose of obtaining legal advice could be used against the client because a member of the attorney's non-lawyer support staff left the attorney's employment, it would have a devastating effect on both the free flow of information between the client and the attorney and on the cost and quality of legal services rendered by an attorney. Every departing secretary, investigator, or paralegal would be free to impart confidential information to the opposition without effective restraint. The only practical way to assure that this will not happen and to preserve public trust in the scrupulous administration of justice is to subject these 'agents' of lawyers to the same disability lawyers have when they leave legal employment with confidential information." 588 F. Supp. at 1044.

Subsequently, as more states began to adopt the *Model Rules of Professional Conduct*, or some variation thereof, more and more jurisdictions concluded that Rule 5.3(a)&(b)[1] when read in conjunction with Rule 1.10(b)[2] requires that non-lawyer employees be held to the same standards as attorneys with regard to client confidentiality and conflicts of interest resulting from changing firms. Typical of the jurisdictions which employed this analysis is the opinion of the Supreme Court of Nevada in *Ciaffone v. District Court,* 113 Nev. 1165, 945 P.2d 950 (1997). The Nevada Supreme Court concluded as follows:

> "When SCR 187 [ARPC Rule 5.3] is read in conjunction with SRC 160 (2) [ARPC 1.10 (b)], non-lawyer employees become subject to the same rules governing imputed disqualification. To hold otherwise would grant less protection to the confidential and privileged information obtained by a non-lawyer than that obtained by a lawyer. No rationale is offered by *Ciaffone* which justifies a lesser degree of protection for confidential information simply because it was obtained by a non-lawyer as opposed to a lawyer. Therefore, we conclude that the policy of protecting the attorney-client privilege must be preserved through imputed disqualification when a non-lawyer employee, in possession of privileged information, accepts employment with a firm who represents a client with materially adverse interests." 945 P.2d at 953.

The Nevada Supreme Court characterized the "Chinese wall" approach as having been "roundly criticized for ignoring the realities of effective screening and litigating that issue should it ever arise." The court cited as an example of such criticism an article in the *Georgetown Journal of Legal Ethics*, viz.:

> "For example, one commentator explained that a majority of courts have rejected screening because of the uncertainty regarding the effectiveness of the screen, the monetary incentive involved in breaching the screen, the fear of disclosing privileged information in the course of proving an effective screen, and the possibility of accidental disclosures. M. Peter Moser, *Chinese Walls: a Means of Avoiding Law Firm Disqualification When a Personally Disqualified Lawyer Joins the Firm*, 3 Geo. J. Legal Ethics 399, 403, 407 (1990)." 945 P.2d at 953.

There are numerous other decisions which reach the same or similar conclusions, e.g., *Cordy v. Sherwin Williams,* 156 F. R. D. 575 (D.C. N.J. 1994); *MMR/Wallace Power & Industrial, Inc. v. Thames Associates*, 764 F. Supp. 712 (D. Conn. 1991); *Makita Corp. v. U.S.,* 17 C. I. T. 240, 819 F. Supp 1099 (CIT 1993); *Glover Bottled Gas Corp. v. Circle M. Beverage Barn, Inc.,* 129 A.D.2d 678, 514 N.Y.S. 2d 440 (1987); *Smart Industries v. Superior Court,* 179 Ariz. 141, 876 P.2d 1176 (1994); *Koulisis v. Rivers,* 730 So.2d 289 (Fla. Dist. App. 1999); *Daines v. Alcatel,* 194 F. R. D. 678 (E. D. Wash. 2000) and *Zimmerman v. Mahaska Bottling Co.,* 270 Kan. 810, 19 P.3d 784 (2001).

In *Zimmerman, supra,* the Supreme Court of Kansas pointed out that disqualification is not inevitable in every instance.

> "Our holding today does not mean that disqualification is mandatory whenever a non-lawyer moves from one private firm to another where the two firms are involved in pending litigation and represent adverse parties. A firm may avoid disqualification if (1) the non-lawyer employee has not acquired material and confidential information regarding the litigation or (2) if

the client of the former firm waives disqualification and approves the use of a screening device or Chinese wall." 19 P.3d at 793.

For the reasons stated above, the Disciplinary Commission of the Alabama State Bar is of the opinion that a non-lawyer employee who changes law firms must be held to the same standards as a lawyer in determining whether a conflict of interest exists. A firm which hires a non-lawyer employee previously employed by opposing counsel in pending litigation would have a conflict of interest and must, therefore, be disqualified if, during the course of the previous employment, the employee acquired confidential information concerning the case. However, as indicated in *Zimmerman*, *supra*, the client of the former firm may waive disqualification and approve the use of a screening device or Chinese wall. [RO 2002-01] | AL

Endnotes

1. Rule 5.3(a) and (b) provides as follows:

   "With respect to a non-lawyer employed or retained by or associated with a lawyer:

   (a) a partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

   (b) a lawyer having direct supervisory authority over the non-lawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional of the lawyer."

2. Rule 1.10(b) provides as follows:

   "When a lawyer becomes associated with a firm, the firm may not knowingly represent a person in the same or a substantially related matter in which that lawyer, or a firm with which the lawyer was associated, had previously represented a client whose interests are materially adverse to that person and about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(b) that is material to the matter."

Please e-mail announcements to Margaret Murphy, *margaret.murphy@alabar.org.*

Due to space constraints, *The Alabama Lawyer* no longer publishes address changes, additional addresses for firms or positions for attorneys that do not affect their employment, such as committee or board affiliations. We do **not** print information on attorneys who are not members of the Alabama State Bar.

About Members
This section announces the opening of new solo firms.

Among Firms
This section announces the opening of a new firm, a firm's name change, the new employment of an attorney or the promotion of an attorney within that firm.

About Members

James J. Coomes announces the opening of **The Coomes Law Firm PC** at 2027 Stonegate Trail, Ste. 115, Birmingham 35242. Phone (205) 552-1550.

Andy Stivender announces the opening of **Andy Stivender LLC** at 118 N. Ross St., Auburn 36830. Phone (334) 821-6257.

Thomas E. Wright announces the opening of **The Law Firm of Tom Wright LLC** at 34 W. 11th St., Anniston 36201. Phone (256) 770-7727.

Among Firms

Armbrecht Jackson LLP announces that **Julia C. James** has become associated with the firm.

Bradley Arant Boult Cummings LLP announces that **Lance J. Wilkerson** has joined as a partner.

The Dillon Law Group LLC announces that **Bill Dillon** has joined the firm.

Fish Nelson LLC of Birmingham announces the association of **Trey Cotney**.

Gaines, Gault, Hendrix & Bishop PC announces that **Sara L. Williams** has joined as a partner, and **Susan Bryan** and **Drew McNutt** have joined as associates.

Gordon & Rees LLP announces that **Jeffrey W. Melcher** has joined as a partner.

Daniel G. Hamm PC announces a name change to **Hamm & Wilkins PC**.

Harrison Gammons & Rawlinson PC announces that **Gerri L. Plain** has joined as an associate.

Haygood, Cleveland, Pierce, Mattson & Thompson LLP announces a name change to **Haygood, Cleveland, Pierce & Thompson LLP** and that **Michael L. DiChiara** has joined as an associate.

Huie, Fernambucq & Stewart LLP announces that **Samantha Nicolle, Brent Almond** and **William Gunter** have joined as associates, and **Lauren Davis** has rejoined the firm.

Jones Walker announces that **Ralph H. Smith, II** has been named special counsel.

McPhillips Shinbaum LLP announces that **Christopher Worshek** has joined as an associate.

Porterfield, Harper, Mills, Motlow & Ireland PA announces that **Ryan D. Wilson** has joined as an associate.

Samford & Denson LLP announces that **Chad Wachter** has joined the firm of counsel.

Sirote & Permutt PC announces that **Howard W. Neiswender** has joined the firm as a shareholder.

Starnes Davis Florie LLP announces that **Weathers P. Bolt** has joined as an associate.

Stephens Millirons PC announces that **Caitlin E. Bouldin** has joined as an associate.

Traci Owen Vella, Rachel A. King and **Stella C. Jackson** announce the opening of **Vella, King & Jackson** at 3000 Crescent Ave., Birmingham 35209. Phone (205) 868-1555.

William B. Tatum and **Edward E. Wilson, Jr.** announce the opening of **Tatum Wilson PC** at 301 Randolph Ave., Huntsville 35801. Phone (256) 270-2671.

Trimmier Law Firm announces a name change to **Trimmier, Kudulis & Reisinger LLC** and that **Jonathan Kudulis** and **Edward Reisinger** have become managing partners.

Woodruff & Love PC announces that **Gregory C. Morgan** has joined the firm. | AL

Othni J. Lathram
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For more information about the Institute, visit www.ali.state.al.us.

Institute's Core Mission Remains the Same

The year 2012 was a very exciting and busy for the Alabama Law Institute. While it was a year of transformation and change in some respects, the core values, function and work of the institute are as strong as ever. This steadfastness is due to the strong leadership and loyalty provided by our officers, council, membership and staff. It is with great pride that I am able to report on the institute's activities as follows.

The institute's core mission remains to simplify and improve the laws of the State of Alabama through a systematic process of considering, drafting and reviewing proposed legislation for presentment to the legislature. This is made possible through the tireless efforts of lawyers throughout Alabama who are willing to donate their time serving on institute committees that do this work. In fiscal year 2012, more than 5,950 hours were donated by lawyers representing nearly every county in Alabama.

This tremendous commitment by the members of the Alabama State Bar results in proposed legislation that is practical and meaningful and which lacks the potential of unintended consequences. Currently the institute is studying the following acts of areas of law:

Uniform Collaborative Law Act

Chaired by Senator Cam Ward with Penny Davis serving as reporter

Collaborative law is a *voluntary* process in which the lawyers and clients agree that the lawyers will represent the clients solely for purposes of settlement, and that the clients will hire new counsel if the case does not settle. The parties and their lawyers work together to find an equitable resolution of a dispute, retaining experts as necessary. No one is required to participate, and parties are free to terminate the process at any time. The Act includes explicit informed-consent requirements for parties to enter into collaborative law with an understanding of the costs and benefits of participation. The process is intended to promote full and open disclosure; information disclosed in a collaborative process, which is not otherwise discoverable, is privileged against use in any subsequent litigation.

The collaborative law process provides lawyers and clients with an important, useful and cost-effective option for amicable, non-adversarial dispute resolution. Like mediation, it promotes problem-solving and permits solutions not possible in litigation or arbitration.

Limited Liability Company Act (LLC)

Chaired by Kent Henslee with Professor Jim Bryce of the University of Alabama School of Law serving as reporter

The committee has reviewed the Revised Uniform LLC Act as well as the ABA Revised Prototype LLC Act and compared them with the current Alabama law. The committee is incorporating parts of both revisions into the current law as well as ensuring any changes to the LLC Act is compatible with the new Business and Non-Profit Entities Code.

Non-Profit Corporation Act

Chaired by L.B. Feld with Professor Jim Bryce of the University of Alabama School of Law serving as reporter

Alabama's Model Non-Profit Act was adopted in 1984 and followed the 1964 Model Non-Profit Act drafted by the American Bar Association. Since that time, the Non-Profit Act has twice been revised by the ABA with the third edition adopted in August 2008.

The committee is reviewing the Non-Profit Act in light of the need to make changes to incorporate the new Non-Profit Corporation Law into the Alabama Business and Non-Profit Entities Code. The committee is working to ensure that the changes in the Model Act recommended by the American Bar Association are compatible with Alabama's new Alabama Business and Non-Profit Entities Code effective 2011.

UCC Article 9 Amendments

Chaired by Larry Vinson with Professor Bill Henning of the University of Alabama School of Law serving as reporter

These amendments provide greater guidance as to the name of a debtor to be provided on a financing statement. For business entities and other registered organizations, the amendments clarify that the proper name for perfection purposes is the name filed with the state and provided on the organization's charter or other constitutive documents, to the extent there is a conflict with the name on an entity database. More importantly, the amendments provide significantly greater clarity as to the name of an individual debtor to be provided on a financing statement.

The amendments also deal with perfection issues arising on after-acquired property when a debtor (individual or organization) moves to a new jurisdiction and a number of additional technical amendments.

Amendments to the Alabama Condominium Act

Chaired by John Plunk with Carol Stewart and Melinda Sellers serving as reporters

Alabama's Condominium Act was passed in 1990. During the past 21 years, issues have been raised needing clarification. The committee reviewed the Uniform Common Interest Ownership Act to provide provisions to clarify the Condominium Act. These amendments are not a complete revision of the current law only clarification of it.

Alabama Business and Non-Profit Entities Code Standing Committee

Chaired by Jim Wilson

This committee serves as a standing committee to address issues and improvements needed to the 2009 Business and Non-Profit Entities Code. Any suggestions for areas to cover or issues are welcome to be submitted for consideration.

Employment Contracts and Restrictive Covenants

Chaired by Will Hill Tankersley

Alabama law on the interpretation and implementation of restrictive covenants is varied and has very little statutory guidance. This committee is exploring options to provide a statutory framework for how these agreements can be drafted, interpreted and enforced.

Uniform Interstate Family Support Act

Chaired by Julia Roth with Penny Davis serving as reporter

The 2008 Uniform Interstate Family Support Act (UIFSA) amendments modify the current version of the UIFSA's international provisions to comport with the obligations of the United States under the 2000 Hague Convention on Maintenance.

The UIFSA provides universal and uniform rules for the enforcement of family support orders by setting basic jurisdictional standards for state courts and by determining the basis for a state to exercise continuing exclusive jurisdiction over a child support proceeding. It establishes rules for

Continued from page 77

determining which state issues the controlling order in the event of proceedings initiated in multiple jurisdictions. It further provides rules for modifying or refusing to modify another state's child support order.

In order for the United States to fully accede to the Hague Convention it is necessary to modify the UIFSA by incorporating provisions of the Convention that affect existing state law. Section 7 of the UIFSA provides for the guidelines and procedures for the registration recognition enforcement and modification of foreign support orders from countries that are parties to the Convention. Enactment of the amendment to the UIFSA will improve the enforcement of American child support orders abroad and will assist many children residing in the United States in their efforts to receive the financial support due from parents, wherever the parents reside.

Legislation before Congress to ratify the Convention provides that the new amendments of the UIFSA must be enacted in every jurisdiction within two years after the enactment of federal implementing legislation as a condition for continued receipt of federal funds for state child support programs. If that legislation is enacted as presented, the failure to enact this amendment by that date will result in the loss of significant federal funding. The committee is watching Congress closely for any action to ratify the convention.

Uniform Certificate of Title Act for Vessels

Chaired by E.B. Peebles and the reporter is Professor Bill Henning of the University of Alabama School of Law

The major objectives of the Uniform Certificate of Title Act for Vessels are to: (1) qualify as a state titling law that the Coast Guard will approve; (2) facilitate transfers of ownership of a vessel; (3) deter and impede the theft of vessels by making information about the ownership of vessels available to both government officials and those interested in acquiring an interest in a vessel; (4) accommodate existing financing arrangements for vessels; and (5) provide certain consumer protections when purchasing a vessel through the Act's branding initiative.

Partition of Heirs Property Act

Chaired by Bill Gamble and Bob McCurley serves as reporter

The Uniform Law Commission promulgated the Uniform Partition of Heirs Property Act (UPHPA) to help address family tenancy in common issues. The Act does not limit or prohibit the filing of a partition action, and does not replace in any comprehensive way existing partition laws, but provides narrowly focused statutory procedures and a hierarchy of remedies for use in partition actions involving only heirs' property.

Alabama Criminal Code Review

Chair of the committee is Judge Howard Hawk with Bill Bowen serving as reporter

The *Alabama Criminal Code* became effective in 1980. Since that time there have been numerous amendments, additions and changes. A new *Criminal Code* committee was formed in 2009.

The 1980 *Criminal Code* is being compared with the current law showing line-through and underlined changes during the past 30 years. The committee is undertaking a systematic review of the entire criminal code, classification system and sentencing structure.

This review will be conducted with the goal of ensuring the criminal code is as effective and efficient as possible. The committee is reviewing the chapters one at a time. It is anticipated that this review will take several years to complete.

Constitutional Reform

On November 6th, the citizens of Alabama ratified two new articles of the Alabama Constitution. The vote will allow articles 12 and 13 of the Alabama Constitution of 1901 to be replaced with modern articles. As has been discussed in previous columns, these revised articles were the work of the Alabama Constitutional Revision Commission. The passage of these first two articles is important both for the reform they provide and for the momentum their passage gives to the commission's efforts. The commission is now set to study the Legislative, Executive and Education articles among others and will make recommendations on them to the legislature.

The institute is proud to support these efforts and to help the commission in undertaking its work. In that regard, special thanks are due to **Bob McCurley** who is on contract with **Speaker Mike Hubbard** and **Senator Del Marsh** to work with the commission, and to **Professor Howard Walthall** and **Mike Waters**, who so generously and graciously donate their time to work with the commission. Their work, the work of the commission and the commitment shown by the legislature provide great hope that we are on track to significant constitutional reform.

As we start this new year, I express my gratitude and pride to be able to work with so many members of our great bar on such important work. In addition, I am extremely grateful for the overwhelming support our legislature gives to this work. | AL


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