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RECENT DEVELOPMENTS IN ALABAMA TORT LAW

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1. Negligence and Wantonness

A. *Hinton v. Monsanto Co.*,_____So.2d_____, 2001 Ala. LEXIS 347 (Ala. September 14, 2001) (1000599), answering a certified question from the United States District Court for the Northern District of Alabama, held that a complaint which did not allege any past or present personal injury did not state a cause of action for medical monitoring, where plaintiff alleged exposure to hazardous contamination and pollution because of the Monsanto's conduct. A class action was brought alleging exposure to PCBs in the Anniston area; plaintiff argued that medical monitoring of class members was necessary in order to detect injuries or illnesses that may arise in the future as a result of exposure to PCB. Discussing arguments in favor of and against recognition of such a claim, the court concluded that such a claim would violate Alabama's long-established requirement of an "injury" or "damage". A concurrence by Justice Lyons noted concerns about the running of the statute of limitations, and observed that, absent a physical injury, a cause of action had not accrued.

B. In *Wal-Mart Stores, Inc. v. Irby*, ___So.2d____ , 2001 Ala. LEXIS 401 (Ala. Civ. App. June 30, 2000) (2990481) the Court of Civil Appeals found that a jury question was present as to whether constructive notice had been imputed to Wal-Mart. After the fall, shampoo was observed on the floor. It appeared to be sticky and drying, and was becoming transparent. There was an open bottle of shampoo on a nearby shelf, and there were pallet jack tracks in the area of the customer's fall. A Wal-Mart employee had been in the area observing a suspected shoplifter, ten minutes before the accident, and, though she was on her knees within ten inches of the area of the spill, did not notice anything on the floor. A jury could reasonably have concluded that, in her zeal to apprehend the shoplifter, she may not have noticed the spill. However, the Supreme Court reversed in *Ex parte Wal-Mart Stores, Inc*., ____So.2d____, 2001 Ala. LEXIS 148 (Ala. May 4, 2001). The majority opinion, written by Justice Woodall, held the customer did not establish actual notice, constructive notice or delinquency in discovering and removing the substance. The majority pointed to a store employee's testimony that she had been on her knees within 10 inches of this area 5-7 minutes before the customer's accident watching a suspected shoplifter and had not noticed anything on the floor. The customer's description of the shampoo was deemed insufficient to show notice, because she presented no evidence as to whether

coconut-based shampoo becomes “sticky” or “clear” if spilled and if so, how much time is required.

C.. *Mitchell v. Torrence Cablevision USA, Inc*., ____So.2d_____ , 2000 Ala. LEXIS 914 (Ala. Civ. App. August 11, 2000) (2990681), cert. denied, *Ex parte Torrence Cablevision USA, Inc*., ____ So.2d_____, 2001 Ala. LEXIS 221 (Ala. 2001) affirmed summary judgment for a cable company as to negligence where a customer had tripped and fallen over a cable lying across her yard. The customer was deemed contributorily negligent and to have assumed the risk. However, the Court held there was substantial evidence of wantonness with respect to the company’s failure to bury or hang the cable.

Evidence indicated that Torrence Cablevision knew that its failing to hang or bury the cable would likely cause injury. Torrence’s franchise agreement with the Mobile County Commission required its construction to conform to the National Electric Safety Code, which created a duty to bury or hang overhead the cable that ran from the road to the customer’s home. The Court rejected Torrence Cablevision’s argument that, because the cable was an open and obvious danger, summary judgment was proper dismissing the wantonness claim. A jury could conclude that Torrence acted with reckless indifference, in that the Code requires that the cable be buried, and that customer made six service requests asking that Torrence bury the cable, but yet it failed to do, for reasons not fully explained.

D. In *E.P. v. McFadden*, 785 So.2d 364 (Ala. Civ. App. March 24, 2000) (2981128) the Court of Civil Appeals reversed summary judgement that had been granted in favor of a hospital in a suit that alleged that a nurse employed by the hospital sexually abused a six-year-old child. Prior to the incident, the nurse had received many reprimands for inappropriate behavior and had been suspended or put on probation several times for behavioral problems with patients and co-workers. He had taken a leave of absence and been committed to another hospital for treatment of his medical condition. Upon release, the hospital's administrative personnel began monitoring his behavior and maintaining contact with his psychiatrist. The court concluded substantial evidence was present creating a factual issue as to whether the assault on the child was foreseeable and whether the hospital had a duty to protect her from the nurse. However, the Alabama Supreme Court reversed the Court of Civil Appeals in *Ex parte South Baldwin Regional Medical Center*, 785 So.2d 368 (Ala. Oct. 27, 2000) (1991546). The Supreme Court held that the evidence fell short of demonstrating that the nurse's supervisors should have foreseen that he would probably sexually molest a child in the hospital's care. The court distinguished *Young v. Huntsville Hospital*, 595 So.2d 1386 (Ala. 1992), stating that the incident giving rise to the child's claim occurred in a patient-care room, in the presence of family members, and the child was not, as was the plaintiff in *Young*, anesthetized and uniquely dependent upon the hospital for protection.

E. *Ex parte Potmesil*, 785 So.2d 340 (Ala. November 3, 2000), written by Justice Brown, found there was no evidence that a customer, who tripped at a rug display in a store, assumed the risk. Reversing the Court of Civil Appeals, Justice Brown wrote that the store was not entitled to a jury charge on assumption of risk. The customer and her companion were walking through the linens department. According to the companion, beds protruded into the aisle about eight inches. The customer testified that she tripped, but never saw anything that could have cause her to fall. She said she thought she tripped on a rug, because her companion told her that she saw a rolled

rug extending from under a bedding display, after the fall. The companion testified that, after the fall, she noticed a rolled rug at the foot of the bed display protruding into the aisle. The bed and the rolled rug were the only items in the customers' path that could have caused her to fall. Store employees denied seeing a rug protruding into the aisle.

The trial court, over the customer's objections, charged the jury on assumption of risk. The Alabama Supreme Court held this was error, because the evidence gave no indication that the customer actually knew of, and appreciated the danger involved and voluntarily consented that she would bear the risk that she would fall while walking down the aisle.

F. *Wal-Mart Stores Inc. v Rolin*, ___So. 2d____, 2001 Ala. LEXIS 357 (Sept. 21, 2001), affirmed a verdict in favor of a customer who tripped over a barbecue grill in the store's garden center. Wal-Mart had constructed the barbecue grill display in its garden center, using concrete stepping stones. After the customer fell, her husband noticed a barbecue grill sticking out of the box in the area where she fell. Wal-Mart argued that was no showing of actual or constructive notice that a barbecue grill was sticking out of box or that the grill display was hazardous. Such a showing was unnecessary, however, where a defendant affirmatively creates the dangerous condition. The court analogized *Mims v Jack's Restaurant*, 568 So.2d 609 (Ala. 1990), and affirmed the judgment.

G. *Cloninger v. Wal-Mart Stores, Inc.*, ___ So.2d ____, 2001 Ala. LEXIS 83 (Ala. March 30, 2001) (1992183), a falling merchandise case, refused to disturb a jury verdict in favor of Wal-Mart. Evidence supported a finding the incident (a customer was struck by a fan which fell from a shelf) was not caused by negligence on Wal-Mart's part. The customer did not see what caused the fan to fall and a Wal-Mart employee testified there were no fans hanging over the edge of the shelf, and that there were no fans on the risers in the housewares department, where this occurred. No error appeared in the trial court's exclusion of prior incidents of falling merchandise in Wal-Mart Stores except those that had occurred in the Gadsden store; three persons injured by falling merchandise in the Gadsden store were permitted to testify.

H. *Christensen v. Southern Normal School*, 790 So.2d 252 (Ala. January 12, 2001) (8-0) answered certified questions from the United States District Court as to standards in determining whether a plaintiff's complaint seeks to circumvent the principle that Alabama recognizes no cause of action for educational malpractice. Parents and guardians of students sued a boarding school for negligence, fraud and breach of contract, based on language in the school catalog concerning a wholesome, secure environment and school discipline. Depositions indicated instances of violence in the dormitories, illegal drugs and alcohol and sexual relations between staff members and students. The Supreme Court held that Alabama does not recognize a cause of action for educational malpractice, and if the negligence claims raised questions concerning the reasonableness of the school's conduct in providing educational services, then such claims are not cognizable. However, if the claims required only a determination whether contract provisions between the student and school are fulfilled, no educational malpractice claim is asserted. A fraud claim, if not merely so couched to avoid the doctrine that precludes educational malpractice claims, may be pursued if properly pleaded and proved.

I. *McGinnis v. Jim Walter Homes, Inc.*,_____So.2d_____, 2001 Ala. LEXIS 76

(Ala. March 23, 2001)(1000209) (5-0), reversed summary judgment as to claims arising out of a fatal house fire against Jim Walter Homes, the general contractor who had built plaintiff's home in 1991. Evidence sustained plaintiff's theory that Jim Walter had voluntarily undertaken to inspect and repair their home, as they had complained about electrical problems and Jim Walter had sent representatives to the home. Relying on *Cochran v. Keeton*, 47 Ala. App. 194, 252 So.2d 301, the Court held that it was not necessary that Jim Walter had acknowledged an electrical defect or promised to repair such defects before it could be liable on such a voluntary undertaking. A genuine issue of fact existed as to whether Jim Walter's performance of the "action undertaken" was "uncompleted" when it failed to discover a reason for persistent electrical problems and to repair the defect. Summary judgment was also reversed as to claims against the electrical subcontractor for improper installation of electrical wiring in that expert testimony established issues of fact as to electrical defects and cause of the fire.

The Court held that Alabama Power Company, however, was entitled to summary judgment, stating that a supplier of electricity is not responsible for defects in the system to which electricity is supplied; no evidence indicated Alabama Power's act of connecting power to the home in 1991 was a proximate cause of the fire in 1996.

J. *Knowles v. State Farm Mutual Automobile Insurance Co*., 781 So.2d 211 (Ala. September 29, 2000) denied recovery on an underinsured motorist benefits claim. Plaintiff Knowles had fallen from a trailer during a hay ride. The truck was driven by Dodd, alleged to be an agent of Woodmen of the World Life Insurance Society. Knowles also sued Woodmen, alleging respondeat superior and negligence entrustment, as well as State Farm, for underinsured motorist benefits. Dodd was determined to be entitled to immunity as a volunteer under § 6-5-336. Knowles entered a pro tanto settlement with Woodmen for $32,500. The Court held that, because Knowles settled his claims against Woodmen, if Dodd was an agent of Woodmen and Knowles accepted a $32,500 settlement from Woodmen's liability insurance carrier (which had one million dollars of available coverage), then State Farm had no obligation to pay uninsured or underinsured motorist benefits.

K. *Omni Insurance Co. v. Foreman*, ___ So.2d ____, 2001 Ala. LEXIS 168 (Ala. 2001) rejected Omni's argument that *Knowles v. State Farm Mutual Automobile Insurance Co*., supra, overruled sub silentio the holding of *State Farm Mutual Automobile Insurance Co. v. Scott*, supra. This 7-0 opinion held there was no inconsistency between *Knowles* and *Scott*. Had the plaintiff in *Knowles* offered substantial evidence that damages exceeded one million dollars, and had the court concluded that State Farm, the underinsured motorist carrier had no obligation under those facts, the court would then have to reconcile *Knowles* and *Scott*. However, *Scott* was described as a sound decision and the Alabama Supreme Court expressly agreed with its reasoning, and refused to hold that the plaintiff Forman had relinquished his rights to underinsured motorist coverage by failing to exhaust all the tortfeasor's liability insurance.

L. *George H. Lanier Memorial Hospital v. Andrews*, ____ So.2d ____, 2001 Ala. LEXIS 595 (Ala. April 13, 2001) (1990595) reversed a negligence/wantonness verdict in favor of parents of a deceased child. They sued a hospital and two nurses for their conduct in harvesting, without their consent, the corneas of the deceased child. The majority opinion (written by Justice Brown) held the trial court's jury charge, which included language from a criminal statute, § 13A-11-13, Alabama Code (abuse of a corpse), was erroneous. The instructions did not

contain the elements of the action before the jury, but rather introduced extraneous elements and an extraneous duty that was not at issue. The dissenting opinions (Chief Justice Moore and Justice Johnstone) stated the charge failed to prejudice the defendant, simply imposing a superfluous burden of proof on the plaintiffs.

M. *Meyer v. Wal-Mart Stores, Inc.*,_____ So.2d_____, 2001 Ala. LEXIS 337(Ala. September 14, 2001) (1000905*)* upheld a jury verdict in favor of Wal-Mart arising out of a altercation between plaintiff/customer and a Wal-Mart cashier at the checkout line. The customer either struck the cashier or simply tried to retrieve her merchandise, and the cashier grabbed the customer's hair and repeatedly hit her head. The Supreme Court rejected the customer's argument that she was entitled to a judgment as a matter of law. The court held that the verdict in favor of Wal-Mart was consistent with a finding that the cashier was not acting in the line and scope of her employment when she assaulted the customer, but rather was acting solely for personal motives having no relation to the business of the employer. Wal-Mart had emphasized its policy against fighting on store property, did nothing to ratify the cashier's acts, and fired her shortly after the altercation.

N. *Wild Wild West Social Club, Inc. v. Morrison*, ___So.2d____,2001 Ala. LEXIS 240 (Ala. Civ. App. June 23, 2000) (2990396) considered arguments that injuries to a club patron from being hit in the groin by a club bouncer in the parking lot, after the patron had been ejected, were foreseeable. The club urged application of *Butler v. AAA Warehousing & Moving Company*, 686 So.2d 291 (Ala. Civ. App. 1996), which involved injuries in a parade reviewing stand during Mardi Gras. The Court of Civil Appeals pointed to evidence that it was within the bouncer's job description to "make" intoxicated patrons leave the premises and break up fights. This job description recognized the probability that altercations, including violence, may occur. This probability was certainly distinguishable from the "bare possibility" in *Butler* that an injury could occur if a person's foot were caught in the space between the levels of a reviewing stand. However, the Alabama Supreme Court reversed the Court of Civil Appeal in *Ex parte Wild Wild West Social Club, Inc.*, ____ So.2d ____, 2001 Ala. LEXIS 240 (Ala. 2001) The Court applied foreseeability standards relating to criminal acts of third parties and stated that that the bare chance that an ejected bar patron might be attacked by a security guard was not sufficient to impose liability; the only evidence suggesting the club could have foreseen any violence by the bouncer (who was held not to be an agent of the club) was the description of his job duties concerning breaking up fights that occurred in the parking lot, watching the parking lot, observing and making people leave who are highly intoxicated.

O. *Shelter Mutual Insurance Co. v. Barton*, _____So.2d_____(Ala. September 7, 2001)(1991157) distinguishes *Hogan v. State Farm Automobile Insurance Company*, 730 So. 2d 1157 (Ala. 1998) in rejecting a bad faith claim against Shelter Mutual based on a claim for uninsured motorist benefits. Plaintiff, a passenger in Walter's vehicle, was injured when that vehicle collided with a vehicle driven by Shannon Vaden, who was uninsured. There was a factual dispute as to which vehicle was at fault in the collision. Walters' Shelter Mutual policy had been issued in Missouri. The per curiam (3-2-3) decision held the uninsured motorist insurance claim was governed by Missouri law, but the Alabama Guest Statute applied since the collision occurred in Alabama.

Plaintiff argued that Shelter Mutual breached the policy because Vaden's negligence proximately caused the accident and/or Walters' negligence caused accident. The plurality opinion stated that *Hogan* did not hold that a passenger may be legally entitled to recover damages under the uninsured motorist provisions of the driver's policy of insurance, stating that *Hogan* did nothing more than entitle plaintiff to recover under the uninsured motorist provisions of her own policy. To allow plaintiff to recover under a policy that Walters, the driver, had purchased and paid for, according to the opinion, would be to controvert the purpose and tenor of the Alabama Guest Statute and the only way she could recover uninsured benefits under the Shelter policy would be for her to step into Walters' shoes and establish that he was legally entitled to recover. The jury determined both Vaden and Walters were negligent, so Alabama's contributory negligence laws prevented Walters from being "legally entitled to recover" under the uninsured motorist provisions of the Shelter policy. His negligence, however, is not imputed to a passenger and a factual issue remained as to which driver proximately caused the injuries.

The decision concluded that the trial court properly submitted the breach of contract claim with the jury, but not the bad faith claim, and reversed the verdict in the plaintiff's favor.

P. *State Farm Auto Insur. Co. v. Carlton,* ____ So.2d _____, 2001 Ala. Civil App. LEXIS 207 (Ala. Civ. App. May 11, 2001), a case of first impression, questions *Hogan* and considered whether a worker can receive uninsured motorist benefits under his family automobile liability policy when he is injured on the job by a negligent coworker/driver who is immune to suit because of the exclusivity provisions of the Worker's Compensation Act. The court held that the worker was not entitled to receive the UM benefits, although the court described a lack of "clarity" in the law and stated: "We conclude the fact that the worker had received workers' compensation benefits for his injuries does distinguish this case from *Baldwin, Jeffers* and *Hogan*. In the event that our supreme court finds that distinction insufficient to remove this case from the rule of Baldwin, Jeffers and Hogan, we ask the court to revisit the holdings of those cases."

Q. In *Everette v. Brad Ragan, Inc.,* ___ F.Supp.2d ____ 2000 U.S. Dist. LEXIS 4124 (S.D. Ala. 2000) "Big Mo" Everett, a professional bounty hunter, alleged the defendant Brad Ragan negligently repaired his vehicle, damaging a fuel filter and o-ring, and claimed compensatory damages for his inability to apprehend a fugitive as a result of the failure eof his vehicle to start. The court granted a motion to dismiss, finding that, under no circumstances, was it reasonable foreseeable that "Big Mo" would fail to apprehend a fugitive as a result of negligent installment of the fuel filter.

R. *Hathcock v. Wood,* ___ So.2d ____ , 2001 Ala. LEXIS 68 (Ala. March 16, 2001) (1982225) rejected the contention of defendant Hathcock (whose vehicle struck Wood's vehicle from the rear) that he breached no duty of care in that he was driving at a safe speed, following at a lawful distance, but did not see that Wood's vehicle was stopping, as his view of the brake lights was obstructed by another vehicle. The opinion, by Justice Brown, disagreed with this argument and his argument that he was confronted with a sudden emergency; Hathcock could have reasonably expected that vehicles in front of him on a two lane road could suddenly slow down or stop at any time.

S. *Thedford v. Payne*, ___ So.2d ____, 2001 Ala. Civ. App. LEXIS 216 (Ala. Civ. App. May 18, 2001) held that the Guest Statute applied to preclude plaintiff's recovery under negligence claim. Although plaintiff testified that he paid defendant to take him to or from a football practice, the ride was not conditioned on his payment. Both parties testified that they often rode together out of friendship if either's automobile was inoperable. There was no evidence that the defendant conditioned his offer of transportation to plaintiff on plaintiff's paying him for the transportation. The court described plaintiff's making financial contributions to defendant as " a mere social courtesy." The court also determined that the Guest Statute does not bar a negligent-entrustment claim against the owner of an automobile. The Guest Statute was found to apply "only to such person as may be responsible for the manner of [the automobile's] operation; ... it does not apply to the owner unless he is operating the [automobile] in person or it is under his immediate control or is operated by his servant or agent duly authorized by him."

T. In *Prettyman v. Goodwin*, 114 F. Supp.2d 1188 (S.D. Ala. 2000), the plaintiff was injured in automobile accident in a Wal-Mart parking lot, at an intersection with no stop signs, stop line, or any other traffic control devices. Plaintiff sued Wal-Mart and the defendant driver, alleging negligence and personal injuries. Wal-Mart obtained a summary judgment on the grounds that it owed no statutory or common law duty to plaintiff. The court concluded that, given the clear rule that local governments have no duty to institute traffic-control devices, it would be anomalous to construe Ala. Code § 32-5-2 (1975) and the Alabama Manual on Uniform Traffic-Control Devices as creating an affirmative duty to erect and maintain traffic devices for private entities. The court also found that Wal-Mart owed no common-law duty to the plaintiff because the intersection was an open and obvious danger, a matter with respect to which facts were undisputed.

U. In *Ott v. City of Mobile*, _____ F. Supp.2d ____, 2001 U.S. Dist. LEXIS 5125 (S.D. Ala. 2001), discussing state law claims against the city under § 11-47-190 (generally allowing suit against a municipal defendant for negligence of its employees), the United State District Court for the Southern District of Alabama states that the tort of negligent supervision or training requires as an element the existence of a master-servant relationship, and that Alabama recognizes no cause of action against a supervisor for negligent failure to supervise or train a subordinate.

V. *Baugher v. Beaver Const. Co.*, 791 So.2d 932 , 2000 Ala. LEXIS 510 (Ala. 2000),an opinion by Justice Johnstone, upheld the construction statute of repose, § 6-5-221(a), as against the plaintiff's argument that it violates the right to remedy provisions of §13 of the Alabama Constitution. The court, distinguished the holding of *Jackson v. Mannesmann Demag Corp.*, 435 So.2d 725 (Ala. 1983), which invalidated this statute's precursor, which did not provide for those plaintiffs whose causes of action accrued close to the expiration of the limitations. The court noted that there is a "savings clause" in this statute of repose that provides parties who are injured near the expiration of the thirteen-year period sufficient time to file their actions.

W. *Hicks v. Dunn*, ____ So.2d _____, 2001 Ala. LEXIS 378 (Ala. October 12, 2001), written by Justice Lyons, found that the trial court erred in dismissing plaintiff's wantonness claim from the case, arising from a traffic collision. Although speed alone does not amount to

wantonness, speed, coupled with other circumstances, can constitute wantonness; defendant was driving much faster than the posted speed limit, and not paying attention to the road, and did not slow despite construction signs and his knowledge that a restaurant into which patrons would likely be turning was on the other side of the hill that he was cresting.

X. *Ex parte Neese*, ___ So.2d ____, (Ala. October 26, 2001) determined defendant homeowner entitled to summary judgment due to the open and obvious defense, where plaintiff fell because of a door mat lying upside down on a walkway leading to the house, which plaintiff had crossed over at least three times on the day that she fell.

2. Products Liability

A. *Verchot v. General Motors Corp.,* ____So. 2d____ 2001 Ala. LEXIS 188 (Ala. 2001) upheld summary judgment in GM's favor where plaintiffs claimed a defective master cylinder caused brake failure, resulting in an accident. GM complained that plaintiffs failed to preserve the vehicle for inspection, but plaintiffs argued they proved the defect through plaintiff's testimony describing the accident, and some photographs taken at an inspection by mechanics eight days after the accident, prior to the car's sale for salvage by plaintiff's insurer.

The Court noted that ordinarily, expert testimony is required in an AEMLD case due to the complex and technical nature of the commodity. The mechanics who inspected the vehicle described their observations that the master cylinder was engaged and the wheels were rolling freely when they removed the cylinder and the wheels locked when the same master cylinder was reinstalled. However, the court stated that the mechanics could not say that an internal defect in the master cylinder was the only factor that could have caused the brakes to fail, and other factors, such as brake fluid leakage, for possible causes. A GM engineer testified by affidavit that, due to the absence of the vehicle, neither nor anyone else could conclude a reasonable engineering certainty that the accident was caused by brake failure resulting from a defect.

The Court held that 200 GM "1241 Reports" produced in discovery by GM, which revealed allegedly similar brake failure occurrences, were inadmissible, because they did not possess the requisite reliability. These were not the result of a continued and detailed investigation but served merely as a preliminary investigation involving only taking a statement from the driver; the persons taking the reports were not required to assemble all factual data, or determine the cause or extent of damage and had no duty to cross- examine the people making the complaints or investigate further. Their purpose was only to alert the defendant to possible difficulties with the product rather than to commit the defendant as a final analysis of a particular accident or cause.

B. *Baker v. Letica Corp* ,785 So.2d 1142 (Ala. Civ. App. 2000) affirmed a verdict in favor of manufacturers of paint and a bucket in a product liability claim. Baker alleged he was injured when the handle on the paint bucket broke. However, the paint bucket was disposed of by a coworker. The Court held that the trial court did not err in charging the jury on spoliation of evidence. The Court emphasized evidence that Baker and his witnesses had given inconsistent accounts of the accident, and his credibility was impaired by a criminal record. Baker knew that

the bucket was evidence of paramount importance and that when he left the bucket after the accident, he knew that his coworker would use the contents and discard it. He had the authority and opportunity to instruct the coworker to preserve the bucket.

C. *McGraw v. Furon Co.*, ____So.2d____, 2001 LEXIS 175 (Ala. 2001) affirmed summary judgment in favor of Furon, a corporate successor to Reeves Rubber Company. Reeves purchased a rubber processing machine, called a batch-off machine, and used it at its plant in Oklahoma. The plant closed, and the machine was placed in an outdoor scrap yard along with other discarded equipment. The machine was given to an equipment broker, who removed it from the yard, and then resold it to the employer of plaintiff Bruce McGraw. McGraw's arm was drawn into the machine, resulting in severe injures and its amputation.

Furon argued that it was only an "occasional seller" of used rubber machines; on a number of occasions Furon has sold or disposed of used rubber machine which it no longer needs. The Court rejected McGraw's argument that Furon was thus engaged in the business of selling used rubber machines, and held that Furon was not liable under AEMLD.

The Court distinguished *Rutley v. Country Skillet Poultry Co*., 549 So.2d 82 (Ala. 1989) with regard to McGraw's argument that Furon negligently failed to warn of the dangerous nature of the batch-off machine. The Court disagreed that a letter from its original manufacturer telling Furon that it was responsible for safety devices clearly put it on notice that the machine was defective. Further, the *Rutley* plaintiff presented evidence of numerous prior injuries on the machine and that defendant's actual knowledge of dangerous conditions presented by the machines.

D. *Haynie v. Howmedica Osteonics Corp*, 137 F. Supp. 1292 (S.D. Ala. 2000) held an AEMLD claim, based on a defective tibial insert, barred by the statute of limitations. The Court held the plaintiff/patient's limitations period began to run on the date he first sustained damages, that is, immediately after the implantation surgery when he began to suffer pain as a result of the implant. The Court rejected his contention that it was a continuous injury. Because he first sustained damages immediately after the 1995 surgery, and suit was not filed until August 1999, it was deemed outside the statute of limitations.

E. In *Spain v. Brown & Williamson Tobacco Corp*. 230 F.3d 1300 (11th Cir.2000) the Eleventh Circuit Court of Appeals discussed arguments concerning the time of accrual of product liability claim in claims against cigarette manufacturers. The defendants argued that a "completed wrong" would have occurred, and the cause of action arose, when the smoker became addicted to cigarettes shortly after she began smoking in 1962, and the claims would be barred. Plaintiff contended she did not have an actual injury, and thus the cause of action did not accrue, until 1998, when she was diagnosed with lung cancer. The court stated there was no clear answer in state law appellate cases, and certified the question to the Alabama Supreme Court.

F. In *Globetti v. Sandoz Pharmaceutical Corp*., ___F. Supp.2d____, 2001 U.S. Dist. LEXIS 2093 (N.D. Ala. 2001) a court considered a pharmaceutical company's learned intermediary defense and held there were questions of material fact as to plaintiff's claims that the company provided an inadequate warning. The Court observed that the manufacturer's duty is limited to an obligation to advise the prescribing physician to any potential dangers that may

result from the use of the product. The doctrine provides a limited exception to the general rule that the manufacturer must warn the "foreseeable user" that is, the ultimate consumer, of the product's hazards.

However, the fact that some warning is given to the doctor is not dispositive of the failure-to-warn issue. Where a warning has been provided, the question arises as to whether warning was adequate, and adequacy of the warning is a question of fact for the jury. Summary judgment was denied as to warnings, negligence or fraud claims but granted as to strict liability claims.

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G. In *Sanks v. Parke-Davis*,_____ F. Supp.2d___, 2001 U.S. Dist. LEXIS 20739 (M.D. Ala. 2000) a plaintiff unsuccessfully sought to avoid application of the learned intermediary doctrine by arguing that a pharmacy voluntarily assumed a duty to warn. The court acknowledged that under Alabama law, a party can voluntarily assume a duty to warn, becoming liable for negligent or wanton performance of the voluntarily assumed duty. Though the pharmacist responded to plaintiff's inquiry about Rezulin's safety by telling her it had no side effects, a response to an inquiry is not the same as "volunteering" to act. Plaintiff's expert's affidavit that the pharmacist breached the standard of care did not alter relative legal authority that pharmacists do not have a legal duty to warn about a medication's potentially life threatening side effects. The learned intermediary doctrine provides that pharmaceutical manufacturers are only required to warn the prescribing physician, who acts as a learned intermediary between the manufacturer and consumer, about potentially adverse side effects. The doctrine has been extended by implication to pharmacies and pharmacists.

H. In *Bowden v. Wal-Mart Stores, Inc.*, 124 F.Supp.2d 1228 (M.D. Ala. 2000) a federal district court considered Wal-Mart's argument that the risk of injury from its product was open and obvious, that is, that the plaintiff, an eight year old boy, assumed the risk of injury. Wal-Mart had sold adhesive plastic glow-in-dark stars which the boy's grandparents had purchased and which had been stuck to the ceiling in this bedroom. While playing with a helium balloon and one of the stars which had fallen to the floor, the boy pressed a star against the balloon, which exploded, propelling the star through the air with such force that it injured his eye. The Court rejected Wal Mart's argument that it was entitled to a judgment as a matter of law on its open and obvious or assumption of risk defense, observing that a general awareness of danger is not sufficient to establish that one has assumed the risk of injury. The court pointed to testimony by the boy that he had an accident because he "didn't know that you shouldn't do it." One cannot knowingly, intelligently and voluntarily embrace the consequences of an unknown risk. Even if the child understood he might suffer an injury, there was a genuine factual dispute as to whether the assumed the full extent of the risk of puncturing his retina with such force that he would lose a portion of his eyesight. The Court denied summary judgment as to the claims of negligent design, distribution and sale.

3. Medical Malpractice

A. *McGaster v. South Baldwin Hospital,* 776 So.2d 155 (Ala. Civ. App. August 4, 2000) (2990380) affirmed summary judgment for defendants in a medical malpractice case. A surgical sponge was found on the lining of the patient's duodenum during surgery. The patient had previously had gall-bladder surgery one year earlier. The Court held that expert testimony was

necessary to establish how the sponge could have traveled from the peritoneal cavity through the stomach wall, and that this case did not fall within an exception for expert testimony requirements in medical malpractice cases.

B. *Anderson v. Alabama Reference Laboratories*, 778 So.2d 806 (Ala. August 18, 2000) (1982182) held that a medical reference laboratory, alleged to have negligently performed tuberculosis testing on a sputum specimen, was a "health care provider" within the meaning of the Alabama Medical Liability Act. The patient was thus required to produce expert testimony, and his expert, who did not practice in tuberculosis testing, was held not to be a qualified "similarly situated health care provider."

C. *Hall v. Chi*, 782 So. 2d 218 (Ala. Sept. 8, 2000) (1990253) held that the wrongful death two-year statute of limitations in § 6-5-410 was not impliedly repealed by the AMLA provisions of § 6-5-482(a), providing that such actions must be commenced within two years after the act giving rise to the claim. The court refused to hold time-barred a suit which had been filed within two years of the patient's death, but more that two years after the alleged act of malpractice.

D. *Ex parte Ridgeview Health Care Center, Inc.*, 786 So.2d 1112 (Ala. December 1, 2000) (1990722), written by Justice See, held that § 6-5-551, as amended in 2000, superseded *Ex parte McCollough*, 747 So.2d 887 (Ala. 1999) (which permitted discovery of other acts or omissions by a nursing home where a plaintiff alleged systemic failure in hiring, training, supervising, retention or terminating employees). The Court stated that the amendment to the § 6-5-551 makes it clear that a claim against a health care provider alleging that it breached the standard of care in hiring, training, supervising, retaining or terminating employees is governed by the AMLA, and its prohibitions against such "other acts" discovery is applicable. *Ridgeview* was applied in *Ex parte Coosa Valley Health Care, Inc.* 789 So.2d 208 (Ala. December 29, 2000) (1990702), also denying discovery concerning acts or omissions by a nursing home in hiring, training, or supervising employees other than those who provided care and/or services to the decedent; the court did permit discovery of identities of all employees of the nursing home during the last four years.

E. *Wilson v. Teng*, 786 So.2d 489 (Ala. December 8, 2000) (19982180) held there was an issue of fact as to whether a physician - patient relationship existed between a child brought to a hospital emergency room and the defendant pediatrician based on the pre-existing physician - patient relationship with the child and the physician's actions and interactions in the emergency room.

F. *Wade Clinic of Chiropractic, P.C. v. Rayburn*, _____So.2d____, 2000 Ala. LEXIS 507 (Ala. November 22, 2000) disagreed with a defendant's contention that the patient's expert affidavit should be stricken as inconsistent with his deposition testimony. Although he answered in deposition that he could not say that the defendant chiropractor's acts fell below an acceptable standard of care "from the information he had", a subsequent affidavit opined a different conclusion. However, this was predicated on certain different or hypothetically assumed facts, including the actual date of an automobile collision; the patient's condition after the collision and before the chiropractor's adjustment and problems accompanying his adjustment of the jaw. The

Court explained that an expert is not restricted to one set of hypothetically assumed facts for the formation of opinions. Astute counsel may elicit multiple varying conclusions from a single expert witness on the basis of varying set of assumptions

G. In *Waddail v. Roberts*, ___ So.2d ____, 2000 Ala. Civ. App. LEXIS 684 (Ala. Civ. App. 2000) the Court of Civil Appeals, applying § 6-5-548(e), held that plaintiff's expert, a medical doctor certified by the American College of Emergency Medicine, could not testify as to the standard of care for which the defendant physician, a doctor of osteopathy, certified by the American Osteopathic Board of Family Physicians. However, in *Ex parte Waddail*, ___So.2d___, 2001 Ala. LEXIS 274 (Ala. July 13, 2001) the Alabama Supreme Court reversed this decision, noting that the defendant physician was not a specialist and holding that the last sentence of § 6-5-548(e) applies only to specialists.

H. *Nelson v. Elba General Hosp. & Nursing Home, Inc.*, ____ So.2d ____, 2001 Ala. Civ. App. LEXIS 31 (Ala. Civ. App. 2000) discussed standards on the issue of causation. The Court of Civil Appeals held that a registered nurse, whose opinions were proffered by defendant hospital concerning medical causation, was not qualified, since the legislature has not granted a registered nurse the authority to make a medical diagnosis. However, the Alabama Supreme Court reversed in *Ex parte Elba General Hospital &. Nursing Home,* Inc., ___So.2d___, 2001 Ala. LEXIS 344 (Ala. Sept. 14, 2001), holding that the plaintiff had not raised in writing the issue of the admissibility of the nurse's affidavit.

I. *Marsh v. Green*, 782 So. 2d 223, 2000 Ala. LEXIS 400 (Sept. 22, 2000) precluded a defendant surgeon from using § 6-5-548 as a sword rather than a shield. The defendant surgeon, who at trial criticized the conduct of a non-party pathologist, was estopped from invoking the strict requirements of § 6-5-548(a) regarding expert qualification criteria in resisting the patient's argument that the surgeon had placed the principle of combining and concurring negligence at issue. The Court held the trial court erred in refusing the patient a charge on a combining and concurring negligence.

J. *Lyons v. Walker County Regional Medical Center*, 791 So.2d 937 (Ala. 2000) found a genuine issue of material fact as to whether a hospital's failure to follow its procedures, in failing to record the results of an electrolytes test on the front of a patient's chart, proximately caused his death. Expert testimony from an emergency room nurses showed a failure to provided professional medical services that similar medical providers within the medical community would have provided; the patient's laboratory results stated "panic values exceeded" and the failure to follow up on and report, the panic values to the physician, was a breach of the standard of care. The doctor on call at the hospital at the time of the death testified that, within a reasonably degree of medical certainty, the patient would have survived had he treated him, but he was not given the information concerning the laboratory results.

K. *Adams v. American Home Products Corp.*, 122 F.Supp.2d 1301 (M.D. Ala. 2000), in rejecting an argument that an Alabama physician had been fraudulently joined in a case alleging injury from prescription diet pills, considered the question of when a cause of action against the physician accrued. The Court rejected a defense argument that a cause of action for medical malpractice accrues when the tortious act or omission took place rather than when the patient

first suffers injury. The Court stated that the AMLA's statute of limitation is tolled until the wrongful act results in legal injury to the plaintiff. The plaintiff did not take the pills until 1997, and no evidence suggested damage caused by the pills may not have accrued until sometime in late 1998. The court could not find that the delay between her ingestion of the pill and the onset of her resulting injuries was less than one year. Further, though there was an official notice of a nationwide settlement relating to the diet and medication disseminated in December 1999, the evidence indicates the possibility she did not discover her cause of action until March 2000. Her suit, filed in September 2000, fell within the six month safe harbor provisions of § 6-5-482.

L. *Sullivan v. Mihelic*,___So.2d____, 2001 Ala. LEXIS 256 (Ala. June 29, 2001), considered and rejected defendant's argument that after a 1996 appellate decision (*Mihelic v. Sullivan*, 686 So.2d 1130 (Ala. 1996) finding plaintiffs' then –expert unqualified, plaintiffs were precluded, after remand, from introducing new or additional experts.

M. *Sonnier v. Talley,* ___So.2d ____, 2001 Ala. LEXIS 237 (Ala. June 22, 2001) determined that misrepresentation claims added by amendment related back to the original malpractice claims in the complaint and these misrepresentation claims were not barred by the statute of limitations.

N. *Vaughan v. Oliver*, ____So. 2d____, 2001 Ala. LEXIS 360 (Ala. Sept. 28, 2001), involving a malpositioned catheter used on a hospitalized patient, held that an expert is not required by §6-5-548(c) to work in the same "environment" as the defendant physician. Both were licensed and board certified radiologists. The court rejected the argument that the expert had to have worked in a hospital during the year preceding the negligent act, noting that the expert did have his own private practice, which included reading x-rays.

The court required, however, that a judgment on the jury's award of $ 500,000 past damages and $2,000,000 in future damages be amended in accordance with the 1987 future damages legislation, §6-5-543(b). In a brief discussion, the court simply referred to the language, "shall" in the statute as connoting a mandatory duty for a trial court to order the payment of future damages in excess of $150,000 in periodic payments. The court did not discuss the holding of *Clark v. Container Corp. of America, Inc.*, 589 So. 2d 184 (Ala. 1991) , which held unconstitutional the parallel legislation (§6-11-3) providing for structured payments of future damages in cases other than medical malpractice cases.

O. *Collins v. Ashhurst*,____So.2d____,2001 Ala. LEXIS 372 (Ala. Oct. 5, 2001) found that a trial court erred in striking assault and battery and trespass counts in a complaint because the AMLA allowed only one type of action. The Supreme Court explained that AMLA envisions tort and contract claims, based on either intentional or unintentional conduct.

4. Governmental Entities

A. *Ex parte Cranman*, ___So. 2d ___, 2000 Ala. LEXIS 273 (Ala. Nov. 22, 2000) (1971903) restated rules concerning immunity of state agents and state employees. This decision, released June 16, 2000, withdrew a November 24, 1999, opinion which had promulgated immunity standards with a far broader reach; this view is represented by the dissenting opinion of Justice Maddox in the June 16, 2000, opinion. On modifying the holding

of prior cases [e.g. *Elmore v. Fields*, 153 Ala. 345, 45 So. 66 (1907)] the majority opinion, written by Justice Lyons, recounted detailed historical, constitutional and policy considerations relating to immunity issues.

The case involved medical malpractice claims that state-paid physicians at the University of Alabama Student Health Center negligently failed to diagnose a student's testicular cancer. The physicians invoked state immunity, asserting they were engaging in a discretionary function within the scope of their authority, and summary judgment was granted in their favor. The Court of Civil Appeals affirmed.

Recent cases, the court noted, dealing with the discretionary/ministerial function have used language that suggests a requirement be involved in "planning tasks" and "policy-level decision making" in order to qualify for immunity [e.g. *Defoor v. Evesque*, 694 So. 2d 1302, 1035 (Ala. 1997); *Town of Loxley v. Coleman*, 727 So. 2d 907 (Ala. 1998)]. "Ministerial functions" have been described as "characterized by operational tasks and minor decision-making." [*Kassaw v. Minor*, 717 So. 2d 382, 385 (Ala. Civ. App. 1998)]. The language of these cases could be read as disallowing state-agent immunity where the actor, even though he may be making a complex decision beyond the range of a lay person, is not involved at the time in decision-making that directly relates to the exercise of a governmental-policy judgment.

The court restated state-agent immunity rules:

[A] State agent shall be immune from civil liability in his or her personal capacity when the conduct

(1) formulating plans, policies, or designs; or

(2) exercising his or her judgment in the administration of a department or agency of government, including, but not limited to, examples such as:

(a) making administrative adjudications;

(b) allocating resources;

(c) negotiating contracts;

(d) hiring, firing, transferring, assigning, or supervising personnel;

or

(3) discharging duties imposed on a department or agency by statute, rule, or regulation, insofar as the statute, rule, or regulation prescribes the manner for performing the duties and the State agent performs the duties in that manner; or

(4) exercising judgment in the enforcement of the criminal laws of the State, including, but not limited to, law-enforcement officers' arresting or attempting to arrest persons; or

(5) exercising judgment in the discharge of duties imposed by statute, rule, or regulation in releasing prisoners, counseling or releasing persons of unsound mind, or educating students.

Notwithstanding anything to the contrary in the foregoing statement of the rule, a State agent shall not be immune from civil liability in his or her personal capacity

(1) when the Constitution or laws of the United States, or the Constitution of this State, or laws, rules, or regulations of this State enacted or promulgated for the purpose of regulating the activities of a governmental agency require otherwise; or

(2) when the State agent acts willfully, maliciously, fraudulently, in bad faith, beyond his or her authority, or under a mistaken interpretation of the law.

In applying these restated rules to the case at hand, the court rejected the argument that the physicians were immune in that medical care involves discretion, and that governmental policy need not be material to the physician's decision-making. The court held that the conduct of the physicians, in their treatment of the student, did not fit any category of the conduct recognized by the restated rule as immune; the physicians were therefore not entitled to state-agent immunity. (Justice Johnstone, Brown and Cook wrote separate concurrences, and Justice Maddox, joined by Justice See, dissented.)

B. *Ex parte Flynn*, 776 So.2d 99 (Ala. June 30, 2000)(1981999) applied the restated *Cranman* rule to deny immunity to a hospital nurse alleged to have allowed a sedated patient to fall while trying to use the bathroom. The nurse argued that she was exercising discretion in determining the most appropriate method of implementing the physician's orders of "bedrest and bedside commode." The court concluded that, even assuming, arguendo that the nurse was called upon to use her judgment in implementing the physician's orders, she was not entitled to immunity, as there was no factor that would distinguish the case from *Cranman*.

C. *Wimpee v. Stella*, 791 So.2d 915 (Ala. Sept. 1, 2000) (1971774) following *Cranman*, held that state-employed physicians, residents in training employed by a state university hospital, were not entitled to state-agent immunity in a claim for negligence in delivering a child.

D. *Ex parte Tuscaloosa County*, ___So. 2d ___, 2000 Ala. LEXIS 364 (Ala. Sept. 8, 2000) (1982209), written by Justice See, overruled *Tuscaloosa County v. Henderson*, 699 So.2d 1274 (Ala. Civ. App. 1997) and held that a county, through its license inspector, is acting as the agent of the state and he partakes of state-agent immunity when sued in his official capacity. The court also held that he was entitled to discretionary-function immunity with regard to claims against him in his individual capacity, as the plaintiff had not shown "malice" in the context of immunity issues, though the inspector had been found liable for malicious prosecution.

Chief Justice Roy Moore dissented, joined by Justice Johnstone, observing that the United States and Alabama Constitutions protect citizens from unlawful arrest.

Chief Justice Moore suggested that the jury could properly find the inspector's behavior had been wanton, and believed that jury's verdict could be upheld. Because the arrest exceeded his authority and was based on a mistaken interpretation of the law of probable cause, the inspector's actions provided two bases for denying immunity, under *Cranman*.

E. *Ex parte Duvall*, 782 So. 2d 244 (Ala. October 27, 2000) (1982307) held conservation officers were "peace officers" within the meaning of § 6-5-338, and entitled to discretionary immunity for claims arising from the officer's arrest of plaintiff. Discussing *Cranman*, the court concluded they were engaged in a discretionary function when they arrested plaintiff.

F. *Hauseman v. University of Alabama Health Services Foundation*, __ So.2d____, 2000 Ala. LEXIS 470 (Ala. November 3, 2000) (1990084) applied the *Cranman* standard to a discretionary-immunity argument asserted by a cardiac surgeon. Plaintiff argued that the surgeon had vicarious liability for negligence of cardiac resident physicians on his surgery team. The residents' treatment of the patient did not fit with any of the categories of immune state-

agent conduct set out in the *Cranman* standard and this did not warrant summary judgment for the surgeon as to the theory that he was vicariously liable for the residents as "loaned" servants.

G. *Ex parte Blankenship*, ___ So.2d ____, 2000 Ala. LEXIS 463 (Ala. November 3, 2000) (1990982) held that the *Cranman* standard required summary judgment dismissing claims against a high school band director and principal in a negligent supervision case alleging that the principal and band director should have prevented the thirteen-year old female plaintiff from leaving the school with a nineteen-year old man who was not a student at this school but who was permitted to participate in marching band. The defendants thought, incorrectly, that he was a student at a private school that did not have a marching band. After leaving the campus, the man engaged in sexual intercourse with plaintiff; he subsequently pleaded guilty to consensual statutory rape. Plaintiff argued that the defendants had no authority to allow the man to participate in the band, because he did not meet the school board's requirement for participating in the band program. The Supreme Court disagreed, concluding that the policy did not necessarily preclude the band director and principal from authority to offer the program to students not registered at the school. The court held that state-agent immunity protected the band director and principal in their exercise of discretion.

H. *Horton v. Briley*, ___ So.2d____ , 2001 Ala. Civ. App. LEXIS 7 (Ala. Civ. App. January 12, 2001) (2991218) applied the *Cranman* standard to hold that a school bus driver was not entitled to state-agent immunity when sued in her personal capacity for a student's injuries. Though a bus driver uses her own judgment or discretion in performing duties, that judgment or discretion is not related to the formulation or application of government policy. A bus driver's duties are not included within any categories of state-agent immunity described in *Cranman*. The Court also rejected the bus driver's arguments that the statutes establishing the Board of Adjustment required the student to pursue her claims by filing a claim with the Board of Adjustment.

I. *City of Bayou La Batre v. Robinson*, 785 So.2d 1128 (Ala. December 8, 2000) (1990411) considered issues arising from a magistrate's failure to properly fax (faxed upside down so that a blank page was sent) a warrant /recall order to the police department, which resulted in the plaintiff's arrest. He sued the City for false arrest and the Court held that, since his allegations relating to improper use of a fax machine could describe "neglect, carelessness, or unskillfulness" within the meaning of § 11-47-190, this false imprisonment claim was not an "intentional tort" for which the City would be immune.

The Court also considered the City's argument that its magistrate enjoyed judicial immunity and thus could not be vicariously liable. Noting that, in Alabama, the office of magistrate is a hybrid creature, combining both clerical attributes and limited judicial attributes, and comparing the *Cranman* standard, the Court concluded that the City and magistrate were not immune. Her actions, when faxing the order upside down, was executing an administrative duty that did not involve the exercise of judgment. The Court affirmed the trial court's order denying the City's motion.

J. *Morris v. City of Montgomery*, _____So. 2d_____, 2001 Ala. LEXIS 308 (Ala. August 31, 2001)(1000467) held that a police officer was not entitled to discretionary immunity under § 6-5-338(a) against a claim of statutory negligence. The police officer stopped a vehicle

for excessive smoke and cited the driver for driving without a license and for the smoke, but failed to impound the vehicle as required by the Alabama Safe Streets Act, § 32-5A-200, et seq. The driver began consuming alcohol, became intoxicated and struck another vehicle, injuring its occupants, one of them fatally. The court agreed that the plaintiffs demonstrated a claim of statutory negligence, which requires the existence of a statute creating a mandatory duty to perform; that plaintiff is among the class of persons the statute was enacted to protect; that the injuries were of a type contemplated by the statute; that the defendant violated the statute; and that the plaintiffs' injuries proximately resulted from the violation. Holding that the discretionary - function immunity evaporates upon the violation of a statute imposing a mandatory duty, summary judgment which had been entered in favor of the police officer, the city, and the police chief was deemed error. No error was found, however, in the dismissal of wantonness claims.

K. In *Bayles v. Marriott*, ___ So. 2d ___, 2001 Ala. Civ. App. LEXIS 192 (Ala. Civ App. 2001) the defendants (principal, assistant principal, and two teachers) were involved in playing a practical joke on their fellow school employees. The employees were directed to sit in a particular chair. When they did so, the back of the chair would sink and the front of the chair would rise up, suggesting the employee was too heavy. At least five people, including the principal, sat in the chair. No one other than plaintiff was hurt or frightened by the trick. After the principal sat in the chair, she concluded that no safety hazard was presented and left for an appointment outside the school. The plaintiff was then summoned to sit in the chair. She reinjured her back, and consequently sued the defendants for negligence, wantonness, conspiracy, and failure to warn. The court found that the defendant principal was entitled to state-agent immunity as she had exercised her judgment about whether the chair was safe. It also found the remaining defendants were not liable as they owed plaintiff wife no duty, did not intend to harm her, and no evidence showed they conspired to hurt her.

L. *Dunham v. Ovbiagle*, ___ So.2d____, 2001 Ala. LEXIS 288 (Ala. July 20, 2001) found doctors employed by the University of South Alabama Health Services Foundation not entitled to summary judgment on immunity grounds. This suit alleged the doctors negligently released plaintiff's husband from the hospital, and a result he committed suicide. The doctors' reliance on their affidavits stating their care involved discretionary care health determinations that required the exercise of professional judgment and discretion was insufficient for *Cranman* immunity; they failed to submit any statute, rule or regulation that purported the govern the exercise of their duties at the hospital.

M. *Osborn v. Izenberg*, ___ So.2d___, 2001 Ala. LEXIS 336 (Ala. 2001) reversed a trial court for reinstating a patient's case, which had been dismissed on immunity grounds after the 1999 *Cranman* opinion. The patient did not appeal, and moved to reinstate the case after the 2000 *Cranman* opinion was issued. The Court held that Rule 60(b) did not permit such reinstatement.

N. *Hollingsworth v. City of Rainbow City,* ___ So.2d____, 2001 Ala. LEXIS 399 (Ala. Nov. 2, 2001) considered evidence indicating there was a dangerous condition at an intersection, resulting in an accident in which plaintiff was injured; and that the City had been placed on notice of the defective roadway condition. Affidavits showed that there had been specific

complaints about the intersection blind spot. The Court held an issue of material fact existed as to whether the City had constructive notice of the dangers. The Court also held the § 11-47-191 joinder requirement was not triggered with respect to the conduct of the driver of the vehicle in which plaintiff was a passenger.

5. Employment

A. *Cooper v. Nicoletta*, ____ So.2d ____, 2001 Ala. LEXIS 7 (Ala. March 23, 2001) (1992101) affirmed summary judgment entered in favor of coemployee defendants. Plaintiff Cooper had sued under § 25-5-11(c)(1) and (2). Cooper was instructed by his supervisor, one of the defendants, to empty a timber-processing vat that contained heated water mixed with caustic soda. Although pumps were available to drain the vats, the usual procedure employed at this plant was to empty the vat by removing an outfeed door. This method was faster and more effective than using the pump. This door had been designed to allow workers to enter the vat to make repairs, and had not been designed as a means of emptying the vat. When Cooper, as instructed, removed the bolts from the outfeed door, the contents rapidly escaped from the vat and struck him, burning him.

The Supreme Court held that there was no "willful" conduct under § 25-5-1 (c)(1); that there was no evidence the supervisory employees intended to injure Cooper; and there was no evidence that a reasonable man in the position of the defendants would have known that injury was substantially certain to occur as a result of his actions. There was no prior similar injury.

Cooper's theory under § 25-5-11(c)(1)(2), removal of a safety device, was not successful. The purpose of the outfeed door was for entering the vat for repair purposes once the vat had been emptied. It was not designed or intended to be a means for emptying the vat. The Court rejected Cooper's characterization of the outfeed door as a safety device.

B. *Murray v. Manz,* ___ So.2d ____ (Ala. Civ. App. May 25, 2001) (2990960), withdrawing a January 12, opinion, affirmed summary judgment which had been entered in favor of co-employee defendants. Plaintiff sued supervisory co-employees; while trying to dislodge a die from a punch press, it was activated, and plaintiff's arm was severed. The Court concluded that a light curtain was not a "safety device provided by the manufacturer" within the meaning of §25-5-11(c)(2); the light curtain had been added to the machine by its original purchaser prior to the time that plaintiff's employer bought it from that original purchaser.

C. *Pettibone v. Tyson,* ____ So.2d ____, 2001 Ala. LEXIS 84 (Ala. March 30, 2001) (1981561) reversed a jury verdict entered in favor of co-employee defendant Tyson arising out of a failure by Tyson (lead maintenance technician) to maintain and/or repair the brakes on their employer's van. Tyson was responsible for proper maintenance and timely repair of any reported problem with the van. Plaintiff brought claims under both § 25-5-11-1(c)(1) and (c)(2). The Alabama Supreme Court agreed with the plaintiff's contention that the trial court's jury charge erroneously stated that, even as to the subsection (c)(2) claim, the plaintiff must show the co-employee defendant acted with a purpose, intent, or design to injure another and have actual knowledge that an injury will occur from his action or substantial certainty that an injury will occur.

D. *Reed v. Heil Co*., 206 F. 3d 1055 (11th Cir. 2000) brought to an end the question of removability of § 25-5-11.1 retaliatory discharge actions from state to federal court. After Reed's retaliatory discharge case had been removed to federal court and summarily dismissed, Reed argued that 28 U.S.C. § 1445(c) barred the removal to federal court of claims arising under Alabama's worker's compensation laws. The Eleventh Circuit found that the Alabama courts and legislature could not decide whether a retaliatory discharge provision arose under Alabama's workers' compensation laws within the meaning of § 1445(c). That statute is a law with nationwide application and federal law governs its interpretation. The court concluded that for the purposes of § 1445(c) Alabama's retaliatory discharge cause of action arises under our workers' compensation laws. The court found that § 25-5-11.1 was an integral part of Alabama's worker's compensation laws enacted to enhance the efficacy of Alabama's worker's compensation system. The court held that the federal district court lacked subject matter jurisdiction to hear Reed's retaliatory discharge claim and remanded the cause back to state court.

E .*G.UB.MK. Constructors v. Carson*, ___So.2d___, 2001 Ala. LEXIS 134 (Ala. 2001) reversed a $350,000 jury verdict based on insufficiency of the evidence that plaintiff was terminated by the defendant. Plaintiff, a pipe fitter, was referred to G.UB.MK. for employment by his union. After suffering an on the job injury, he was "furloughed" because of "lack of work." However, soon thereafter, two other non-injured "furloughed" pipe fitters were returned to work. Defendant instituted a reduction of force once the project came to an end and laid off, this work force. The Alabama Supreme Court found that the plaintiff had failed to present substantial evidence of termination because once the plaintiff was laid off, only the union had the power to refer him for employment with the defendant. Further, the Court found that even if the defendant employer indirectly influenced the union's decision not to refer the plaintiff back for employment then such action could not be categorized as a termination. Chief Justice Moore noted in his dissent that plaintiff had presented evidence that defendant had a policy of not rehiring employees with pending worker's compensation claims. That coupled with the apparent influence the defendant had over the union was substantial evidence from which a jury could have found for the plaintiff.

F. *Ayers v. Duo-Fast Corp.*, 779 So.2d 210 (Ala. September 15, 2000) (1981099). An employer separately settled its subrogation claim against the third party, a product manufacturer sued by an injured worker, prior to the worker's settlement of his product liability claim. The court rejected the employer's argument that it need not pay its pro rata share of the attorney fee from its recovery of its subrogation interest.

G. *Travelers Indemnity Co. v. Griner*, ___ So.2d ___, 2001 Ala. LEXIS 123 (Ala. April 20, 2001) (1981990, 1992325) affirmed a tort of outrage award ($300,000 compensatory and $200,000 punitive damages) for Travelers' refusal to provide certain reasonably necessary medically related expenditures in accordance with a previous workers' compensation settlement. Griner injured his back in 1990, and had spinal-fusion surgery in 1993. After the surgery, Travelers and Crawford & Company (who administered the claim for Travelers), despite the requirements of the insurance policy and the order approving the settlement, delayed payment for reasonable and necessary medical devices and treatment and often refused to pay for them. In particular, Griner's physicians had authorized and confirmed the necessity of a hospital bed (because Griner's pain prevented him from sleeping in a regular bed and he had to sleep in a

recliner); a whirlpool tub (to provide water therapy to alleviate pain in his legs) and psychotherapy (to address his pain-related depression). Though these items were authorized by physicians and covered by Travelers' policy, they were not provided for a period of about five years. Evidence indicated these refusals forced Griner to suffer increased pain, sleep deprivation and clinical depression for five years.

Travelers and Crawford admitted they had a duty under the policy to provide these treatments, and also admitted that, at one point, Griner became so frustrated and depressed that he discharged his attorney and offered to settle all future medical claims for $80,000, telling the adjuster that he would buy his own hospital bed and whirlpool tub. At that time, the company estimated it could reasonably expect to pay $279,400 for future medical benefits over his lifetime, but the adjuster only offered $5000, and wrote in her file, "I simply chuckled and stated we're not interested in anything near that."

The 8-0 opinion, written by Justice Stuart (with only Justice See dissenting) found the evidence sufficient for the jury to find that the conduct of Travelers and Crawford was so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency and to be regarded as utterly intolerable in a civilized society.

The Court also rejected a request for punitive damages remittitur, emphasizing the "reprehensibility" factor and noting that the punitive-to-compensatory ratio was 1:1.5.

H. *Grantham v. Vanderzl*, ___So.2d___, 2001 Ala. LEXIS 163 (Ala. 2001) rejected an operating room nurse's outrage claim against a doctor. According to the nurse, during surgery, the doctor took one of the surgical drapes containing the patient's blood and surgical refuse and threw it at the nurse. The doctor contended this was an accident but conceded that he saw the blood and fluids were on the nurse's face and that his response was "I don't give a damn." The nurse later underwent blood tests for communicable diseases, and though they were negative, she was required to repeat the test five times of the next year. She was told by the infectious-disease supervisor to consider herself HIV-positive and adapt her lifestyle accordingly. The majority opinion stated that generalized apprehensions and fears do not rise to the level of extreme, severe emotional distress required to support a claim for tort of outrage. The majority stated that the nurse's mere fear of contracting disease without actual exposure to it cannot be sufficient to cause the level of emotional distress necessary. In actuality, she was never in danger of contracting a communicable disease as a result of the incident. She admitted in deposition that she had no reason to believe she presently has any disease as a result of exposure to the patient's blood.

The dissenting opinion by Justice Woodall states that the majority ignored other evidence of her emotional distress, such as her humiliation in front of her peers, that she was on the verge of tears and rushed from the operating room to wash the blood off; she broke down and cried and became physically nauseated about having blood and knee grindings from the patient's knee on her face, in her eyes and all over her body; the embarrassment, crying spells and uncontrollable rage due to the attack, and the statement by the infectious-disease supervisors she should consider herself HIV positive.

I. *Britt v. Shelby County Health Care Authority*, ___ So.2d ___ (Ala. Civ. App. April 13, 2001) (2991083) considered alternative claims for negligence and workers' compensation benefits, brought by Britt, a respiratory technician employed by a hospital. After working weekend double shifts, 16 hours on Saturdays, 16 hours on Sundays with an 8-hour break, she

fell asleep while driving home and was seriously injured when her car crossed a median and overturned. The trial court granted summary judgment for the hospital on negligence, and entered a judgment for the hospital on the workers' compensation claim, after a bench trial. The Court of Civil Appeals majority affirmed the trial court's conclusion that the accident was not compensable under the Workers' Compensation Act; the accident was not "in the course of" her employment. The test is not one of causation, but whether the worker, at the time and place of the accident, was reasonably fulfilling the duties of her employment or engaged in some action incident to it. However, the Court held that the negligence claim was not barred by exclusivity, because the injury did not come within the fundamental coverage provisions of the Act. The majority rejected the hospital's argument that exclusivity would bar the claim, in that any duty owed to Britt stemmed from their employment relationship.

J. *Johnson v. Federal Express Corp*,_____ F. Supp.2d____, 2001 U.S. Dist. LEXIS 8558 (M.D. Ala. 2001) found a question of fact with regard to plaintiff's complaint that her employer, Federal Express, falsely imprisoned her when company security questioned her about involvement with anonymous letters. While she was on paid suspension, Federal Express asked her to return to work in uniform. Two security guards escorted her to a conference room with glass windows. Other employees passing by saw her and shot her dirty looks while she answered questions for 7-1/2 hours. Security followed her to the restroom, let her call her husband and an attorney only in their presence, and told her the interrogation would stop if she confessed to writing the letters. She told security she needed to pick up her daughter from school, but they would not let her leave.

K. *AutoZone, Inc. v. Leonard*, ____So.2d_____, 2001 Ala. LEXIS _____(Ala. 2001), upheld a finding that AutoZone engaged in oppressive conduct or malice toward a worker, who sued for retaliatory discharge. AutoZone had no legitimate basis to deny the worker his workers' compensation benefits and when he appealed that denial of benefits, AutoZone terminated him from its employment. Reasons advanced by AutoZone for his termination, unexcused absences and failure to cooperate with a loss prevention investigation, were merely pretextual. He provided written medical excuses for his absences, including one that was lost or destroyed by AutoZone. Additionally, two AutoZone managerial employees were questioned about hypothetical situations that were factually similar to the worker's discharge, and admitted that such conduct would be oppressive or malicious.

6. Fraud

A. *Morris v. Laster*, ___ So.2d ___ , 2001 Ala. LEXIS 103 (Ala. April 6, 2001) (1990386, 1990401) reversed a fraud/wantonness verdict against Morris (who operated Morris Pest Control) for compensatory and punitive damages on the grounds that the trial court erred in admitting improper pattern and practice testimony, including other homeowners who described problems with Morris's termite inspection services. Morris had provided a termite letter for a home sale closing, where the home was to be purchased by the Lasters. His report noted fungus, and that he had treated it, but omitted reporting the presence of powder-post beetle holes and termite trails which were found to be present by a different pest control company (whose report was not provided to the Lasters). The majority stated that, in order for pattern and practice evidence to be admissible, collateral acts of fraud must be substantially of the same character and

contemporaneous in point of time, or nearly so, and stated that high levels of similarity between past acts and present behavior are required. The majority stated that the "pattern and practice" exception to the 1987 punitive damages cap in § 6-11-21 caused courts to allow a broader range of such evidence. However, the majority said, with the repeal of the old statutory cap and the substitution of a new series of restrictions (§ 6-11-21, as amended in 1999) "we no longer have a basis for a broad reading" of the pattern and practice exception. The majority held that three of the witnesses provided admissible pattern and practice testimony in that they showed Morris carried on a pattern or practice of making inaccurate inspections and keeping incorrect records. Two additional witnesses, however, tended to show that Morris used too little of the required chemicals and failed to make follow-up visits, and allegations that he had used improper pest control chemicals and had by deceit induced an elderly couple to purchase an unnecessary termite bond. The majority held that these latter two witnesses's testimony was inadmissible.

Justice Johnstone dissented, stating that the defendants' variations on their pervasive and chronic and theme of termite and beetle fraud merely demonstrated their ingenuity in pursuing the same general pattern and practice they successfully used on the Lasters.

B. *Cassels v. Pal*, 791 So.2d 947 (Ala. February 9, 2001) (1980531, 1980583) held that fraud claims by sellers of a house were barred by the statute of limitations. The sellers asserted that they were led to believe that the house would be transferred to them upon payment of $20,000 cash, inclusive of rental payments received and closing costs. The sellers attended the closing and themselves signed the one page document which disclosed a mortgage, which, together with the closing officer's explanation, should have provoked inquiry by a reasonable person as to whether the mortgage would impede the reconveyance of the house on the schedule allegedly represented to the sellers. Because this occurred more than two years prior to filing suit, the Court held their fraud claim barred.

C. *Cooper & Co. v. Lester*, ___ So.2d ___ , 2000 Ala. LEXIS 551 (Ala. December 22, 2000) (191368), involving home purchasers' claims for fraud and suppression of facts concerning flood hazards in the subdivision where the homes were located, upheld liability findings that the defendants intentionally deceived the purchasers about the ability of an easement to handle the drainage of rainwater; in response to a specific inquiry a purchaser was told flooding would subside as more houses were built and the land was more developed. Another representation was made that there should not be a problem with the water, and that there was an easement that would be able to handle the drainage of rainwater. The Court determined there was an intent to deceive and that the purchasers' reliance was reasonable.

The Court also concluded there was evidence of fraudulent suppression; because these were new homes, the doctrine of caveat emptor did not apply, and the flooding constituted a defect affecting health and safety.

D. *Aldridge v. DaimlerChrysler Corp.*, ____ So.2d ___, 2001 Ala. LEXIS 113 (Ala. April 13, 2001) (1981622) considered promissory fraud claims brought by several employees against Chrysler, claiming they were promised preferential hiring if they participated in a voluntary employment termination program (VTEP). The Court held that the claims of some of these employees presented fact questions. Chrysler argued that the employees' inability to identify specific persons who made the promises of preferential rehire rights precluded their proving that Chrysler, at the time the statement was made, acted with a present intent to deceive

and not to perform the promise. However, testimony by a Chrysler Director of Union Relations stated that Chrysler had no policy regarding whether people who accepted the VTEP would be hired on a preferential basis and that such a statement would not be consistent with Chrysler's policy. A genuine issue of fact was thus presented as to fraudulent intent, when this was contrasted with the testimony about the contrary oral promises made by Chrysler representative. Claims of some of the employees, who heard of the preferential rehire promise from a coworker or union representative, rather than the Chrysler representative, failed, however, because they depended upon hearsay and did not fall within an exception to the hearsay rule. Though the employment was at-will, some of the employees relinquished seniority as a result of the fraud, and the Court thus rejected Chrysler's argument that these employees had not suffered any compensable damage.

E. *Jim Walter Homes, Inc. v. Kendrick*, _____So. 2d_____, 2001 Ala. LEXIS 172 (Ala. May 11, 2001) (1981938) rejected a home purchaser's efforts to argue that the defendant contractor was equitably estopped from asserting the statute of limitations because of the contractor's promises to make repairs. The court held that, a matter of public policy, this did not toll the statutory limitations; the purchaser's five-year delay was not reasonable especially given that the contractor did not make promises on the condition that the purchaser not sue the contractor.

F. *BellSouth Mobility, Inc. v. Cellulink, Inc*. ____ So.2d ____, 2000 Ala. LEXIS 551 (Ala. 2001) rejected a sales agent's fraud claim against BellSouth, based in part on a representation that BellSouth was "committed to its agents." The agent pointed to comments made throughout the relationship, before and after the agency agreement was signed, stating that BellSouth was totally committed to their strategic long-term partnership. The Court characterized such representations as "puffery" and held that these are not the type of statements that will support a fraud claim.

G. *Wright v. American General Life & Accident Ins. Co*., 136 F. Supp.2d 1207 (M. D. Ala. 2001) discussed claims that an insurer engaged in fraudulent practices involving concealment of information that industrial policy premiums were higher for African-Americans than for similarly situated white persons, questioned whether the claims are barred by the rule of repose in Alabama. The court stated that the Alabama Supreme Court has not clearly spoken, noting that it is not clear that the rule of repose applies in tort actions . Because there was at least a possibility that state law might impose liability on the resident defendants, the case was remanded to state court.

H. *Doss v. Serra Chevrolet, Inc*. 781 So.2d 973 (Ala. Civ. App. Oct 13, 2000) permitted a mother, who provided the down payment toward her daughter's purchase of a Hyundai sold by Serra alleged to have been misrepresented as "new," to maintain a claim. The court rejected Serra's argument that the mother sustained no injury.

I. In *Chase v. Kawasaki Corp.,* 140 F.Supp.2d 1280 (M.D. Ala. 2001) a federal district court held that children injured on an ATV, about which misrepresentations were allegedly made to their parents, could not recover. The court acknowledged that a person indirectly injured by a deceit, may under some circumstances sue the party who made the misrepresentation. Cases have found that the misrepresentation does not have to made directly to the injured party, but

cases have never gone so far as to say that the injured party does not have to prove reliance on the alleged misrepresentation. According to the court, the entire basis for third party standing in misrepresentation is that the deceiver contemplated that the third party would be induced to act by the deceiver's misstatement made to someone else. Because the injured children could not prove that they relied on the misrepresentation, their claim failed.

J. *Smith v. Smith*,_____ So.2d ___, 2001 Ala. LEXIS 224 (Ala. 2001) held that a purchaser's reliance on a "Dear landowner" letter on the letterhead of a vendor-related construction company which directed the purchaser to make payments to a different entity was not reasonable; the purchaser alleged the defendant misrepresented to her that she was at that time a landowner when she was not. The court pointed to the closing documents she signed that contained the blank spaces for her husband to sign; these blank spaces put her on notice that the closing documents were not complete without his signature. Further, she acknowledged that she was asked to have her husband go to sign the documents and that she agreed to have him do so, and she, in fact, did ask her husband to do so. A reasonably prudent person who exercised reasonable care would have discovered the fact that the defendant did not consider the sale to have closed and that title to the property had not yet passed to plaintiff.

K. *US Diagnostic, Inc. v. Shelby Radiology, P.C.*, ____So.2d____, 2000 Ala. LEXIS 416 (Ala. Sept. 29, 2000) (1982181) found that there was evidence of intent to deceive, and affirmed a fraud verdict against US Diagnostic in favor of Shelby Medical Center. Shelby Radiology provides radiology services for diagnostic centers at various location, including AMI, which was purchased by US Diagnostic in 1995. Shelby at that time employed three radiologists, but the workload had become too demanding, Shelby considered possible options, including discontinuing services to AMI; another option would be to hire a fourth radiologist and continue to service all its facilities, but this option would be viable only if Shelby could secure from US Diagnostic a contract that would be "noncancelable" for three years. Dr. Jander, one of the Shelby radiologists, discussed by telephone these options with Dr. Burke, president of US Diagnostic, and informed US Diagnostic of their intention to add a fourth radiologist. Shelby provided a Radiology Services Agreement (RSA), a three-year, noncancelable contract, within the context of the party's preceding telephone conversation. After some period of time, and an inquiry by Shelby about the RSA, Dr. Burke stated that he had misplaced it and requested another copy, which was provided. Shelby began negotiating with Dr. Lindsey for his possible employment as the fourth radiologist, and, for Dr. Lindsey, the three-year provision of the RSA was a primary consideration. Dr. Jander telephoned Dr. Burke, and told him "we need to know whether our contract is acceptable, because if it is, we will hire Dr. Lindsey and we will continue the services. If it's not, tell me now, and we just won't hire Dr. Lindsey and we {will} all go our merry way." Dr. Burke replied that he had looked at the RSA, "he found it acceptable" and said specifically to go ahead and hire Dr. Lindsey. Shelby did so, but several more months went by without the RSA being executed, and, after additional inquiries, Shelby received a letter from Dr. Burke's successor purporting to terminate the relationship between Shelby and US Diagnostic. A verdict in favor of Shelby was affirmed by Alabama Supreme Court, the court finding that there was evidence of intent to deceive, and that Shelby's reliance was reasonable.

The court explained:

> In this case, the best evidence that Dr. Burke never intended to perform this promise came from Dr. Burke himself. He testified unequivocally that he did not take the RSA "seriously." (Reporter's Transcript, at 816-17.) He also testified that he "absolutely [did] not" intend to execute [*13] any contract with Shelby that contained a three-year, noncancelable provision. Id. at 815. We emphasize that the issue is not whether Dr. Burke intended to execute some contract, as the defendants state it, but whether he intended to execute the RSA, or a contract that differed in no material respect therefrom. The three-year, noncancelable provision was, as Dr. Jander described it, "the key." He said, "Everything else [was] minor." Id. at 310. On that issue, therefore, the evidence is clear.

L. *Ex parte Liberty Life National Life Insurance Co.*,___So.2d___, 2001 Ala. LEXIS 112 (Ala. 2001) discussed the *Owen* factors in concluding that Liberty National had owed a duty to disclose to Mrs. White, a policy purchaser who reads at a tenth grade level. Liberty National agents learned that she would stop paying premiums when an agent stopped collecting premiums from her at her home. Agents would stop collecting premiums, then go to her home and sell her a new policy, or new policies. The agents exploited this pattern, churning her policies in order to earn "production credit." The relationship between White and Liberty National, the value of the facts suppressed (that she could have reinstated older policies at less cost for greater benefit than buying new policies), and the difference in the levels of knowledge between White and Liberty National was sufficient to support the conclusion that she was owed a duty to disclose.

M. *Ex parte Walden,* ____So.2d___, 2000 Ala. LEXIS 471 (Ala. 2000) written by Justice Brown, applied the *Owen* factors to determine that a duty to disclose existed on the part of a lawyer and family trust (who owed money to plaintiff secured by Florida property). When the lawyer's loan became delinquent, a title search revealed various claims against the property, including unsatisfied mortgages, which, if valid, would have meant there was no equity in the property. Evidence indicated that, when plaintiff confronted the lawyer and demanded substitute collateral, he failed to reveal that the title search was incorrect. He remained silent, knowing that plaintiff had not recorded her deed to the property and that he had a sales contract pending on the property that would net him approximately $28,000.

N. *Lewis v. Fraunfelder*, ____ So. 2d _____ (Ala. October 27, 2000) (1982085) withdrew an original opinion that had been released on May 12, 2000, and substituted an opinion that held plaintiff Lewis not entitled to base a claim alleging "civil mail fraud" against defendant Fraunfelder. Plaintiff Lewis alleged civil mail fraud because of Fraunfelder's incurring credit card debts in Lewis' name through the use of credit card applications in her name that Fraunfelder obtained after moving into a house where Lewis previously lived. The court held that § 6-3-370, Alabama Code, does not create a cause of action; rather, it merely allows a plaintiff to commence a civil action even if the plaintiff does not pursue criminal prosecution of the defendant.

O. *Consumer Identity Protection Act* (Act 2001-312, S.B. No. 144) provides a civil action for damages (in addition to criminal penalties) for identity theft; it further provides for recovery of actual damages for a consumer reporting agency for intentional or reckless violation of an agency's obligations, after certain notices from the consumer, relating to failure to clear false information from credit histories. The Act also provides a defense that the agency has established and implemented reasonable practices and procedures to comply with the requirements.

7. Bad Faith

*Ex parte Simmons,*_____So.2d_____, 2001 Ala. LEXIS 343 (Ala. 2001) rev'g *Simmons v. Congress Life Insurance Co.*,____So.2d____, 1998 Ala. Civ. App. LEXIS 701 (Ala. Civ. App. 1998) reversed a Court of Civil Appeals decision that found a plaintiff had presented no genuine issue of material facts as to a bad faith denial. The Alabama Supreme Court agreed there was no substantial evidence indicating that the insurer initially denied the claim in bad faith. However, the Alabama Supreme Court stated that the Court of Civil Appeals had frozen the bad faith inquiry at the moment of denial, in reliance upon *Lavoie*. It would stand the logic of *Lavoie* on its head to say that an insurer acting initially in good faith when denying a claim is thereafter exempt from liability for acting in bad faith, if notwithstanding information subsequently received on reconsideration, it declined in bad faith to alter its position. Here, although the insurer sought additional information during an "appeal" process, it perfunctorily "suspended activity' on plaintiff's appeal, on the basis that it could not obtain a complete set of records from her chiropractor. No meaningful investigation, however, was ever undertaken. *Lavoie* does not serve as a shield to protect an insurer from the consequences of actions taken in bad faith during a "reconsideration" or an "appeal".

B. *Ex parte State Farm Fire & Casualty Co.*, ____ So.2d _____ (Ala. March 30, 2001)(1992376), dealt with a first impression question as to how the doctrine of waiver might apply to cause a waiver of the attorney client privilege based on "issue injection", where the parties claiming the privilege seek to recover, as an element of damages for bad faith and other claims, the attorney fees they claim to have incurred in a related lawsuit. State Farm denied coverage in an underlying lawsuit brought against Carrington and Brown. Carrington and Brown sued State Farm on claims including breach of contract and bad faith. State Farm sought discovery as to the attorneys' files relating to the legal expenses, claimed by Carrington and Brown in the bad faith case. The Court held that reasonableness of attorney fees can be determined independently by use of expert testimony without disclosure of the documents relating to the actual advice given by the attorneys. The Court required production only of documents dealing with the reasonableness or the amount of the attorney fees, subject to redaction.

C. *Gilbert v. Alta Health & Life Insurance Co.*, 122 F. Supp. 2d 1267 (N.D. Ala. 2000)(Johnson, J.) held that the Alabama tort for bad faith refusal to pay benefits fell within ERISA's savings clause and was not preempted by ERISA. Similarly, *Hill v. BlueCross BlueShield of Alabama*, 117 F. Supp. 2d 1209 (N.D. Ala. 2000) (Acker, J.) held that a beneficiary's claim for bad faith denial of his claim was not preempted by ERISA, in that this tort comes within the savings clause for state laws regulating commerce.

D. *Ex parte Alfa Mut. Ins. Co*., ____ So.2d _____, 2001 Ala. LEXIS 135 (Ala. 2001) recommended that Instruction 20.37, Alabama Pattern Jury Instructions: Civil (2d ed.1993), the pattern jury instruction for a bad-faith claim, be amended to avoid recurring confusion leading to inconsistent jury verdicts on breach-of-contract and bad-faith claims. "In order to find for the plaintiff on his/her bad-faith count, you must have found for the plaintiff on his/her breach-of-contract count".

E. *Congress Life Insurance Co. v. Barstow*, ____So.2d____, 2001 Ala. LEXIS 132 (Ala. 2011) held that Barstow's request for preauthorization for jaw surgery for her daughter did not constitute a "claim" for benefits presently due. The request for preauthorization, while initially denied, was ultimately approved. The surgery did not occur until more than two years after the preauthorization request, and the evidence did not indicate that surgery had originally been scheduled and delayed.

The court also reasoned that even if the request for preauthorization constituted a "claim" for benefits under the policy, the insurer's initial refusal to preauthorize the procedure was not tantamount to a denial. A constructive denial can be established in two ways: (1) by showing that the passage of time is so great that the delay alone creates a denial; or (2) by showing sufficient delay in payment coupled with some wrongful intent by the insurance company. Because the request for preauthorization was delayed for six weeks, that passage, by itself, is not so great that it amounts to a denial. Barstow did not establish wrongful intent upon the insurer's part. Payment was not delayed; rather, the insurer ultimately approved the request for preauthorization, about two years before the surgery, and paid the benefits in full when the claim came due.

F**.** *Acceptance Ins. Co. v. Brown*, _____ So.2d _____, 2001 Ala. LEXIS 255 (Ala. 2001) found bad faith liability for an insurer's failure to defend, notwithstanding its contention it had a debatable reason for denying the request for defense; the insurer had information supporting the insured's contention that the shooting on which the underlying claim was based, was accidental or may have been the result of negligence, and there was at least a duty to defend under a reservation of rights.

8. Defamation / Privacy

A. *Ex parte Blue Cross & Blue Shield of Alabama*, 773 So.2d 475 (Ala. June 9, 2000) (1980260) clarified and restated the law dealing with qualified privilege in several respects. Justice Johnstone, writing for the court, first explained that, although, "qualified privilege" and "conditional privilege" have been used interchangeably in appellate opinions, the court would henceforth use the term "qualified privilege," because the defense is not subject to any condition but rather is simply subject to the qualification, or limitation, that it suffices against only claims for innocent or mistaken defamation and not against claims for defamation committed with actual malice.

Further, confusion regarding the burden of proof concerning bad faith and actual malice was addressed; overruling a 1923 case , *Kenny v. Gurley*, 208 Ala. 623, 95 So. 34 (1923), that had held that the defendant must plead the absence of actual malice, the court clarified that the matters of good or bad faith and actual malice are not two separate elements. Rather, the term

good faith is intended as opposite of the term actual malice. The court further clarified and held that the plaintiff must plead defamation with actual malice and bears the burden of proving defamation with actual malice to prevail against a defense of qualified privilege; the defendant need not plead good faith (the absence of actual malice) and does not bear the burden of proving good faith to establish the defense of qualified privilege.

The affirmative defense of qualified privilege so pleaded and proved will defeat a claim of innocent or mistaken defamation, because this defense negates the malice implied by the mere falsity of a defamatory statement. The only variety of defamation not subject to the qualified privilege defense is defamation committed with actual malice (as distinguished from implied malice).

B. *Black v. Aegis Consumer Funding Group, Inc*., ____F. Supp.2d___, 2001 U.S. Dist. LEXIS 2632 (S.D. Ala. 2001) made findings of fact in a default judgment against defendants, finding liability for invasion of privacy concerning debt collection. The court compared *Barnwell* and *Norris* in that the debtor experienced a deliberate, systematic campaign of harassment, approximately 20 phone calls within a period of one month, late at night and early in the morning, at home and at work; the debtor's parents were called as well. The collection activity impacted members of the debtor's family with no responsibility to the creditor, and her parents, children and babysitter. The debtor and her family were subjected to profanity and threats. The Court found that the activities of the creditor fell far beyond the realm of reasonable action and well into the area of wrongful and actionable intrusion, causing not only outrage but mental suffering, shame and humiliation.

C. *Parker v. Parker* , 124 F. Supp. 2d 1216 (M.D. Ala. 2000) rejected invasion of privacy claims relating to problems with plaintiff's credit and credit reports about the plaintiff, stemming from an imposter who fraudulently opened an account using plaintiff's name and credit information. The court applied the Fair Credit Reporting Act (15 U.S.C. § 1681, et seq.), which provides qualified immunity for invasion of privacy, defamation and negligence, unless the consumer shows that the false information was furnished with "malice or willful intent to injure." As plaintiff could not make such a showing, his invasion of privacy claim failed.

D. *Myrick v. Barron,* ____So.2d____, 2001 Ala. LEXIS 250 (Ala. 2001) found that Alfa's investigation of State Senator Barron , after a dispute arose involving an appointment on the Auburn University Board of Trustees, did not constitute wrongful intrusion upon Barron's privacy. The court's opinion, reversing compensatory and punitive damages awards against Alfa, described the investigation conducted by investigators hired by Alfa. They conducted a public records search and interviewed numerous people in DeKalb county about Barron. Barron learned about this investigation, and held a news conference to condemn Alfa's investigation. Alfa initially denied that any investigation had been conducted, then later admitted that a private investigation firm was hired to gather information pertaining to Barron.

The court quoted from *Nader v. General Motors Corp*., 25 N.Y.2d 560, 255 N.E.2d 765, 307 N.Y.S.2d 647 (1970) in which the New York Court of Appeals found no liability on GM's part for its investigation of Ralph Nader, stating:

> "'We cannot find any basis for a claim of invasion-of-privacy [based on wrongful intrusion] ... in the allegations that the [defendant], through

> its agents or employees, interviewed many persons who knew the plaintiff, asking questions about him and casting aspersions on his character. Although those inquiries may have uncovered information of a personal nature, it is difficult to see how they may be said to have invaded the plaintiff's privacy. Information about the plaintiff which was already known to others could hardly be regarded as private to the plaintiff. Presumably, the plaintiff had previously revealed the information to such other persons, and he would necessarily assume the risk that a friend or acquaintance in whom he had confided might breach the confidence. If, as alleged, the questions tended to disparage the plaintiff's character, his remedy would seem to be by way of an action for defamation, not for breach of his right to privacy.'

The court reversed and rendered the case, describing Barron's allegations as concerning only voluntary interviews in which Alfa only learned information already known (or allegedly known) by others. The court states that it will not "create a broad privacy action, with no metes and bounds, that would extend beyond [one's] dwelling, papers, and private records, creating unknown dangers to unsuspecting routine inquirers."

9. Intentional Interference with Business

A. *Cobb v. Union Camp Corp.* , ____So.2d ____(Ala. Civ. App. May 19, 2000) (2981432), reversed, *Ex parte Union Camp Corp*., ____So.2d____, (Ala. June 1, 2001) rejected a claim that Union Camp, the owner of timber land, interfered with the business relations of plaintiff Cobb, who had contracted with Evergreen Forest Products, Inc., with regard to harvesting timber on the Union Camp land. Evidence indicated a Union Camp district manager told an Evergreen procurement officer to stop using Cobb to cut on Union Camp property. However, the court stated that, although Cobb had contracted with Evergreen, the object of their contract, i.e., the wood to be cut, was provided by and located on Union Camp property. Because Union Camp was an essential party to the business relationship between Evergreen and Cobb, it could not be held liable for Cobb's claim of intentional interference with a business relationship. However, the Supreme court reversed this decision on a different issue.

B. *Folmar & Associates, LLP v. Holberg*, ____So.2d____ (Ala. August 4, 2000) (1990328), in a first impression ruling, held that the tort of intentional interference with contract or business relationship does not encompass claims of interference with a judgment of divorce.

C. In 2000, the legislature enacted a statute (§34-7-100,101) that provides a civil remedy against one who interferes with a real estate brokerage relationship by soliciting, requesting, or demanding a referral fee or commission, when reasonable cause for payment of the referral fee or commission does not exist. The term "interference with a real estate brokerage relationship" may also include a threat to reduce, withhold or eliminate any relocation or other benefits, or the actual reduction, withholding or elimination of any relocation or other benefits, in order to generate a referral fee from a real estate broker when reasonable cause for payment does not exist. However, communication between an employer and an employee about relocation policies and benefits does not constitute such interference and advising a party of the right to allow a

brokerage relationship to expire pursuant to its own terms is similarly not deemed interference with a real estate brokerage relationship. The Act provides that a civil action may be brought and actual damages, as well as treble damages, may be awarded, plus reasonable attorney fees and expenses.

D. In *Colonial Bank v. Patterson*, ___So.2d____, 2001 Ala. LEXIS 493 (Ala. 2000) considered a "tripartite relationship" among three parties. The Alabama Supreme Court held that a bank was not liable, as a matter of law, to a corporate customer's shareholder for the bank's refusal to honor a check drawn by the shareholder on the corporate customer's account, since the bank, as a party to the business relationship with the corporate customer's two shareholders, had a legal right to take that action pursuant to rules and regulations that governed the account.

E. *BellSouth Mobility, Inc. v. Cellulink, Inc*., ____So2d____, 2001 Ala. LEXIS 183 (Ala. 2001), where Cellulink had leased kiosks in Wal-Mart stores to sell cellular telephone equipment, considered Cellulink's claims that BellSouth, for whom Cellulink had contracted to market equipment for, tortiously interfered with the relationship between Cellulink and Wal-Mart, causing its termination. Cellulink argued that BellSouth tricked Wal-Mart into helping BellSouth remove Cellulink from Alabama Wal-Mart stores in order to "eliminate the middle man" and save commissions and residual compensation that it was paying Cellulink.

Reversing a verdict in favor of Cellulink, the court stated that the plaintiff must establish that the defendant is a stranger to the contract with which the defendant allegedly interfered, and one is not a stranger to the contract just because one is not a party to the contract. When tripartite relationships exist and disputes arise between two of the three third parties, then a claim alleging interference by the third party that arises from conduct by the third party that is appropriate under its contract with the other two parties is not recognized.

The court also rejected Cellulink's contention that the "party to the relationship" argument was an affirmative defense which BellSouth had not pleaded and proven. The court stated that the absence of the defendant's involvement in the business relationship is an element of a plaintiff's tortious interference claim.

F. *Union Food and Commercial Worker's Unions v. Philip Morris, Inc*., 223 F. 3d 1271 (11th Cir. 2000) discussed proximate cause principles where an employee health and welfare benefit plan sued tobacco manufacturers to recover costs for medical treatment to plan participants afflicted with tobacco-related illness as well as reduced contributions plan participants afflicted with these illnesses. The District Court held that the plans' proffered amendment for intentional interference with contract failed to state a claim. The Eleventh Circuit Court of Appeals affirmed, holding that the claims were barred by the doctrine of proximate cause. The Court stated:

> The law cannot undertake to trace back the chain of causes indefinitely, for it is obvious that this would lead to inquiries far beyond human power and wisdom--in fact, infinite in their scope. It therefore stops at the first link in the chain of causation, and looks only to the person who is the proximate cause of the injury. The general rule is that the damage to be recovered must be the natural and proximate consequence of the act complained of. "It is not enough if it be the natural consequence; it must be both natural and proximate."

The Court pointed to the common law rule that a health-care provider has no direct cause of action in court against one who injures the provider's beneficiary, imposing increased costs upon the provider, and noted that other circuits had uniformly rejected virtually identical suits on proximate cause grounds. The Court also rejected the plans' arguments based on the relaxation of proximate cause requirements in intentional tort cases.

10. Environmental Torts

A. *Russell Corp. v. Sullivan*, 790 So.2d 940 (Ala. January 1, 2001) (1981074, 1981095, 1981096) reversed a judgment for $155,000 compensatory and $52,000,000 punitive damages in favor of homeowners of homes adjacent to Lake Martin. They sued Russell Corp., Avondale Mills, and Alabama Power Company for trespass and nuisance, alleging property damage by release of chemicals into Lake Martin. Trespass claims against Alabama Power, the owner of the lake, were held insufficiently supported as there was no intentional act by Alabama Power and no participation in the discharge of Russell and Avondale's waste into the lake. The nuisance claim against Alabama Power, predicated on a Federal Energy Regulatory Commission permit requiring it to be responsible for pollution, was rejected as the homeowners had disclaimed reliance on the FERC license while seeking remand after the case had been removed to federal court, and there was no other basis for concluding that Alabama Power had control. The court rejected the indirect trespass claims against Russell and Avondale, concluding that the homeowners had not shown "substantial damages" to their property. The court stated that the homeowners' experts' conclusions were not supported by chemical data, and that plaintiffs' theories depended upon multiple inferences. The nuisance, as to Russell and Avondale, was held to be a public nuisance, and the homeowners had not proved that they incurred special damage not suffered by others. Partial dissents, joined by Cook, Johnstone and England, J.J., disagreed with the majority's holdings concerning nuisance.

B. *Courtaulds Fibers, Inc. v. Long*, 779 So. 2d 198(Ala. Sept. 15, 2000) (1971996, 1972028) reversed a $1,000,000 compensatory award that had been entered against Courtaulds in connection with carbon disulfide emissions. The majority, relying on § 6-5-127(a), concluded that plaintiffs, who owned land 3 to 4 miles from the plant, had not established substantial evidence of nuisance, and held that plaintiffs had not shown that Courtaulds' failure to install carbon-bed-absorption technology in its plant constituted negligent or improper operation.

C. *Payton v. Monsanto Co.* , ____So.2d____, 2001 Ala. LEXIS 153 (Ala. May 4, 2001) states that Alabama law does not recognize a continuing tort in instances where there has been a single act followed by multiple consequences. The fact that a plaintiff discovers damage for the first time outside the limitations period does not save the plaintiff, as the court does not apply a "discovery rule." The complaint averred conduct by Monsanto beginning in the early 1930s that continued until the filing of the 1997 suit.

Monsanto offered evidence suggesting that hazardous levels of PCBs were present in Lay Lake before the limitations applicable to the action (based on discovery conducted in a prior class action suit for PCB contamination of the lake), this evidence did not negate the allegations of the instant case complaint describing continuing discharge of PCBs at the time of the commencement of the action. Because Monsanto bears the burden of persuasion at trial, a naked motion for summary judgement unsupported by averment or reference in the record

refuting the complaint's allegation of continuing PCB discharge as of the filing of suit was not sufficient to shift to the plaintiff the burden of demonstrating that substantial evidence supports his allegations.

11. Malicious Prosecution

A. *Wal-Mart Stores, Inc. v. Goodman,* 789 So.2d 166 (Ala. December 22, 2000) (1981683) held that a jury question was presented on the issue of probable cause. The shopper, at the time of apprehension for shoplifting, presented the store employee with a receipt that matched the product code and the merchandise the shopper had allegedly concealed. The employee made no effort to verify its legitimacy, and did not call the customer service desk to determine whether the customer had attempted to exchange the merchandise. The Court also held Wal-Mart not entitled to a new trial because of its argument that a shopper had spoliated evidence by destroying a box that had contained a cordless telephone. The shopper obtained a malicious prosecution judgement against Wal-Mart because of being was arrested in the store after she had attempted to return a telephone, previously purchased. She testified that when she entered the store, a greeter affixed a sticker to the box that she was carrying that contained the telephone and told her to go to the Customer Service desk. She did so but found no suitable replacement, and retrieved the telephone and the receipt and placed it in the top of her shopping cart. She made a purchase, and then was arrested after she left the front of the store. Wal-Mart unsuccessfully argued spoliation, claiming that the "greeter label", when taken off, would have left an impression of the word "void", and could have shown whether the shopper actually entered the store with the box. However, she did not know that the entire box would be a key piece of evidence in her case, and Wal-Mart did not prove she intentionally destroyed the box in order to inhibit Wal-Mart's case.

B. *Wal-Mart Stores, Inc. v. Patterson,*___So.2d ____, 2001 Ala. LEXIS 368 (Ala. Oct. 5, 2001) held that Wal-Mart was not entitled to immunity under the Alabama Worthless Check Act, §13 A-9-13.1 through 13.3 where it had not requested the name, address, and home telephone number of the party presenting the check, Plaintiff's estranged wife forged his name on the check, which had been accepted by Wal-Mart. When the check was returned, plaintiff was arrested for passing a worthless check. Had Wal-Mart complied with the statutory requirements and requested that information, the inconsistency between the presenter and the signature would have been obvious.

12. Joint Tortfeasors / Vicarious Liability

A. *Lowry v. Garrett*, ___ So.2d ____ , 2001 Ala. Civ. App. LEXIS 81 (Ala. Civ. App. March 2, 2001) (2991300) rejected plaintiff's contention that an attorney Garrett, whose estate she had sued, alleging invasion of privacy, was a joint tortfeasor with a California attorney and other parties in California who had allowed attorney Garrett to obtain access to a confidential statement plaintiff had given about plaintiff being molested as a child. After a bench trial, the trial court found plaintiff entitled to $25,000 in damages against attorney Garrett but, because she had entered a pro tanto settlement with the California defendants for $108,000, that settlement fully offset the damages award against the Garrett estate.

Her claim against Garrett was based on invasion of privacy, for damages for the trauma and injuries she suffered when she learned in a telephone call from Garrett that her confidential statement had been released without her consent. Because the acts of the California defendants and Garrett combined to produce a single, indivisible injury, the Court of Civil Appeals held that Garrett estate was entitled to a set-off.

B. *Crete Carrier Corp. v. Adair*, ____ So.2d _____, 2000 Ala. Civ. App. LEXIS 655 (Ala. Civ. App. October 20, 2000) (2990695), written by Judge Crawley, reversed a jury verdict against a trucking company. Plaintiff sued the company and its driver, alleging a respondeat superior claim, as well as a negligent entrustment claim. During trial, at the conclusion of all the evidence, plaintiff dismissed the negligent entrustment and requested the trial court dismiss the driver without prejudice. The company objected to a dismissal without prejudice, and the trial court then dismissed the driver with prejudice. The verdict awarding damages in favor of plaintiff was reversed, the Court of Civil Appeals holding that a dismissal with prejudice constitutes an adjudication on the merits and that, because the driver and the company were joint tortfeasors, the company was entitled to a judgment as a matter of law.

C. *Ex parte Goldsen*, 783 So.2d 53 (Ala. August 11, 2000) (1991512) reversing the Court of Civil Appeals, considered the unusual question of whether a jury award against a negligent defendant can be offset by a pro tanto settlement when the jury finds that the settling party had not been negligent, and therefore, would not be liable for the damage to the plaintiff. The court held that a plaintiff, though entitled to full compensation for an injury, is entitled to only one recovery for a single injury caused by two or more tortfeasors and extended that rule to settling parties who are determined, after they have been dismissed from the case, to have had no liability.

D. *Morris v. Laster*, ___ So.2d ____, 2001 Ala. LEXIS 103 (Ala. April 6, 2001) (1990386, 1990401) altered Alabama law regarding trial practice when there has been a pro tanto settlement. The defendant filed a motion to take a post-judgment credit with regard to a pro tanto settlement previously reached between the plaintiffs and several former defendants. The trial court denied the motion and related the substance of the settlement to the jury, with the instruction to determine the total amount of damages and then give credit for the $510,000 had already been paid by the former defendants. The instruction closely followed suggested language in charge 11.30, Alabama Pattern Jury Instructions (2d ed. 1993). The majority concluded that a defendant has a right to prevent the jury from hearing any information about a pro tanto settlement and to elect to have the trial court calculate the set off. Because the choice of how to raise a settlement as a defense rests squarely with the defendant, the defendant must be allowed the election of either informing the jury of the settlement or choosing a post-judgment set-off performed by the trial court.

Justice Lyons' concurrence noted that keeping a pro tanto settlement from the jury when doing so serves the plaintiff's interest appeared to be just as compelling as the converse; however, the question of whether details of the pro tanto settlement should be withheld from the jury unless both sides consent to disclose must await another day.

Justice Harwood's partial dissent advocated that, once the pro tanto settlement defense has been raised, the trial judge should have discretion in determining how to accommodate the defense.

Justice Johnstone's dissent discussed in detail the case law authority relied on by the majority, stating that such authority did not authorize the majority's ruling. He pointed out that the legitimate reason for allowing a defendant set-off for a pro tanto settlement is to prevent a double recovery; the legally recognized purpose has never been to allow the defendant to shift blame or suggest plaintiff's greed or otherwise prejudice the plaintiff in the minds of the jurors.

E. *Tyson Foods, Inc. v. Stevens*, 783 So.2d 804 (Ala. 2000) held that the parties' characterization of a relationship did not control the result, Plaintiffs, who owned property adjacent to a hog farm operated by Burnett, filed suit for negligence and nuisance with regard to odor and waste-management system overflow problems. The Alabama Supreme Court opinion, written by Justice Brown, upheld the liability findings against Tyson Foods, Inc., with whose predecessor Burnett had entered into a "Finishing Hog Agreement." Under this contract, Burnett was described as an independent contractor of Tyson, and would be responsible for operating and maintaining the hog farm. Tyson would deliver young hogs to Burnett, and he would feed, water and care for the hogs until they reached market size, at which time Tyson would retrieve the hogs. Tyson supplied food, and veterinary supplies and veterinary care for the hogs. Tyson determined the location where the hog houses were to be built, specified their dimensions, and assisted in securing financing for the hog house construction. Tyson required Burnett to construct and maintain a waste-management system. Tyson representatives would inspect the farm about weekly and note their observations on standardized inspection reports. The evidence presented was sufficient to create a jury question as to the existence of Burnett's agency on behalf of Tyson.

F. *Tyus v. Reynolds*, ____So.2d____, 2001 Ala. Civ. App. LEXIS 151 (Ala. Civ. App. 2001) found that testimony by the driver that he was simply on his way home after dropping off his mother at an engagement, and getting food at a fast food restaurant, was sufficient to rebut the administrative presumption that would have precluded his brother (the owner of the vehicle) from recovering due to the driver's alleged contributory negligence.

13. Subrogation

A. *Ex parte State Farm Fire & Casualty Co.*, 764 So.2d 543 (Ala. Jan. 21, 2000) (1981136) overruled *Powell v. Blue Cross & Blue Shield of Alabama*'s "make whole" rule. Homeowners suing jointly with State Farm, their insurer, alleged defendants had caused a fire. The insured settled with defendants for $5,000 but had not received reimbursement of a $250 deductible. The defendants argued they were entitled to dismissal because the insured had not been "made whole." The Alabama Supreme Court reversed the Court of Civil Appeals and declared, in a 4-1-3 decision, that *Powell* was wrongly decided, reinstating the holding of *International Underwriters/Brokers, Inc. v. Liao*, 548 So. 2d 163 (Ala. 1989). *Liao* held that, while the doctrine of subrogation is of purely equitable origin and nature, it may be modified by contract.

Justice Lyons' special concurrence acknowledged a predicament that existed before *Powell* in that Rule 17(a), ARCP, requires joinder of an insurer/subrogee even where the insured has a substantial interest in the claim apart from the insurer's subrogated interest, thereby permitting joinder as a ploy for the purpose of weakening the insured's claim. Justice Lyons

suggested the advisory committee of the Rules of Civil Procedure consider an amendment that would allow a trial court, in its discretion, to prevent a party from disclosing to the jury an insured's interest when justice requires.

A dissent by Justice Johnstone (joined by Cook and England, J.J.) suggests that this case did not justify overruling *Powell*; this case merely would require an obvious exception to the "make whole" rule; that, while an insurer could not enforce a contract before a loss requiring an insured to waive the "make whole" rule and could not exact such a waiver as a condition to payment after loss, an insured, may, after a loss, effectively waive the "make whole" rule, and if the insured does so, then no other party can invoke this rule. Such a proposed exception would foreclose any misuse of the rule by alleged tortfeasors yet would preserve the obvious equities of the rule.

B. *Allstate Insurance Company v. Hugh Cole Building, Inc.* 772 So.2d 1145 (Ala. June 2, 2000) (1990046) answered a certified question from the United States District Court for the Middle District of Alabama inquiring whether the "made-whole" rule prevents subrogation by a property insurer, who has paid its insured under the policy and obtained a subrogation agreement from maintaining a timely filed subrogation suit against a third party, where the insured has not been made whole but allowed the statute of limitations to run without filing any suit against a third party.

The Supreme Court noted that *Powell* had been overruled in *Ex parte State Farm & Casualty Company,* which held that an insurer may contract with its insured for subrogation even before the insured is made whole. The court thereby concluded that whether the insured's unsatisfied claim is time-barred was simply irrelevant. Assuming the existence of an agreement allowing Allstate to be subrogated without the owner being made whole, Allstate was deemed entitled to subrogation.

C. *Ex parte Cassidy*, 772 So.2d 445 (Ala. May 19, 2000) (1990531). In an automobile accident case, the defendant and its liability insurer sought to join the plaintiff's automobile insurer, Safeco, as a real party in interest with a subrogation claim. The opinion, written by Justice Houston, observed that the question of whether a subrogee may be a real party in interest had recently undergone significant changes. The general rule, represented by *International Underwriters/Brokers, Inc. v. Liao*, 548 So.2d 163 (Ala. 1989), was that a subrogee is not entitled to recovery unless the insured has had a full recovery, though this may be superseded by any agreement to the contrary by the parties. *Powell v. Blue Cross & Blue Shield, supra,* held in 1990 that there would be no subrogation until the insured had received full recovery and this rule could not be altered by an agreement. But in 2000, *Ex parte State Farm Fire & Casualty Company, supra*, overruled *Powell.*

Under *Liao*, Safeco can be a real party in interest if it and the plaintiff had agreed that subrogation would occur before the plaintiff receives a full recovery from other parties. As in *Ex parte Brock,* the plaintiff's insurance policy, including the subrogation agreement, had not been put into record, and it would be necessary that the court study the subrogation agreement to determine whether it allows Safeco to subrogate before Brock is made whole. The court thereby refused to require that the trial court set aside an order denying the defendant's motion to join Safeco as a real party in interest.

D. *Nationwide Property & Cas. Ins. Co. v. DPF Architects, P.C.*, ___ So.2d ___ (Ala. February 23, 2001) (1990385, 1900492) considered arguments, in a subrogation claim brought by Nationwide against building contractors, that, because the insured / property owners had not been "made whole", in that they were not reimbursed for their deductibles, Nationwide could not pursue a subrogation action. The Court disagreed, holding that the contractors had no standing to assert a "made whole" argument. The only party with standing to object to such a lack of payment by the insurer is the insured.

14. Compensatory Damages

A. *Marsh v. Green,* 782 So. 2d 223 (Ala. Sept. 22, 2000)(1981897) overruled *American Legion Post No. 57 v. Leahey*, 681 So. 2d 1337 (Ala. 1996), which had declared §12-21-45 (1987 tort reform legislation abrogating the collateral source rule) unconstitutional. This decision arose in the context of an equal protection challenge to §6-5-545, which had abolished the collateral source rule in medical malpractice cases. The *Marsh* majority stated that the *Leahey* reasoning was erroneous, and that §12-21-45 was not unconstitutional. The majority suggested that a defendant might argue that reimbursement for medical expenses already paid by an insurer is a double recovery, and that a plaintiff might argue that a defendant reaps a windfall unless additional damages are awarded, beyond the mere expense of insurance, so as to compensate the plaintiff for having the discipline and foresight to devote money or earning power to the expense of acquiring the insurance or other collateral source benefits. The majority suggested that a verdict form dealing specifically with collateral-source reimbursement would facilitate future appellate review concerning the validity or permissible effect of such arguments.

The dissent by Justice Cook agreed with the *Leahey* analysis, stating that majority resurrects a statute that is constitutionally deficient, with neither an explanation for holding the statute constitutional nor a suggested procedure for implementing the statute.

B. *Hull v. Jackson*, ___ So.2d ____ (Ala. January 12, 2001) (1981499), in its initial opinion released in January, would have radically changed Alabama damages law to hold that the portion of a health provider's medical fee that is written off because of the contract with the group health insurer is not a collateral source, reasoning that the injured plaintiff never became liable to pay the providers anything beyond amount of her co-payments. However, this opinion was withdrawn and a new opinion substituted March 23, 2001, and the case was remanded for further proceedings consistent with *Marsh v. Green.*

C. *Wal-Mart Stores, Inc. v. Goodman*, 789 So.2d 166 (Ala. December 22, 2000) (1981683), a malicious prosecution case, held that a $200,000 mental anguish award was not excessive. Plaintiff testified about stress caused by the arrest, suffering pains during her pregnancy, and becoming very anxious over the health of her unborn child. She was humiliated at the time of her arrest on Christmas Eve, a busy shopping day, being led out of Wal-Mart in handcuffs, escorted by police and accompanied by her two young children. She was fired from her job because of the arrest and had difficulty in finding other employment. When she failed to appear for a shoplifting trial date, she was arrested and placed in a holding cell, to await trial, before being found not guilty at trial. She remains embarrassed over what happened. Wal-Mart

had ample opportunity for cross examination about mental anguish. Her mental anguish was not limited to the period of the time between the arrest and acquittal.

D. *Hathcock v. Wood*, __ So.2d ___ (Ala. March 16, 2001) (1982225), affirmed awards of $600,000 to Marshall Wood and $200,000 to his wife Reba Wood. The Woods were injured in an automobile collision. Defendant Hathcock claimed the trial court improperly admitted "poverty evidence" in that the Woods, after the injuries, had to close their upholstery business and sell their house. The Court held this was admissible for the purpose of proving the damages claimed, that is, the lost earnings claim, and also that the defendant had "opened the door" to evidence about the house sale by arguing that delays and gaps in medical treatment meant the injuries were not as serious as claimed; there was testimony that concerns about medical bills led to sale of the house.

The Court also rejected the defendant's excessiveness arguments, and even though the record showed medical expenses of only approximately $5000, the award was supported by neuropsychologist testimony that a head injury had altered Wood's personality making him emotionally fragile, and permanently unable to support, comfort and care for Mrs. Wood. He experienced intense emotional outbursts and depression because of chronic pain and inability to work, and suffered a change in cognitive ability, memory, and emotional capacity to handle elements of daily life. The award for Mr. Wood, largely for mental anguish and lost income, was not excessive.

15. Punitive Damages

A. The United States Supreme Court in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc*.,532 U.S. 424, 121 S.Ct. 1678 (May 14, 2001), deciding an appeal from the Ninth Circuit Court of Appeals in an unfair competition case, held that appellate review of the three guideposts promulgated in *BMW of North America, Inc. v. Gore* should apply a de novo standard in determining the constitutionality of punitive damages awards. The majority opinion reasoned that appellate courts are equally capable with trial courts in analyzing the second *Gore* factor (disparity between harm and punitive damages award); appellate courts are more suited to analyze the third factor (any difference between punitive damages award and civil penalties in comparable cases); the court acknowledged that district courts have a somewhat superior vantage over courts of appeal, primarily with witness credibility in demeanor issues, as to the first *Gore* factor (reprehensibility of defendant's misconduct).

The court also indicates that a jury's punitive damages award is not a finding of "fact," so appellate review of a district court's determination that an award is consistent with due process does not implicate Seventh Amendment concerns.

B. *Acceptance Insurance Co. v. Brown* , ____So.2d ____, 2001 Ala. LEXIS ____ (Ala. 2001) applied *Leatherman's* holding concerning de novo review. This decision, considering a $1.2 million punitive damages award (remitted by the trial court to $300,000), along with a $270,000 compensatory award (remitted by the trial court to $105,000), applied the de novo review standard to remit the punitive damages award to $180,000 and the compensatory damages to $60,000.

A dissent by Chief Justice Moore, joined by Justice Woodall, disagreed with the remittutur and questioned the proposition that *Leatherman* mandates that Alabama appellate courts apply a de novo standard in reviewing punitive damages awards.

C. *Horton Homes, Inc. v. Brooks* , _____So.2d_____, 2001 Ala. LEXIS (Ala. July 13, 2001)(1000346) required remittitur of a $600,000 punitive damages verdict to $150,000 dollars in a case relating to problems with a mobile home. Relying on *Cooper Industries, Inc. v. Leatherman Tool Group, Inc*., the majority applied a de novo standard of review to the constitutional challenge to the amount of the punitive damages award, and gave no deference to the jury's award or trial court's ruling. Chief Justice Moore's partial dissent states that *Leatherman* did not require Alabama courts to change their standard of review.

D. *Prudential Ballard Realty Co. v. Weatherly*, ___So. 2d ___, 2000 Ala. LEXIS 530 (Ala. December 1, 2000) (1981671) held that the terms "malicious" and "oppressive," and the term "gross," which is defined as inexcusable, flagrant, or shameful, are subsumed within the definition of fraud in §6-11-20(b)(1). In other words, it cannot seriously be argued that an intentional act of fraud committed for the purpose of "depriving a person or entity of property or legal rights or otherwise causing injury," is not a gross, malicious, or oppressive act, as those terms are defined in §6-11-20. In short, for purposes of applying §6-11-20(b)(1), the terms "gross," "malicious," and "oppressive" are redundant.

The court considered a $2,500,000 punitive damages award for fraud with respect to a home sale transaction, where $250,000 compensatory damages had been awarded. Though the trial court remitted the punitive damages to $1,250,000, the Supreme Court required a further remittitur of $750,000. Justice Houston's special concurrence advocated a benchmark of the greater of $20,000 or three times the compensatory award; a punitive damages award under this would be presumed reasonable and an award above this would require special justification if challenged by the defendant.

E. *Wal-Mart Stores, Inc. v. Goodman*, 789 So.2d 166 (Ala. December 22, 2000) (1981683), remitted a $3,000,000 punitive damages award to $600,000 in a malicious prosection case. The Court determined the degree of reprehensibility sufficient to warrant only a 3.1 ratio to compensatory damages (there had been a $200,000 mental anguish award. It did not involve a continuing pattern or practice; a store manager failed to investigate the plaintiff/customer's contentions that she had a receipt for the merchandise; even after her acquittal, Wal-Mart demanded the merchandise be returned; Wal-Mart's loss prevention policy suggested an unhealthy incentive for employees to make arrests to get favorable performance ratings; however, no evidence suggested the manager had any vindictive, spiteful or other improper motives.

F. *Ex parte Liberty National Life Insurance Co.*, ___ So.2d ___ (Ala. April 13, 2001) (1982146) considered excessiveness arguments in a fraudulent suppression case arising out of the "churning" of small life insurance policies by agents to maximize their "production credits." An agent failed to disclose to the policyholder, whose 1991 policy had lapsed, that she could reinstate her prior policy for about $367 less in premiums than it would take her to purchase the new policy being sold to her. The jury returned a $1350 compensatory damages verdict and $200,000 in punitive damages (remitted by the trial court to $150,000). The Supreme Court

further remitted the compensatory award to $367 and remitted the punitive damages award to $30,000.

The court found that § 6-11-27 factors of ratification and benefit were present. Liberty National was found to have fraudulently suppressed facts relating to policy "churning" practices in which agents would collect premiums from plaintiff at her home for six months to a year, stop collecting them, then return a few months after a policy lapsed and sell her at least one new one; the agents failed to tell her that she had the option of reinstating the previous policies that would have provided full benefits in eleven months, rather than the three year period required on the newly issued policies. Liberty National's issuance of the newer policies within a short time after the agent allowed the older policy to lapse, and its continued acceptance of premiums for the new policies, constituted a ratification of the agent's fraud. Moreover, greater premium revenues produced by the newer policies and the lesser risk to the insurer entailed by the 1993 policies benefited Liberty National itself.

G. *Omni Insurance Co. v. Foreman* ,___So.2d_____, 2001 Ala. LEXIS 168 (Ala. 2001) held that an underinsured motorist policy providing benefits for amounts that the insured person "is entitled to recover" does not preclude the recovery of punitive damages. The court examined the meaning of § 32-7-23(a) Alabama Code that required payments of sums the insured is "legally entitled to recover." The insurer argued that because punitive damages serve no compensatory purpose, as a matter of public policy, punitive damages should not be recoverable under the statute. The court disagreed, stating that, when an injured person sues a tortfeasor and offers substantial evidence of conduct recognized as appropriate to support an award of punitive damages, the trial court that takes the issue of punitive damages from a jury will see its judgement reversed. Under such circumstances, the injured party is "legally entitled to recover" such punitive damages as a jury may in its discretion award.

H. *Hill v. Campbell* ,____So.2d_____, 2000 Ala. Civ. App. LEXIS 142 (Ala. Civ. App. 2000) considered whether Alabama public policy prohibits an insurance company, where the claim is not based on wrongful death, from excluding coverage for punitive damages in liability coverage, and whether such an exclusion would also violate the Alabama Uninsured Motorist Act. The Court of Civil Appeals opinion, written by Presiding Judge Yates, found that it did not violate Alabama public policy for an insurer to exclude coverage for punitive damages in its liability policy applicable to its insured.

However, such an exclusion does violate the Uninsured Motorist Act with regard to uninsured and underinsured motorist coverage. The court discussed a number of holdings from other jurisdictions and the mandate in the Alabama statute that uninsured motorist coverage should provide for "protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of bodily injury, sickness or disease, including death resulting death from." The legislature did not distinguish between personal injury damages and damages arising from wrongful death, which in Alabama are only punitive damages. To make such a distinction when none exists in the statute would force the court to guess the intent of the legislature rather than look at the plain meaning of the words the legislature used.

I. *New Plan Realty Trust v. Morgan,* ____So.2d_____ , 2000 Ala. LEXIS 593 (Ala. 2000), upheld punitive damages for an apartment operator's trespass and conversion in removing

and disposing of plaintiff's belongings from her apartment before the end of lease. Although the manager assured plaintiff that no one would enter her apartment and remove her belongings, she directed other employees to remove the belongings and dispose of them before the lease termination date. The company's investigation consisted of one conversation with the manager who admitted she had disposed of the belongings. Although this manager was terminated, the company wrote to plaintiff's attorney that it had "no information regarding this matter" and that to their knowledge, plaintiff's apartment "was vacated and there were no personal items left." The company's letter disavowed knowledge of the disposal of plaintiff's belongings although the manager had already informed the company of her actions. The company ratified the manager's wrongful conduct by joining in it by disavowing her disposal of the belongings. Further, the manager's wrongful conduct benefited the company by readying plaintiff's apartment for the next tenant before the end of her lease.

J. *Cavalier Manufacturing, Inc. v. Jackson*, ___So.2d ____, 2001 Ala. LEXIS 373 (Ala. October 5, 2001) in an 8-1 opinion (with only Justice See dissenting) considered the first impression issue of whether an arbitration clause that prohibits an arbitrator from awarding punitive damages is valid. The court acknowledged the public policy behind punitive damages to punish the wrongdoer and deter others from engaging in the same conduct, and the legislative expression in § 6-11-20(a) that punitive damages be available as a remedy in fraud actions. The court held that a predispute arbitration clause that forbids an arbitrator from awarding punitive damages is void as contrary to public policy of the state to protect its citizens in certain legislatively prescribed action from wrongful behaviour and to punish the wrongdoer. Because the arbitration agreement had a severability clause, however, this void provision was severable from the rest of the arbitration agreement and arbitration was ordered.

16. Arbitration

A. Southern Energy Homes, Inc. v. Ard, 772 So. 2d 1131 (Ala. June 2, 2000) (1971998) overruled *Southern Energy Homes, Inc. v. Lee*, 732 So. 2d 994 (Ala. 1999) and reversed a trial court's decision that a mobile home manufacturer could not enforce arbitration notwithstanding the Magnuson-Moss Act. The Ards never signed an agreement with the manufacturer that contained an arbitration provisions, though arbitration provisions were contained in the manufacturer's written warranty document. The plaintiffs did sign an arbitration agreement with the seller, but the manufacturer was not a signatory party to that transaction.

The 5-4 main opinion held the plaintiffs were contractually bound to the arbitration provisions because they had accepted the benefits of the warranty containing the arbitration provisions, as the manufacturer submitted an affidavit indicating that warranty service had been requested and performed pursuant to the written warranty that contained the arbitration provisions. The opinion stated this constituted their acceptance of the arbitration provisions themselves. Second, they sued the manufacturer on an express warranty theory, and a plaintiff cannot simultaneously claim the benefits of a contract yet repudiate its burdens and conditions.

A dissent, written by Justice Johnstone, extensively quoted Judge Thompson's opinion in *Wilson v. Waverlee Homes, Inc.*, 954 F. Supp. 1530 (M.D. Ala. 1997) including the conclusion that the legislative history of the Magnuson-Moss Act, particularly the remarks of Senator Moss, a co-sponsor, clearly evidences Congress's intent to preclude a waiver of judicial remedies for the statutory rights at issue. He pointed out that the manufacturer was not a signatory to the

contract between plaintiffs and the seller, and that arbitration provision did not compel arbitration of claims that did not arise from the contract or between parties to the contract. The warranty claims were not intertwined with and founded upon the sales contract, except in the utterly collateral sense that if plaintiffs had never purchased the mobile home, they would not have been protected by the warranties. They did not sue the manufacturer for a breach of any duty imposed or entailed by the retail installment contract plaintiffs signed with the seller. The manufacturer was not a party to that contract nor a third party beneficiary.

B. S*isters of the Visitation v. Cochran Plastering Company*, 775 So.2d 759 (Ala. May 26, 2000) (1981513) enunciated standards in determining whether a transaction has sufficient interstate commerce involvement to be within the scope of the Federal Arbitration Act.

The majority opinion, written by Justice Lyons, described factors in determining whether a particular contract has a substantial effect on interstate commerce:

(1) Citizenship of the parties;
(2) Tools and equipment;
(3) Allocation of cost of services and materials;
(4) Subsequent movement of the object of the services across state lines; and
(5) Degree of separability of subject contracts from other contracts which are subject to the FAA.

C. *Ex parte Stewart*, _____ So.2d _____, 2000 Ala. LEXIS 397 (Ala. 2000) applied the *Sisters of Visitation* test, examining issues concerning the "flow" of interstate commerce with regard to the distribution of Birmingham News newspapers. Plaintiffs argued claims, including breach of contract and fraud, for termination of Birmingham News distributorships, were required to be arbitrated. The plaintiffs bought complete newspapers from the Birmingham News and then distributed them to homes, newstands, news racks, and other places within Alabama. The Birmingham News showed that virtually all of the inserts, such as comics, Parade magazine, and advertising inserts, are prepared, printed and shipped to The Birmingham News from outside the state of Alabama. The plaintiffs argued that the flow of interstate commerce ended when these inserts and news content were delivered to The Birmingham News, but a majority opinion of the Alabama Supreme Court rejected that argument.

D. *Brown v Dewitt, Inc.* .,____ So.2d _____, 2001 Ala. LEXIS 254 (Ala. 2001) held that the defendant failed to meet its burden showing the transaction substantially affected interstate commerce. Brown sued Dewitt, alleging it breached an agreement to convey a condominium that was to be constructed by Dewitt. The agreement contained an arbitration provision. Dewitt conceded, however, that evidence did not support a finding of substantial interstate commerce under the first four factors established in *Sisters of Visitation*. The only factor at issue was the "degree of separability from other contracts." Dewitt pointed to a title insurance policy commitment that had been issued by a California corporation. He contended this was not a "proximity contract" but was integral to the purchase agreement entered into by Dewitt and Brown. Assuming, without deciding, that the title insurance coverage involved substantial interstate commerce, the analysis must focus on the degree of interstate commerce involved in the instant transaction and analyze the effect Brown's contract would have on the related title insurance policy, if the court were to conclude the Brown contract not subject to the FAA.

E. *Tefco Finance Co. v. Green*, ___ So.2d ____ (Ala. March 16, 2001) (1991402) (written by Justice See) did not require arbitration, in that a retail installment contract/security agreement did not involve interstate commerce. An automoblie purchaser sued T.R. Motors, alleging fraud, and breach of contract, with regard to mechincal problems and additional charges made to her monthly payments. Nothing in the record indicated the car had been taken across state lines; that the purchase had any effect on interstate commerce; or even that other T.R. Motors customers had traveled outside Alabama in an automobile sold or financed by T.R. Motors.

F. *F.A. Dobbs & Sons, Inc. v. Northcutt*, ___ So.2d___, 2001 Ala. LEXIS 401 (Ala. Nov. 2, 2001), held that defendant construction company failed to show that its contract with plaintiffs substantially affected interstate commerce; it submitted an affidavit that it used materials and suppliers from various locations across the United States, and that many of its cabinets are shipped outside the state. However, the contract at issue was limited to parties residing in Alabama and was performed in Alabama. The defendant did not present evidence that it used materials purchased outside Alabama in the construction of plaintiff's building.

G. *Ex parte Stamey*, 776 So. 2d 85 (Ala. June 30, 2000) (1981629) considered whether mobile home purchasers' claims against the seller were required to be arbitrated because of an arbitration provision in a financing agreement between the purchasers and Green Tree. The seller was not a signatory to the arbitration agreement.

The court stated that there were two exceptions to the general rule that precludes a non signatory from enforcing an arbitration agreement: (1) a theory of equitable estoppel for claims that are so intimately founded in and intertwined with the claim made against a signatory; and (2) a third party beneficiary theory, that affords the third party all the rights and benefits, as well as the burdens, of that contract, included those associated with the arbitration.

The requirements for establishing the equitable estoppel exception are:

> (1) that the scope of the arbitration agreement signed by the party resisting arbitration be broad enough to encompass those claims made by that party against nonsignatories, or that those claims be "intimately founded in and intertwined with" the claims made by the party resisting arbitration against an entity that is a party to the contract, and
> (2) that the description of the parties subject to the arbitration agreement not be so restrictive as to preclude arbitration by the party seeking it. In other words, the language of the arbitration agreement must be so broad that the nonparty could assert that in reliance on that language he believed he had the right to have the claims against him submitted to arbitration, and, therefore, that he saw no need to enter into a second arbitration agreement.

In most cases presented on an equitable estoppel claim, the court had not allowed the claims to be arbitrated, because the arbitration provision language limited arbitration to the signing parties, so there had been no assent on the part of the resisting party to arbitrate claims against non-signatory. However, the court concluded that the purchasers' claims against the seller were related to the financing of the contract in that the money lent to the purchasers went,

among other things, to pay for the installation of the same septic system that was the basis of their fraud, conversion and breach of contract claims.

The third party beneficiary theory can arise out of two different sets of facts. The first occurs when a third party beneficiary/non-signatory attempts to resist arbitration, and the court holds that such a third party beneficiary cannot both claim the benefit of the contract and avoid the arbitration provision at the same time. The second fact situation is that where, for a non signatory/third party beneficiary attempts to enforce the arbitration agreement against a signatory. A party claiming to be a third party beneficiary must establish that the contracting parties intended, upon execution of the contract, to bestow a direct, as opposed to an incidental, benefit upon the third party. The court concluded that the parties did intend a direct benefit, in that amounts from the financing agreement were paid on behalf of the purchasers to the seller, including the cost of the land and the cost of the installations.

H. *Oakwood Mobile Homes, Inc. v. Barger*, 773 So.2d 454 (Ala. June 9, 2000) (1981749) distinguished fraud in the factum from fraud in the inducement. Fraud in the inducement consists of one party's misrepresenting a material fact concerning the subject matter of the underlying transaction and the other party's other relying on the misrepresentation to his, her or its detriment in executing a document or taking a course of action. Fraud in the factum occurs when a party procures another party's signature to an instrument without knowledge of its true nature or contents. The court recognized that a challenge to avoid or rescind a contract is subject to arbitration but a challenge to the very existence of a contract is not subject to arbitration. A claim of fraud in the factum is a challenge to the very existence of the contract. The court held that a claim of fraud in the factum is to be decided by a trial court or a jury, rather than the arbitrator.

However, in the case at issue, the court applied the reasonable reliance standard of *Foremost Insurance Company v. Parham*, 693 So. 2d 409 (Ala. 1997) and concluded that the plaintiff's reliance on the defendant's representation was not reasonable, inasmuch as the document was entitled "Arbitration Agreement" and he was not prevented from reading the documents he signed. The court then concluded that the plaintiff's claim of fraud in the factum was not meritorious, and ordered arbitration.

I. *W. D. Williams, Inc. v. Ivey* , 777 So. 2d 94 (Ala. June 30, 2000) (1980212) considered the ore tenus testimony of an automobile purchaser, who alleged various claims relating to problems with a vehicle she purchased from defendant, through a salesman whom she had known for about seven years and from whom she had previously bought other vehicles. The Supreme Court concluded that the testimony was sufficient to create a fact question regarding whether the purchaser's reliance on the salesman's representations was reasonable. The Court affirmed the trial court's denial of the motion for arbitration.

J. *Allmerica Financial Life Insurance & Annuity Co. v. Miller*, 775 So. 2d 132 (Ala. June 23, 2000) (1980529) considered §10101 of the NASD Code of Arbitration, which excepts from arbitration matters involving the insurance business of any member who is also an insurance company. Plaintiff was an insurance agent who sued his employer at another company through whom he was employed, alleging various wrongs arising out of the terms of his employment. He had become a top seller of certain insurance products and was promised vested commissions for selling this product. He alleged that the defendant companies sold off the product line to a

different company and thereby severed his vested commissions. The court held that his claims involved the insurance business of Allmerica, and that because they fell within the exception, the trial court correctly refused to compel arbitration.

K. *Southern Energy Homes, Inc. v. Gary*, 774 So. 2d 521 (Ala. May 26, 2000) (1972290) determined the arbitrability of claims against a mobile home manufacturer, who was a non-signatory to contracts containing arbitration provisions. Arbitration provisions were contained in real estate sales contracts between the purchaser and seller, and a retail installment agreement between the purchaser and the Bank of America, which provided financing for the mobile home purchase. The court held the scope of the arbitration clause in the sales contract was not sufficiently broad to encompass claims against the manufacturer, as it provided only that "any complaint between the parties" be settled by arbitration. The clause in the retail installment contract was broader, but it simply required arbitration of controversies or claims between the purchaser and the Bank or any assignees arising out of or relating to the contract. The manufacturer was not an assignee, so that did not require arbitration as to the manufacturer.

However, the court agreed with the manufacturer's arguments that the purchaser's claims against it were inextricably intertwined with his claims against the seller. The court pointed to claims that the seller was a co-conspirator with the non-signatory manufacturer in a concerted action to suppress the fact that the mobile home was sub-standard housing and that the manufacturer had a pattern and practice of not honoring its warranties. The court distinguished the general conspiracy allegations at issue in *Med Center Cars, Inc. v. Smith*, 727 So. 2d 9 (Ala. 1998), which had not identified a specific defendant who was subject to arbitration; this counter claim made specific allegations of conspiracy against the seller (who is clearly subject to arbitration) in addition to the allegations against manufacturer. This was deemed closer to *Ex parte Napier*, 723 So. 2d 49 (Ala. 1998), and the court concluded these claims were closely intertwined. This connection was held sufficient to subject all the claims against the manufacturer to arbitration.

The court also rejected arguments by a mobile home purchaser that he made no knowing waiver of his right to trial by jury, the arbitration clauses were contracts of adhesion, and they were unconscionable. Considering the documents together, the court concluded they clearly pointed out a purchaser executing them would be waiving the right to trial by jury and adequately informed the purchaser about the arbitration process. He did not present substantial evidence of unconscionability as his affidavit stated only that he had a tenth grade education, he did not know of the arbitration clause until his attorney informed him, that no one on behalf of the seller advised him as to the clause and what it meant, and that he had given nothing in exchange for being required to sign an arbitration provision.

L. *Norman v. Occupational Safety Association of Alabama Workmen's Compensation Fund*, ___So. 2d ___(Ala. June 30, 2000) (1980076) examined a limited arbitration clause, that specifically referenced only the signing parties; the court held that this did not encompass nonsignatory defendants. The plaintiff Fund entered a contract with Riscorp for the transfer of the Fund's workers compensation coverage to Riscorp. This contract contained an arbitration provision that any dispute or other matter or question between Fund and the insurer [Riscorp] arising out of or relating to the formation, performance or breach of the agreement shall be settled through arbitration.

The Fund sued Riscorp, as well as Peter Norman, a former administrator of the fund, and IAA, a company that furnished the administrator, alleging fraud, breach of fiduciary duties and breach of contract in recommending the transfer of coverage to Riscorp.

The court held that the nonsignatory defendants, Norman and IAA, could not require arbitration of claims against those defendants. The arbitration agreement was compared to that in *Med Center Cars, Inc. v. Smith*, 727 So. 2d 9 (Ala. 1998), which had limited the scope of the agreement to disputes, claims of controversies arising between the buyer and seller in that case.

M. *Southtrust Bank v. Williams*, 775 So. 2d 184 (Ala. July 21, 2000) (1980706) held that a bank's amendment of its internal regulations so as to provide for arbitration was effective with regard to a checking account customer's claim. The customer's failure to close the account, after receiving a copy of the amended regulation in his account statement, together with § 5-20-5, Alabama Code (1975), operated to supply the necessary assent.

N. *Liberty Finance, Inc. v. Carson*, ___So.2d _____ (Ala. Aug. 4, 2000) (1990400) (6-3) held that an arbitration provision contained in a consumer loan document was not broad enough to require arbitration of fraud claims against Liberty Finance and an insurance company. The arbitration clause was limited to any "dispute, controversy or claim arising out of or relating to any benefits or coverage hereunder or the breach thereof"; the fraud claim arose from an alleged requirement that the plaintiff/borrower purchase unneeded insurance.

O. *Southern Energy Homes, Inc. v. Hennes*, ____So.2d____ (Ala. August 4, 2000) (1982118) denied arbitration, holding that a mobile home manufacturer had not established that the purchaser had assented to an arbitration provision contained in a homeowner's manual. The manufacturer simply showed that it had unilaterally enclosed the arbitration provision in the manual, received by the purchaser; the manufacturer did not show a signature by the purchaser evidencing his assent, nor did it show assent manifested by ratification, as there was no evidence the purchaser had invoked the warranty contained in the manual, nor accepted the benefits of the warranty. The court noted that the purchaser could not pursue an express warranty claim, since he could not disavow the arbitration provision and at the same time rely on such a warranty that contained the provision.

P. *Brewbaker Motors, Inc. v. Belser*, ____ So.2d____ (Ala. Aug. 4, 2000) (1990034) held that a customer's claims against a repair shop for false imprisonment, negligence, malicious prosecution, fraud, and the tort of outrage, which arose from her arrest while using a loaner vehicle furnished by the repair shop, need not be arbitrated. After her arrest and release, she was told she had to sign an invoice which contained an arbitration agreement at the repair shop in order to obtain her own vehicle. The arbitration agreement related to disputes "concerning any of the negotiations for and performance of service or repairs to the vehicle... and all other aspects of the service and repairs performed on the vehicle." The customer paid no fee for using the loaner vehicle, and there was no suggestion that the parties "negotiated" for the loaner vehicle as a condition for having the customer's own vehicle repaired.

Q. *Ex parte Morris* , ___ So.2d _____ (Ala. October 27, 2000) (1990485) required homeowners to submit their claims against Terminix for negligence, wantonness, and fraud to arbitration. Among the issues considered were whether the arbitration provisions in a "Termite

Protection Plan" unilaterally issued by Terminix, a few months after a prior Terminix inspection report had proven to be incorrect and Terminix agreed to pay for work needed to repair termite damage, applied to pre-plan conduct. The majority rejected the homeowners' argument that the arbitration provisions of the Termite Protection Plan were not broad enough to cover claims that arose before the execution of that plan.

A dissent by Justice Johnstone, joined by Justice Cook, agreed with the homeowners' arguments, and further pointed out that the arbitration paragraph prohibited the arbitrator from holding Terminix responsible for termite damage existing before the issuance of the Termite Protection Plan. The effect of the order to arbitrate was not to determine the appropriate forum for the homeowners' claim but rather to destroy the claim altogether.

R. *Ex parte Discount Foods, Inc.* ___ So.2d ___ (Ala. January 12, 2001) (1991127), disapproved the rationale of *Ex parte Discount Foods, Inc.*, 711 So.2d 992 (Ala. 1998) which had indicated that even a broad arbitration provision should be not enforced to require arbitration of a claim alleging an intentional tort that is not related to the underlying transaction that gave rise to the arbitration agreement. The majority required enforcement of arbitration as to the other signatory to the arbitration provision, even as to claims alleging wrongful intentional conduct that did not relate to the contract containing the arbitration provisions. However, the majority did not require arbitration as to a defendant who was not a signatory, as the arbitration provision applied to a "controversy or claim between the parties."

S. *American General Finance, Inc. v. Branch,* ____ So.2d _____ (Ala. December 22, 2000) (1990887, 1990888) held that, as to one borrower/plaintiff, an arbitration clause contained in loan documents was unconscionable. The case alleged that plaintiffs were enticed, pursuant to a scheme or plan, to borrow money under circumstances that enabled defendants to collect excessive finance charges to sell customers "duplicative services" through "flipping" and to collect un unnecessary or excessive premiums for credit disability and life insurance. The Court held that the threshold question of unconscionability was a question for the court rather than the arbitrator. The Court looked at prior law indicating factors important in determining whether a contract is unconscionable: In addition to finding that one party was unsophisticated and/or uneducated, a court should ask (1) whether there was an absence of meaningful choice orone party's part; (2) whether the contractual terms are unreasonably favorable to one party; (3) whether there was unequal bargaining power among the parties; and (4) whether there was oppressive, one-sided, or patently unfair terms in the contract. The Court here found the arbitration provision unusually broad, relating to every actual or potential transaction, past, present or future. It purported to invest the arbitrator with the threshold issue of arbitrability. It exempted the defendants/lenders from the duty to arbitrate, permitting them the right to a jury trial for claims against the borrower. A further provision purported to limit the right of the arbitrator to award an amount exceeding five times the economic loss. Evidence established overwhelming bargaining power on the part of the defendant/lender. The majority upheld the trial court's finding that, as to one of the borrowers, the arbitration was unconscionable and unenforceable.

T. *McKee v. Hendrix*, ___ So.2d ___ (Ala. Civ. App. April 20, 2001) (2991185, 2000016) involved defendants' attacks on an award entered by arbitrator in favor of plaintiffs/homeowners. The homeowners sued for breach of warranty concerning home repairs,

seeking damages including mental anguish. The arbitrator awarded $16,322.42 in damages and attorney fees. The defendants appealed the trial court's order confirming and adopting the arbitrator's award, arguing the arbitrator exceeded his authority by awarding mental anguish damages because the warranty agreement excluded liability for mental anguish. The defendants based this on a warranty exclusion for incidental, consequential or secondary damages. However, the defendants had not objected in a timely way to the mental anguish claim, since they first objected only after the issue had been tried before the arbitrator and after they had filed their own posthearing brief. The Court of Civil Appeals rejected the defendants' arguments and also their arguments that this same warranty exclusion precluded attorney fee awards. The parties had agreed to arbitrate under the AAA Construction Industry Arbitration Rules, which permitted such attorney fees if all parties requested such an award.

U. *Cavalier Manufacturing, Inc. v. Jackson*, ___ So.2d ____ (Ala. April 13, 2001), concerning arbitration issues as to warranty, negligence and fraud claims against a mobile home manufacturer, held that the contract did involve interstate commerce so as to make applicable the FAA. Citing *Southern Energy Homes, Inc. v. McCray*, ___ So.2d ____ (Ala. December 1, 2000) (1991435), the Court held that an Alabama resident's purchase of a new mobile home, even one manufactured in Alabama, can be a transaction that substantially affects interstate commerce, depending upon the facts of its purchase, such as the source of the mobile home or its components. Because the company that constructed the home used components furnished by out-of-state suppliers, interstate commerce was substantially affected.

The purchasers argued that the arbitration provison's clause that prohibited the arbitrator from awarding punitive damages rendered the fraud claim not arbitrable, because it did not provide relief equivalent to remedies that would be available to the trial court. The Court remanded the case with instructions for the trial court to determine whether the arbitration clause was valid even though it prohibited the arbitrator from awarding punitive damages.

Chief Justice Moore dissented, expressing concern about the clause prohibiting the arbitrator from awarding punitive damages. He stated that "Those whose harm others should feel the sting of a judgment for damages. Could a thief contract with his victim to avoid any punishment beyond paying back the exact amount he stole?"

V. *Ex parte Thicklin*, ___ So.2d____, 2001 Ala. LEXIS 380 (Ala. Oct. 12, 2001) denied arbitration as to claims for express warranty and Magnuson-Moss Act violations, and held the arbitration clause's prohibition of punitive damages was unconscionable, but the remainder of the plaintiff's were deemed properly arbitrable.

W. *Adkins v. Palm Harbor Homes*, 157 F.Supp.2d 1256 (M.D. Ala. August 22, 2001) denied arbitration as to written express warranty claims, which were brought under the Magnuson-Moss Warranty Act. The failure to include all of the relevant terms of the warranty, including the requirement that the warranty had to be enforced through binding arbitration, if entered at the time of the purchase, violated the Magnuson-Moss Warranty Act.

X. *Auvil v. Johnson*, ___ So.2d____, 2001 Ala. LEXIS 210 (Ala. June 10, 2001) analyzed a series of cases dealing with non-signatory defendants, in determining that an insurance agent defendant had no standing to enforce an arbitration provision contained in a document that the agent did not sign. The doctrine of equitable estoppel intertwining does not

apply where the arbitration agreement is specifically limited to the parties, i.e., where the provision is not broad enough to indicate an intent on plaintiff's part to arbitrate with a nonsignatory.

(6) *Ex parte Early*, ____ So.2d____, 2001 Ala. LEXIS 219 (Ala. June 15, 2001) remanded the case for the trial court to conduct a hearing on whether mobile home buyers entered an arbitration agreement because of economic duress.

Z. *Cunningham v. Fleetwood Homes of Georgia, Inc*., ____ So.2d _____, 2001 Ala. LEXIS 115 (Ala. 2001), while explicitly refusing to decide whether the Magnuson-Moss Act makes arbitration agreements unenforceable as to all Magnuson-Moss claims, held that a mobile home manufacturer's failure to disclose in the warranty a term or clause requiring purchasers to utilize an informal dispute resolution mechanism runs afoul of Magnuson-Moss Act's disclosure requirements. The court affirmed the district court's order declining to compel arbitration of written or express warranty claims.

AA. A debtor who executed a promissory note which contained arbitration provisions, upon being sued by Regions Bank, filed a motion to compel arbitration *in Huntley v. Regions Bank*, _____ So.2d _____, 2001 Ala. LEXIS _____ (Ala. 2001). However, the debtor made no showing that the contract evidenced a transaction affecting interstate commerce, and arbitration was denied. The limited information in the record supported that the transaction was intrastate in nature; the debtors were Alabama residents and Regions Bank was a state banking association with its principal place of business in Mobile; the promissory note stated it had been delivered and accepted in the state of Alabama.

BB. *American General Finance Inc. v. Morton,* _____ So.2d _____, 2001 Ala. LEXIS 181 (Ala. 2001) denied enforcement of an arbitration clause, holding that American General failed to sustain its burden of showing the contract evidenced a transaction substantially affecting interstate commerce. Claims arising from plaintiff's purchase of real estate from American General were not required to arbitrated. The sale of real property in Alabama to an Alabama resident by an Alabama company, where all obligations arising out of the sales contract are to be performed in Alabama, is not a transaction within the flow of interstate commerce.

CC. *Ex parte Allen*, _____ So.2d _____, 2001 Ala. LEXIS 122 (Ala. 2001) found that the defendants had sustained their burden of showing a contract, involving construction and operation of a golf and country club, substantially affected interstate commerce. The golf course was designed by an Atlanta company, and it was contemplated that the design, layout and construction of the golf course would be performed by individuals and companies from other states. Representatives of the contractors in charge of construction travelled to Alabama from Florida on numerous occasions prior to the signing of the agreement; it was contemplated that the vast majority of materials, equipment, machinery and supplies necessary for construction would come from states other than Alabama.

DD. Equifirst, who financed a mobile home purchase, failed to obtain enforcement of an arbitration provision against Ware and Harrington in *Equifirst Corp. v. Ware*, ____ So.2d _____, 2001 Ala. LEXIS _____ (Ala. 2001). Harrington, who was a signatory to an arbitration

rider executed at closing, was not asserting claims against Equifirst, although Harrington had been added on Equifirst's motion as a party defendant. Ware did not sign any documents agreeing to arbitrate, and the court rejected Equifirst's argument that she was a third party beneficiary of the mortgage agreement, and Ware was not attempting to claim the benefit of the Harrington/Equifirst agreement.

EE. *Cook's Pest Control v. Boykin*, , ____ So.2d _____, 2001 Ala. LEXIS _____ (Ala. 2001) held that a hospital patient, bitten by fire ants, was not required to arbitrate her claims against Cook's Pest Control. The arbitration provisions relied on by Cook's were contained in its contract with the hospital. The patient specifically disavowed any status as a third-party beneficiary of the Cook's/hospital contract, and it appeared that she relied on theories of recovery that do not depend on the existence of the contract. The Court held that, to the extent she could prove prima facie elements of her case against Cook's without reference to the contract, she was not bound by the arbitration agreement. The Court also rejected Cook's contention that the patient's claims were "intertwined with" and "related" to the contract. She made substantial allegations of negligence that were independent of any contractual obligations. A non-signatory cannot require arbitration of a claim by the signatory against the non-signatory when the scope of the arbitration agreement was limited, as was the case here, to the signatories themselves.

FF. *Modern Woodmen of American v. McElroy*, ____ So.2d _____, 2001 Ala. LEXIS 143 (Ala. 2001) affirmed a denial of arbitration sought by Modern Woodmen and its agent in a fraud case alleging Modern Woodmen and its agents used plaintiff's health insurance premiums to purchase life insurance policies without plaintiff's knowledge. The Supreme Court found no error in the trial court permitting plaintiffs to amend their complaint to remove references and claims regarding a Celtic Life Insurance policy that contained the arbitration provisions. The Court further rejected the argument that the claims against Modern Woodmen and the agent, who were non-signatories to the Celtic Life policy, were intertwined with that contract, and found plaintiff not equitably estopped from avoiding arbitration.

GG. *Blue Cross and Blue Shield of Alabama v. Woodruff*, ____ So.2d _____, 2001 Ala. LEXIS _____ (Ala. 2001). Woodruff sued Blue Cross, alleging that it fraudulently sold policies that duplicated benefits that policy purchasers were entitled to receive from Medicaid. Blue Cross invoked arbitration provisions it had undertaken to place in a 1992 endorsement to the policy and a 1993 revision to the policy. However, its 1991 contract stated that the contract could be changed only by written amendments, endorsements or revisions, signed by one of its officers and sent to the policyholder, and the record did not reflect that this had been done.

HH *Thermo-Sav, Inc. v. Bozeman*, 782 So.2d 241 (Ala. 2000) affirmed a trial court's denial of Thermo-Sav's motion to compel arbitration where the arbitration clause was printed on the reverse side of the contract, presented on a clipboard to plaintiff Bozeman. The Court stated:

> The evidence suggests that Bozeman was not aware of any of the terms that appeared on the reverse side of the contract. Because Thermo-Sav knew of those provisions and failed to bring them to Bozeman's attention, the circuit court could have concluded that

Bozeman did not agree to be bound by those provisions and that those provisions, including the arbitration clause, are not enforceable against her.

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