# ALABAMA EVIDENCE UPDATE

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## INTRODUCTION

The purpose of this paper is to summarize some fairly recent cases/developments in Alabama evidence law. It is by no means an exhaustive summary of all recent developments, but it is designed to provide an overview of a few practical evidentiary issues that Alabama practitioners should know. The topics covered are as follows:

- Authentication of electronic evidence, i.e., emails, text messages, and website printouts
- Improper comments by trial judge from the bench
- Rule 404(b) evidence
- Self-Authentication of Business Records
- Alabama Hospital Records
- Hearsay/Business Records Exception
- Impeachment with Criminal Convictions
- Admissibility of guilty plea from district court in circuit court *de novo* trial
- Reopening case after it has been submitted to the jury
- Judicial Notice
- Curative Admissibility/"Opening the Door"
- Psychotherapist-Patient Privilege
- Hearsay/Statement Against Interest Exception to the Hearsay Rule
- Juror Testimony Post-Trial to Impeach Verdict
- Wealth of Parties
- Curative Admissibility; Introducing Other Incidents in Medical Malpractice Action

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## SUMMARIES OF RECENT ALABAMA EVIDENCE CASES

Authentication of electronic evidence, i.e., emails, text messages, and website printouts

While electronic evidence (social media, text messages, emails, websites, etc.) has become very common in litigation, there are very few Alabama appellate decisions addressing admissibility issues concerning such evidence. For example, although emails have been around for many years and are routinely offered into evidence in Alabama courts, no Alabama appellate court had "directly addressed the proper authentication of emails" until 2014 in *Culp v. State*, 178 So. 3d 378, 384 (Ala. Crim. App. 2014). Consistent with decisions across the country, the court held that the subject emails were properly authenticated under ALA. R. EVID. 901(b)(4) – "Distinctive Characteristics and the Like." Under Rule 901(b)(4), "evidence may be authenticated or identified upon the basis of its possessing distinctive characteristics which, when combined with the accompanying circumstances, furnish a basis for reasonably concluding that the evidence is what the offeror purports it to be."[2]

While Rule 901(b)(4) "is rarely cited in Alabama appellate decisions, outside Alabama it 'is one of the most frequently used to authenticate email and other electronic records.'"[3] It has been used across the country, for example, to authenticate emails, text messages, chat room conversations, and other types of electronic evidence.[4] Thus, an email may be authenticated

[2] Charles W. Gamble, Terrence W. McCarthy, & Robert J. Goodwin, *Gamble's Alabama Rules of Evidence*, § 901(b)(4) (3d ed. 2014).

[3] Terrence W. McCarthy & Allison Nichols-Gault, *A Guide to the Admissibility of Social Media/Electronic Evidence in Alabama*, 75 Ala. Law. 42, 44 (2014) (quoting *Lorraine v. Markel American Ins. Co.*, 241 F.R.D. 534, 546 (D. Md. 2007); Charles W. Gamble, Terrence W. McCarthy, & Robert J. Goodwin, *Gamble's Alabama Rules of Evidence*, § 901(b)(4), Practice Pointer 5 (3d ed. 2014).

[4] *See e.g*., *U.S. v. Siddiqui*, 235 F.3d 1318, 1322-23 (11th Cir. 2000) (email properly authenticated by circumstantial evidence, including the defendant's email address, content, use of defendant's nickname, and testimony of a witness who spoke to the defendant about the subject of the email); *Perfect 10, Inc. v. Cybernet Ventures, Inc*., 213 F. Supp.2d 1146, 1153-54 (C.D. Cal. 2002) (website posts ruled authentic due to circumstances); *Tienda v. State*, 358 S.W. 3d 633 (Tex. Ct. Crim. App. 2012) (content of postings on defendant's social media web page was sufficient circumstantial evidence to attribute the postings to the defendant in a prosecution for murder).

based on the circumstances such as the email address, email suffix, whether it was a reply email, and by information contained in the email exchange.

In *Culp*, the court concluded that, in accordance with Rule 901(b)(4), that the e-mails were properly authenticated under Rule 901(b)(4) as having been sent by the defendant. The defendant's girlfriend testified that the defendant sent her the e-mails, that she assisted him in setting up his e-mail account, that each e-mail contained the defendant's photograph and screen name, that many of the e-mails concluded with the defendant's initials, and that the e-mails contained code words uniquely used by the defendant and his girlfriend for referencing methamphetamine. Thus, there was enough circumstantial evidence to authenticate the emails.

Soon after *Culp* was decided, in *Smith v. Smith*, the Alabama Court of Civil Appeals quoted *Culp* extensively and found there was enough circumstantial evidence to authenticate the emails at issue under Rule 901(b)(4). *See Smith v. Smith*, 196 So. 3d 1191 (Ala. Civ. App. 2015).

Finally, in *Municipal Workers Compensation Fund, Inc. v. Morgan Keegan & Company, Inc.*, 190 So. 3d 895 (Ala. 2015), the Alabama Supreme Court relied upon Rule 901(b)(4) to rule that website materials were properly authenticated.

For more detailed information about admitting social media/electronic evidence, please see part 3 of this paper, which is an article I co-authored for The Alabama Lawyer along with Allison Nichols-Gault. The article can also be found on Westlaw, and the cite is *A Guide to the Admissibility of Social Media/Electronic Evidence in Alabama*, 75 Ala. Law. 42 (2014).

Improper comments by trial judge from the bench

In *S.A.M. v. M.H.W.*, No. 2160686, 2017 WL 5017396 (Ala. Civ. App. Nov. 3, 2017) (Not Yet Released for Publication), the Alabama Court of Civil Appeals reversed and remanded a child custody order when a juvenile-court judge improperly considered extrajudicial facts and remarks based on his own personal experiences when making his determination. The specific rules at issue in the case were Rule 201, which addresses when a court may take judicial notice of adjudicative facts, and Rule 605, which says that a trial judge is incompetent to testify at a trial over which he/she presides.

During the bench trial, the trial judge questioned the mother extensively during her testimony. For example, the mother had taken the child on a four month trip across the country and the judge questioned whether that was dangerous for a toddler. From the bench, the court indicated that the mother's decision to make the trip with the child indicated a lack of stability. The judge also questioned the mother about why the father should not have custody, and as an example the mother testified that the father "smokes marijuana or has in the past." *Id*. at * 3.

At that point, the judge extensively examined the mother, who worked seasonally for the forestry service in Washington, as to whether smoking marijuana makes a parent unfit. During this exchange, the judge offered his opinion of "outdoor people" residing in Washington, where the mother worked and intended to reside, and their propensity to smoke marijuana. *Id*. *4. Specifically, the judge commented that he had witnessed people in Washington smoking marijuana during a hiking trip to the state, questioning the mother's honesty with the court. *Id*. The judge concluded that the mother's concern that the father may or may not smoke marijuana around the child "did not make much sense" based on her "choosing to place her child around a

bunch of people who smoke marijuana" by moving to Washington and securing employment with the forestry service. *Id*.

The court awarded primary custody to the father.

On appeal, the mother argued that judge's comments from the bench ran afoul of two rules of evidence. First, the mother argued that the trial judge essentially acted as a witness at the trial, which is not allowed under Rule 605. Second, the mother argued that the court impermissibly took judicial notice of adjudicative facts that do not fall under the umbrella of Rule 201.

Regarding the first issue, the appellate court first observed that it found no Alabama cases interpreting Rule 605, so it engaged in an analysis of the Federal Rules of Evidence and the rules of evidence of other jurisdictions. *Id*. at *6. The court's research "revealed that Rule 605 and Rule 201 are often considered together when a trial judge makes comments regarding facts within his or her personal knowledge." *Id.* The court also quoted the general rule of Rule 605 as set forth in *McElroy's Alabama Evidence*: "'Obviously the trial court has broad power to question witnesses and to comment upon the evidence. Additionally, the court may take judicial notice of certain facts.... However, when the judge otherwise begins by comment to interject material and extrajudicial facts within the judge's own knowledge, and not properly noticed or judicially acquired, the judge may then be held to have become a witness in violation of Rule 605.'" *Id*. (quoting Charles W. Gamble & Robert J. Goodwin, *McElroy's Alabama Evidence*, § 95.05(1) (6th ed. 2009)).

The Court pointed out that judges who become a source of evidence by offering testimony on a particular issue based on personal knowledge place appellate courts in an impossible position, because they are forced to evaluate evidence whose character and probative

value are not shown in the record. *Id.* at *6. Furthermore, when a judge functions as a source of evidence, the parties are unable to vigorously cross-examine and impeach the judge due to their desire to remain in the judge's good graces. *Id*. at 8. Here, the court found that the judge's commentary on his own personal knowledge of marijuana usage among people in Washington to question the honesty of the mother was a violation of Rule 605 because it extended outside of his role of explaining, summarizing, or commenting on the evidence before him.

The comments of the trial judge were gleaned from his own personal knowledge and beliefs and did not pertain to the evidence presented before him. He was simply stating his own observations and opinions on marijuana usage by a certain group in Washington. In doing this, the judge rendered both parties unable to cross-examine his testimony concerning his observations, and the mother was not permitted to persuade what should have been an impartial fact-finder that she was moving to Washington for work, and not to surround her child with people who regularly use marijuana and, more importantly, that she was not being dishonest to the court about her position. Therefore, the court ruled that the judge's comments were a violation of both Rule 605 and 201.

Rule 404(b) evidence

As usual, the Alabama appellate courts have had several recent opportunities to address ALA. R. EVID. 404(b). In the five decisions addressed below, the trial courts were reversed in three of them. While all of these cases were criminal cases (as are most Rule 404(b) cases), the rule may also be used in civil cases.

Any discussion of Rule 404(b) should actually begin with Rule 404(a), which states that character evidence is inadmissible to prove that a person acted in conformity with that character

on the occasion in question. Notwithstanding this general exclusionary rule of character evidence, Rule 404(b) provides that evidence of a crime, wrong, or other act may be admissible for other purposes, such as proving "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." ALA. R. EVID. 404(b).

Invariably, the Rule 404(b) analysis begins when one party attempts to admit collateral acts against an opposing party. The most common example is the prosecution will attempt to introduce collateral acts of the defendant, which will typically draw an objection from the defense that the evidence violates the general exclusionary rule of character found in Rule 404. From that point, in theory, the Rule 404(b) analysis should always be the same:

- First, the prosecution must identify a permissible purpose for the evidence, i.e., a purpose other than conformity. For example, if the defendant is charged with constructive possession of cocaine, the prosecution may argue that the defendant's prior conviction for possessing cocaine is being offered to show knowledge, as opposed to being offered for conformity purposes.
- Second, the purpose identified by the prosecution must be material, i.e., "of consequence," to the case as provided in Rule 401. *See e.g., Frye v. State*, 185 So. 3d 1156, 1164-65 (Ala. Crim. App. 2015) (quoting MCELROY'S ALABAMA EVIDENCE in reversing conviction for first degree rape and sodomy; holding that trial court committed reversible error in admitting evidence of defendant's physical assault of victim 13 months before the alleged sexual assault under Rule 404(b) to prove intent, as intent is not an element of first degree rape or sodomy).
- Third, the evidence must be logically relevant under Rule 401. That is, the evidence must logically serve as a basis from which to infer the purpose. If the evidence does not prove

what you say it is offered to prove, it is inadmissible. *See e.g.*, *Frye v. State*, 185 So. 3d 1156, 1153-64 (Ala. Crim. App. 2015) (quoting cases that quote MCELROY'S ALABAMA EVIDENCE in reversing conviction for first degree rape and sodomy; holding that trial court committed reversible error in admitting evidence of defendant's physical assault of victim 13 months before the alleged sexual assault under Rule 404(b) to prove motive, as the state did not show how exactly the prior assault motivated defendant to commit the sexual assault at issue; further observing that the record suggested the more likely motive was over a dispute the defendant and victim had over child support payments).

- Fourth, the evidence must satisfy Rule 403 in that the probative value of the evidence must not be substantially outweighed by the danger of unfair prejudice.
- Fifth, the party against whom the evidence is offered is entitled to a jury instruction that informs the jury to restrict the evidence to its proper use.

The following are some Rule 404(b) cases decided by the Alabama appellate courts in recent history.

In *Lucas v. State*, 204 So. 3d 929 (Ala. Crim. App. 2016), while the criminal sexual abuse defendant failed to preserve the Rule 404(b) issues for appellate review, the Alabama Court of Criminal Appeals held that the defendant's two prior sexually related encounters with the teenage victim were properly admitted anyway to prove motive. The evidence indicated that when the victim was 13 or 14 years old, the defendant got in bed with her, put his arm around her, and called her "so hot." Approximately one year later, he asked her to join him to watch a pornographic video. Both of those collateral acts were deemed admissible to prove his motive and that he was sexually attracted to the victim. The court also held that evidence of the defendant inappropriately touching someone other than the victim subsequent to the sexual crime

at issue was admissible to prove that his motive for touching the teenage victim was his sexual desire for teenage girls.

While motive is commonly used as a means to admit Rule 404(b) evidence, the Alabama Supreme Court's decision of *Ex parte Boone*, 228 So. 3d 993 (Ala. 2016) shows that the use of motive does have some limits. In that case, the defendant was convicted of attempted murder and was sentenced to life in prison as a habitual offender. The defendant made one argument on appeal: that the trial court erred in admitting evidence that the defendant was affiliated with a "gang" because such evidence was: (1) presumptively prejudicial; (2) not relevant to motive (which was the purpose for which it was admitted); and (3) even if relevant, the probative value of the evidence was substantially outweighed by its prejudicial effect. The Alabama Supreme Court agreed and reversed the Alabama Court of Criminal Appeals (which had affirmed the trial court's decision to admit the evidence). More specifically, the Supreme Court ruled that the Court of Criminal Appeals "did not identify any link between [the defendant's] alleged affiliation with a gang and the asserted motive for the shooting." *Id*. at 996. Rather, the Supreme Court concluded that the animosity between the defendant and the victim arose out of a personal dispute and had nothing to do with gang affiliation or a gang dispute.

The *Boone* case is a good reminder of the third step of the Rule 404(b) analysis articulated above. That is, the evidence offered must be logically relevant to prove the purpose for which it is offered. In *Boone*, the evidence of gang membership had no link to the purpose for which it was offered – motive.

*Yates v. State*, 227 So. 3d 1240 (Ala. Crim. App. 2016) is another recent example where the trial court was reversed for the admission of Rule 404(b) evidence. The defendant was convicted at trial, as an accomplice, of murder, attempted murder, and shooting into an occupied

vehicle. At trial, the state was allowed to introduce evidence that in a telephone conversation one month after the shootings, the defendant informed Melton Crosby (a suspect in the crimes at issue) that he wanted to kill someone named Stacy Pittman who had stolen his clothes. The state argued that the conversation showed that the defendant and Crosby were conspiring to kill Stacy Pittman, and the evidence demonstrated that the defendant had the intent to aid and abet Crosby in the shootings at issue. The trial court admitted the evidence and instructed the jury that it was admissible only on the issue of intent.

In reversing the trial court, the court explained that "we can conceive of only one clear purpose for admitting the conversation between Yates and Crosby into evidence – to show Yates's propensity to kill." *Id*. at 1248. The court observed that the conversation was incomprehensible, it was not clear that there was any intent to aid and abet in the killing of anyone, and that the court failed to see its relevance. The court also said it was not necessary, as there was ample other evidence to show intent.

In *Horton v. State*, 217 So. 3d 27 (Ala. Crim. App. 2016), the defendant was on trial for capital murder that occurred during a robbery in the first degree, and the trial court was reversed for committing error on several Rule 404(b) issues. Specifically the trial court committed reversible plain error in admitting evidence of the defendant's use and sale of drugs, his prior assault on his mother, and his assault on his eyewitness girlfriend and threat to throw her into a fire. First, such evidence was not admissible to prove intent because the victim was shot twice in the head with a revolver, and intent to kill could easily be inferred by the use of a deadly weapon. Second, such evidence was not admissible to prove motive because there was nothing in the record to support that these collateral acts were linked to his motive to commit the murder. Third, the evidence was not admissible to rebut an insanity defense because the defendant had

withdrawn his insanity plea before trial. Fourth, the evidence was not admissible as falling within the *res gestae*, as the collateral acts were not inseparable from the murder or part of a continuous criminal transaction evidence was also inadmissible under Rule 403). Fifth, the evidence was also inadmissible under Rule 403.

The *Horton* trial court was affirmed in finding that evidence that the defendant escaped from a mental hospital while serving a jail sentence for an unrelated crime was admissible as indicative of consciousness of guilt where the murder in question was committed shortly before defendant's escape. Further, the defendant's threat to shoot anyone who did not help him get out of jail and to burn their houses down was also admissible as relevant to consciousness of guilt. However, the case was reversed and remanded due to the other evidentiary errors already described.

In *Walden v. State*, 243 So. 3d 300 (Ala. Crim. App. 2016), the defendant appealed his conviction for the unlawful possession of marijuana. He argued on appeal that the trial court erred in admitting two prior convictions – one for the first degree possession of marijuana, and the other for the unlawful distribution of a controlled substance (marijuana). The trial court ruled that the convictions were admissible under Rule 404(b) for the purpose of showing intent and knowledge as part of the constructive possession charge, and the jury was instructed accordingly. The appellate court affirmed the admissibility of the convictions, as they were properly admitted to show knowledge, and they did not run afoul of ALA. R. EVID. 403.

Self-Authentication of Business Records

Rule 803(6), commonly known as the business records exception to the hearsay rule, provides a hearsay exception for records of regularly conducted activity. Historically, absent a

stipulation of the parties, the proponent of a business record was typically required to establish the Rule 803(6) foundation by calling a live witness at trial. In 2000, recognizing that producing a live witness to answer a few routine questions was often burdensome and a waste of time, the federal rules were amended to provide a method for the self-authentication of business records. Effective October 1, 2013, the Alabama Rules of Evidence adopted the federal approach with the addition of Rules 902(11), 902(12), and an amendment to Rule 803(6). Rule 902(11), which provides for the self-authentication of certified *domestic* records of regularly conducted activity, provides as follows:

> **Rule 902. Self-authentication**.
> Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:
> * * * *
> **(11) Certified Domestic Records of Regularly Conducted Activity**. The original or a duplicate of a domestic record of regularly conducted activity that would be admissible under Rule 803(6) if accompanied by an affidavit or sworn testimony of its custodian or other qualified person, certifying that the record:
> (A) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;
> (B) was kept in the course of the regularly conducted activity; and
> (C) was made by the regularly conducted activity as a regular practice.
> A party intending to offer a record into evidence under this section must provide written notice of that intention to all adverse parties and must make the record and certification available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.

Rule 902(11) has several important provisions. First, the proponent obviously must demonstrate that the foundational elements of Rule 803(6) are satisfied. While this was traditionally done with live testimony, a proponent may now satisfy the foundational

requirements of Rule 803(6) if the proposed records are accompanied "by an affidavit or sworn testimony of [a] custodian or other qualified person."

Second, there are two procedural requirements that the proponent must satisfy. The first procedural requirement is that a party intending to offer business records with a Rule 902(11) certification must provide written notice of this intent to all adverse parties. The second procedural requirement is that the proponent must make the business records and certification available for inspection prior to offering them into evidence in sufficient time to provide the adverse parties a fair opportunity to challenge the records and certification.

Finally, if the requirements of Rule 902(11) and amended Rule 803(6) are satisfied, the record will satisfy the requirements for authentication, hearsay, and the best evidence rule. All other potential objections, such as relevance, remain.

Rule 902(12), which provides for the self-authentication of certified *foreign* records of regularly conducted activity, is virtually identical to Rule 902(11), which provides for the self-authentication of certified domestic records.

Alabama Hospital Records

In *D.E.R. v. State*, 254 So. 3d 242 (Ala. Crim. App. 2017), the Alabama Court of Criminal Appeals reversed and remanded a sodomy conviction because the trial court admitted statements from hospital records into evidence that did not meet a hearsay exception. As most Alabama lawyers know, Ala. Code § 12-21-5 grants self-authenticating status to Alabama hospital records when accompanied by a records custodian affidavit that substantially complies with the language in Ala. Code § 12-21-7. In addition, the records may overcome a hearsay objection if the original hospital record was made and kept in the usual and regular course of

business of the hospital, it was in the regular course of business of the hospital to make and keep such record, and the record was made at the time of such acts, transactions, occurrences or events therein referred to occurred or arose or were made, or within a reasonable time thereafter. Ala. Code § 12-21-5.

While the prosecution had a records custodian affidavit for the records, the Alabama Court of Criminal Appeals ruled that it did not substantially comply with Ala. Code § 12-21-7 because it did not reference the defendant, the court, the hospital location, or the victim/patient. In addition, the court observed that "[n]o custodian or other qualified witness testified that the medical records complied with the requirements set out in Rule 803(6)," which is the business records exception to the hearsay rule. *Id*. at 250. Accordingly, the records were inadmissible hearsay.

A discussion of the *D.E.R*. decision would be incomplete without mentioning Ala. R. Evid. 902(11), which gives self-authentication and hearsay exception status to business records. As discussed previously, Rule 902(11), which became effective October 1, 2013, provides that domestic records of regularly conducted activity may be admitted without a live witness if accompanied by a certification that sets forth the foundation for the business records exception contained in Rule 803(6). The hospital records at issue in *D.E.R*. were accompanied by a records custodian affidavit that included the following language: "I am the custodian of records for Riverview Regional Medical attached hereto are 14 pages of medical records. These said pages are kept in the regular course of business, and it was in the regular course for an employee or representative of RRMC, with knowledge of the act, event, condition, or diagnosis, recorded to make the record or to transmit information thereof to be included in such record; and the record was made at or near the time or reasonbl[y] soon thereafter." *Id*. at 253.

The language in the above affidavit arguably complies with Rule 902(11)/803(6), which would allow for the records to be self-authenticating and fall under the business records exception to the hearsay rule. The prosecution, however, did not make this argument in its original appeal brief, but instead raised it for the first time on application for rehearing. Thus, the issue was not properly before the court. *Id*. at n. 9.

The same footnote in which the court stated that the Rule 902(11)/803(6) issue was not before the court also states as follows: "Rule 803(6) provides that records of a regularly conducted business may be certified under Rule 902(11) or 902(12), Ala. R. Evid. Rule 902(11) concerns certified domestic records of regularly conducted activity, and Rule 902(12) concerns certified foreign records [of] regularly conducted activity. Accordingly, these provisions are not applicable here." *D.E.R.*. 254 So. 3d at 250 n. 9.

While the opinion says the provisions of Rule 902(11) and 803(6) "are not applicable," they presumably would have been applicable had the argument been properly made. Indeed, the original drafters of Rule 803(6) explained that "[a] hospital record that satisfies the elements of [Rule 803(6)] would be admissible as under pre-rules Alabama evidence law. Use of the term 'diagnoses' makes this clear. Such admissibility abrogates the necessity for, at least for hearsay purposes, the preexisting specialized statute making admissible certified copies of hospital records that are generated in the usual and regular course of the hospital's business. Ala. Code 1975, § 12-21-5." Ala. R. Evid. 803(6) advisory committee's notes. And, because Rule 902(11) provides that records "that would be admissible under Rule 803(6)" can be admitted with an affidavit that sets forth the necessary elements, hospital records can potentially be admitted through 803(6) and 902(11). Thus, even though those provisions were "not applicable" in the

*D.E.R.* decision, the intent behind Rule 902(11) and Rule 803(6) appears to be that hospital records can be authenticated under these provisions if done properly.

Hearsay/Business Records Exception

In *Ingmire v. State*, 215 So. 3d 592 (Ala. Crim. App. 2016), the Alabama Court of Criminal Appeals reversed and remanded the trial court over the admission of a report from the National Crime Information Center ("NCIC"). The defendant in that case allegedly stole a four-wheeler all-terrain vehicle and was convicted of second degree theft of property. The prosecution admitted into evidence over a hearsay objection an NCIC report from Florida indicating that a four-wheeler had been stolen. The primary issue on appeal was whether the NCIC report fell under ALA. R. EVID. 803(6), which is the business records exception to the hearsay rule.

First, the appellate court noted that the NCIC report fell within the definition of hearsay because it was offered to prove the truth of the matter asserted, i.e., to show that the four-wheeler was stolen. The court next observed that "[a]lthough Alabama courts have addressed the admissibility of police reports, we have been unable to locate any Alabama case addressing whether NCIC police reports fall within any of the hearsay exception – specifically the business records exception." *Id*. at 596. Other jurisdictions that previously addressed the issue did so with mixed results. The court then concluded that "there was no evidence in this case to show that the information within the report fell within the business records exception—or any other exception—to the hearsay rule." *Id. at* 597. As part of its analysis, the court stated that "Officer Bruner did not testify regarding the regularity of the preparation of the NCIC reports. Furthermore, there was no evidence to show that the NCIC reports were regularly relied on by

the Geneva County Sheriff's Office. In fact, there was no testimony in this case to establish that the information within the NCIC report was trustworthy. Thus, we hold that the circuit court erred when it allowed Officer Bruner to testify regarding information that he learned from the NCIC report." *Id*. at 597.

Impeachment with Criminal Convictions

It has long been the law in Alabama and Federal courts that a witness may be impeached with certain prior convictions. Historically, Alabama law limited these past convictions for impeachment purposes to crimes of moral turpitude. Charles W. Gamble, Terrence W. McCarthy & Robert J. Goodwin, *Gamble's Alabama Rules of Evidence*, § 609 (3d ed. 2014); Ala. R. Evid. 609 advisory committee's notes. With the adoption of Rule 609 of the Alabama and Federal Rules of Evidence, two categories of convictions are now allowed to impeach a witness: (1) crimes punishable by death or greater than one year in prison (the common definition of a felony); and (2) crimes of dishonesty or false statement.

If a witness has been convicted of a crime of dishonesty or false statement that is less than ten years old, it is "automatically admissible." That is, the trial judge has no discretion to exclude the conviction for unfair prejudice. If the impeaching conviction is a merely a felony and is not a crime of dishonesty or false statement, the trial judge is vested with discretion to weigh the unfair prejudice against the probative value. *See generally*, Ala. R. Evid. 609(a) (containing balancing tests for felony convictions under 609(a)(1), but not containing balancing test for crimes of dishonesty or false statement under 609(a)(2)).[5]

[5] For any witness other than the criminally accused, the Court must perform a Rule 403 analysis to determine if the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. Because Rule 403 favors inclusion of evidence rather than exclusion, it is typically difficult for an attorney to argue that the conviction of someone other than the criminally accused would be inadmissible under Rule 403. By

In *Ex parte Byner*, No. 1170397, 2018 WL 3947705 (Ala. Aug. 17, 2018) (Not Yet Released For Publication), the Alabama Supreme Court decided, as a matter of first impression, that a prior robbery conviction qualifies as a crime of dishonesty or false statement. The Court heavily relied on a prior opinion from the Alabama Court of Criminal Appeals which held that theft is a crime of dishonesty or false statement. *See Huffman v. State*, 706 So. 2d 808 (Ala. Crim. App. 1997). The Supreme Court in *Byner* expressly rejected the more narrow interpretation of crimes of dishonesty or false statement followed by the majority of federal courts.

Admissibility of guilty plea from district court in circuit court *de novo* trial

*Woods v. State*, No. 1151152, 2016 WL 7428394 (Ala. Dec. 23, 2016) (Not Yet Released For Publication) is a DUI case in which the Alabama Supreme Court agreed with the trial court, reversing the Alabama Court of Criminal Appeals in the process. In *Woods*, the defendant pleaded guilty to DUI in Montgomery County District Court. He then appealed to the Montgomery County Circuit Court for a trial *de novo*, where he was again convicted of DUI. At the Circuit Court trial, over the defendant's objection, the prosecution admitted a redacted copy of the sentencing order from the District Court in which his guilty plea had been accepted. The defendant's sole argument on appeal was that it was error to introduce the District Court's judgment of guilt into the *de novo* trial in the Circuit Court.

The state's primary argument, relying on *Phillips v. City of Dothan*, 534 So. 2d 381 (Ala. Crim. App. 1988), was that a defendant's guilty plea in a lower court, but not the judgment itself,

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contrast, it is a much tougher burden to impeach the criminally accused with a felony conviction. Under those circumstances, the impeaching party must show that the probative value of the evidence outweighs its prejudicial effect to the accused – a reverse Rule 403 test. Thus, it is often difficult to successfully impeach the criminally accused with a prior conviction due to this exacting balancing test.

is admissible in a criminal trial in the circuit court because a guilty plea is a judicial confession. In response, the Court of Criminal Appeals overruled the holding in *Phillips*, stating that "we are convinced that the holding in *Phillips* violates well settled principles of law regarding a trial *de novo* and that the admission of such evidence is inherently prejudicial." *Woods v. State*, CR-14-0845, 2016 WL 3136203, at *5 (Ala. Crim. App. June 3, 2016) (Not Yet Released For Publication). In a trial *de novo*, the Alabama Court of Criminal Appeals held that the defendant's slate is "wiped clean," so a defendant in the circuit court should not be encumbered by a guilty plea made in the district court. The Alabama Court of Criminal Appeals also concluded that the guilty plea in these circumstances "is so overly prejudicial that it runs afoul of Rule 403, ALA. R. EVID." *Id*. at *6.

In a case of first impression, the Alabama Supreme Court reversed the Alabama Court of Criminal Appeals, holding it is not improper to admit into evidence in a trial *de novo* in the Circuit Court evidence of a defendant's guilty plea in the District Court (assuming the plea was voluntary and not induced by coercion or by some other improper way). *Woods v. State*, No. 1151152, 2016 WL 7428394 (Ala. Dec. 23, 2016) (Not Yet Released For Publication). The Supreme Court also clarified that the judgment from the district court is not admissible in the trial *de novo*, but the guilty plea is admissible, as it is in the nature of a judicial confession. As the Supreme Court further explained, the guilty plea does not function as a conclusive presumption of guilt, and can be challenged or explained away like any other piece of evidence. The Supreme Court also ruled that admission of the guilty plea did not unfairly prejudice the defendant so it did not violate Rule 403 of the Alabama Rules of Evidence.

Reopening case after it has been submitted to the jury

*Ex parte State of Alabama (In re: Geranda Marcine Harris v. State of Alabama)*, 235 So. 3d 258 (Ala. 2016), is another case in which the Alabama Supreme Court agreed with the trial court and reversed the Alabama Court of Criminal Appeals.

First, in *Harris v. State*, 235 So. 3d 255 (Ala. Crim. App. 2016), the Alabama Court of Criminal Appeals reversed the trial court in this burglary case for allowing the jury to take a closer look at the defendant after deliberations had begun. At trial, a surveillance video and photographs were shown to the jury which depicted a burglary of a liquor store. The defendant's main argument was that the person depicted in the video was not him, and defense counsel in opening statement asked the jury to pay attention to the defendant's physique and to compare it with the physique of the person in the video. During closing argument, defense counsel once again referenced the defendant's physical features and argued that the person in the video and pictures was not the defendant.

After jury deliberations began, the jury sent a note to the judge asking: "Can we take a closer look at the defendant and/or use picture, hold it up in hand while doing so?" The trial court, over the defendant's objection, granted the request and had the defendant stand in front of the jury in the courtroom for "a number of seconds." The defendant was convicted, and on appeal, the defendant argued that this was the equivalent of reopening the case after it had been submitted to the jury.

The Alabama Court of Criminal Appeals launched into an analysis of other cases. Some of those cases included the trial court being reversed for allowing the jury to take a closer look at the defendant after jury deliberations had begun. In another case, *Jolly v. State*, 405 So. 2d 76 (Ala. Crim. App. 1981), the trial court was not reversed even though it granted the jury's request

after deliberations had begun to see a photograph that had not been admitted into evidence. Although technically an error to show the jury the photograph, the Alabama Court of Criminal Appeals determined it conveyed no new information to the jury and technical errors such as that one do not rise to the level of reversible error.

Ultimately, in determining that the trial court committed reversible error in allowing the jury to take a closer look at the defendant after deliberations had begun, the Alabama Court of Criminal Appeals explained the decision as follows: "Although the State is correct in its assertion that the jury's final examination of Harris gave it no more information than it already had, *Ex parte Batteaste* stands for the proposition that the rule discussed in *Jolly* and *Merriweather*, i.e., that it is not reversible error to allow evidence that has not been admitted to go to the jury if that evidence provides no new information, is different when that evidence relates to the person of the defendant. Accordingly, the trial court erred by overruling Harris's objection to the jury's request to look at him after it had begun deliberations."

In *Ex parte State of Alabama (In re: Geranda Marcine Harris v. State of Alabama)*, 235 So. 3d 258 (Ala. 2016), the Alabama Supreme Court reversed the Alabama Court of Criminal Appeals, and the rationale for the reversal was succinctly summarized as follows: "In the present case, we are not presented with a situation, like those in *Ex parte Batteaste*, *Harnage*, and *Caver*, where the case was submitted to the jury without the defendant's appearance ever being specifically presented to the jury. Instead, on more than one occasion before the jury retired, Harris's counsel specifically asked the jury to observe Harris's appearance. Thus, this evidence was specifically presented to the jury and was not new evidence, and the parties had the opportunity to address this evidence before the case was submitted to the jury." The Supreme Court found that the trial court did not reopen the case and allow the presentation of new

evidence after the case had been submitted to the jury, and the decision of the Alabama Court of Criminal Appeals was reversed.

Judicial Notice

*Petrina v. Petrina*, 215 So. 3d 1075 (Ala. Civ. App. 2016), a divorce action, is another recent case in which the trial court was reversed based on an evidentiary issue. The trial court found that prior to the marriage, the husband was a Romanian-born illegal alien who made approximately $20,800 per year. His wife earned substantial income, and the court found that the husband enjoyed the lifestyle of a very wealthy man during the marriage. In the divorce judgment, the Court wrote that the husband is now a naturalized citizen, he will remain so after the divorce, and that American citizenship provided a great financial benefit to him. The court then referred to a 2012 study from the Migration Policy Institute that indicated, on average, a naturalized citizen earns 67% more than a non-citizen. The court awarded the husband $100,000 of the marital estate. The husband appealed this judgment, and he argued that the Migration Policy Institute publication was not mentioned at trial, it was not introduced into evidence, and it was improper for the court to take judicial notice of information from that publication.

The Alabama Court of Civil Appeals agreed with the husband that the trial court erred in taking judicial notice of information from the publication. Such information did not fall within the parameters of ALA. R. EVID. 201, which says a court may take judicial notice of adjudicative facts only when they are beyond reasonable dispute either because they are generally known within the court's territorial jurisdiction or because they can be accurately and readily determined by consulting sources that are acknowledged to be accurate.

Curative Admissibility/"Opening the Door"

In *Caver v. State*, 219 So. 3d 1 (Ala. Crim. App. 2016), a trial court was again reversed on an evidentiary issue. The defendant was charged with the unlawful possession of marijuana that was found at his girlfriend's house. The girlfriend testified the marijuana found in a bedroom of the house belonged to her. There was some mail in the house with the defendant's name on it, and the girlfriend testified that those were letters she had written to the defendant while he was in prison on an unrelated case, and it was returned to her because she sent it to the wrong address. On cross-examination, the prosecution elicited that when she wrote letters to the defendant in prison, he was serving time for burglary and sodomy. While defense counsel objected to the relevance of this line of questioning, the court ruled that the defense had "opened the door" when the girlfriend testified that the letters were returned when she attempted to mail them to the prison. The defendant was convicted, and he appealed.

The Alabama Court of Criminal Appeals reversed the trial court, holding that the defense did not open the door to which the prosecution could ask about the specifics of his prior convictions. While the defense counsel did open the door to the matter of the defendant previously serving prison time, this was merely to explain why the mail addressed to the defendant was found in the house and to show the girlfriend possessed the mail, as opposed to the defendant. It was highly prejudicial for the jury to hear about the burglary and sodomy convictions, and the error was not harmless.

Psychotherapist-Patient Privilege

*Ex parte Johnson*, 219 So. 3d 655 (Ala. Civ. App. 2016), is a recent example of an unsuccessful attempt to try to pierce the psychotherapist-patient privilege, found in ALA. R.

EVID. 503. In this post-divorce child custody modification proceeding, the former husband issued a third-party subpoena seeking documents from a clinical psychologist who had provided services to the child of the marriage. The psychologist filed a motion to quash the subpoena, which was denied by the trial court. The psychologist filed a petition for writ of mandamus.

At issue in the mandamus was whether the child's records fell under an exception to the privilege, which provides that "[t]here is no privilege under this rule for relevant communications offered in a child custody case in which the mental state of a party is clearly an issue and a proper resolution of the custody question requires disclosure." ALA. R. EVID. 503(d)(5) (emphasis added). Relying on *Jones v. McCoy*, 150 So. 3d 1074, 1081 (Ala. Civ. App. 2013), the appellate court held that its "precedent indicates that a child is not considered to be a party to a child-modification action." Further, the court observed that the advisory committee's notes to Rule 503 suggest the exception is intended to apply when the mental state of the person seeking custody, not the mental state of the child who is the subject of the custody dispute, is at issue. Thus, the child's records were covered by the privilege, the exception did not apply, and the trial court erred in denying the motion to quash.

More recently, in *Ex parte Altapointe Health Systems, Inc.*, 249 So. 3d 1108 (Ala. 2017), the Alabama Supreme Court made it clear that the psychotherapist-patient privilege does not necessarily protect all information within the knowledge of a mental health professional. In that case, the plaintiff was a resident of a mental health care facility, and he sued the facility for negligence, wantonness, and other claims after he was attacked by another resident. The plaintiff served the defendant with an interrogatory asking if the defendant was aware of any prior aggressive acts of the resident who allegedly attacked the plaintiff. The defendant objected due to the psychotherapist-patient privilege. The Alabama Supreme Court found the objection was

improper, as the privilege is intended to protect confidential communications between a patient and the psychotherapist. If a mental health facility gained knowledge of other attacks outside of a confidential setting, the privilege would not apply. Thus, the court ultimately "reject[ed] [the defendant's] blanket contention that all information within is knowledge pertaining to [the alleged attacker] is protected by the psychotherapist-patient privilege." *Id.* at 1115.

Hearsay/Statement Against Interest Exception to the Hearsay Rule

In *Sheffield v. State*, 248 So. 3d 38 (Ala. Crim. App. 2017), the Alabama Court of Criminal Appeals addressed a case of first impression for Alabama regarding the statement against interest exception to the hearsay rule. As background, Rule 804(b)(3) of the Alabama Rules of Evidence provides a hearsay exception for statements made by an unavailable declarant against "the declarant's pecuniary or proprietary interest." Ala. R. Evid. 804(b)(3). While the corresponding federal rule also covers statements against the "penal" interest of the unavailable declarant, Alabama's rule does not extend to such statements.

The defendant was convicted of murder, and on appeal the defendant argued that the trial court erred in admitting his wife's out of court statements implicating the defendant in the murder. The trial court ruled that because these statements implicating the husband in the murder were against her husband's penal interest, they were admissible because that made them against the pecuniary and proprietary interest of the wife. The Alabama Court of Criminal Appeals reversed the trial court, finding that a reasonable person under the circumstances would not have considered the risk to the wife's pecuniary or proprietary interest so great that she would not tell a lie.

Juror Testimony Post-Trial to Impeach Verdict

The "no impeachment rule" generally provides that a juror may not testify about statements made during jury deliberations if offered to challenge the validity of a verdict or indictment. This longstanding rule has roots dating back to English common law, and is codified in Rule 606(b) of both the Federal and Alabama Rules of Evidence.

Federal Rule 606(b) begins with a general exclusionary rule that a juror may not testify about statements made or occurrences during jury deliberations if offered during an inquiry into the validity of the verdict or indictment. Fed. R. Evid. 606(b)(1). Three exceptions to this general exclusionary rule are listed in the text of the rule. The exceptions provide that jurors may testify about: (A) "extraneous prejudicial information" improperly brought to their attention; (B) "outside influences" improperly brought to bear on any juror; and (C) a mistake on the verdict form.[6] Fed. R. Evid. 606(b)(2).

The Alabama Rules of Evidence became effective January 1, 1996, and while Ala. R. Evid. 606(b) has some differences from the corresponding federal rule, the rules are very similar. The Alabama rule, like the federal rule, contains a general exclusionary rule that prohibits juror testimony about statements made and occurrences during jury deliberations if offered during an inquiry into the validity of the verdict or indictment. Ala. R. Evid. 606(b). The Alabama rule also contains the "extraneous prejudicial information" and "outside influences" exceptions. Alabama's rule, however, does not contain the "mistake on the verdict form" exception that was added to the federal rule by amendment in 2006.

In *Ankor Energy, LLC v. Kelly*, Nos. 1151269 & 1160476, 2018 WL 4090567 (Ala. Aug. 24, 2018) (Not Yet Released For Publication), the losing side at trial, the Kellys, filed a motion

[6] The "mistake on the verdict form" exception was added to Fed. R. Evid. 606(b) by amendment in 2006.

for new trial on the basis that a juror conducted independent online research to become familiar with various technical terms presented during the trial. Attached to the motion was a handwritten unsworn "affidavit" from that juror describing what she did. In response, Ankor moved to strike the handwritten juror affidavit on the following grounds: (1) it was an impermissible attempt to impeach the jury's verdict; (2) even if the affidavit were considered, there was no showing of prejudice to the Kellys; (3) because the juror did not share the information with other jurors, the online search could not have affected the other jurors' decisions; and (4) the handwritten affidavit was not properly sworn. The trial court granted the motion for new trial.

The Alabama Supreme Court reversed, holding that the trial court exceeded its discretion in not striking the handwritten juror affidavit. While the Supreme Court did acknowledge that the juror conducting online research fell with the "extraneous-information exception to Rule 606(b)," the affidavit was insufficient because it was not sworn. Notably, the juror was not administered an oath, nor was the juror otherwise informed that she was swearing to tell the truth in the handwritten affidavit. The attorney who obtained the affidavit did add a jurat, indicating when, where, and before whom the affidavit was sworn, but it was not added until after the juror signed the affidavit. Thus, the Supreme Court concluded that "[w]ithout the administering of an oath or the recital on the document that it was being made under oath before the juror signed it, the handwritten affidavit was not a sworn document. The trial court exceeded its discretion in denying Ankor's motion to strike the handwritten affidavit." *Id*. at *7.

The Alabama Supreme Court further explained that juror misconduct regarding the use of extraneous materials warrants a new trial only when one of two requirements is met: (1) the jury verdict was "actually prejudiced" by the extraneous information; or (2) the extraneous

information is of such type as to constitute prejudice as a matter of law, i.e., "presumed prejudice." There was no "actual prejudice" in this case because the juror did not share the information with any other jurors and she stated in a separate affidavit that the extraneous information did not motivate her in any way. There was no "presumed prejudice" because the juror stated in another affidavit that she obtained "very little information" from her search, she did not share this information with other jurors, and there was nothing to indicate that the jury deliberations as a whole or the individual juror's decision was tainted by the misconduct.

Another pivotal decision impacting Rule 606(b) was issued by the United States Supreme Court in 2017. While Rule 606(b) lists specific exceptions to the "no impeachment rule," the United States Supreme Court has added a new exception based on the Sixth Amendment to the United States Constitution. Specifically, on March 6, 2017, the United States Supreme Court in *Pena-Rodriguez v. Colorado*, 137 S.Ct. 855 (2017), ruled that where a juror makes a "clear statement" indicating that he or she relied on racial stereotypes or animus to convict a criminal defendant, other jurors may be permitted to testify about these statements during an inquiry into the validity of the verdict or indictment even if they occurred during jury deliberations.

The *Pena-Rodriguez* case arose out of a criminal prosecution in Colorado. Rule 606(b) of the Colorado Rules of Evidence, like the corresponding federal and Alabama rules, generally precludes jurors from giving testimony about statements made during jury deliberations in a proceeding that inquiries into the validity of the verdict.

In *Pena-Rodriguez*, the defendant, a Hispanic male, was charged with harassment, unlawful sexual contact, and attempted sexual assault on a child. During *voir dire*, members of the venire were asked repeatedly whether they could be fair and impartial, and at no time did any of the empaneled jurors express any reservations based on racial or any other bias. The

defendant was found guilty of harassment and unlawful sexual contact, but no verdict was reached on the sexual assault charge.

The defendant filed a motion for new trial, and attached to that motion were affidavits from two jurors. Those affidavits described numerous biased statements made by a juror identified as "Juror H.C." For example, Juror H.C. stated that in his experience as an ex-law enforcement officer, "Mexican men had a bravado that caused them to believe they could do what they wanted with women." 137 S.Ct. at 862. He also said that "I think he did it because he's Mexican and Mexican men take whatever they want," as well as several other racially biased statements. *Id*.

Although the trial court recognized and acknowledged the bias of Juror H.C., the motion for new trial was denied because "[t]he actual deliberations that occur among the jurors are protected from inquiry under [Colorado Rule of Evidence] 606(b)." *Id*. at 862. This ruling was affirmed by the Colorado Court of Appeals and the Colorado Supreme Court, with both appellate courts relying on the general "no impeachment rule" of Rule 606(b).

By a 5-3 vote, the United States Supreme Court reversed and remanded the case, essentially creating a new "racial bias" exception to the general "no impeachment rule." In writing for the majority, Justice Kennedy acknowledged the long history and policy reasons for the "no impeachment rule," but he also emphasized that "[t]ime and again, this Court has been called upon to enforce the Constitution's guarantee against state-sponsored racial discrimination in the jury system." *Id*. at 867. The majority then concluded: "A constitutional rule that racial bias in the justice system must be addressed – including, in some instances, after the verdict has been entered – is necessary to prevent a systematic loss of confidence in jury verdicts, a confidence that is a central premise of the Sixth Amendment trial right." *Id*. at 869.

The Court then explicitly expressed the new exception as follows: "where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee." *Id*.

Wealth of Parties

It is well settled and well known that "[a] civil litigant is precluded generally from making the jury privy to the litigant's own poverty or an opponent's wealth. This preclusion has given rise to a general rule of exclusion with regard to wealth or poverty of litigants when offered to enhance or mitigate damages." Charles W. Gamble, Terrence W. McCarthy, & Robert J. Goodwin, *Gamble's Alabama Rules of Evidence*, § 414 (3d ed. 2014).

In *Ansley v. Inmed Group, Inc.*, No. 1160465, 2018 WL 2076434 (Ala. May 4, 2018) (Not Yet Released For Publication), the Alabama Supreme Court once again recognized that, notwithstanding the above general exclusionary rule, evidence of financial worth can be admissible if it goes to a material issue in the case or if a party "opens the door" to such evidence. *Id*. at * 9. In this wrongful death action, the plaintiff argued that the court erred in allowing evidence showing the poor financial status of the defendant hospital and in refusing to allow rebuttal evidence of the hospital's alleged wealth. The Alabama Supreme Court affirmed the decision of the trial court.

The plaintiff's primary theory of liability was that the defendant hospital did not have the necessary equipment to diagnose a pulmonary embolism, and so the patient should have been transferred to a larger hospital sooner. The plaintiff called the hospital administrator as an

adverse witness, and on direct examination, Plaintiff's counsel repeatedly asked him whether it would be unethical for a hospital to put its financial gain over safety. This suggested that the hospital, in the interest of putting profits over safety, would admit patients who should be transferred to a more capable facility.

When the hospital administrator was questioned by counsel for the hospital, he testified that it was a "rural hospital," that it had to "budget monies," and that the administrator personally borrowed money to pay hospital employees. Although plaintiff's counsel objected to this line of questioning, the trial court overruled the objection. In affirming the trial court, the Alabama Supreme Court observed that "it is clear the trial court determined that [the administrator's] testimony was relevant in part because of [plaintiff's] suggestion that [the hospital and the administrator] were more interested in profit than in protecting patients and to explain why [the hospital] did not have the equipment necessary to diagnose and treat a pulmonary embolism." *Id*. at * 9.

Curative Admissibility; Introducing Other Incidents in Medical Malpractice Action

A party in a medical malpractice action is generally prohibited by statute from conducting discovery regarding other acts or omissions or from introducing at trial evidence of other acts or omissions. Ala. Code § 6-5-551. In *Baptist Health System, Inc. v. Cantu*, No. 1151117, 2018 WL 2276599 (Ala. May 18, 2018) (Not Yet Released For Publication), the Alabama Supreme Court reversed and remanded a $10 million medical malpractice verdict, holding that the trial court erred in allowing evidence of prior lawsuits against the hospital under the doctrine of curative admissibility.

In *Cantu*, the plaintiff alleged that the defendant hospital was vicariously liable for the alleged medical malpractice of a doctor with privileges at the hospital. At trial, the hospital

corporate representative testified that she had "never heard of" the notion of a hospital "somehow controlling or supervising the actions of independent physicians on staff." *Id*. at * 4. The trial court agreed with Plaintiff's counsel that this testimony "opened the door" to other lawsuits in which the hospital was sued based on the actions of doctors. Thus, under the doctrine of "curative admissibility," Plaintiff's counsel was able to question the witness about approximately 10 prior lawsuits in which the plaintiffs alleged that the hospital was liable for the actions of its doctors. Plaintiff's counsel's questions about each lawsuit included a description of the underlying injuries and specific facts that were alleged in the lawsuits.

The Alabama Supreme Court explained that "[c]urative admissibility is a doctrine which holds that if a party introduces illegal evidence, his opponent has the unconditional right to rebut such evidence with other illegal evidence." *Id*. at * 4 (internal quotes and citations omitted). But that doctrine is not without limits. Quoting *McElroy's Alabama Evidence*, the Court emphasized that "'[a] limitation upon this doctrine is the rule that the illegal rebuttal evidence may be admitted only to the extent that it cures the effect of the admission of the fist illegal evidence. If, for example, a party introduces evidence of a hearsay conversation then his opponent has the right to introduce only so much of the remainder of the conversation as rebuts that portion first offered.'" *Id*. (quoting C. Gamble, *McElroy's Alabama Evidence*, § 14.01 (3rd ed. 1977)).

In reversing the trial court, the Alabama Supreme Court explained that, if a door was opened, it was limited. The corporate representative's answer "would have opened a door only to the extent of knowledge of the existence of prior lawsuits against [the hospital] where agency was at issue – not the additional facts from which any prior claims of vicarious liability stemmed." *Id*. at * 9 (emphasis in original). The Court determined that the plaintiff did not limit his questioning to demonstrate knowledge, but "used the opportunity to also introduce the

damning, inflammatory facts and horrific injuries in each of those prior cases." *Id*. In sum, this was "undeniably prejudicial," and was improper under the "narrow doctrine" that curative admissibility is.