TORT-BASED CIVIL ACTIONS THAT MAY ARISE IN TANDEM WITH WORKERS' COMPENSATION CASES

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WHEN A WORKER IS INJURED, the Alabama Workers' Compensation Act, Ala. Code §§ 25-5-51 through 25-5-340 ("the Act"), provides a statutory, "no-fault" scheme under which the employer pays the worker an amount of money for a prescribed number of weeks to compensate the worker for the injury. When an injury is "compensable" under the Act, Ala. Code § 25-5-57 sets out a compensation schedule – this many weeks for a thumb, that many weeks for an eye plus a leg, etc. – which "reads like a price list at a cannibal's meat market." *Ex parte Drummond Co.*, 837 So. 2d 831, 839 (Ala. 2002) (Johnstone, J., dissenting).

With rare exception, the Act's no-fault scheme imposes an exclusive form of action for claims brought against the employer and the employer's insurance carrier, Ala. Code §§ 25-5-1(4), 25-5-52, 25-5-53. However, the Act and case law allow or provide remedies for a worker's injury in addition to, or instead of, the no-fault scheme. The latter remedies are the focus of this presentation.

RETALIATORY DISCHARGE CLAIMS - In *Meeks v. Opp Cotton Mills, Inc.*, 459 So. 2d 814 (Ala. 1984), a bare (5-4) majority of the Alabama Supreme Court refused to "deviate from the steadfastly followed rule that an employee at will may be discharged for no reason or any reason, including a 'wrong' reason," and held that a worker who was fired after he made a workers' compensation claim did not have a remedy at law. A year later, the legislature created the remedy when it enacted what is now codified at Ala. Code § 25-5-11.1, which says in its entirety:

> **No employee shall be terminated by an employer solely because the employee has instituted or maintained any action against the employer to recover workers' compensation benefits under this chapter or solely because the employee has filed a written notice of violation of a safety rule pursuant to [Ala. Code § 25-5-11(c)(4)].**

During the past twenty-one years, Section 25-5-11.1 has been construed and applied in a number of decisions. In a recent case, *Dunn v. Comcast Corp.*, 781 So. 2d 940 (Ala. 2000), the Supreme Court explained:

> [A] trial court, in deciding whether to enter a summary judgment against the employee in a retaliatory-discharge case, should view all evidence in the light most favorable to the employee and ask whether the employee has shown: (1) an employment relationship; (2) an on-the-job injury; (3) notice to employer of the on-the-job injury; and (4) subsequent termination of employment. [. . .] An employee who presents substantial evidence of all four elements has established a prima facie case of retaliatory discharge. The burden would then shift to the employer

> to rebut the inference that the discharge was retaliatory, by articulating a nonretaliatory reason for the discharge, supported by substantial evidence. [. . .] If the employee cannot rebut the employer's nonretaliatory explanation, then a summary judgment would be appropriate. However, if a genuine issue of material fact exists as to whether the nonretaliatory reason given by the employer was actually the basis for the discharge, then a summary judgment would not be appropriate.

781 So. 2d at 943 (citations omitted).

Section 25-5-11.1 does ***not*** require formal commencement of a civil action as a prerequisite to recovery. *Hexcel Decatur, Inc. v. Vickers*, 908 So. 2d 237, 242 (Ala. 2005) (citing cases and refusing to overrule precedent to that effect). And, apparently because it is often difficult or impossible to find an employer holding a "smoking gun," Alabama law says that "'[c]ircumstantial evidence of a causal connection between a workers' compensation claim and an employee's discharge is appropriate in a retaliatory-discharge action.'" *Flint Constr. Co. v. Hall*, 904 So. 2d 236, 248 (Ala. 2004) (citations omitted).

If the substantial evidence, viewed in a light most favorable to the plaintiff-employee, shows that the defendant-employer's proffered "reasons" for termination were not true, then a summary judgment may not be grounded upon the conclusion that the plaintiff-employee failed to prove that he or she was terminated "solely" because of a worker's compensation claim. *Alabama Power Co. v. Aldridge*, 854 So. 2d 554, 569-570 (Ala. 2002); *Flint Constr. Co. v. Hall*, 904 So. 2d at 251-252 & n. 3

["Viewing the entire record, Flint's internally inconsistent evidence as to why it discharged Hall was sufficient to allow the jury to conclude that the competing reason tendered by Hall must be true."]

Another key consideration is the closeness in time between the claim and the firing. A "close temporal proximity between the claim and the termination" raises the inference that the worker's compensation claim caused the retaliatory discharge in violation of Section 25-5-11.1. *See, e.g., Coca-Cola Bottling Co. v. Hollander*, 885 So. 2d 125, 131 (Ala. 2003), and cases cited therein. Such a "temporal proximity" may suffice to establish a causal connection between the claim and the wrongful termination. *See, e.g., Alabama Power Co. v. Aldridge*, 854 So. 2d at 563.

It is important to keep in mind that a summary judgment cannot be sustained upon the sole basis that the worker was not "willing and able" to come to work. The "willing and able" doctrine is ***not*** an essential element of the plaintiff's prima facie case, but it may be relevant to the defendant's opportunity to establish a defense to the retaliatory discharge claim or to mitigate its damages for lost wages. *Dunn v. Comcast*, 781 So. 2d at 943.

Nor is an employer's stated basis for discharge sufficient to entitle the employer to a judgment as a matter of law, unless

the underlying facts surrounding the stated basis for the discharge are undisputed. *Ford v. Carylon Corp.*, 937 So. 2d 491, 502 (Ala. 2006).

Another point to bear in mind in a retaliatory discharge case is the language of Alabama Pattern Jury Instruction 41.8, which says:

> **IF THE EMPLOYER DELIBERATELY MAKES AN EMPLOYEE'S WORKING CONDITIONS SO INTOLERABLE THAT THE EMPLOYEE IS FORCED INTO AN INVOLUNTARY RESIGNATION, THEN THE EMPLOYER IS LIABLE TO THE SAME EXTENT AS IF THE EMPLOYER HAD FORMALLY DISCHARGED THE EMPLOYEE.**

(Citing *Irons v. Service Merchandise Co.*, 611 So. 2d 294 (Ala. 1992).

Finally, I want to discuss the decision in *AutoZone, Inc. v. Leonard*, 812 So. 2d 1179 (Ala. 2001), which affirmed a judgment of $75,000 in compensatory damages and $275,000 in punitive damages in a retaliatory discharge case where I represented the plaintiff, Mike Leonard. Mr. Leonard was injured in a car wreck while he was driving to another AutoZone location to pick up a part for a customer. Although it was undisputed that Mr. Leonard was on the job when the wreck occurred, AutoZone's insurance carrier denied Mr. Leonard's claim for workers' compensation benefits on the basis that he "deviated from course" because he failed to "go the back way," as his supervisor claimed he had told Mr. Leonard to do. Mr. Leonard later was fired by AutoZone and his wife and two daughters moved out of state after the

financial pressures led to the collapse of his marriage. The evidence showed that Mr. Leonard sustained $3,000 in lost wages between the time he was fired by AutoZone and the time he obtained other employment. The Supreme Court found that the jury properly could have awarded Mr. Leonard $3,000 for his lost wages and $72,000 for his mental anguish in compensatory damages. The Supreme Court also held that the 3.67-to-1 "ratio" of punitive damages was reasonable, because "[t]he evidence on which the jury based its finding of a wrongful discharge suggests reprehensibility of such a degree as to justify the court's award of punitive damages." 812 So. 2d at 1187.

CO-EMPLOYEE CASES – Back in the "Good Old Days," a worker's fellow employees and his employer's workers' compensation insurance carrier could be found liable for common-law negligent or wanton conduct. Typically, those early cases claimed that the co-employee or carrier negligently or wantonly undertook to inspect the workplace and the worker was injured as a result of some overlooked hazard. Some of the first waves of "Tort Reform" washed over the shoals of the Alabama Legislature in 1985 and resulted in the enactment of alterations to the Workers' Compensation Act that now appear at Ala. Code § 25-5-11((b) and (c). Those provisions, which imposed a radically higher,

"willful conduct," standard in co-employee cases, now read as follows:

> (b) If personal injury or death to any employee results from the willful conduct, as defined in subsection (c) herein, of any officer, director, agent, or employee of the same employer or any workers' compensation insurance carrier of the employer or any person, firm, association, trust, fund, or corporation responsible for servicing any payment of workers' compensation claims for the employer, or any officer, director, agent, or employee of the carrier, person, firm, association, trust, fund, or corporation, or of a labor union, or an official or representative thereof, the employee shall have a cause of action against the person, workers' compensation carrier, or labor union.
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> (c) As used herein, "willful conduct" means any of the following:
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> (1) A purpose or intent or design to injure another; and if a person, with knowledge of the danger or peril to another, consciously pursues a course of conduct with a design, intent, and purpose of inflicting injury, then he or she is guilty of "willful conduct."
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> (2) The willful and intentional removal from a machine of a safety guard or safety device provided by the manufacturer of the machine with knowledge that injury or death would likely or probably result from the removal; provided, however, that removal of a guard or device shall not be willful conduct unless the removal did, in fact, increase the danger in the use of the machine and was not done for the purpose of repair of the machine or was not part of an improvement or modification of the machine which rendered the safety device unnecessary or ineffective.
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> (3) The intoxication of another employee of the employer if the conduct of that employee has wrongfully and proximately caused injury or death to the plaintiff or plaintiff's decedent [. . .]
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> (4) Willful and intentional violation of a specific written safety rule of the employer after written notice to the violating employee by another employee who, within six months after the date of receipt of the written notice, suffers injury resulting in death or permanent total disability as a proximate result of the willful and intentional violation. [. . .]

I hope you will appreciate that these statutory requirements are a far cry from simply claiming that the co-employee was "negligent" and that the worker was caused to be injured.

My principal focus in this presentation is upon the provisions of subsections (c)(1) and (c)(2), which are the more commonly pursued of these claims. Subsection (c)(1) is often referred to as the "substantially certain" claim and subsection (c)(2) is often referred to as the "safety device removal" claim.

An instructive, recent decision that addressed both (c)(1) and (c)(2) claims, *Ex parte Newton*, 895 So. 2d 851 (Ala. 2004), was brought by a worker whose hands were injured while he was operating a wire machine on which a roller-release lever had been welded shut. The trial court entered summary judgment on both claims and the Court of Civil Appeals affirmed without an opinion. The Supreme Court reversed in part, as to the (c)(2) claim. Justice Woodall's opinion explained:

> ***We first analyze Newton's claim under § 25-5-11(c)(1).*** Initially, ***it should be noted that Newton does not contend that the Wrights acted with any "purpose or intent or design to injure" him.*** Instead, in his petition, he contends that his injuries "resulted from activities by the [Wrights] which created a substantial certainty of injury." The substantial-certainty standard can be traced to this Court's decision in *Reed v. Brunson*, 527 So. 2d 102, 120 (Ala. 1988), in which we stated, in pertinent part:
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> > "We believe the Legislature sought to ensure that these kinds of cases would not be submitted to a jury without at least some evidence tending to show ... that a reasonable man in the position of the

> defendant would have known that a particular result (i.e., injury or death) was substantially certain to follow from his actions."

In response to Newton's claim, the Wrights argue on appeal, as they did in their summary-judgment motion, that Newton has offered no evidence indicating that they were "substantially certain" that injury would occur if employees, including Newton, continued to operate the wire machine in its known condition. Newton, on the other hand, contends that he "has presented substantial evidence that an injury was substantially certain to occur while operating the known and proven dangerous machine." [. . .] We agree with the Wrights.

The substantial-certainty standard is an exacting one. Indeed, "an injured plaintiff [must] prove more than simply that he was compelled to work under circumstances that posed a foreseeable risk of harm to him or others (or circumstances from which harm could likely or even probably result)." *Reed*, 527 So. 2d at 120. In his petition for the writ of certiorari, Newton alleges that his claim under § 25-5-11(c)(1) "is supported by the fact that prior to [his] injury, another employee had suffered an amputation injury while performing the same task on the same dangerous and unguarded machine." However, the prior accident, standing alone, does not constitute substantial evidence indicating that the Wrights knew to a "substantial certainty" that injury would occur if employees, including Newton, continued to operate the wire machine in its known condition. While the record does not reflect the date of the earlier accident involving the machine, Guy Wright testified that the accident occurred "like years before [Newton] got hurt." During those years, by his own estimate, Newton had put between 2,000 and 5,000 rolls of wire mesh into the machine without suffering any injury. Other operators, including Georgette Wright, also operated the wire machine without injury after the earlier accident. Because Newton did not present substantial evidence in support of his claim under § 25-5-11(c)(1), the summary judgment for the Wrights as to that claim must be affirmed.

We now focus upon Newton's claim under § 25-5-11(c)(2). The principles relevant to our consideration of this claim were stated in *Moore v. Reeves*, 589 So. 2d 173, 177-79 (Ala. 1991):

> "We hold that a 'safety device' or 'safety guard' is that which is provided, principally, but not exclusively, as protection to an employee, which provides some shield between the employee and danger so as to prevent the employee from incurring injury while he is engaged in the performance of the service required of him by the employer: it is not something that is a component part of the machine whose principal purpose is to facilitate or expedite the work.
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> "...
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> "... ***We hold that the failure to maintain and/or repair a safety guard or device provided by the manufacturer of a particular machine would be tantamount to the 'removal of' or the 'failure to install' a safety guard or device. To hold otherwise would allow supervisory employees to neglect the maintenance and repair of safety equipment provided to protect co-employees from injury***, which by its very nature is a clear violation of public policy."

The substance of Newton's claim is stated clearly in his petition for the writ of certiorari:

> "The [Wrights] violated § 25-5-11(c)(2) in that they failed to maintain or repair a safety device provided with the machine as originally designed and manufactured, and this failure to maintain and repair the safety device directly caused the amputation of [my] hands by the machine. The safety device, called an 'upper-roll release,' had, in fact, been welded shut so that it was inoperable. Had it not been welded shut, [my] injuries could have been avoided or greatly reduced."

In response to Newton's claim, the Wrights argue on appeal, as they did in their summary-judgment motion, that the upper-roll-release lever was not a safety device, and that, even if it was such a device, welding it in place did not increase the danger in using the machine. Newton, on the other hand, contends that he presented substantial evidence creating a genuine issue of material fact as to this claim. We agree with Newton.

In their summary-judgment motion, the Wrights alleged that it was clear from the testimony of their engineering expert that the upper-roll-release lever was not principally a safety device, but, instead, the principal purpose of the lever was to facilitate the removal of tubular sheet material from the pinch roll. In response, Newton offered the testimony of Tolbert, his engineering expert, which clearly presented a genuine issue of material fact as to whether the principal purpose of the lever was to protect an employee or to facilitate the work. In order to agree with the Wrights' argument, we would have to ignore Tolbert's testimony concerning the safety functions of the lever. Although the Wrights ignore that testimony in their brief to this Court, we cannot do so.

Finally, the Wrights make a conclusory argument that, even if the upper-roll-release lever could be properly found to be a safety device, the fact that it was welded shut did not increase the risk in operating the machine. This argument merits little analysis, because Tolbert's testimony obviously provided substantial evidence to the contrary. Also, while the Wrights contend that Newton's ignorance of the function of the lever somehow supports their contention, it certainly does not. *See Jackson v. Hill*, 670 So. 2d 917, 919 (Ala. 1995) (***"Certainly, it was not the intention of the legislature to allow supervisors to fail to inform employees about safety devices so that the supervisors could remove them and then not be responsible for injuries resulting from the removal."***).

Because Newton presented substantial evidence in support of his claim under § 25-5-11(c)(2), the summary judgment for the Wrights as to that claim must be reversed.

895 So. 2d at 854-56 (emphasis added).

Cooper v. Nicoletta, 797 So. 2d 1072 (Ala. 2001), another case involving both (c)(1) and (c)(2) claims, was brought by a worker who suffered third-degree burns after he removed the bolts on the outfeed door of a hot, caustic-soda vat at a Georgia-Pacific plant and the contents rapidly escaped. The Supreme Court affirmed a summary judgment as to the (c)(1) claim, because the worker failed to produce any evidence of prior similar injuries which would have made the defendants "substantially certain" that he would be injured. 797 So. 2d at 1078. The Court also affirmed a summary judgment as to the (c)(2) claim, because the evidence showed that "the purpose of the outfeed door was for entering into the vat for repair purposes once the vat had been emptied [and it] was neither designed nor intended to be a means of emptying the vat. We find nothing in the record to support the [worker's] characterization of the outfeed door as a safety device." 797 So. 2d at 1079.

In another recent decision, *Wadsworth v. Jewell*, 902 So. 2d 664 (Ala. 2004), the Supreme Court affirmed a summary judgment as to a (c)(2) claim brought by a worker who alleged that her co-employees failed to supply her with an ergonomic computer keyboard, causing her carpal tunnel syndrome to worsen. The Court found it was "inescapable" that the worker had failed to

prove that a safety device provided by the manufacturer with respect to the computer was removed. 902 so. 2d at 669.

The decision in *Ex parte Canada*, 890 So. 2d 968, 970 (Ala. 2004), which reversed a summary judgment as to a (c)(2) claim where the "safety device" was a plastic guard on a table saw, reiterated that "§ 25-5-11(c)(2) defines 'willful conduct' in the context of the removal of a safety guard or safety device from a machine; ***it does not require proof of an intent to injure the employee***."

You can find out more about co-employee cases by reading a couple of *Alabama Lawyer* articles: G. Cochran and D. Stevens, *Not So Fast: Turning Down That Co-Employee Liability Case Can Cost the Injured Employee and You Money*, 57 Ala. Law. 45 (Jan, 1996); and K. Patton and W. Campbell, *Alabama Code § 25-5-11: A Narrow Cause of Action Against Co-Employees*, 64 Ala. Law. 38 (Jan. 2003). As their titles strongly indicate, the first article was written by plaintiffs' lawyers and the second article was written by defendants' lawyers.

OUTRAGEOUS CONDUCT CASES – After years of hearing that we live in a "Christian nation," you might be shocked the first time an injured worker comes to your law office and tells you that his employer's insurance carrier has refused to pay for the worker's medical expenses relating to his back injury, as the law or the

court order requires it to do. For this misconduct, Alabama law supplies a remedy by way of the common-law tort of outrage.

In *Morgan v. North Mississippi Medical Center*, 2006 U.S. Dist. LEXIS 74428 (S.D. Ala. 2006) (a case that did *not* involve a worker's injury), Judge Steele noted that

> Alabama courts have deemed outrage a "very limited cause of action that is available only in the most egregious circumstances." [. . .] So circumscribed, in fact, is the reach of the tort of outrage that the Alabama Supreme Court has allowed such claims only in three limited circumstances: "cases having to do with wrongful conduct in the context of family burials; cases where insurance agents employed heavy-handed, barbaric means to coerce a settlement; and cases involving egregious sexual harassment."

Id. at *46-47 (citations omitted).

Notwithstanding this "circumscribed" approach, the Alabama Supreme Court affirmed a $750,000 tort-of-outrage judgment that was entered in favor of a worker in *Continental Cas. Ins. Co. v. McDonald*, 567 So. 2d 1208 (Ala. 1990). The worker, McDonald, injured his back while working at Akwell Industries and he settled his worker's compensation claim for $12,000, with CNA (his employer's carrier) remaining liable for McDonald's medical expenses arising from the injury. After McDonald underwent five surgeries and was told by his doctors that they could nothing else to relieve his pain or improve his disability, CNA undertook to coerce McDonald into accepting a lump-sum settlement of his medical claim. McDonald alleged "that CNA delayed payments to doctors, hospitals, and pharmacists for unreasonable lengths of

time, causing, for example, hospitals to threaten collection actions against him and pharmacy to refuse to provide further pain medication. CNA also resisted paying for a hot tub or whirlpool bath prescribed by McDonald's doctor, suggesting instead membership in a health spa or other in-home alternatives. McDonald argues that CNA intentionally caused him severe emotional distress by these and other actions in its handling of his medical expenses." 567 So. 2d at 1210.

The Supreme Court's opinion in *CNA v. McDonald* laid out several pages of evidentiary narrative, including telephone calls, correspondence and notes from CNA's files that spanned a time frame from McDonald's injury in 1976 until McDonald filed suit in 1987. The first issue the Court had to address was CNA's statute of limitations arguments, which was disposed of in Justice Almon's opinion for a unanimous Court, as follows:

> Thus, there is clearly a threshold beyond which an insurance company's recalcitrance must go before it crosses into outrageous conduct. If we were to hold that McDonald was barred from bringing this action upon the expiration of [. . .] two years after the first time he suffered severe emotional distress over CNA's handling of his claim, we would place plaintiffs in the untenable position of not knowing whether their claim is premature and thus subject to summary judgment for lack of a genuine question of material fact [. . .], or has been in existence long enough for the period of limitations to run, as CNA argues here. The better policy would be to encourage cooperation and attempts to work out differences, like McDonald's attempts in this case, and to preserve the cause of action should those attempts prove futile.
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> [. . .]

> In sum, this action was not barred by the statute of limitations, because CNA's conduct, if it was tortious at all, was in the nature of a continuing tort, and that conduct was continuing even up to the time the action was filed.

567 So. 2d at 1216-17 (citations omitted).

Moving to the merits, the Court's opinion distinguished the facts of McDonald's case from those in *Garvin v. Shewbart*, 564 So. 2d 428 (Ala. 1990) ("*Garvin II*"), a case in which the Court affirmed a summary judgment that was entered in favor of CNA on similar claims. Chief among those were facts showing that McDonald was denied the day-to-day medical treatment that his condition required, whereas Garvin had only been denied a third surgery; that McDonald suffered unusually severe pain; and that with respect to McDonald, CNA "engaged in repeated conduct that brought the availability of treatment into doubt," whereas Garvin's attempts to show that she was suffering distress from the delays in seeing a physician for a second surgery opinion "did not so clearly cross the line of 'severe distress' and 'outrageous conduct.'" 567 So. 2d at 1220.

The *McDonald* decision concluded:

> This case is different [from *Garvin II*]. [. . .] The jury was entitled to believe that CNA engaged in a deliberate effort to cause McDonald severe emotional distress in order to coerce him into accepting an unreasonably low lump-sum settlement that would drastically reduce CNA's liability for his future medical expenses. The evidence supports a finding that CNA systematically withheld payments in order to cause McDonald anguish over the possibility of the cessation of medical treatments for his pain and thereby cause

> him to accept a method of payment that would not subject him to CNA's "aggravation," as he called it. A jury could reasonably find from the evidence that such conduct was "beyond all possible bounds of decency ... atrocious[,] and utterly intolerable in a civilized society."

567 So. 2d at 1221 (citations omitted).

In a later decision, *Travelers Indemnity Co. of Illinois v. Griner*, 809 So. 2d 808 (Ala. 2001), the Supreme Court affirmed a judgment awarding $300,000 in compensatory damages and $200,000 in punitive damages to another worker who had sustained an on-the-job back injury and who claimed that Travelers (his employer's carrier) had failed to authorize certain reasonably necessary medically related expenditures. Six justices joined in Justice Stuart's opinion affirming the judgment. Only Justice See dissented, because he concluded that "the evidence submitted at trial was insufficient to demonstrate that the defendants' handling of his claims for insurance benefits amounted to 'outrageous conduct as defined by this Court." 809 So. 2d at 815.

More recently, the 5-0 decision in *Soti v. Lowe's Home Centers, Inc.*, 906 So. 2d 916 (Ala. 2005), affirmed a summary judgment that was entered in favor of an employer and its workers' compensation claims management company, where the worker alleged outrageous conduct in the handling of his medical expenses after he suffered a back injury. Justice Brown's opinion said that the facts of Soti's case "differ dramatically"

from those of McDonald and Griner, because Soti was provided with "extensive and continuing medical treatment" over the course of three years, including three back surgeries, and that Soti's outrage claim did not arise until there was a dispute over a possible hernia surgery that was not suggested until more than two years after Soti had last worked for Lowe's. 906 So. 2d at 920-21.

As the foregoing discussion reflects, these outrageous conduct cases are very fact-intensive and your client's lawsuit will survive or fail depending upon how "egregious" the defendants' conduct was. You also should bear in mind that, although an outrage claim may be brought against the employer or carrier, the Alabama Supreme Court consistently "has held that a tort claim against a workers' compensation insurance carrier alleging a bad faith failure to pay an insurance claim is barred by the exclusivity provision of the Workers' Compensation Act." *Stewart v. Matthews Industries, Inc.*, 644 So. 2d 915, 918 (Ala. 1994).

THIRD-PARTY CLAIMS - If a worker is injured or killed by the conduct of a third party (*i.e.*., someone other than the employer or the employer's insurance carrier), you should look to Ala. Code § 25-5-11(a), (d) and (e), which make provisions not only for bringing a lawsuit against the third party, but also for

reimbursing the employer and the carrier from any damages recovered from the third party.

Here's what those third-party provisions say:

§ 25-5-11. Third party liability.

(a) If the injury or death for which compensation is payable under Articles 3 or 4 of this chapter was caused under circumstances also creating a legal liability for damages on the part of any party other than the employer, whether or not the party is subject to this chapter, the employee, or his or her dependents in case of death, may proceed against the employer to recover compensation under this chapter or may agree with the employer upon the compensation payable under this chapter, and at the same time, may bring an action against the other party to recover damages for the injury or death, and the amount of the damages shall be ascertained and determined without regard to this chapter. If a party, other than the employer, is a workers' compensation insurance carrier of the employer or any person, firm, association, trust, fund, or corporation responsible for servicing and payment of workers' compensation claims for the employer, or any officer, director, agent, or employee of the carrier, person, firm, association, trust, fund, or corporation, or is a labor union, or any official or representative thereof, or is a governmental agency providing occupational safety and health services, or an employee of the agency, or is an officer, director, agent, or employee of the same employer, or his or her personal representative, the injured employee, or his or her dependents in the case of death, may bring an action against any workers' compensation insurance carrier of the employer or any person, firm, association, trust, fund, or corporation responsible for servicing and payment of workers' compensation claims for the employer, labor union, or the governmental agency, or person, or his or her personal representative, only for willful conduct which results in or proximately causes the injury or death. If the injured employee, or in case of death, his or her dependents, recovers damages against the other party, the amount of the damages recovered and collected shall be credited upon the liability of the employer for compensation. If the damages recovered and collected are in excess of the compensation payable under this chapter, there shall be no further liability on the employer to pay compensation on account of the injury or death. To the extent of the recovery of damages against the other party, the employer shall be entitled to

reimbursement for the amount of compensation theretofore paid on account of injury or death. If the employee who recovers damages is receiving or entitled to receive compensation for permanent total disability, then the employer shall be entitled to reimbursement for the amount of compensation theretofore paid, and the employer's obligation to pay further compensation for permanent total disability shall be suspended for the number of weeks which equals the quotient of the total damage recovery, less the amount of any reimbursement for compensation already paid, divided by the amount of the weekly benefit for permanent total disability which the employee was receiving or to which the employee was entitled. For purposes of this amendatory act, the employer shall be entitled to subrogation for medical and vocational benefits expended by the employer on behalf of the employee; however, if a judgment in an action brought pursuant to this section is uncollectible in part, the employer's entitlement to subrogation for such medical and vocational benefits shall be in proportion to the ratio the amount of the judgment collected bears to the total amount of the judgment.

[. . .]

(d) In the event the injured employee, or his or her dependents, in case of death, do not file a civil action against the other party to recover damages within the time allowed by law, the employer or the insurance carrier for the employer shall be allowed an additional period of six months within which to bring a civil action against the other party for damages on account of the injury or death. In the event the employer or the insurance carrier has paid compensation to the employee or his or her dependent, or in the event a proceeding is pending against the employer to require the payment of the compensation, the civil action may be maintained either in the name of the injured employee, his or her dependent in case of death, the employer, or the insurance carrier. In the event the damages recovered in the civil action are in excess of the compensation payable by the employer under this chapter and costs, attorney's fees, and reasonable expenses incurred by the employer in making the collection, the excess of the amount shall be held in trust for the injured employee or, in case of death, for the employee's dependents. If the injured employee has no dependent, the personal representative, in the event of death, may bring a civil action against the other party to recover damages without regard to this chapter.

(e) In a settlement made under this section with a third

party by the employee or, in case of death, by his or her dependents, the employer shall be liable for that part of the attorney's fees incurred in the settlement with the third party, with or without a civil action, in the same proportion that the amount of the reduction in the employer's liability to pay compensation bears to the total recovery had from the third party. For purposes of the subrogation provisions of this subsection only, "compensation" includes medical expenses, as defined in Section 25-5-77, if and only if the employer is entitled to subrogation for medical expenses under subsection (a) of this section.

The typical third-party case is brought against a landowner or general contractor, *see, e.g., H.R.H. Metals, Inc. v. Miller*, 833 So. 2d 18 (Ala. 2002) [worker fell through a skylight], or a product manufacturer, *see, e.g., Ayers v. Duo-Fast Corp.*, 779 So. 2d 210 (Ala. 2000) [worker shot in the back with a nail gun].

Some confusion exists with respect to the proper party who may file a third-party lawsuit. Section 25-5-11(a) says that "the dependents" may proceed against third party. It is now well-settled that, if a deceased worker dies and leaves no dependents who could bring a third-party action, the worker's personal representative may bring a wrongful-death action pursuant to Section 25-5-11. *Valley Forge Ins. Co. v. Alexander*, 640 So. 2d 925, 929 (Ala. 1994). If a third-party, wrongful-death action is not brought by the worker's dependents or personal representative within the Wrongful Death Act's two-year statutory period, the employer or carrier has an additional six months after that time to bring an action against the third party in order to recover the worker's compensation benefits that were

paid. *See* Ala. Code § 25-5-11(d), and *Ex parte Cincinnati Ins. Co.*, 689 So. 2d 47, 50 (Ala. 1997) [holding that punitive damages awarded to the worker's compensation carrier in such a wrongful-death action may exceed the amount of the carrier's subrogation interest, with the excess to be paid to the employee's dependents]. Another point to remember is that even though Section 25-5-11(a) gives the dependent of the employee a right to commence a wrongful death action, such an action "must be deemed to arise under § 6-5-410" (the Wrongful Death Act), "because in Alabama there is but one cause of action for wrongful death." *Alabama Power Co. v. White*, 377 So. 2d 930, 933 (Ala. 1979).

In late 2003 and early 2004, the Alabama Supreme Court cleared up a lot of confusion and some bad law with respect to a worker's ability to collect both workers' compensation benefits ***and*** uninsured or underinsured motorist benefits in those cases where the on-the-job injury occurs as the result of a motor vehicle collision. The first of those cases, *Watts v. Sentry Insurance*, 876 So. 2d 440 (Ala. 2003), held that even though the worker received workers' compensation benefits, he could also recover underinsured motorist benefits from his employer's insurer if his injuries were proximately caused by the negligence or wantonness of an underinsured driver. A second case, *Frazier v. St. Paul Ins. Co.*, 880 So. 2d 406, 410 (Ala. 2003), found that the exclusive-remedy provision of the Workers' Compensation Act

"does not apply to the world at large" and held that the employer's uninsured motorist insurer was not one of the entities described in the exclusive-remedy provision, Ala. Code § 25-5-14. A third case, *Johnson v. Coregis Ins. Co.*, 888 So. 2d 1231, 1234 (Ala. 2004), rejected the arguments advanced by the employer's underinsured motorist carrier, which were that to allow the injured worker to recover both worker's compensation benefits and uninsured motorist benefits "would be allowing double recovery."

SUBROGATION - If you are able to prevail on behalf of your injured worker against a third party and there is a judgment or settlement reached by which the worker or the worker's dependents are entitled to receive a sum of money, you will find that the first person in line with their hand out for some of that money is the worker's employer or worker's compensation carrier (assuming that some workers' compensation benefits were paid). The provisions of Ala. Code § 25-5-11(d), set out above, provide the statutory means by which the employer or carrier gains subrogation rights with respect to the third-party recovery.

As you might imagine, the dollar amounts of these subrogation interests can reach astronomical levels, especially if the worker sustained a back or head injury or was badly burned. Thus, the Alabama Supreme Court has developed a considerable body of case law on the single topic of workers'

compensation subrogation. One decision whose holdings you should commit to memory is *Maryland Cas. Co. v. Tiffin*, 537 So. 2d 469, 474 (Ala. 1988), which adopted the "Fitch" formula that was carved out by the Court of Civil Appeals in *Fitch v. Ins. Co. of N. America*, 408 So. 2d 1017, 1019 (Ala. Civ. App. 1981). The *Tiffin* decision concerned (as did *Fitch*) the pro-rata share of the employee's attorneys' fees that the subrogated employer must bear pursuant to Ala. Code § 25-5-11(e), which is set out above.

In *Tiffin*, the attorney who represented a worker's widow and minor children had a one-third contingency fee with respect to all sums recovered from third parties and he reached a settlement with the third parties in the amount of $200,000. The issue on appeal in *Tiffin* was whether Maryland Casualty was entitled to "full and complete reimbursement" of the benefits it had paid, when the widow and children had recovered damages from the third parties "substantially in excess of the amount of Maryland Casualty's liability under Ala. Code § 25-5-60" [*Death cases; payment of compensation*]. 537 So. 2d at 470.

Justice Houston's opinion in *Tiffin* noted that the worker's compensation carrier, Maryland Casualty, "does not question the reasonableness of [the contingency fee] and agrees that, if it prevails here, it is obligated to pay one-third of the amount reimbursed to it and one-third of the future liability from which

it is released as its proportionate amount of this attorney fee, under § 25-5-11(e)." *Id.* The opinion further noted:

> [T]here is a statutorily prescribed common fund doctrine involved in a third-party recovery in the workmen's compensation context. The plaintiffs' contingent fee contract with their attorneys provides that the attorneys shall receive one-third of all sums recovered. Maryland Casualty is to pay one-third of all sums that it recovers from the common fund and one-third of all sums that it is relieved of paying due to the common fund. It agrees to do this. No more than that is required of it under § 25-5-11(e) or any equitable common fund doctrine.

537 So. 2d at 473. Applying that doctrine, *Tiffin* held:

> [W]e must hold that the sums recovered by the plaintiffs in this action from third parties must be credited against the liability of Maryland Casualty for compensation and that, since they exceed the amount of compensation payable under the workmen's compensation laws, Maryland Casualty has no further liability on account of Mr. Tiffin's death and is entitled to reimbursement for the amount of compensation already paid to the Tiffins for Mr. Tiffin's death, subject to Maryland Casualty's liability for attorney fees under § 25-5-11(e).
>
> The attorney fees should be computed in accordance with the formula adopted in *Fitch* [. . .].

537 So. 2d at 475.

Those of you who love mathematics will appreciate the "Fitch" formula. It looks like this:

$$\frac{\text{Employer's Reduced Liability}}{\text{Third Party Recovery}} = \text{X}$$

Attorney's Fees & Expenses

See Tiffin, 537 So. 2d at 475.

In the "Fitch" formula, you solve the algebraic puzzle for "X" – and that number represents the employer's pro rata share of the fees and expenses. That number then is subtracted from the total amount of benefits paid by the employer to determine its net subrogation interest.

In *Ayers v. Duo-Fast Corp.*, 779 So. 2d 210, 214 (Ala. 2000), the Supreme Court held that the employer, Cavalier, could not circumvent the requirement that it pay its pro rata share of the worker's attorney's fees, even though the employer worked out its own reimbursement of the worker's compensation benefits it had paid directly from the defendant manufacturer, Duo-Fast, in the third-party case brought by the worker. The *Ayers* opinion said:

> The Cavalier/Duo-Fast settlement agreement cannot logically be fragmented from the "settlement process." Cavalier received the benefit contemplated by § 25-5-11 because, as a result of Ayers's third-party action, Cavalier was fully reimbursed by Duo-Fast for the $105,000 Cavalier had disbursed in medical expenses and compensation-benefit payments[.]

779 So. 2d at 216.

Finally, you should be aware of a couple of decisions in which the Alabama Supreme Court has held that an employer's third-party subrogation interest includes the sum of money representing the worker's future (and unpaid) medical expenses. *See Ex parte BE&K*, 728 So. 2d 621 (Ala. 1998), and *Ex parte Williams*, 895 So. 2d 924 (Ala. 2004).