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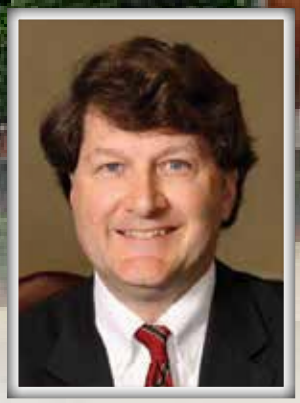

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PRACTICAL EVIDENCE RULES THAT YOU KNOW BUT MAY NOT HAVE A CITATION FOR

By: Robert E. Cooper and W. Steven Nichols

"When I was young I could remember everything, whether it happened or not. Now that I am old I find that I can only remember those things which never happened."----Mark Twain

Several (read: many, many, many) years ago, one of the finest trial lawyers Alabama has ever known prepared a handout for a talk at the Alabama Defense Lawyers Fall meeting in Birmingham. The lawyer was Bobby Black. The title was "Practical Rules of Evidence that You Know But Don't have a Citation For." That tract has attended every trial we have had from that day to this.

As a tribute to Bobby and as a commemoration of his years of service to the Bar, we have updated his earlier work. Our hope is that you will find it useful as a quick reference guide during your trials. If we have omitted a topic or a citation that you think should be included, please send it to us.

UPDATES ON BLACK'S ORIGINAL CATEGORIES OF EVIDENCE:

Prior Traffic Tickets

"[E]vidence of a driver's prior convictions of traffic violations is inadmissible in a suit for damages growing out of an automobile collision where such prior convictions have no connection with the collision in question." *Dean v. Johnston*, 206 So. 2d 610, 613-614 (Ala. 1968).

A witness's prior conviction for a crime involving moral turpitude may be shown as going to his credibility, however, "a conviction for speeding would not involve moral turpitude." *Id.*

Telephone Conversations with Alleged Agent

Where the witness has called the telephone number of a specific business concern as listed in the telephone directory, and the conversation relates to business reasonably transacted on the telephone, the identity of the person answering and also that person's authority to represent the business concern is sufficiently authenticated. *See* 2 Charles W. Gamble & Robert J. Goodwin, *McElroy's Alabama Evidence* § 329.01(4) (6th ed. 2009) (citing Ala. R. Evid. 901(b)(6)(B)).

But see Yancy v. Ruffin, 206 So. 2d 878 (Ala. 1968) (holding that testimony of a telephone conversation between the witness and a purported agent of the corporate defendant was inadmissible hearsay because there was no evidence to establish the identity of the person with whom the witness spoke); *Avon-Avalon, Inc. v. Collins*, 643 So. 2d 570 (Ala. 1994) (holding that testimony of telephone conversation between the deceased and defendant's agent was inadmissible where the witness never heard the voice of the individual the deceased spoke with over the telephone and did not even see the number the deceased dialed).

Driver's License

In a negligence action, the admission into evidence of the failure of the defendant to possess a driver's license is prejudicial and requires reversal. Before such evidence is admissible there must be established a causal connection between the failure to have a license and the injuries received in the accident. No such showing was made in this case. *Giles v. Gardner,* 249 So. 2d 824, 827 (Ala. 1971).

Evidence of a driver's lack of a driver's license should have been admitted in a negligent entrustment action, because such action requires proof of a driver's "incompetence," and evidence of a driver's lack of driver's license is probative (although not conclusive) with respect to the driver's possible inexperience and lack of skill. *Mason v. New*, 475 So. 2d 854 (Ala. 1985).

Accident Reports

"It has been the settled rule in our jurisdiction that the reports of investigating officers are not admissible in evidence, as being hearsay." *Vest v. Gray*, 154 So. 2d 297 (Ala. 1963).

"The automobile accident report of an investigating officer is not admissible into evidence because it does not come under the business records exception to the hearsay rule." *Plenkers v. Chappelle*, 420 So. 2d 41 (Ala. 1982).

A police officer is not allowed to read from the accident report at trial because the information therein is hearsay. *See Crusoe v. Davis*, 2015 Ala. LEXIS 23 (Ala. Feb. 20, 2015).

Pleadings in Another Case

A party's pleadings in a prior case are admissible against that party in a subsequent action as an admission against interest. The prior pleadings, however, must be indeed inconsistent with the party's present position and must be "drawn

under the party's direction or with his consent." *Gulf Shores v. Harbert Int'l*, 608 So. 2d 348, 354 (Ala. 1992).

See also Redwing Carriers, Inc. v. Stone, 310 So. 2d 206 (Ala. 1975) ("Generally, pleadings are admissible against a party as admissions whether the pleadings were filed in behalf of the party in another action, or upon proof that the pleadings were drawn under the party's direction or with his consent.").

Mortality Tables

Admissible where there is evidence that the plaintiff has suffered permanent personal injuries or the question of a person's life expectancy is a material question to be decided. *Drummond Co. v. Self*, 622 So. 2d 336 (Ala. 1993).

But inadmissible where the injury complained of is purely subjective and there is no expert medical testimony tending to show the permanency of the alleged injury. *Collins v. Windham*, 167 So. 2d 690 (Ala. 1964).

Inadmissible in a wrongful death action, in which only punitive damages are recoverable. 2 Charles W. Gamble & Robert J. Goodwin, *McElroy's Alabama Evidence* § 259.01(1)(c) (6th ed. 2009). See also *Kurn v. Counts*, 22 So. 2d 725 (Ala. 1945) (holding that evidence of decedent's age, health, and absence of any physical defects is not admissible in a wrongful death case when cause of the decedent's death is not at an issue). *But see Bessemer v. Clowdus*, 74 So. 2d 259 (Ala. 1954) (recognizing that such evidence is admissible on a claim of contributory negligence, *i.e.,* when the cause of decedent's death is an issue).

Payment by Joint Tortfeasor

Admissible in mitigation of damages. *Louisville & N. R. Co. v. Burke*, 66 So. 885 (Ala. Civ. App. 1914).

Defendant asserting a set-off defense arising from a pro tanto settlement must interpose this defense with specificity at the first opportunity because it is an affirmative defense. *Morris v. Laster*, 821 So. 2d 923 (Ala. 2001).

Repairs or Changes Made After Accident

Not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction. *See* Ala. R. Evid. 407. *See also Phar-Mor, Inc. v. Goff*, 594 So. 2d 1213 (Ala. 1992) (Observing that "subsequent remedial measures have been excluded on two grounds: (1) that evidence of a subsequent repair or change was irrelevant to show antecedent negligence; and (2) that public policy favored promoting safety by removing the disincentive to repair.").

May be admissible when offered for another purpose (other than proving antecedent negligence or culpable conduct), such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment. *See* Ala. R. Evid. 407. *See also Banner Welders v. Knighton*, 425 So. 2d 441 (Ala. 1982) ("[E]vidence of subsequent repairs… may be admissible to show identity of ownership, to show control of the locus, to contradict or impeach a witness, or to lessen the weight of an expert opinion. Another permissible use may occur where such evidence is offered to establish a condition existing at the time of the accident.").

The party seeking to admit evidence of subsequent remedial measures offered for these "other purposes" has the burden of establishing that: (1) the "other purposes" are material, that is, at issue in the case; (2) the "other purposes" are relevant; and (3) the prejudicial effect of the evidence is substantially outweighed by its probative value. *Holland v. First Nat'l Bank*, 519 So. 2d 460 (Ala. 1987).

Speed

Expert who did not observe a collision may express an opinion as to the speed of a vehicle based on skid marks made before impact. However, testimony based on evidence of skid marks made after impact is inadmissible. Also, an expert opinion as to speed may not be given when based solely on the physical condition of the vehicles after an accident. *See Giles v. Gardner*, 249 So. 2d 824, 827-828 (Ala. 1971). *But see Maslankowski v. Beam*, 259 So. 2d 804 (Ala. 1972) (holding that trial court did not abuse its discretion in allowing expert, who was not an eyewitness to the collision, to testify as to the estimated speed at impact predicated on the distances and directions traveled after impact, the damages sustained by the automobiles, the point of impact, the angle of impact and numerous other combining physical facts).

Trial court did not abuse its discretion in admitting evidence of defendant's speed one mile before the accident. *See Swindall v. Speigner*, 214 So. 2d 436 (Ala. 1968).

Evidence of speed two miles before accident was held inadmissible because it was too remote in time, distance and place. *Deese v. White*, 313 So. 2d 166 (Ala. 1975).

A car travels 1.46 feet per second times miles per hour traveling. *See Wayland Distributing Co. v. Gay*, 252 So. 2d 414 (Ala. 1971).

Opinion Evidence

The traditional rule is that an expert's opinion cannot be based on opinion of others. *See Salotti v. Seaboard C. L. R. Co.*, 299 So. 2d 695 (Ala. 1974). The traditional rule has been modified, however, to allow a medical expert to give opinion testimony based in part on the opinions of others when those other opinions are found in medical records that have been admitted into evidence. *See Nash v. Cosby*, 574 So. 2d 700 (Ala. 1990); *Ex parte Wesley*, 575 So. 2d 127 (Ala. 1990).

The information upon which an expert relies must be in evidence. *Ex parte Wesley*, 575 So. 2d 127 (Ala. 1990). *See also Cavalier Ins. Corp. v. Gann*, 329 So. 2d 573 (Ala. Civ. App. 1976) (witness not allowed to read from value book that was not admitted into evidence and give an opinion based on the value stated in the book).

Accordingly, although an expert is permitted to give opinion testimony based on facts which are assumed in a hypothetical question, the hypothesized facts must be facts that have been admitted into evidence. *See Welch v. Houston County Hospital Bd.*, 502 So. 2d 340 (Ala. 1987).

A police officer who did not witness an accident cannot give a causation opinion unless he is first qualified as an expert. *See Worsham v. Fletcher*, 454 So. 2d 946 (Ala. 1984).

X-Rays

Must produce X-rays; cannot testify as to what X-rays show without X-rays being produced. *See Mobile City Lines, Inc. v. Proctor*, 130 So. 2d 388 (Ala. 1961).

Commenting on Opponent's Failure to Call a Witness

The general rule is when a witness is accessible to both parties, or his evidence would be cumulative, neither party can comment on his absence. *Birmingham v. Levens*, 200 So. 888 (Ala. 1941).

The fact that either party can subpoena a potential witness does not make that witness automatically "equally accessible." *See Harrison v. Woodley Square Apartments, Ltd.*, 421 So. 2d 101 (Ala. 1982).

When the testimony of the witness would favor one party over the other, the witness is not "equally accessible." *See Edwards v. Allied Home Mortg. Capital Corp.*, 962 So. 2d 194 (Ala. 2007). *See also Drs. Lane, Bryant, Eubanks & Dulaney v. Otts*, 412 So. 2d 254 (Ala. 1982) (Plaintiff allowed to comment on absence of witness, a physician, in a case where defendants were also physicians because it was "not unreasonable to conclude that he would be friendly toward defendants and unfriendly toward plaintiff."); *Harrison v. Woodley Square Apartments, Ltd.*, 421 So. 2d 101 (Ala. 1982) (testimony of plaintiff's friend would probably favor plaintiff).

Pleas of Guilty or Acquittal in Criminal Trial

When a defendant pleads guilty to a criminal offense, and afterwards is sued in a civil action for an identical offense, the guilty plea is admissible as an admission or declaration against interest. *See Motley v. Page*, 34 So. 2d 201 (Ala. 1948); *Pritchett v. Freeman*, 54 So. 2d 314 (Ala. Civ. App. 1951).

Judgment or acquittal in a criminal case is not admissible in a civil case. *See Bredeson v. Croft*, 326 So. 2d 735 (Ala. 1976). *See also Crummie v. Tuscaloosa County Civil Serv. Bd.*, 630 So. 2d 455 (Ala. Civ. App. 1992) ("An acquittal in a criminal case is not dispositive of the issues presented in a civil action arising out of the same facts.").

A plea of *nolo contendre* in a criminal case is not admissible in a civil case. *See State ex rel. Woods v. Thrower*, 131 So. 2d 420 (Ala. 1961); *Fidelity-Phenix Fire Ins. Co. v. Murphy*, 166 So. 604 (Ala. 1936).

Proof of Agency – Presumption

A. Defendant owned vehicle. *See Schoenith, Inc. v. Forrester*, 69 So. 2d 454 (Ala. 1953).

B. License Plate issued to Defendant. *See Duke v. Williams*, 32 So. 2d 362 (Ala. 1947).

C. Defendant's name painted on vehicle. *See Credeur v. J. B. Hunt Transp.*, 655 So. 2d 933 (Ala. 1994); *Barber Pure Milk Co. v. Holmes*, 84 So. 2d 345 (Ala. 1955).

D. Defendant lessee had unreserved use of vehicle. *See Sears, Roebuck & Co. v. Hamm*, 81 So. 2d 915 (Ala. Civ. App. 1955).

Burden then shifts to defendant to offer evidence to rebut this administrative presumption. *See Bishop v. Fordham*, 92 So. 2d 3 (Ala. 1957). Note that agency cannot be proved by declarations of the alleged agent. *See Greenwald v. Russell*, 172 So. 895 (Ala. 1937).

Calling Hostile Witnesses

A party may not call a witness and immediately cross-examine him on the theory that he is a hostile witness. "There must be an avowed surprise before one's own witness may be subjected to cross-examination by the party calling him. A party will not be permitted to put a witness on the stand knowing that his testimony will be adverse and then claim

surprise in order to impeach such witness." *Cloud v. Moon*, 273 So. 2d 196 (Ala. 1973).

Leadings questions are permitted as a matter of right when a party calls a hostile witness or adverse party. *See* Ala. R. Evid. 611(c).

"The characterization of a witness as adverse or hostile is not dependent upon the unfavorable or 'hostile' nature of his testimony, but rather upon the characterization of the nature and manner of the witness himself." *Wiggins v. State*, 398 So. 2d 780 (Ala. Crim. App. 1981).

Who is hostile:

A. Father. *See Waller v. State*, 4 So. 2d 911 (Ala. 1941).

B. Son. *See Little v. Sugg*, 8 So. 2d 866 (Ala. 1942).

C. Employee. *See Stauffer Chemical Co. v. Buckalew*, 456 So. 2d 778 (Ala. 1984); *Alabama Power Co. v. Talmadge*, 93 So. 548 (Ala. 1921).

D. Wife. *See Barnes v. State*, 14 So. 2d 242 (Ala. Civ. App. 1943).

E. Party. *See Trahan v. Cook*, 265 So. 2d 125 (Ala. 1972); *Morris v. McClellan*, 45 So. 641 (Ala. 1908).

F. Former employee hostile. *See Stauffer Chemical Co. v. Buckalew*, 456 So. 2d 778 (Ala. 1984).

G. Former employee not hostile. *See Mutual Ben. Health & Acci. Ass'n v. Bradford*, 7 So. 2d 20 (Ala. 1942).

Appoint Guardian Ad Litem

A judgment against an infant brought within the jurisdiction of the court by proper service of process is not void and subject to collateral attack for want of a guardian ad litem to represent and protect the infant's interests, but such judgment is erroneous and subject to reversal on appeal. *See Doss v. Terry*, 54 So. 2d 451 (Ala. 1951); *Bell v. Bannister*, 101 So. 653 (Ala. 1924). The infant must have a guardian ad litem in all important stages of the action. *See Citizens Walgreen Drug Agency, Inc. v. Gulf Ins. Co.*, 213 So. 2d 814 (Ala. 1968).

Recovery of Minor's Medical Expenses

Medical and hospital expenses of a minor are obligations and debts of the father. Where the father has incurred or paid them, he has the right to bring a separate suit for them. Where the father, however, brings a suit as next friend of his minor child, he waives in the child's favor his right to recover the expenses of medical and hospital treatment, and is thereafter estopped to claim them in a separate suit. *See Cabaniss v. Cook*, 353 So. 2d 784 (Ala. 1977).

An unemancipated minor cannot recover for medical expenses unless he is dependent on his own resources for a livelihood at the time of the accident. *See Doullut & Williams v. Hoffman*, 86 So. 73 (Ala. 1920).

Minor's Suit Against Parent

Under the parental immunity doctrine, an unemancipated minor is precluded from recovering against his parent in a tort action for personal injuries. *See Owens v. Auto Mut. Indem. Co.*, 177 So. 133 (Ala. 1937).

Sexual abuse cases are a recognized exception to doctrine of parental immunity. *See Hurst v. Capitell*, 539 So. 2d 264 (Ala. 1989).

Allowing Unlicensed Minor to Operate Vehicle

Any person who allows a child under sixteen years old to operate a motor vehicle is negligent as a matter of law. *See Chiniche v. Smith*, 374 So. 2d 872 (Ala. 1979).

Negligent Entrustment

Even if a parent does not own the vehicle, the parent can be held liable for negligent entrustment if the parent exercises sufficient control and dominion over the vehicle. *See Land v. Niehaus*, 340 So. 2d 760 (Ala. 1976).

No coverage under homeowner's policy for a claim for negligent entrustment of an automobile. *See Cooter v. State Farm Fire & Casualty Co.*, 344 So. 2d 496 (Ala. 1977).

Predicate to Introduce Prior Testimony of Absent Witness

"If a witness who has given testimony in the course of a judicial proceeding between the parties litigant, before a competent tribunal, subsequently dies; or becomes insane; or after diligent search is not to be found within the jurisdiction of the court, or if that which is equivalent be shown, that he has left the state permanently, or for such an indefinite time that his return is contingent and uncertain, it is admissible to prove the substance of the testimony he gave formerly." *Williams v. Calloway*, 201 So. 2d 506 (Ala. 1967).

Damages

The measure of damages for injury to property is the difference between the reasonable market value before and after the injury. However, evidence of the amount required to make necessary repairs to damaged property (*e.g.,* automobile) is a factor which a jury is authorized to consider in arriving at the true measure of damages. *Crump v. Geer Bros., Inc.*, 336 So. 2d 1091 (Ala. 1976).

The measure of damages for breach of warranty of habitability is "the difference in the reasonable market value of the house in the condition at the time it was purchased and the reasonable market value of the house as it would have been had the house been constructed substantially according to the contract or warranty." *S.S. Steele & Co. v. Pugh*, 473 So. 2d 978 (Ala. 1985).

An award of only $10,500 to plaintiff in action for personal injury in an automobile accident had to be set aside when undisputed evidence was that lost wages and medical expenses exceeded $10,500. *See Bibb v. Nelson*, 379 So. 2d 1254 (Ala. 1980). *But see Mitchell v. Imms*, 488 So. 2d 817 (Ala. 1986) (holding that the rule in *Bibb* did not apply where "there was disputed evidence as to the extent of [plaintiff's] injuries, the time at which he could have returned to work, and the amount he would have earned had he been working.").

NEW CATEGORIES OF EVIDENCE:

Witnesses Commenting on the Testimony of Another Witness

"A question to a witness which asked whether another witness has testified falsely is improper because it calls for a conclusion of the witness and invades the province of the jury to determine the veracity of the witnesses' testimony." *Clevenger v. State*, 369 So. 2d 563 (Ala. 1979).

Testimony from Former Trial

Under the "rule of compulsory completeness," if testimony from a former trial is introduced, the entirety of it must be received in evidence. *See Drs. Lane, Bryant, Eubanks & Dulaney v. Otts*, 412 So. 2d 254 (Ala. 1982).

Evidence of a Party's Wealth

Evidence of defendant's size, wealth or financial condition is inadmissible. This rule applies in cases involving both compensatory and punitive damages. This rule also applies in wrongful death actions. *See Industrial Chemical & Fiberglass Corp. v. Chandler*, 547 So. 2d 812(Ala. 1988).

However, this general exclusionary rule does not apply if the party's wealth or poverty is relevant to a material issue in the case. Furthermore, it is generally recognized that a party may inquire into an opposing party's wealth on cross-examination or in rebuttal if that opposing party "opens the door" to such an inquiry. *Marks v. Intergraph Corp.*, 740 So. 2d 1066 (Ala. 1999).

Juror Substitution

In civil cases under Ala. R. Civ. P. 47(b), once jury deliberations begin, an alternate juror cannot be substituted. *See Lloyd Noland Hosp. v. Durham*, 906 So. 2d 157 (Ala. 2005).

Robert E. Cooper, partner with **Christian & Small**, has tried more than 150 cases to a jury verdict. His extensive list of clients includes businesses and individuals in the manufacturing, commercial transportation, health care and medical device, and insurance industries, among others. During his career, he has defended clients in matters involving personal injury, professional negligence, fraud and bad faith. Consistently recognized as a leader in the legal profession, Mr. Cooper has an AV® Preeminent Peer Review rating in Martindale Hubbell, and he is listed in *The Best Lawyers in America*, *Benchmark Litigation*, and *Alabama Super Lawyers*. He is a graduate of the University of Alabama and the University of Alabama School of Law.

W. Steven Nichols is an associate at **Christian & Small** with a diverse civil litigation practice that includes experience in matters involving product liability, commercial transportation, personal injury, premises liability, employment law, personal injury and insurance law. He was a contributing author and Editor, along with partners John W. Johnson II and Richard E. Smith, to *Allen's Alabama Liability Insurance Handbook* (2d ed. 2009). Steven is active in ADLA and DRI, and he is a member of the Young Lawyers Section of the Birmingham Bar Association. He serves on the Board of Directors of the King's Ranch and is a volunteer coach for Mountain Brook Athletic's youth football program.