

January 1997

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Recommended Citation

Bruce J. McKee, *ALABAMA: A JURISDICTION OUT OF CONTROL? NOTES AND COMMENTS*, 41 N.Y.L. SCH. L. REV. 637 (1997).

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ALABAMA: A JURISDICTION OUT OF CONTROL?
NOTES AND COMMENTS

BRUCE J. MCKEE*

I. TORT LITIGATION IS NOT HARMING BUSINESS IN ALABAMA

Page two of a 1995 brochure published and disseminated by the Alabama Development Office, an executive agency, entitled *Alabama's Incentives: Executive Summary*, announces:

Existing laws speak best for Alabama's pro-business climate. Over a period of 40 years the state's officials have created an umbrella of laws favorable to business and industry. These laws have been amended and strengthened when needed to assure that Alabama continues to provide industry with a hospitable and profitable business environment.

Alabama's announced total investment for new and expanding industries has exceeded \$2 billion for eight years.¹

Similarly, "Alabama ranked first in the nation for industrial development for three years in a row through 1992, based on our population."² In late 1993, "Mercedes-Benz announced that Vance, Alabama, had beaten out 170 sites in thirty states and Canada for one of the top development prizes in history: the company's \$300 million U.S. production facility."³ Unemployment in Alabama is so low that for the second consecutive year employers will only have to pay the minimum statutory rate for unemployment insurance, the third lowest in the nation.⁴ According to a 1995-1996 Alabama industrial site guide, foreign investment in Alabama

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1. ALABAMA DEV. OFFICE, *ALABAMA'S INCENTIVES: EXECUTIVE SUMMARY 2* (1995).

2. W. Lee Pittman, *The Truth About the Alabama Courts and the Business Climate*, 13 ALA. TRIAL LAW. ASS'N J. 3, 4 (1993).

3. Mark Kelly, *The Industrial Melting Pot: Alabama Turns Up the Heat with Unprecedented Numbers*, 1995 AMAZING ALA. 9 (1994) (published by the Economic Development Association of Alabama).

4. See Linda Gunter, *UI Rates Down, Won't Get Up*, BIRMINGHAM BUS. J., Jan. 9, 1995, at 1.

increased from \$1.9 billion in 1983 to \$7.5 billion in 1993.⁵ Currently, companies from twenty-five foreign countries operate 221 manufacturing plants in Alabama.⁶ *Site Selection* magazine, in its October 1995 issue, ranked Alabama as having the tenth best "business climate" in the nation.⁷

The major package of "tort reform" statutes enacted in Alabama were passed in 1987.⁸ One of the first cases to challenge aspects of those statutes was *Trawick v. Michaels of Oregon Co.*⁹ The record in that case is replete with empirical evidence proving no "tort crisis." John Wilson, Ph.D., a consultant to several state insurance commissions, studied the Alabama insurance industry from 1980 to 1988.¹⁰ The loss ratio of insurers in Alabama was less than the national average, and insurers in Alabama were very profitable.¹¹ For example, medical malpractice insurers made about \$272 million in profit those years, more than twice the national rate of return.¹² In 1996, there are *more* insurers doing business in Alabama than in the early 1990s.

The *Birmingham News* publishes an annual special section called "Alabama Business Review & Outlook." The January 14, 1996, issue contains fifty-four pages of articles on how Alabama businesses are making money "hand over fist."¹³

5. See *Business Alabama: An Economic Overview*, ALABAMA ECON. DEV. GUIDE AND INDUS. SITES GUIDE, 1997-98, at 8, 9.

6. See *id.*

7. Jack Lyne, *Top Business Climate Cats: Southeast, Midwest, Southwest Still Perched Atop SS Rankings*, 40 SITE SELECTION 702, 703 (1995).

8. See, e.g., ALA. CODE § 6-11-20 (1993) (applying a "clear and convincing" evidence standard for plaintiffs in punitive damages cases).

9. 570 So. 2d 252 (Ala. 1990).

10. See Plaintiff's Brief at 7-8, *Trawick*, 570 So. 2d 252.

11. See *id.* at 8 (stating that premiums written in Alabama had a loss/paid ratio of 36.8% and an incurred loss ratio of 55.4% compared to 41.7% and 75.6%, respectively, for the entire country).

12. See *id.* at 94 (noting that the rate of return on premiums written in Alabama was 227.5% versus 110.3% for the United States as a whole).

13. Jerry Underwood, *News Takes a Look at State Commerce in Special Section*, BIRMINGHAM NEWS, Jan. 14, 1996, at 2H, 3H ("[Y]ou may want to . . . send a copy [of this issue] to an out-of-state client or associate. After all, there's no use in keeping *such good news* a secret." (emphasis added)).

II. ALABAMA'S SUBSTANTIVE TORT LAW IS DECIDEDLY NOT PRO-PLAINTIFF

The Alabama Development Office, quoted above, is quite correct in assessing Alabama's substantive law as being favorable to business interests. Consider a few examples:

(1) Alabama is one of only about four states wherein contributory negligence is still a complete defense in a personal injury action.¹⁴ That is, a plaintiff who is found to be guilty, to the slightest degree, of some fault in causing his own injury can collect nothing from a defendant, even if the defendant is found to be ninety-nine percent responsible.

(2) Alabama is perhaps the only remaining state to allow contributory negligence to be a complete defense in a product liability case, even in a "crashworthiness" case.¹⁵

(3) Alabama is virtually the only state not to have adopted "strict" product liability pursuant to the Second Restatement of Torts.¹⁶ The Alabama Extended Manufacturers Liability Doctrine is still somewhat negligence-based, or fault-based, which is one explanation for why contributory negligence is still a valid defense.¹⁷

(4) Alabama has not adopted the theory of "market share liability."¹⁸

(5) Alabama is virtually the only state to reject totally any recovery for the negligent infliction of mental distress.¹⁹

(6) Alabama is the only state that refuses to allow any compensatory damages for wrongful death; the only damages allowed are punitive.²⁰ Thus, in a case where a business executive earning \$500,000 per year is killed by a negligent car driver, a jury might award little or no damages if it determined the defendant was only mildly negligent and did not

14. *See Williams v. Delta Int'l Mach. Corp.*, 619 So. 2d 1330, 1332 (Ala. 1993) (citing *Dennis v. American Honda Motor Co.*, 585 So. 2d 1336 (Ala. 1991)).

15. *See, e.g., General Motors Corp. v. Saint*, 646 So. 2d 564 (Ala. 1994).

16. *Compare* RESTATEMENT (SECOND) OF TORTS § 402A cmt. n (1965) *with* ALA. CODE § 6-5-521 note (1993).

17. *See Casrell v. Altec Indus.*, 335 So. 2d 128 (Ala. 1976).

18. *See Franklin County Sch. Bd. v. Lake Asbestos of Quebec, Ltd.*, No. 84-AR-5435-NW, 1986 WL 69060, at *5-6 (N.D. Ala. Feb. 13, 1986).

19. *See Gideon v. Norfolk S. Corp.*, 633 So. 2d 453 (Ala. 1994) (denying damages to a mother who saw, from a few feet away, her child struck and killed by a train).

20. *See* ALA. CODE § 6-5-410; *see also Bonner v. Williams*, 370 F.2d 301 (5th Cir. 1966) (Alabama's wrongful death statute intended only to allow recovery for punitive damages).

deserve "punishment." This also means there can be no recovery against an Alabama municipality under the federal wrongful death provision.²¹

(7) Alabama is one of the few states to retain the common law view that tort actions not filed before death do not survive.²² Thus, if someone dies before suing for damages for fraud, bad faith, or injuries suffered in a car wreck, the defendant gets off "scot-free."

(8) Alabama is probably the only state to retain a guest passenger statute.²³

(9) Private landowners and governments that provide recreational use lands are not liable for negligence to people who are injured due to defects on the premises.²⁴

(10) Alabama is one of the jurisdictions that retains the common law premises liability classifications of invitees, licensees, and trespassers, whereby a landowner owes a duty to provide reasonably safe premises only to business invitees.²⁵

(11) Owners of livestock or animals who cause injury to motorists on the road, for example, are not liable for negligence, only for willful conduct.²⁶

(12) "Good Samaritans," civic volunteers, firemen, and rescue squad members are not liable for negligence.²⁷

(13) The monetary awards provided in Alabama's Worker's Compensation law²⁸ are close to the lowest in the country. Attorneys' fees are capped at fifteen percent, the lowest in the country, and attorneys are paid nothing for litigating and winning a court order requiring disputed medical bills to be paid, unless the court finds the defendant acted in bad faith in not paying the bills. As in most states, the employer is immune to suit in tort by an injured worker; but, in Alabama, the worker's compensation insurance carrier is also immune. For example, there is no cause of action for bad faith. If a worker is killed on the job, but leaves no dependents, the employer is liable only for funeral expenses.²⁹

21. *See City of Tarrant v. Jefferson*, 682 So. 2d 29 (Ala. 1996) (citing *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981)); *see also* 42 U.S.C. § 1983 (1994).

22. *See* ALA. CODE § 6-5-462.

23. *See id.* § 32-1-2 (1989) (preventing a social passenger from suing a car driver for negligently causing an accident and injuring the passenger).

24. *See id.* §§ 35-15-1 to -3 (1991).

25. *See Whaley v. Lawing*, 352 So. 2d 1090, 1091 (Ala. 1977).

26. *See* ALA. CODE §§ 3-5-1 to -3 (1996).

27. *See id.* §§ 6-5-332, -335 to -336 (1993).

28. *Id.* § 25-5-1 (1992).

29. *See Yarchak v. Munford, Inc.*, 570 So. 2d 648, 650 (Ala. 1990).

(14) Alabama did have the shortest statute of limitations in the country, until 1985, when the general tort statute was raised to two years. But, unlike virtually every other state, generally Alabama does not recognize any tolling or discovery rule.³⁰ That means a victim who was unknowingly exposed to a toxic substance in 1990, but first had a symptom to manifest in 1996, has no cause of action for any compensation because his statute of limitations ran out in 1992 (though there was no possible way of knowing he had been injured).³¹ The only "discovery" rule relates to fraud³² and asbestos³³ claims.

(15) Valid claims can also be barred if not filed within six months of a decedent's estate being opened,³⁴ within six months against a municipality,³⁵ or within one year against a county.³⁶

(16) The State of Alabama still has absolute sovereign immunity.³⁷ Sheriffs and county deputies are absolutely immune to any tort suit.³⁸ Municipal police are granted broad "discretionary function" immunity.³⁹ Even when governmental entities are legally liable, damages are capped at \$100,000.⁴⁰ Fire Protection Districts are also immune.⁴¹ And, airport authorities are immune to negligence actions.⁴²

(17) Significant portions of Alabama's 1987 "tort reform" legislation still stand and are applied everyday in the courtrooms of Alabama.⁴³ Alabama Code section 6-11-20 now requires that plaintiffs, in every punitive damages case, prove by "clear and convincing evidence that the defendant consciously or deliberately engaged in oppression, fraud, wantonness, or malice with regard to the plaintiff."⁴⁴ Approximately half of the states still do not require clear and convincing evidence. Alabama Code section 6-11-27 now provides that a principal or employer

30. *See Payne v. Alabama Cemetery Ass'n*, 413 So. 2d 1067, 1072 (Ala. 1982).

31. *See Johnson v. Garlock, Inc.*, 682 So. 2d 25 (Ala. 1996).

32. *See* ALA. CODE § 6-2-3 (1993).

33. *See id.* § 6-2-30.

34. *See id.* § 43-2-350 (1991).

35. *See id.* § 11-47-23 (1992).

36. *See id.* § 11-12-8 (1989).

37. *See* ALA. CONST. art. I, § 14.

38. *See Hereford v. Jefferson County*, 586 So. 2d 209, 210 (Ala. 1991).

39. ALA. CODE § 6-5-338 (Supp. 1996).

40. *See id.* § 11-93-2 (1994).

41. *See id.* § 11-89-15.

42. *See id.* §§ 4-3-7, -4-4 (1996).

43. *See, e.g., id.* § 6-11-20 (1993).

44. *Id.*

is not vicariously liable for punitive damages except under certain enumerated conditions.⁴⁵ In 1987, several venue provisions were altered in an attempt to favor defendants, in comparison to pre-1987 venue rules.⁴⁶

III. ALABAMA JURIES ARE NOT WILDLY PRO-PLAINTIFF

Jefferson County (Birmingham) is Alabama's most populous county, and it used to be known as a "plaintiff-friendly venue." No more. For example, in the first half of 1995, plaintiffs won less than fifty percent of civil jury trials.⁴⁷ The largest verdict was in a wrongful death/dram shop case, but that \$7.2 million verdict is not collectable.⁴⁸ The only other large verdict, \$4 million for fraud, was reduced by the trial court to \$2 million and settled for close to \$1 million.⁴⁹ Not counting those two verdicts, the average plaintiff's verdict was only approximately \$85,000.⁵⁰ In my anecdotal experience, the trend in 1995 through 1996, in Jefferson County, is even more strongly skewed toward defense verdicts.

It is still practically impossible to win a medical malpractice trial in Alabama. Statistics from Mutual Assurance (MASA), the largest medical malpractice carrier in Alabama, show that doctors won about 98% of the trials in Alabama from 1983 to 1992.⁵¹

A few huge verdicts from a few rural counties have been blown up in the press, for political purposes, to foster a false perception of "runaway juries" in Alabama. Official state-wide court statistics will not support the "tort reformer's" thesis.

45. *See id.* § 6-11-27.

46. *See, e.g., id.* §§ 6-3-11, -21.1

47. *See* Alabama Judicial Data Center, Administrative Office of Courts, Birmingham Court Action Figures for 1995 (computerized data available from Administrative Office of Courts, Montgomery, Alabama).

48. *See* Interoffice Memorandum of Hare, Wynn, Newell & Newton 1 (Sept. 5, 1995) [hereinafter Interoffice Memorandum] (on file with *New York Law School Law Review*).

49. *See* Johnson v. Mercury Fin. Co., JVR No. 133795, 1994 WL 546665 (LRP Jury); *see also* Beth Healy, *Suit Settlement Won't Push Mercury Off Its Smooth Road*, CRANE'S CHI. BUS., Apr. 17, 1995, at 18.

50. *See* Interoffice Memorandum, *supra* note 48.

51. *See* Chart of MASA's Experience Last Ten Years from Smith v. Schulte, 671 So. 2d 1334 (Ala. 1995) (containing Mutual Assurance summary information that was offered into evidence and is part of the record) (on file with *New York Law School Law Review*).

Alabama's statistics mirror the nation-wide trends. "Across all cases, plaintiffs win slightly more than half the cases. They are most successful in automobile personal injury and business cases"⁵² Honest empirical jury researchers find no evidence of a "runaway jury syndrome," but find that most juries are very conscientious in their search for truth and fairness.⁵³

IV. PUNITIVE DAMAGES AWARDS ARE NOT DRAMATICALLY DIFFERENT IN ALABAMA

Be careful of statistics: A lot of "creative accounting" goes on in the tort reform debate, nationally and in Alabama. Verdict amounts tell us very little. Trial or appellate courts often reduce or set aside verdicts, and many verdicts are uncollectable, such as verdicts against uninsured and judgment-proof defendants. In Alabama, the only damages in wrongful death suits are called "punitive damages,"⁵⁴ but it is misleading to lump Alabama wrongful death damages into a total "punitive" figure.

For about the past ten years, Alabama's Administrative Office of Courts has had one of the most complete, detailed, and accurate computer trackings of trial court cases in the country. In Alabama, it is easy to count and collect virtually every punitive damages verdict. Most states, including Florida, Georgia, Tennessee, and Mississippi, do not have this ability. Thus, it is unfair to compare total verdict figures from other states with the almost one hundred percent complete verdict counts available in Alabama.

The Alabama Trial Lawyers Association participated in an attempt to count all punitive damages in Alabama and in neighboring states from 1992 to 1995. More than two thousand cases were retrieved from computerized databases of court decisions, magazine and newspaper articles, and other sources. This method counted virtually one hundred percent of Alabama verdicts, but necessarily far less than one hundred percent of verdicts in neighboring states. Acknowledging the significant

52. ERIK MOLLER, TRENDS IN CIVIL JURY VERDICTS SINCE 1985 xv (RAND Institute for Civil Justice 1996).

53. See, e.g., STEPHEN DANIELS & JOANNE MARTIN, CIVIL JURIES AND THE POLITICS OF REFORM (1995); REID HASTIE ET AL., INSIDE THE JURY (1983); SAUL M. KASSIN & LAWRENCE S. WRIGHTSMAN, THE AMERICAN JURY ON TRIAL (1988); VERDICT: ASSESSING THE CIVIL JURY SYSTEM (Robert E. Litan ed., 1993); NEIL VIDMAR, MEDICAL MALPRACTICE AND THE AMERICAN JURY (1995); Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—And Why Not?*, 140 U. PA. L. REV. 1147 (1992); Neil Vidmar, *Are Juries Competent to Decide Liability in Tort Cases Involving Scientific/Medical Issues?*, 43 EMORY L.J. 885 (1994).

54. See *supra* note 20 and accompanying text.

undercount in other states, the figures of punitive damages verdicts showed this:

Florida	\$577,399,100
Mississippi	\$507,891,866
Alabama	\$297,794,009
Georgia	\$138,795,843
Tennessee	\$2,724,843 ⁵⁵

A few large verdicts in Alabama have been played up in the media to create a false impression of the litigation climate in Alabama. Anecdotally, I read about bigger awards almost every week in some newspaper or legal publication. For example, a *National Law Journal* reports a \$145 million punitive damages verdict in Utah—probably the most conservative state in the union—against State Farm for the bad faith failure to settle, pre-trial, an automobile liability case.⁵⁶

“Tort reformers” in Alabama like to use the statistic of \$200 million in punitive damages verdicts, statewide, in 1994 alone. But, one can prove that only about \$1 million dollars has actually been paid. A \$50 million verdict against Mercury Finance was reduced by the trial court to \$2 million and settled for \$1 million.⁵⁷ Mercury’s profits soared thirty-three percent in 1994, and its CEO’s compensation for 1994 was almost \$2 million.⁵⁸ In the next largest case, a new trial was granted in the \$33 million verdict against Associates Financial.⁵⁹ Some verdicts are uncollectable, some have been confidentially settled, and some are pending on appeal. The point is this: one cannot hear a statistic like, “Alabama juries awarded \$200 million dollars in punitive damages in one year,” and leap to the conclusion that Alabama’s judicial system is “out of whack.”

Official statistics are published in the *Alabama Judicial System Annual Report*, prepared by the Alabama Administrative Office of Courts. In 1994, the Alabama Supreme Court affirmed \$23.1 million in punitive

55. Alabama Trial Lawyers Ass’n, *Tort Reform Issues: Edition #2*, Dec. 7, 1995, at 4-5 (on file with *New York Law School Law Review*).

56. See *Accident Victims Awarded \$147.6M in Bad-Faith Suit*, NAT’L L.J., Sept. 9, 1996, at A15 (discussing *Campbell v. State Farm Mut. Auto. Ins. Co.*, No. 890905231 (Dist. Ct. Salt Lake County July 31, 1996)). See generally Michael Rustad & Thomas Koenig, *The Historical Continuity of Punitive Damages Awards: Reforming the Tort Reformers*, 42 AM. U. L. REV. 1269 (1993).

57. See Healy, *supra* note 49.

58. See *id.*

59. See *Davis v. Associates Fin. Servs.*, JVR No. 125443, 1994 WL 127879 (LRP Jury); see also Jere Locke Beasley, *Present Punitives as Protecting the Public*, NAT’L L.J., Mar. 13, 1995, at C5.

damages.⁶⁰ Over half of that figure, however, was accounted for in the \$12.5 million case of *Northwestern Mutual Life Insurance Co. v. Sheridan*.⁶¹ However, in 1993, the Alabama Supreme Court affirmed only \$5.9 million in non-wrongful death punitive damages, while remitting \$4.3 million.⁶² In 1992, \$10.9 million was affirmed.⁶³ The Annual Reports for those years show that only seventy-four verdicts were returned in Alabama's trial courts in 1993 for non-wrongful death punitive damages, totalling only \$12.2 million statewide.⁶⁴ In 1992, there were fifty-seven verdicts totaling \$38.4 million.⁶⁵

Erik Moller studied verdict histories in several populous counties in six states.⁶⁶ Page 40 of his study notes: "Within our sample, the highest punitive damage awards occurred in *business cases*: over \$375 million in Los Angeles County, and almost \$4 billion in Harris County[, Texas]."⁶⁷ Thus, anything anyone wants to say about a perceived "crisis" in Alabama pales in comparison with one single county in Texas, and only in cases where businesses are suing each other. Just who is calling the kettle black?

The February 5, 1996, issue of the *National Law Journal* contained a special supplement entitled, "Verdicts: The Big Numbers of 1995."⁶⁸ There is no Alabama case on the list of the forty largest verdicts of 1995.⁶⁹ In the secondary list of forty-five other significant verdicts, only two Alabama cases appear: one was settled for an undisclosed amount, and another was reversed in part in that all punitive damages were taken away.⁷⁰

60. See ADMINISTRATIVE OFFICE OF COURTS, ALABAMA JUDICIAL SYSTEM: 1994 ANNUAL REPORT 19 (1994).

61. 630 So. 2d 384 (Ala. 1993).

62. See ADMINISTRATIVE OFFICE OF COURTS, *supra* note 60, at 20.

63. See *id.*

64. See ADMINISTRATIVE OFFICE OF COURTS, ALABAMA JUDICIAL SYSTEM: 1993 ANNUAL REPORT 25 (1993).

65. See *id.*

66. See generally MOLLER, *supra* note 52.

67. *Id.* at 40 (emphasis added). "Business cases" excludes personal injury, malpractice, product liability, and similar cases. See *id.* at 12.

68. *Verdicts: The Big Numbers of 1995*, NAT'L L.J., Feb. 5, 1996 (Special Supp.), at C1.

69. See *id.*

70. See *id.*

