2012 WL 5930450 (Ala.) (Appellate Brief)
Supreme Court of Alabama.

Terrie K. MITCHELL,

v.

R.E. GARRISON TRUCKING, INC.

No. 1110167.
May 16, 2012.

On Appeal From the Circuit Court of Cullman County, Alabama CV 2010-900310

Brief in Support of the Appellant

Brandon L. Blankenship, Kristen E. Stricklin, Attorneys for the Appellant, Blankenship, Harrelson, L.L.P., 15 Southlake Lane, Suite 350, Birmingham, AL 35244, Phone: (205) 912-8255, Facsimile: (205) 912-8258, Email: brandon.blankenship@bhattorneysllp.com, krisstrick@bellsouth.net.

*II *STATEMENT REGARDING ORAL ARGUMENT*

Terrie K. Mitchell, the Appellant in the instant appeal and Plaintiff in the lower court action, requests oral argument to persuade this court that summary judgment was incorrectly granted to the Defendant, R.E. Garrison Trucking, Inc., in the lower court action. Oral argument will significantly aid the court in understanding the issues presented on appeal, including one which appears to be an issue of first impression in this jurisdiction which is whether an exculpatory clause can be used to avoid liability for injury resulting from violations of Safety Statutes - specifically the Federal Motor Carrier Safety Regulations. As seen from the Facts and Arguments presented below, the Plaintiff was injured when a vehicle driven by one of Defendant's drivers crashed. Although the Defendant has admitted that this driver violated the Federal Motor Carrier Safety Regulations during this trip, [1] Defendant still seeks to escape liability by asserting that an alleged exculpatory clause bars all of Plaintiff's claims-including claims of negligence or wantonness stemming from violations of the ***iii** Federal Motor Carrier Safety Regulations. Although courts in other jurisdictions have held that parties cannot use exculpatory provisions or other contractual language to release them from liability for violations of safety regulations in advance, [2] it does not appear that Alabama has addressed this issue. As this issue is directly related to the question of Defendant's liability in the instant action and as it appears to be an issue of first impression in Alabama, Plaintiff requests oral argument to discuss this and other issues in the instant appeal which are set forth in more detail below.

TABLE OF CONTENTS

***vii** *STATEMENT OF JURISDICTION*

For the reasons stated herein, Terrie K. Mitchell, the Appellant in the instant appeal and Plaintiff in the lower court action, asserts that jurisdiction for this appeal is appropriate in the Supreme Court of Alabama. Regarding the timeliness of this appeal, on or about October 21, 2011, the Circuit Court of Cullman County granted a Motion for Summary Judgment filed by R.E. Garrison Trucking, Inc., the Appellee in the instant appeal and Defendant in the lower court action.[3] Subsequently and within the permitted time period, on or about November 3, 2011 Plaintiff filed the instant appeal of said Order Granting Summary Judgment[4] Appellate jurisdiction is appropriate in the Supreme Court of Alabama as the amount claimed exceeded $50,000.[5] Further, as explained in the Statement Regarding Oral Argument, one way the Defendant seeks to escape liability in the instant action is by asserting that an alleged exculpatory clause bars all of Plaintiff's claims-including claims of negligence or wantonness stemming from violations of the Federal Motor Carrier Safety Regulations even though the ***viii** Defendant has admitted that its driver violated said Regulations.[6] Although courts in other jurisdictions have held that parties cannot use exculpatory provisions or other contractual language to release them from liability for violations of safety regulations in advance,[7] it does not appear that Alabama has addressed this issue. As this issue is directly related to the question of Defendant's liability in the instant action and as it appears to be an issue of first impression in Alabama, jurisdiction is further appropriate in the Supreme Court of Alabama.

***ix** *TABLE OF AUTHORITIES*

CASES

***1** *STATEMENT OF THE CASE*

On or about November 17, 2010, Plaintiff filed a Complaint against Defendant seeking to recover for injuries she sustained as a result of a tractor-trailer crash wherein she was a passenger. [8] Defendant answered the Complaint pleading, among other things,

that an exculpatory provision, Alabama's Guest Statute, and imputation of negligence barred Plaintiffs claims. [9] After, various discovery was completed. Defendant filed a Motion for Summary Judgment pursuant to Alabama Rule of Civil Procedure 56 on or about July 21, 2011. [10] The Plaintiff subsequently filed an Opposition to Defendant's Motion for Summary Judgment on or about August 24, 2011, and the Defendant filed a Reply to Plaintiff's Opposition on or about October 3, 2011. [11] Plaintiff also filed a Supplemental Brief in Opposition to Summary Judgment on or about October 7, 2011. [12] After a brief Summary Judgment Hearing and without issuing an Opinion, the Circuit Court of Cullman County found no issues ***2** of material fact and granted Defendant's Motion for Summary Judgment on all counts on or about October 21, 2011. [13] On or about November 3, 2011, Plaintiff filed the instant appeal of the Circuit Court's Grant of Defendant's Motion for Summary Judgment. [14] On or about November 22, 2011, said appeal was stayed due to the parties' participation in Appellate Mediation. However, as the parties were unable to reach a resolution in mediation, the stay of appeal was lifted and the case was reinstated to the appellate docket on or about February 13, 2012.

***3** *STATEMENT OF THE ISSUES*

I. WHETHER THE CIRCUIT COURT WAS INCORRECT IN GRANTING SUMMARY JUDGMENT TO DEFENDANT WHEN GENUINE ISSUES OF MATERIAL FACT EXIST REGARDING WHETHER DEFENDANT VIOLATED ITS DUTY TO THE PLAINTIFF IN A WANTON, RECKLESS, AND/OR WILLFUL MANNER AND WHEN NEITHER DEFENDANT'S PASSENGER AUTHORIZATION FORM NOR THE ALABAMA GUEST STATUTE BARS DEFENDANT'S LIABILITY FOR WANTON, RECKLESS AND/OR WILLFUL CONDUCT.

II. WHETHER THE CIRCUIT COURT WAS INCORRECT IN GRANTING SUMMARY JUDGMENT TO DEFENDANT WHEN GENUINE ISSUES OF MATERIAL FACT EXIST REGARDING WHETHER DEFENDANT VIOLATED ITS DUTY TO THE PLAINTIFF IN A NEGLIGENT MANNER AND WHEN NEITHER DEFENDANT'S PASSENGER AUTHORIZATION FORM NOR THE ALABAMA GUEST STATUTE BARS DEFENDANT'S LIABILITY FOR NEGLIGENT CONDUCT.

III. WHETHER THE CIRCUIT COURT WAS INCORRECT IN GRANTING SUMMARY JUDGMENT TO DEFENDANT ON THE ISSUE OF WHETHER ANY CONTRIBUTORY NEGLIGENCE OF THE DEFENDANT'S DRIVER CAN BE IMPUTED TO PLAINTIFF IN ORDER TO BAR HER RECOVERY.

IV. WHETHER THE CIRCUIT COURT WAS INCORRECT IN GRANTING SUMMARY JUDGMENT TO DEFENDANT ON WHETHER THE ***4** DEFENDANT'S CONDUCT WAS THE PROXIMATE CAUSE OF PLAINTIFF'S INJURIES.

***5** *STATEMENT OF THE FACTS*

On or about November 15, 2010, Plaintiff was a passenger in an 18-wheeler tractor-trailer owned and operated by Defendant. [15] The driver of the tractor-trailer was Suzanne Sonier (“Ms. Sonier”), Plaintiff's sister as well as an agent of the Defendant. [16] On the date in question, Ms. Sonier was engaged in a job for Defendant wherein she was to drive from Georgia to California and back to Georgia. [17] Ms. Sonier asked Plaintiff to ride as a passenger on this trip in order to assist Ms. Sonier with staying awake, preparing meals, caring for her canine companion, etc. [18] Prior to this trip, Ms. Sonier and Plaintiff lived together, pooling their **financial** resources and sharing living expenses in order to help care for their **elderly** father who suffers from Alzheimer's disease. [19] However, they were suffering **financial** difficulties and thus, Plaintiff agreed to accompany Ms. Sonier so that she could complete the job and provide funds to help support ***6** their household. [20]

Regarding the trip in question, Defendant and/or its agents told Ms. Sonier that she would lose her job if she did not complete the trip by a certain date and time.[21] However, it was impossible for Ms. Sonier to legally complete the trip by the deadline mandated by Defendant.[22] Thus, in order to meet Defendant's deadline, Ms. Sonier drove in excess of the hours permitted by the Federal Motor Carrier Safety Regulations, without taking the legally required breaks and, as a result, while en route from California to Georgia, the tractor-trailer violently crashed, causing death to Ms. Sonier and severe physical injuries and emotional distress to the Plaintiff.[23] According to one of Plaintiff's experts, it was impossible for Defendant's dispatchers or other company representatives to be unaware that Ms. Sonier could not legally meet the deadline imposed by Defendant.[24] Moreover, as the dispatchers and/or other company representatives were aware ***7** of this impossibility, they were also aware of the obvious likelihood of a crash involving injury and/or death caused by any attempt to meet Defendant's impossible deadline.[25]

On or about November 17, 2010, Plaintiff filed a Complaint against Defendant seeking to recover for injuries she sustained as a result of the crash.[26] Defendant answered the Complaint pleading that, among other things, an exculpatory provision, Alabama's Guest Statute, and imputation of negligence barred Plaintiff's claims.[27]

8** ***STATEMENT OF THE STANDARD OF REVIEW

Summary Judgment can only be granted when "there is no genuine issue as to any material fact and [] the moving party is entitled to judgment as a matter of law."[28] Further, "[i]t is well settled that the moving party has the burden of establishing that there exists no genuine issue of material fact ...."[29] This is an "exacting burden"[30] and when determining whether the moving party has met this burden, "all reasonable certainties regarding the existence of a genuine issue of a material fact must be resolved against the moving party."[31] In fact, "[s]ummary judgment may be inappropriate even where the parties agree on the basic facts, but disagree about the inferences that should be drawn from these facts"; "[i]f reasonable minds might ***9** differ on the inferences arising from undisputed facts, then the court should deny summary judgment."[32] On appeal, the appellate court applies the same standard used by the lower court when reviewing a summary judgment ruling,[33] reviewing "the entire record ... in a light most favorable to the nonmovant."[34]

***10** *SUMMARY OF THE ARGUMENT*

In Alabama, the owner/driver of a vehicle has a duty to exercise reasonable care in the operation of the vehicle so as not to unreasonably expose any occupant(s) to danger or injury.[35] In the instant action, Defendant is the carrier responsible for the tractor-trailer in question and owed this duty to Plaintiff, a passenger in the tractor-trailer because an agent of Defendant-Ms. Sonier-was driving said tractor-trailer when the crash occurred.[36] Additionally, Alabama requires compliance with the Federal Motor Carrier Safety Regulations which places restrictions on the number of hours motor carrier drivers can drive.[37] However, Defendant permitted and even encouraged Ms. Sonier, while acting in the line and scope of her duties to Defendant, to drive hours in gross excess of those statutorily allowed and in violation of the Federal Motor Carrier Safety Regulations.[38] For this and other reasons discussed in the Argument below, Plaintiff asserts Defendant breached the ***11** dut(ies) it owed her in a negligent as well as wanton, reckless, and/or willful manner. Additionally, based on the expert opinions as well facts asserted by Plaintiff and/or admitted by Defendant, there arises at least a reasonable inference that Defendant's violation of the dut(ies) owed to Plaintiff were the proximate cause of Plaintiff's injuries.

In response, Defendant argues that Plaintiff's claims are barred (1) by an alleged exculpatory clause in a Passenger Authorization Form; (2) by the Alabama Guest Statute; (3) by an imputation of alleged contributory negligence from Defendant's driver, Ms. Sonier, to Plaintiff; and (4) by a lack of evidence sufficient to create an inference that Defendant's action/inaction was the proximate cause of Plaintiff's injuries. [39] However, as explained and discussed below, Defendant's alleged exculpatory clause is invalid because it is unclear, ambiguous regarding who it applies to, uses overly broad language and purports to exculpate against wanton conduct which Alabama prohibits on public policy grounds. Additionally, based on their relationship and the material benefit Plaintiff's presence on the trip provided to Ms. Sonier, Plaintiff was a *passenger* in the tractor-trailer, ***12** not a guest, and thus Alabama's Guest Statute does not bar her claims. Moreover, Defendant has failed to put forth any evidence which meets Alabama's requirements for imputation of contributory negligence in the instant action. Finally, the facts and expert opinion provided by Plaintiff are sufficient to create at least a reasonable inference that Defendant's action/inaction was the proximate cause of Plaintiff's injuries. In any event, there also exists, at a minimum, genuine issues of material fact on some or all of the issues discussed above. Consequently, the Circuit Court was incorrect in granting summary judgment for Defendant.

13** ***ARGUMENT

I. THE CIRCUIT COURT WAS INCORRECT IN GRANTING SUMMARY JUDGMENT TO DEFENDANT BECAUSE GENUINE ISSUES OF MATERIAL FACT EXIST REGARDING WHETHER DEFENDANT VIOLATED ITS DUTY TO THE PLAINTIFF IN A WANTON, RECKLESS, AND/OR WILLFUL MANNER AND BECAUSE NEITHER DEFENDANT'S PASSENGER AUTHORIZATION FORM NOR THE ALABAMA GUEST STATUTE BARS DEFENDANT'S LIABILITY FOR WANTON, RECKLESS AND/OR WILLFUL CONDUCT.

The Circuit Court was incorrect in granting Defendant's Motion for Summary Judgment on all counts, but especially on the issue of Defendant's wanton, reckless, and/or willful conduct toward Plaintiff. In addition to there being genuine issues of material fact surrounding whether Defendant exhibited wanton, reckless, and/or willful conduct toward Plaintiff, neither Defendant's alleged exculpatory provision in its Passenger Authorization Form nor the Alabama Guest Statute bar Defendant's liability for wanton, reckless and/or willful conduct as Defendant suggests.

A. ***Genuine Issues of Material Fact Exist Regarding Defendant's Wanton, Reckless and/or Willful Conduct toward Plaintiff.***

In Alabama, the owner/driver of a vehicle owes a duty to any occupants of the vehicle to,

> exercise reasonable care in its operation not to unreasonably expose to danger and injury the occupant by increasing the hazard and method of travel, but he must exercise the care and diligence which a man of reasonable prudence engaged in like business would exercise for his own protection and ***14** the protection of his family and property. [40]

In the instant action, Defendant is the carrier responsible for the tractor-trailer in question and owed this duty to Plaintiff, a passenger in the tractor-trailer because an agent of Defendant-Ms. Sonier-was driving said tractor-trailer when the crash occurred. [41] Additionally, Alabama requires compliance with the Federal Motor Carrier Safety Regulations which places restrictions on the number of hours motor carrier drivers can drive. [42] Plaintiff has alleged that Defendant breached these dut(ies) by wantonly, knowingly, and with a reckless disregard and indifference to the likely consequences, allowing its agent Ms. Sonier, while acting in the line and scope of her duties to Defendant, to drive hours in gross excess of those statutorily allowed and in violation of the Federal Motor Carrier Safety Regulations. [43]

Willfulness or wantonness imports premeditation or knowledge and consciousness that injury is likely to result ***15** from the act done or from the omission to act. [44] In the instant action, there are several facts which support a charge of wantonness and/or willfulness on the part of the Defendant. The Federal Motor Carrier Safety Regulations provide, among other things, restrictions on the number of hours motor carrier drivers can drive. [45] Moreover, the Federal Register gives the following guidance to questions surrounding the Federal Motor Carrier Safety Regulations:

(1) "[A] carrier is liable for violations of the hours of service regulations if it had or should have had the means by which to detect the violations. Liability under the FMSCRs does not depend upon actual knowledge of the violations" and (2) "Carriers are liable for the actions of their employees. Neither intent to commit a violation, nor actual knowledge of, a violation is a necessary element of that liability. Carriers 'permit' violations of the hours of service regulations by their employees if they fail to have in place management systems that effectively prevent such violations." [46]

Alabama requires compliance with the Federal Motor Carrier Safety Regulations and, as such, Defendant should have taken steps to ensure that it, as well as its drivers, such as Ms. Sonier, complied with said Safety Regulations ***16** when completing trips for Defendant. [47] However, in the instant action, not only did Defendant fail to ensure compliance with the Federal Motor Carrier Safety Regulations, but it actually encouraged violations of same, disregarding any risks associated with the violations. Defendant and/or its agents told Ms. Sonier that she would lose her job if she did not complete the trip by a certain deadline-one which it was impossible for Ms. Sonier to legally meet without driving in excess of the hours permitted by the Federal Motor Carrier Safety Regulations. [48] As Defendant is aware of the Federal Motor Safety Carrier Regulation requirements, the fact that it gave Ms. Sonier a deadline which could not have been met without violating the Safety Regulations shows Defendant was wanton, exhibiting a reckless disregard for the life and safety of Plaintiff, a known passenger in its vehicle. Further, according to one of Plaintiff's experts, it was impossible for Defendant's dispatchers or other company representatives to be unaware that Ms. Sonier could not legally meet the deadline imposed by Defendant. [49] Moreover, as the dispatchers and/or other ***17** company representatives were aware of this impossibility, they were also aware of the obvious likelihood of a crash involving injury and/or death caused by any attempt to meet Defendant's deadline. [50]

Additionally, Defendant has admitted that its agent Ms. Sonier violated the Federal Motor Carrier Safety Regulations on the trip she was completing for Defendant. [51] In fact, Defendant even characterized Ms. Sonier's actions as "reckless behavior." [52] As Ms. Sonier's violations of the Federal Motor Carrier Safety Regulations occurred in the line and scope of her employment or agency with Defendant, Defendant is vicariously liable for these violations as well as Plaintiff's injuries in the crash which resulted from Ms. Sonier's violation of the Safety Regulations. Thus, Defendant's conduct rises to the level of wantonness, recklessness, and/or willfulness due to the fact that (1) Defendant and/or its dispatchers had knowledge and were consciously aware that injury to the Plaintiff was likely to result yet they failed to take action to prevent such ***18** injuries from occurring and (2) Defendant had knowledge that its trip deadline required Ms. Sonier to violate the Federal Motor Carrier Safety Regulations and thus is liable for her actions and the ensuing crash.

Obviously, Defendant has denied many facts set forth in Plaintiff's affidavit. However, this very denial of the facts described above show, at a minimum, that genuine issues surround these material facts. Because the facts as described in Plaintiff's affidavit and expert report are sufficient to show Defendant's actions were wanton, willful, and/or exhibited a reckless disregard for the life and safety of Plaintiff as a known passenger in a vehicle driven by its agent, a determination of their truth is an issue to be decided by a jury. Consequently, the Circuit Court was incorrect in granting summary judgment on this issue.

B. ***Defendant's Passenger Authorization Form Does Not Bar Defendant's Liability for Wanton, Reckless and/or Willful Conduct.***

In its Motion for Summary Judgment, Defendant argued that Plaintiff's claims are barred by an exculpatory provision or anticipatory release in a document Plaintiff signed prior to riding as a passenger in one of Defendant's tractor-trailers. While

Alabama courts have recognized the validity of exculpatory provisions for negligence claims in ***19** limited circumstances, they have held that agreements that seek to exculpate parties from intentional or wanton conduct are void as a matter of public policy.[53] Thus, even if this Court were to find Defendant's alleged release clause valid to exculpate against Defendant's own negligence, it is not valid to bar Plaintiff's claims for Defendant's wanton, reckless and/or willful conduct. Consequently, the Circuit Court was incorrect in granting summary judgment on this issue.

Furthermore, in asserting the validity of its alleged exculpatory provision, Defendant attempts to use this provision to escape liability from violations of the Federal Motor Carrier Safety Regulations. As discussed above, carriers have a duty to comply with these regulations and are liable for their own as well as their agents' violations regardless of whether they intended to commit a violation or actually knew a violation was committed; so long as the carrier had or should have had the means by which to detect violations and/or failed to have systems in place to prevent ***20** violations by their agents, the carrier is liable.[54]

Also, as discussed above in the instant action, not only did Defendant fail to ensure compliance with the Federal Motor Carrier Safety Regulations, but it actually encouraged violations of same by telling its driver, Ms. Sonier, that she would lose her job if she did not complete the trip by a certain deadline-one which it was impossible to legally meet without driving in excess of the hours permitted by the Federal Motor Carrier Safety Regulations.[55] Moreover, Defendant has admitted that its agent, Ms. Sonier, violated the Federal Motor Carrier Safety Regulations on the trip during which the instant crash occurred.[56] In *Hargis v. Baize*, the Court stated that "a party cannot contract away liability for damages caused by that party's failure to comply with a duty imposed by a safety statute."[57] As the ***21** Federal Motor Carrier Safety Regulations would be considered a "safety statute" with which Alabama requires compliance,[58] Defendant should not be permitted to use its alleged exculpatory provision to "contract away" Plaintiff's damages which were caused by Defendant's failure to comply or ensure that its agent complied with said safety statute. Plaintiff anticipates Defendant will argue (1) that it did not place a deadline on Ms. Sonier's trip which was legally impossible to meet without violating the Safety Regulations and (2) that Ms. Sonier's violations of same did not cause the crash. However, these arguments contain genuine issues of material fact which should be decided by a jury and, as a result, the Circuit Court was incorrect in granting summary judgment on the issue of whether Defendant's alleged exculpatory clause bars Plaintiff's claims in the instant ***22** action.

C. *Alabama's Guest Statute Does Not Bar Defendant's Liability for Wanton, Reckless and/or Willful Conduct.*

In its Motion for Summary Judgment, Defendant argues that Plaintiff's negligence claims are barred by Alabama's Guest Statute. While Defendant does not appear to assert that Plaintiff's wanton, reckless and/or willful claims are barred by this statute, Plaintiff seeks to reiterate here that these claims are not barred by Alabama's Guest Statute which states :

> [t]he owner, operator or person responsible for the operation of a motor vehicle shall not be liable for loss or damage arising from injuries or death of a guest ... unless such injuries or death are caused by the willful or wanton misconduct of such operator, owner or person responsible for the operation of said motor vehicle.[59]

II. THE CIRCUIT COURT WAS INCORRECT IN GRANTING SUMMARY JUDGMENT TO DEFENDANT WHEN GENUINE ISSUES OF MATERIAL FACT EXIST REGARDING WHETHER DEFENDANT VIOLATED ITS DUTY TO THE PLAINTIFF IN A NEGLIGENT MANNER AND WHEN NEITHER DEFENDANT'S PASSENGER AUTHORIZATION FORM NOR THE ALABAMA GUEST STATUTE BARS DEFENDANT'S LIABILITY FOR NEGLIGENT CONDUCT.

The Circuit Court was incorrect in granting Defendant's Motion for Summary Judgment on all counts, including the issue of Defendant's negligence toward Plaintiff. In addition to there being genuine issues of material fact ***23** surrounding whether

Defendant exhibited negligent conduct toward Plaintiff, neither Defendant's alleged exculpatory provision nor the Alabama Guest Statute bar Defendant's liability for negligent conduct.

A. ***Genuine Issues of Material Fact Exist Regarding Defendant's Negligent Conduct toward Plaintiff.***

Once again, the owner/driver of a vehicle owes a duty to any occupants to "exercise reasonable care in its operation not to unreasonably expose to danger and injury the occupant ..." as well as to "exercise the care and diligence which a man of reasonable prudence engaged in like business would exercise for his own protection ...." [60] In the instant action, Defendant is the carrier responsible for the tractor-trailer in question and owed this duty to Plaintiff, a passenger in the tractor-trailer, because an agent of Defendant-Ms. Sonier-was driving said tractor-trailer when the crash occurred. [61] Additionally, Alabama requires compliance with the Federal Motor Carrier Safety Regulations which places restrictions on the number of hours motor carrier drivers can drive. [62] Plaintiff has alleged ***24** Defendant breached these dut(ies) in a negligent manner by allowing and actually encouraging its agent Ms. Sonier, while acting in the line and scope of her duties to Defendant, to drive hours in gross excess of those statutorily allowed and in violation of the Federal Motor Carrier Safety Regulations. [63] Given the egregiousness of Defendant's violation of these dut(ies), the same facts which support Plaintiff's claims of wantonness would also support her claims of negligence-namely that Defendant and/or its agents told Ms. Sonier that she would lose her job if she did not complete the trip by a deadline which was impossible to legally meet without driving in excess of the hours permitted by the Federal Motor Carrier Safety Regulations. [64] Further, according to one of Plaintiff's experts, it was impossible for Defendant's dispatchers or other company representatives to be unaware that Ms. Sonier could not legally meet the deadline imposed by Defendant and, as such, Defendant and/or its dispatchers were also aware of the obvious likelihood of a crash involving injury and/or death caused by any attempt to meet this impossible ***25** deadline. [65]

As Defendant is aware of the Federal Motor Carrier Safety Regulation requirements, the fact that it gave Ms. Sonier a deadline which could not have been met without violating the safety requirements shows, at a minimum, that it negligently violated its duty to Plaintiff, a known passenger in the tractor-trailer. Just as with the issue of wantonness, however, Defendant has obviously denied many facts set forth above. However, this denial simply shows that genuine issues surround these material facts and, because the facts as described in Plaintiff's affidavit and expert report are sufficient to show Defendant's negligence, a determination of their truth is an issue to be decided by a jury. Consequently, the Circuit Court was incorrect in granting summary judgment on Defendant's negligence.

B. ***Defendant's Passenger Authorization Form Does Not Bar Defendant's Liability for Negligent Conduct.***

In its Motion for Summary Judgment, Defendant argued that Plaintiff's claims are barred by an exculpatory provision or anticipatory release in a document entitled "Passenger Authorization Form" which Plaintiff signed prior to riding as a passenger in one of Defendant's tractor-trailers. [66]

***26** For many years, Alabama followed the rule that a party could not contract against the consequences of his own negligence. [67] However, this rule was modified in *Industrial Title, Inc. v. Stewart* when the Alabama Supreme Court opined that private parties may contract or indemnify against negligence if the parties "knowingly, evenhandedly, and for valid consideration, intelligently enter into [the] agreement" and if the exculpation of negligence is "expressed in clear and unequivocal language." [68] *Industrial Title* also summarized several rules followed in Alabama regarding agreements which indemnify or exculpate [69] against ***27** one's own negligence, namely that "the intention to indemnify the negligence of the indemnitee must clearly appear from the wording of the instrument" and "[a] contract [] purporting or claimed to relieve one from the consequences of his failure to exercise ordinary care must be strictly construed;" further, such an agreement will *not* be construed to indemnify against one's own negligence unless that intention is "expressed in clear, unequivocal terms" which can

have no other meaning. [70] These majority statements were further echoed by the concurrence which noted a "strong disfavor by the courts" of agreements that exculpate against one's own negligence. [71]

Additional cases have recognized this disfavor, explaining that agreements which attempt to exculpate a party for its own negligence are "carefully scrutinized." [72] One reason behind such strong scrutiny is that "[a]greements exempting persons from liability for negligence induce a ***28** want of care ...." [73] In *City of Montgomery v. JYD International, Inc.*, the Alabama Supreme Court noted that, although *Industrial Title, Inc.* rejected the "per se" elimination of exculpation against one's own negligence, the motivation for this rejection was a balancing of tort and contract law interests. [74] Thus, "[t]he tort law incentive to exercise due care [can] be shifted to the indemnitor through a negotiated contract [] only if the indemnitor [is] clearly aware of his obligation and [is] therefore at least given the opportunity to attempt to monitor the activities of those whom he indemnifie[s]." [75] The Court also recognized the sometimes illogical nature of exculpatory provisions as they relate to negligence of others, noting that the less control one has over an area, the less reasonable it is for that person to bear responsibility for injuries there; "[t]o allow [a] transfer [of] responsibility ... under such circumstances would be totally at odds with ***29** the tort system's incentives to encourage safety measures" and "[a]ny argument that the agreement simply shifts the burden to [one party] to take such measures is untenable if [that party] has no right to exercise control over the potentially hazardous area or activity." [76] Thus, while the Defendant is correct that Alabama courts recognize the validity of exculpatory provisions for negligence claims, they do so in limited circumstances. Moreover, agreements that attempt to exculpate against a party's own negligence are "carefully scrutinized." [77] In order to bar Plaintiff's claims of negligence in the instant action, it must clearly and unequivocally appear from the wording of the Passenger Authorization Form that Defendant intended to exculpate against its own negligence. [78] However, for the reasons set forth below, the Form does not meet Alabama's stringent requirement for clarity on exculpation of negligence and thus does not bar Plaintiff's claims of negligence.

Defendant spends significant time arguing that the Plaintiff received consideration for execution of the Passenger Authorization form. Although consideration is ***30** required in these agreements, the language of said agreement must still meet Alabama's stringent requirement of clarity to be valid; sufficient consideration will not automatically validate an otherwise unclear exculpatory provision. As stated above, to be valid in Alabama, exculpations of negligence must be "expressed in clear and unequivocal language." [79] One simple way to ensure an agreement "unequivocally" exculpates a party from its own negligence is to just say so-that is, to actually use the word negligence so that no confusion or ambiguity arises. Although the word "negligence" is not *required*, the language of the agreement must still clearly evidence that *both parties* intended to release the party in question from its *own negligence.* [80] In Summary Judgment, the Defendant placed much emphasis on *Barnes v. Birmingham International Raceway, Inc.* for the proposition that anticipatory releases can discharge liability for negligent conduct when there is no ambiguity. [81] Though the Defendant asserts that the *Barnes* court upheld a release simply because it purported to ***31** insulate the defendant from "any and all" injuries to the plaintiff, the release in *Barnes* is distinguished from and is actually far more clear than the release in the instant action as it *specifically stated* the participant released the Raceway from *the Raceway's own negligence.* [82] In contrast, Defendant's Passenger Authorization Form does not use the word negligence, nor is it clear from the language that someone signing the Form specifically releases Defendant from its own negligence.

Rather than clearly explaining that the Passenger Authorization Form releases Defendant from its own negligent conduct said Form instead makes the broad statement that the person signing the Form,

> release[s] and acquit[s] and forever discharge[s] R.E. GARRISON TRUCKING, INC., and their agents, representatives and all other person of any claims, demands, and damages of any kind, known or unknown, resulting in a personal injury, death, or property damages arising from any accident or incident while an occupant in any vehicle owned or under contract to R.E. GARRISON TRUCKING, INC. [83]

As an initial matter, the Passenger Authorization Form language does not distinguish between exculpation for claims of negligence and claims of wanton, reckless or willful ***32** conduct. Because the language could be read as attempting to exculpate Defendant against wanton, reckless and/or willful conduct, which is prohibited on public policy grounds, [84] the entire exculpatory provision is invalid due to this lack of distinction and lack of clarity.

Additionally, the very breadth of the exculpatory language adds to its lack of clarity. In *Richards v. Richards*, the Wisconsin Supreme Court found an exculpatory clause void against public policy for many reasons, one being its extreme breadth and "allinclusive[ness]." [85] This case is persuasive as the court noted several principles similar to those recognized in Alabama, such as that exculpatory provisions are not favored in the law and while not automatically void, are strictly construed against the party seeking exculpation. [86] As with the instant agreement, the exculpatory clause in *Richards* purported to release the company at issue, other entities and *all* affiliated or associated companies from *all* claims-whether for ***33** intentional, reckless or negligent conduct. [87] According to the court, "[t]he very breadth of the release raises questions about its meaning and demonstrates its one-sidedness; it is unreasonably favorable to the [] drafter of the contract." [88] In another persuasive case on overbreadth, *Sivaslian v. Rawlins* involved an exculpatory provision executed in connection with a parachute jumping school. [89] The agreement purported to release the Skydiving company from " 'any and all manner of actions ... which [the plaintiff] may have by reason of [her] participation in flying and parachute jumping activities,' " leaving a question as to whether this was sufficient to release the company from its own negligence. [90] In holding that such generic language *did not* release the company from its own negligence, the New York Appellate Division cited the stringent standard of clarity-used by Alabama-which requires " 'the drafter of such an agreement [to] make its terms ***34** unambiguous ...[and] understandable as well. [91] Although the word "negligence" need not be used, "words conveying a similar import must appear." [92] The broad language stating that the plaintiff will "release and hold harmless" the defendant from "any and all manner of actions" by reason of the plaintiff's participation in certain activities was not sufficient to clearly inform the plaintiff she was assuming not only those risks inherent in the activities, but also those "occasioned by defendant's own fault, carelessness or negligence ... and exculpating defendants from their failure to use due care ..." [93] The *Sivaslian* court also found that when such generic exculpatory language is used, "[t]o fully appreciate what [the plaintiff] was waiving by her signature, plaintiff would be required to possess legal skill sufficient to equate legal 'actions' with the release of defendants from liability even for acts of their own negligence, fault or carelessness." [94] Similarly, Defendant's overly broad language in the instant action does not clearly exculpate against its own negligence as Alabama requires.

***35** However, the lack of clarity in Defendant's Passenger Authorization Form does not stop at overly broad language. This form is a one-page document which appears to have three separate purposes: to give Defendant consent for a passenger to ride in a company vehicle, to allegedly release Defendant of all claims, and to be an application for insurance coverage. [95] Yet the very title of this multi-purpose form-"Passenger Authorization Form and Application for Passenger Accident Coverage"-is not reasonably clear enough to put anyone on notice that it includes a waiver of future liability for anything against the Defendant, let alone negligence specifically. Also, nothing highlights or sets apart the exculpatory provisions which, for all intents and purpose, attempt to relieve Defendant of its dut(ies) to exercise ordinary care, to not to act with wanton or wilful disregard, and to abide by safety statutes such as the Federal Motor Carrier Safety Regulations. Instead, the alleged exculpatory language is lost in the middle of the document, between provisions discussing insurance coverage and premium deductions. [96] The format of Defendant's Form as well as the placement of the alleged exculpatory language ***36** does not meet Alabama's requirement that exculpation against one's own negligence must be "expressed in clear, unequivocal terms" which can have no other meaning. [97]

Additionally, unequal bargaining power existed between Ms. Sonier, the Plaintiff and the Defendant regarding the form. The pre-printed form was unilaterally drafted by Defendant and likely presented on a take-it-or-leave-it basis. Consequently, it stands to reason there were no contractual negotiations regarding the form given that (1) a disparity existed regarding the knowledge and experience of Ms. Sonier and Plaintiff compared with that of the Defendant and (2) both Ms. Sonier and Plaintiff-but

especially Ms. Sonier-needed Plaintiff to ride as a passenger given Defendant's unreasonable trip deadline and threat to fire Ms. Sonier if said deadline was not met. [98]

Further, the alleged exculpatory provision begins with the words "I, _____ by my signature hereby release ...." [99] In the blank space the words "SAME AS ABOVE" are printed. [100] However, both Terrie Mitchell and ***37** Suzanne Sonier's names are listed "above" and both of their signatures appear below the alleged exculpatory release. This ambiguity regarding who the alleged exculpatory language refers to simply adds to the lack of clarity found in the wording and placement of the clause. As Defendant unilaterally drafted this Form, it should be strictly construed against the Defendant and, as explained above, the resulting lack of clarity makes the alleged exculpatory language void.

As yet another reason exculpatory provisions must be clear, courts have also noted practical concerns surrounding execution of these provisions. In *Frank v. Matthews*, the court stated that "release forms ... are typically signed by patrons who lack legal expertise [and] [e]xculpatory clauses, therefore, are strictly construed against the drafter;" [101] "[a]bsent language that signifies a 'clear and unmistakable waiver and shifting of risk,' these clauses are unenforceable." [102] This reasoning parallels Alabama's requirements of clear and unequivocal language coupled with ***38** strict construction. As the unilateral drafter of the agreement in question, if Defendant wanted to exculpate against negligence, it should have done so using clear, unambiguous language evidencing an unmistakable release of *its own negligence* by Plaintiff. This, however, they did not do.

Moreover, it appears Defendant admits its release only purports to relieve it from inherent dangers of riding in a commercial vehicle as its Summary Judgment Brief argues that the Plaintiff should have been aware of these inherent dangers and that the release was designed to relieve Defendant from liability for the type of crash which occurred. [103] As the Alabama Supreme Court has stated, "the intention to indemnify the negligence of the indemnitee must clearly appear from the wording of the instrument" [104] Because Defendant's release does not clearly indicate that it releases Defendant from its own negligence and because the type of negligence as well as wantonness, recklessness, and/or willfulness exhibited by Defendant in the instant action is not an inherent danger of riding in a commercial ***39** vehicle, Defendant's alleged exculpatory clause is not valid as to negligence, wantonness, recklessness, or willfulness.

Though Plaintiff asserts that the ambiguity and lack of clarity of Defendant's alleged exculpatory provision makes it invalid, at a minimum, genuine issues of material fact exist regarding (1) whether the agreement clearly releases Defendant from liability for its own negligence as well as (2) whether the overbreadth, placement of the clause and ambiguity surrounding who the "SAME AS ABOVE" phrase refers to prevents the clarity necessary to uphold the exculpatory provision. As noted in a case cited by Defendant, "if the ... terms of the document are ambiguous in any respect, then the true meaning of the document becomes a question for the factfinder." [105] Consequently, the Circuit Court was incorrect in granting summary judgment on this issue and a jury should be permitted to determine whether the provision exhibits the requisite clarity to be upheld as valid and exculpate Defendant against its own negligence. [106]

***40** Furthermore, in asserting the validity of its alleged exculpatory provision, Defendant attempts to use this provision to escape liability from violations of the Federal Motor Carrier Safety Regulations. As discussed above, carriers have a duty to comply with these regulations and are liable for their own as well as their agents' violations regardless of whether they intended to commit a violation or actually knew a violation was committed; so long as the carrier had or should have had the means by which to detect violations and/or failed to have systems in place to prevent violations by their agents, the carrier is liable. [107]

Also as discussed above, in the instant action, not only did Defendant fail to ensure compliance with the Federal Motor Carrier Safety Regulations, but it actually encouraged violations of same by telling its driver, Ms. Sonier, that she would lose her job if she did not complete the trip by a certain deadline-one which it was impossible ***41** for Ms. Sonier to legally meet without driving in excess of the hours permitted by the Federal Motor Carrier Safety Regulations. [108] Moreover, Defendant has admitted that its agent, Ms. Sonier, violated the Federal Motor Carrier Safety Regulations on the trip during which the instant

crash occurred. [109] In *Hargis v. Baize*, the Court stated that "a party cannot contract away liability for damages caused by that party's failure to comply with a duty imposed by a safety statute." [110] As the Federal Motor Carrier Safety Regulations would be considered a "safety statute" with ***42** which Alabama requires compliance, [111] Defendant should not be permitted to use its alleged exculpatory provision to "contract away" Plaintiff's damages which were caused by Defendant's failure to comply or ensure that its agent complied with said safety statute. Plaintiff anticipates Defendant will argue (1) that it did not place a deadline on Ms. Sonier's trip which was legally impossible to meet without violating the Safety Regulations and (2) that Ms. Sonier's violations of same did not cause the crash. However, these arguments contain genuine issues of material fact which should be decided by a jury and, as a result, the Circuit Court was incorrect in granting summary judgment on the issue of whether Defendant's alleged exculpatory clause bars Plaintiff's claims in the instant action.

C. *Alabama's Guest Statute Does Not Bar Defendant's Liability for Negligent Conduct.*

In its Motion for Summary Judgment, Defendant argues that Plaintiff's negligence claims are barred by Alabama's Guest Statute. This statutory language prevents owners and operators of motor vehicles from being liable for damages resulting from injury or death to a *guest* of the vehicle, as ***43** opposed to a *passenger*. [112] Thus, for purposes of this argument, the pivotal determination is whether Plaintiff was a guest or passenger in the tractor-trailer.

As an initial matter, it is interesting to note that Defendant's alleged exculpatory document is titled "Passenger Authorization Form and Application for Passenger Accident Coverage." [113] Considering its attempts to uphold the validity of this document with respect to Plaintiff, it appears Defendant actually views Plaintiff a passenger and not a guest. Further, Defendant has referred to Plaintiff as a "passenger" in legal documents submitted in the lower court action. [114] As evidenced by the Alabama Code, the terms "guest" and "passenger" have very different legal meanings; thus, Defendant's current argument that Plaintiff is a guest when it in fact labels her a passenger under its authorization form is curious. In any event, the Defendant asserts that the applicable rule for determining whether one is a passenger or a guest is,

if the transportation of a rider confers a benefit only on the person to whom the ride is given, and no benefits other than such as are incidental to ***44** hospitality, goodwill or the like, on the person furnishing the transportation, the rider is a guest. [115]

A few years later, however, the Alabama Supreme Court stated in *Kemp v. Jackson* that "if the trip is for any benefit to the driver, conferred or anticipated, it is sufficient to take the case out of the guest statute." [116] In addition to conferring a benefit only to the driver, the relationship will also be one of passenger and not guest if there is a mutual benefit to *both* the driver and the rider. According to the Alabama Supreme Court,

[t]he Legislature, when it used the word 'guest' did not intend to include persons who are being transported for the mutual benefit of both the passenger and the operator or the owner of the car, and, in determining whether the transportation was for the mutual benefit of both, not merely the act of transportation must be considered, but also any contract or relationship between the parties to which it was an incident. [117]

Thus, as long as Plaintiff's presence on the trip provided *any* benefit to Ms. Sonier, or a *mutual benefit* to both of them, Plaintiff was a passenger and not a guest

***45** Though Defendant asserts that Plaintiff denied providing any benefit to Ms. Sonier and denied any joint relationship between the two, Plaintiff's Affidavit states otherwise, clarifying any previous discovery responses. In the instant action, Plaintiff agreed to ride as a passenger with Defendant's driver, Ms. Sonier, in order to assist her in staying awake, preparing meals, and caring for her canine companion. [118] Additionally, prior to the trip, Ms. Sonier and Plaintiff had a relationship whereby they lived together, pooling **financial** resources and sharing living expenses in order to help care for their **elderly** father who suffers

from Alzheimer's disease.[119] However, they were suffering **financial** difficulties and thus, Plaintiff agreed to accompany Ms. Sonier so that Ms. Sonier could complete and keep her job as well as provide funds to help support their household.[120] Consequently, Plaintiff's participation in the trip was materially beneficial to the driver and is removed from the purview of the guest statute. This assertion is further strengthened considering the impossible deadline placed on Ms. Sonier and Defendant's threat that ***46** Ms. Sonier would lose her job if she did not complete the trip by the deadline.[121] Plaintiff's agreement to ride as a passenger with Ms. Sonier was therefore directly related to the trip itself-had Defendant not placed unreasonable and illegal trip requirements on Ms. Sonier, she might have been able to drive by herself.

In its Summary Judgment Brief, Defendant cites *Neal v. Sem Ray, Inc.* in support of its argument that Plaintiff is a guest and not a passenger under Alabama's Guest Statute.[122] *Neal* is easily distinguished from the instant action, however, as the plaintiff there rode on a delivery with a dump truck driver solely to "keep [the driver] company."[123] In discussing the difference between a guest - whose presence provides nothing more to the driver than the pleasure of his or her companionship - and a passenger, the court cited case language stating,

where the rider accompanies the driver at the instance of the latter for the purpose of having the rider render a benefit or service to the driver on a trip which is primarily for the attainment of some objective of the driver, the rider is a passenger ***47** and not a guest.[124]

As discussed above, the instant Plaintiff accompanied Ms. Sonier at her request in order to assist her in staying awake, preparing meals, caring for her canine companion, etc.[125] on a trip, the primary purpose of which was Ms. Sonier making a delivery for the Defendant. Even if Ms. Sonier *also* derived some companionship from Plaintiff's presence, it was not the sole reason she requested Plaintiff accompany her.[126] Thus, as the facts of the instant Plaintiffs presence in the Defendant's tractor-trailer are different from the facts of the plaintiff's presence in the dump truck in *Neal*, *Neal* is inapplicable to this case.[127]

In any event, whether the reason(s) Plaintiff accompanied Defendant's driver on the trip made her a passenger or a guest under Alabama's Guest Statute is a factual determination which is appropriate for a jury and thus, the Circuit Court was incorrect in granting summary ***48** judgment on this issue.[128]

III. THE CIRCUIT COURT WAS INCORRECT IN GRANTING SUMMARY JUDGMENT TO DEFENDANT ON THE ISSUE OF WHETHER ANY CONTRIBUTORY NEGLIGENCE OF THE DEFENDANT'S DRIVER CAN BE IMPUTED TO PLAINTIFF IN ORDER TO BAR HER RECOVERY.

In its Reply to Plaintiff's Opposition for Summary Judgment, Defendant argues Ms. Sonier was contributorily negligent and that this alleged contributory negligence is imputed to Plaintiff to act as yet another bar on Plaintiffs recovery from Defendant.[129] It appears this argument is a response to Plaintiff's statement that one reason she is not a guest under Alabama's Guest Statute is because she was in a joint relationship with Ms. Sonier such that they experienced mutual benefits from her presence on the trip in question.[130] According to Defendant, this sort of joint relationship is akin to a partnership such that each person is an agent of the other and any negligence of one will be imputed to the other.[131] However, Defendant misunderstands this statement about the relationship between ***49** Plaintiff and Ms. Sonier which simply takes Plaintiff's presence in the tractor-trailer out of Alabama's Guest Statue. In fact, in a case cited by Defendant, the court used the term "joint business relationship" in the context of the Alabama Guest Statute, stating,

if the carriage tends to promote the mutual interest of both himself and the driver for their common benefit, thus creating a joint business relationship between the motorist and his rider, the rider is a passenger and not a guest.[132]

As explained above, this is the type of relationship which existed between Plaintiff and Ms. Sonier during the trip in question. Plaintiff's presence not only conferred a material benefit on Ms. Sonier, but also tended to promote the mutual interest of them both. Plaintiff assisted Ms. Sonier by preparing meals, keeping Ms. Sonier awake, caring for her canine companion, etc. [133] Additionally, Plaintiff agreed to accompany Ms. Sonier so that Ms. Sonier could complete and keep her job in order to provide funds to help support their joint household. [134] Thus, the existence of a joint relationship or joint business relationship between ***50** Plaintiff and Ms. Sonier simply takes the case out of the purview of the Alabama Guest statute and does not, as Defendant suggests, create an imputation of negligence so as to bar Plaintiff's claims.

Defendant's argument that Plaintiff and Ms. Sonier had a relationship akin to a partnership such that any contributory negligence of Ms. Sonier is imputed to Plaintiff is misguided. Black's Legal Dictionary defines a partnership as "a voluntary association of two or more persons who jointly own and carry on a business for profit." [135] As seen from the facts in the case, no partnership is present between Plaintiff and Ms. Sonier. Even assuming *arguendo* that Paintiff and Ms. Sonier were engaged in a joint enterprise or partnership, the Alabama Supreme Court in *Banks v. Harbin* has stated that "the negligence of a driver may not be imputed to a passenger unless there is some evidence that the passenger had some authority over the car's movements." [136] Moreover, "to warrant a [direct] charge on contributory negligence, the ***51** defendants must produce some evidence that raises an inference of contributory negligence by the passenger." [137] In *Banks*, which involved a vehicular accident where the driver did not survive, the defendants did not contend the plaintiff exercised any authority over the car; thus, the Court stated that any negligence of the driver would be immaterial to the issue of whether plaintiff's decedent was contributorily negligent. [138] Similarly, in the instant action, Defendant presented no evidence showing Plaintiff had any authority over the tractor-trailer's movements *or* over the actions of its driver, Ms. Sonier. Further, even if, *arguendo,* Plaintiff did have authority over the tractor-trailer's movements, she could not have legally exercised this authority as she did not possess a CDL license to drive.

The contributory negligence that Defendant asserts should be imputed from Ms. Sonier to Plaintiff is that at or near the time of the accident, Ms. Sonier allegedly ingested methamphetamine. However, as stated above, because Plaintiff had no authority over the tractor-trailer's movements, her claims are not barred by any contributory ***52** negligence on the part of Ms. Sonier. Further, the proper imputation of negligence based on Ms. Sonier's alleged drug use-which appears to have been done under the duress of meeting the Defendant's unreasonable delivery schedule and during a time in which the Defendant has admitted to having knowledge of Ms. Sonier's violations of the Federal Motor Carrier Safety Regulations-is on the Defendant, *not* the Plaintiff. [139]

Additionally and/or alternatively, Plaintiff did not assume the risk of any negligence by Defendant or Ms. Sonier. Assumption of the risk generally refers to dangers inherent in the particular activity and of which the Plaintiff was aware and appreciated. [140] Regarding the instant action, risks that a carrier will impose an unreasonable deadline on a driver which is impossible to meet without violating the law or that a driver will ingest methamphetamine in order to stay awake to comply with said deadline are not risks which are inherent in riding in a ***53** tractor-trailer.

Further, assumption of risk is based on "voluntary exposure to danger and is applicable only in cases where the injured person might reasonably elect whether or not he should expose himself to the peril" and if "exposure ... to the peril was due to his inability reasonably to escape after he became, or should have become, aware of the danger, the doctrine does not apply." [141] Assumption of risk "has no application where ... [it] is the result of influence, circumstances, or surroundings which are a real inducement to continue." [142] In the instant action, assumption of the risk is not applicable as Plaintiff was originally induced to continue on the trip because of her **financial** difficulties, which precluded a safer alternative for her to return home combined with the fact that she did in fact object to Ms. Sonier's conduct, asking her repeatedly to stop and rest. [143]

Thus, Plaintiff did not assume any risks and because Defendant has provided no evidence that Plaintiff had authority over the movements of the tractor-trailer, any ***54** contributory negligence on the part of Ms. Sonier cannot be imputed to Plaintiff. [144]

At a minimum, however, genuine issues of material fact would exist regarding whether Plaintiff had authority over the movements of the tractor-trailer such that the Circuit Court should not have granted summary judgment on this issue.

IV. THE CIRCUIT COURT WAS INCORRECT IN GRANTING SUMMARY JUDGMENT TO DEFENDANT ON WHETHER THE DEFENDANT'S CONDUCT WAS THE PROXIMATE CAUSE OF PLAINTIFF'S INJURIES.

As Defendant points out, the elements of a negligence action include (1) a duty owed by defendant to plaintiff; (2) breach of that duty by defendant; (3) loss or injury suffered by plaintiff; and (4) that defendant's breach was the actual and proximate cause of the plaintiff's loss or injury. [145] However, contrary to Defendant's arguments, the record is not "completely devoid" of evidence that Defendant's conduct was the proximate cause of Plaintiff's injuries. In her affidavit and responses to discovery, Plaintiff has described the circumstances under which Ms. ***55** Sonier was driving for Defendant. These circumstances were that Defendant and/or its agents told Ms. Sonier that she would lose her job if she did not complete the trip by a certain date and time-a deadline which it was impossible for Ms. Sonier to legally meet. [146] Thus, Ms. Sonier drove in excess of the hours permitted by the Federal Motor Carrier Safety Regulations without taking the legally required breaks, a fact that Defendant has already admitted. [147] Also, it was determined that Ms. Sonier had methamphetamine in her system during the trip-a drug described as a stimulant. According to one of Plaintiff's experts, it was impossible for Defendant's dispatchers or other company representatives to be unaware that Ms. Sonier could not legally meet the deadline imposed by Defendant. [148] Moreover, as the dispatchers and/or other company representatives were aware of this impossibility, they were also aware of the obvious likelihood of a crash involving injury and/or death caused by any attempt to meet Defendant's impossible deadline. [149] Prior to the violent crash which resulted in Ms. Sonier's ***56** death and Plaintiff's injuries, Plaintiff remembers seeing the tractor-trailer pass trees and then remembers waking up in the woods. [150] Moreover, Plaintiff did not testify that she remembered the tractor-trailer colliding with any other object before it landed in the woods. [151]

As several Alabama cases have noted "it is well established that the question of proximate cause is almost always a question of fact to be determined by the jury, and that the question must go to the jury if reasonable inferences from the evidence support the plaintiffs evidence." [152] In fact, "a summary judgment is rarely appropriate in a negligence action." [153] Consequently, the question becomes whether the plaintiff presented *some* ***57** *evidence* from which a jury could draw *reasonable inferences* about the proximate cause of the incident; if so, the issue of proximate cause should go to the jury and should not be decided by the Court on a Motion for Summary Judgment.

In *Swanstrom v. Teledyne Continental Motors, Inc.*, the plaintiff was the pilot and sole occupant of a plane when it crashed, killing the plaintiff. [154] The plaintiff's estate sued manufacturers of the engine and fuel pump in the plane, alleging various claims of negligence and breach of warranties. [155] On summary judgment, the plaintiff presented the following evidence: witness statements about what they saw and/or heard before the plane crashed and expert opinions as to what could have caused the crash, while the defendants submitted reports showing there were no anomalies with the engine or fuel pump after the crash and argued that plaintiff's evidence was "equally probative" of pilot error as it was engine or fuel pump failure. [156] Although the trial court found insufficient evidence regarding whether a defect in the engine/fuel pump proximately caused the crash, the Supreme Court concluded that the expert opinion and ***58** statements about what witnesses saw/heard before the crash *were* substantial evidence from which a jury could (1) find the engine/fuel pump were defective and probably caused a fire and (2) further infer that this fire caused the crash. [157] In making this determination, the Supreme Court again noted that the question of proximate cause is almost always one of fact to be determined by the jury. [158]

Additionally, in *Galloway v. Ozark Striping Inc., et al.*, the plaintiff was working in a roadway construction zone when he was hit by a driver. [159] Along with the driver, the plaintiff also sued two subcontractors of the construction company, alleging they negligently and/or wantonly failed to control traffic flow to prevent the accident. [160] The ultimate question on appeal was

whether there was sufficient evidence for a jury to infer that the failure to erect and maintain construction signs by ABI-one of the subcontractors-proximately caused the accident. [161] ***59** Regarding proximate cause, the Court noted that "a negligent act or omission is the proximate cause of an injury if the injury is a 'natural and probable consequence of the negligent act or omission which an ordinarily prudent person ought reasonably to foresee would result in injury.' " [162] The Court also recognized that "[p]roximate causation is ordinarily a question for the jury." [163] The evidence presented on the issue of proximate cause in *Galloway* included: testimony from the plaintiff that on the date of the accident he did not see any construction zone signs other than a speed limit sign; testimony from the ALDOT's engineer that without full compliance with the traffic control plan, the likelihood of an accident between a driver and worker increases; and an expert opinion that, "had ABI complied with its duty to maintain construction signs, the accident probably would not have occurred." [164] Although ABI argued alternate theories on proximate cause-that the driver knew about the construction zone prior to the day of the accident and that fog or sun could have obscured his ***60** vision-the Court determined that these alternates did not conclusively decide the issue of proximate cause. [165] Thus, even without conclusive evidence linking ABI to the cause of the accident, the Court determined that genuine issues of material fact existed regarding whether ABI breached its duty and whether said breach proximately caused the accident. [166] With proximate cause, "the courts look more for the possibility of a hazard of some form to some person than for the expectation of the particular chance that happened;" "it is sufficient that the injuries are the natural, although not the necessary and inevitable, result of the negligent fault ...." [167]

In the instant action, based on the evidence regarding what Plaintiff saw/heard before the crash, the unreasonable trip deadline imposed by Defendant, Defendant's awareness of Ms. Sonier's violations of the Federal Motor Carrier Safety Regulations, and expert opinions as to the Defendant's awareness of the obvious likelihood of a crash involving injury and/or death caused by any attempt to meet its ***61** impossible deadline, [168] a jury could reasonably infer that Defendant's negligence and/or wantonness was the proximate cause of the crash which led to Plaintiff's injuries. [169] As seen from the case summaries above, this evidence is similar to that presented in both *Swanstrom* and *Galloway.* Additionally, other similarities exist between the instant action and *Swanstrom* and *Galloway.* As Ms. Sonier was killed and the Plaintiff can only testify as to what she saw/heard prior to the crash, the instant Defendant asserts a lack of proof regarding exactly what caused the crash. Likewise, the plaintiff in *Swanstrom* was the pilot and sole passenger in the plane and died leaving no absolute proof as to what caused the crash; however, the Court found that statements of what witnesses saw and heard before the crash as well as expert opinions on the cause of the crash were sufficient evidence from which a jury could conclude that the defendant's conduct was the proximate cause of the crash. [170]

Also like the instant Defendant, the defendants in *Swanstrom* and *Galloway* both argued alternative theories for the incidents in question; in *Swanstrom,* the defendant put ***62** forth evidence showing that nothing was wrong with the engine or fuel pump after the plane crash and argued that the cause of said crash could have been pilot error while in *Galloway,* the defendant argued that the plaintiff was aware of the construction site and that obscured vision could have caused the crash. [171] However, in both cases the Court found that evidence submitted by the plaintiffs-which as previously discussed is similar to evidence presented by the Plaintiff in the instant action-was sufficient for a jury to infer the defendant's conduct was the proximate cause of the injury. [172] Further, in *Galloway,* the Court specifically found that the evidence submitted by plaintiff and defendant created genuine issues of material fact regarding whether the defendant breached its duty and if so, whether said breach was the proximate cause of the incident. [173]

In its Summary Judgment Brief, Defendant argues that the fact an accident occurs is not enough to show negligence and cites *Butler v. AAA Warehousing and Moving Co., Inc.* in ***63** support of this proposition. [174] However, the facts in *Butler* can be distinguished, making it inapplicable to the instant action. As an initial matter, the court in Butler did recognize that "summary judgment is rarely appropriate in negligence cases." [175] In *Butler,* the plaintiff asserted the defendant was negligent in failing to recognize the hazard of an open space on a reviewing stand it erected for watching Mardi Gras parades. [176] The court noted that whether a duty of care exists depends on "foreseeability that harm may result if care is not exercised" and that foreseeability is

"based on the probability that harm will occur, rather than the bare possibility." [177] However, the facts in *Butler* revealed that the stand was erected properly and did not violate any safety code or standard and was thus not a safety hazard. [178] Because there were no facts to support foreseeability of harm or violations by the defendant in ***64** erecting the stand, the court made the statement on which Defendant relies that the fact an accident occurs is not enough to show negligence. [179] Contrary to *Butler*, evidence in the instant action of the unreasonable trip deadline imposed by Defendant, Defendant's awareness of Ms. Sonier's violations of the Federal Motor Carrier Safety Regulations, and expert opinions as to the Defendant's awareness of the obvious likelihood of a crash involving injury and/or death caused by any attempt to meet its impossible deadline [180] reveals that it was or should have been foreseeable to the Defendant that based on its action/inaction, a crash could occur causing injuries to the Plaintiff, a known passenger in the tractor-trailer. Regardless of whether an exact cause of the crash is known, there is enough evidence for a jury to reasonably infer that Defendant's negligence and/or wantonness was the proximate cause of the crash which led to Plaintiff's injuries and thus, the Circuit Court was incorrect in granting summary judgment to the Defendant on this issue. [181]

CONCLUSION

***65** Based on the foregoing, the Circuit Court was incorrect in granting Defendant's Motion for Summary Judgment on all issues. Therefore, Plaintiff prays that this Honorable Court will reverse the decision of the lower court, finding that genuine issues of material fact exist on some or all of the issues submitted for summary judgment.

Appendix not available.

Footnotes

1 Plaintiff asserts that Defendant encouraged and/or, at a minimum, knew of yet failed to act on the driver's violations of the Federal Motor Carrier Safety Regulations and that these violations led to the crash which injured Plaintiff.

2 *Hargis v. Baize*, 168 S.W.3d 36, 47 (KY 2005) (citing *Boyer v. Atchison*, T. & S.F. Ry. Co., 181 N.E.2d 372, 375 (1962) (exculpatory provision in free pass to use railroad did not relieve railroad of liability for injury caused by its violation of Safety Appliance Act); *D.H. Davis Coal Co. V. Polland*, 62 N.E. 492, 495-96 (1902) (provision in contract of employment by which employee relieved employer of duty to provide safeguards required by statute held unenforceable); *Warren City Lines, Inc. v. United Ref. Co.*, 287 A.2d 149, 151 (1971) (exculpatory clause in contract for lease of gasoline pump did not relieve lessor of liability for explosion caused by lessor's violation of safety regulation: "Any attempt by a negligent party to exculpate himself for a violation of a statute intended for the protection of human life is invalid."); *Metz v. Medford Fur Foods, Inc.*, 90 N.W.2d 106, 108 (1958) (hold-harmless agreement in contract of sale was unenforceable where damages were caused by seller's violation of statute prohibiting sale of adulterated foods).

3 C. 187.

4 C. 188-189.

5 *See* Ala. Code § 12-2-7 and 12-3-10 (1975).

6 C. 164.

7 *Hargis v. Baize*, 168 S.W.3d 36, 47 (KY 2005) (citing *Boyer v. Atchison*, T. & S.F. Ry. Co., 181 N.E.2d 372, 375 (1962) (exculpatory provision in free pass to use railroad did not relieve railroad of liability for injury caused by its violation of Safety Appliance Act); *D.H. Davis Coal Co. V. Polland*, 62 N.E. 492, 495-96 (1902) (provision in contract of employment by which employee relieved employer of duty to provide safeguards required by statute held unenforceable); *Warren City Lines, Inc. v. United Ref. Co.*, 287 A.2d 149, 151 (1971) (exculpatory clause in contract for lease of gasoline pump did not relieve lessor of liability for explosion caused by lessor's violation of safety regulation: "Any attempt by a negligent party to exculpate himself for a violation of a statute intended for the protection of human life is invalid."); *Metz v. Medford Fur Foods, Inc.*, 90 N.W.2d 106, 108 (1958) (hold-harmless agreement in contract of sale was unenforceable where damages were caused by seller's violation of statute prohibiting sale of adulterated foods).

8 C. 8-12.

9 C. 16-27.

10 C. 67-99.

11 C. 111-167 and 173-180.

12 C. 181-186.
13 C. 187.
14 C. 188-189.
15 C. 160-161.
16 C. 160-161.
17 *See* C. 160-161.
18 *See* C. 160-161.
19 C. 160-161.
20 C. 160-161.
21 C. 91 and 160-161.
22 C. 157-158.
23 *See* C. 8-12; 157-158; and 164.
24 C. 157-158.
25 C. 157-158.
26 C. 8-12.
27 C. 16-27.
28 AL. R. CIV. P. 5 6 (c) (3).
29 *Long v. Long*, 647 So. 2d 767, 768 (Ala. Civ. App. 1994) (citing *Porter v. Fisher*, 636 So. 2d 682 (Ala. Civ. App. 1994)).
30 *Clemons v. Dougherty County, Georgia*, 684 F.2d 1365, 1368 (11th Cir. 1982) (citing *Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970)); *see also*, *Scott v. Lane*, 414 So. 2d 939, 941 (Ala. 1982) (noting that "[d]ue to the similarity of the Alabama and Federal Rules of Civil Procedure, a presumption arises that cases construing the Federal Rules are authority for construction of the Alabama Rules").
31 *Long*, 647 So. 2d at 768 (citing *Porter*, 636 So. 2d at 682).
32 *Clemons*, 684 F.2d at 1368 (citing *Adickes*, 398 U.S. 144).
33 *Galloway v. Ozark Striping, Inc.*, 2 6 So. 3d 413 (Ala. Civ. App. 2009) (citing *Melton v. Perry County Bd. of Educ.*, 562 So. 2d 1341 (Ala. Civ. App. 1990)).
34 *Id.* (citing *Mann v. City of Tallassee*, 510 So. 2d 222 (Ala. 1987)).
35 *Kemp v. Jackson*, 145 So. 2d 187, 192 (Ala. 1962) (quoting *Galloway v. Perkins*, 73 So. 956 (Ala. 1916)).
36 C. 160-161.
37 Ala. Code §32-9A-2 (1975); 49 C.F.R. § 395.3 (2002).
38 C. 91; 160-161; and 164.
39 *See* C. 67-99.
40 *Kemp*, 145 So. 2d at 192 (quoting *Galloway v. Perkins*, 73 So. 956 (Ala. 1916)).
41 C. 160-161.
42 Ala. Code §32-9A-2 (1975); 49 C.F.R. § 395.3 (2002).
43 C. 91; 160-161; and 164.
44 *Lynn Strickland Sales & Serv., Inc. v. Aero-Lane Fabricators, Inc.*, 510 So.2d 142, 145 (Ala. 1987).
45 *See, e.g.*, 49 C.F.R. § 395.3 (2002).
46 62 Fed. Reg. 16369,16424 (April 4, 1997).
47 Ala. Code §32-9A-2 (1975).
48 C. 91; 157-158; and 160-161.
49 C. 157-158.
50 C. 157-158.
51 C. 164.
52 C. 10 7.
53 *See Reece v. Finch*, 562 So. 2d 195, 196, 199-200 (Ala. 1990); *City of Montgomery v. JYD Int'l, Inc.*, 534 So. 2d 592, 594 (Ala. 1988).
54 62 Fed. Reg. 16369,16424 (April 4, 1997); *see also* 49 C.F.R. § 395.3 (2002).
55 C. 91; 157-158; and 160-161.
56 C. 164.
57 168 S.W.3d 36, 47 (KY 2005) (emphasis added) (citing *Boyer v. Atchison*, T. & S.F. Ry. Co., 181 N.E.2d 372, 375 (1962) (exculpatory provision in free pass to use railroad did not relieve railroad of liability for injury caused by its violation of Safety Appliance Act);

D.H. Davis Coal Co. V. Polland, 62 N.E. 492, 495-96 (1902) (provision in contract of employment by which employee relieved employer of duty to provide safeguards required by statute held unenforceable); *Warren City Lines, Inc. v. United Ref. Co.*, 287 A.2d 149, 151 (1971) (exculpatory clause in contract for lease of gasoline pump did not relieve lessor of liability for explosion caused by lessor's violation of safety regulation: "Any attempt by a negligent party to exculpate himself for a violation of a statute intended for the protection of human life is invalid."); *Metz v. Medford Fur Foods, Inc.*, 90 N.W.2d 106, 108 (1958) (hold-harmless agreement in contract of sale was unenforceable where damages were caused by seller's violation of statute prohibiting sale of adulterated foods)).

58 Ala. Code §32-9A-2 (1975).

59 Ala. Code § 32-1-2 (1975) (emphasis added).

60 *Kemp*, 145 So. 2d at 192 (quoting *Galloway v. Perkins*, 73 So. 956 (Ala. 1916)).

61 C. 160-161.

62 Ala. Code §32-9A-2 (1975); 49 C.F.R. § 395.3 (2002).

63 C. 8-12 and 160-161.

64 C. 91; 157-158; and 160-161.

65 C. 157-158.

66 C. 131.

67 *Alabama Great S. R.R. Co. v. Sumter Plywood Corp.*, 359 So. 2d 1140, 1145 (Ala. 1978) (citing *Hous. Auth. of Birmingham District v. Morris*, 14 So. 2d 527 (Ala. 1943) (holding modified by *Indus. Title, Inc. v. Stewart*, 388 So. 2d 171 (Ala. 1980)); Note that *Hous. Auth. of Birmingham District v. Morris* followed the rule that a person could not contract against his own negligence which was later modified by *Indus. Tile, Inc. v. Stewart* to permit such contracts under certain conditions.

68 388 So. 2d 171, 176 (Ala. 1980).

69 *See Black Warrior Elec. Membership Corp. v. Mississippi Power Co.*, 413 F.2d 1221, 1224 n.10 (5th Cir. 1969) (stating that "[t]here is no substantial difference between an exculpatory clause and an indemnity provision insofar as interpretation of the provision to cover negligence of the grantor or indemnitee.")

70 *Indus. Title, Inc.*, 388 So. 2d at 176 (emphasis added).

71 *Id.* at 177 (Jones, J. concurring).

72 *City of Montgomery v. JYD mt'l Inc.*, 534 So. 2d 592, 594 (Ala. 1988).

73 *Id.* (citing *Hous. Auth. of Birmingham District*, 14 So. 2d at 531) (holding modified by *Indus. Title, Inc. v. Stewart*, 388 So. 2d 171 (Ala. 1980); Note that *Hous. Auth. of Birmingham District v. Morris* followed the rule that a person could not contract against his own negligence which was later modified by *Indus. Tile, Inc. v. Stewart* to permit such contracts under certain conditions.

74 *Id.* at 595.

75 *Id.* (emphasis added).

76 *Id.*

77 *Id.* at 594.

78 *Indus. Title, Inc.*, 38 8 So. 2d at 176.

79 *Id.*

80 *See Humana Med. Corp. v. Bagby Elevator Co.*, 653 So. 2d 972, 975 (Ala. 1995).

81 551 So. 2d 929 (Ala. 1989).

82 *Id.* at 930-31.

83 C. 131.

84 *See Reece v. Finch*, 562 So. 2d 195, 196, 199-200 (Ala. 1990); *JYD Int'l, Inc.*, 534 So. 2d at 594.

85 513 N.W.2d 118 (Wis. 1994).

86 *Id.* (internal citations omitted); *see also, Indus. Title, Inc.*, 388 So. 2d at 177 (Jones, J. concurring); *JYD Int'l Inc.*, 534 So. 2d at 594.

87 *Richards*, 513 N.W.2d 118.

88 *Id.*

89 88 A.D.2d 703 (N.Y. App. Div. 1982).

90 *Id.* at 703-04.

91 *Id.* at 704 (internal citations omitted).

92 *Id.* (internal citations omitted).

93 *Id.*

94 *Id.*

95 C. 131.
96 C. 131.
97 *Indus. Title, Inc.*, 38 8 So. 2d at 17 6.
98 C. 91; 157-158; and 160-161.
99 C. 131.
100 C. 131.
101 136 S.W.3d 196, 201 (Mo. Ct. App. 2004) (citing *Hornbeck v. All Am. Indoor Sports, Inc.*, 898 S.W.2d 717, 721 (Mo. Ct. App. 19 95)).
102 *Id.* (citing *Alack v. Vic Tanny Int'l of Mo., Inc.*, 92 3 S.W.2d 330, 337 (Mo. 1996)).
103 *See* C. 67-99.
104 *Indus. Title, Inc.*, 38 8 So. 2d at 176 (emphasis added)
105 *Wayne J. Griffin Elec. Inc. v. Dunn Const. Co.*, 62 2 So. 2d 314, 317 (Ala. 1993) (emphasis added).
106 *See Beardslee v. Blomberg*, 7 0 A.D.2d 732 (N.Y. App. Div. 1979) (wherein the New York Appellate Division found an issue of material fact regarding whether an exculpatory provision's language was clear enough to prevent the defendant from being liable for its own negligence and whether the parties contemplated that an agreement would exculpate the defendant from negligence in furnishing or failure to furnish equipment on a race track when the exculpatory provision in question purported to relieve the defendants of liability from injuries received while the plaintiff was in a restricted area but did not clearly contemplate relieving the defendants of liability from their own negligent actions of furnishing /failing to furnish equipment).
107 62 Fed. Reg. 16369,16424 (April 4, 1997); *see also* 49 C.F.R. § 395.3 (2002).
108 C. 91; 157-158; and 160-161.
109 C. 164.
110 168 S.W.3d 36, 47 (KY 2005) (emphasis added) (citing *Boyer v. Atchison*, T. & S.F. Ry. Co., 181 N.E.2d 372, 375 (1962) (exculpatory provision in free pass to use railroad did not relieve railroad of liability for injury caused by its violation of Safety Appliance Act); *D.H. Davis Coal Co. V. Polland*, 62 N.E. 492, 495-96 (1902) (provision in contract of employment by which employee relieved employer of duty to provide safeguards required by statute held unenforceable); *Warren City Lines, Inc. v. United Ref. Co.*, 287 A.2d 149, 151 (1971) (exculpatory clause in contract for lease of gasoline pump did not relieve lessor of liability for explosion caused by lessor's violation of safety regulation: "Any attempt by a negligent party to exculpate himself for a violation of a statute intended for the protection of human life is invalid."); *Metz v. Medford Fur Foods, Inc.*, 90 N.W.2d 106, 108 (1958) (hold-harmless agreement in contract of sale was unenforceable where damages were caused by seller's violation of statute prohibiting sale of adulterated foods)).
111 Ala. Code § 32-9A-2 (1975).
112 Ala. Code § 32-1-2 (1975).
113 C. 131.
114 See, e.g., C. 105.
115 *Wagnon v. Patterson*, 70 So. 2d 244 (1954).
116 145 So. 2d 187, 192 (Ala. 1962) (emphasis added) (citing *Blair v. Greene*, 22 So. 2d 834 (Ala. 1945), *Sullivan v. Davis*, 83 So. 2d 434 (Ala. 1955), *Klein v. Harris*, 108 So. 2d 425 (Ala. 1958), 59 A.L.R.2d 331).
117 *Sullivan v. Davis*, 83 So. 2d 434, 436 (Ala. 1955) (quoting *Kruy v. Smith*, 144 A. 304, 305 (Conn. 1929)).
118 C. 160-161.
119 C. 160-161.
120 C. 160-161.
121 C. 91 and 160-161.
122 68 So. 3d 194 (Ala. Civ. App. 2011).
123 *Id.* at 195.
124 *Id.* at 198 (quoting *Cash v. Caldwell*, 603 So. 2d 1001 (Ala. 1992) (internal citations omitted).
125 C. 160-161.
126 C. 160-161.
127 *Neal*, 68 So. 3d at 198-99.
128 *Boggs v. Turner*, 168 So. 2d 1, 3 (Ala. 1964).
129 See C. 173-180.
130 *See* C. 111-167.
131 See C. 173-180.

132 *Wagnon*, 70 So. 2d at 249 (emphasis added).
133 *See* C. 160-161.
134 C. 160-161.
135 Black's Law Dictionary 523 (3rd pocket ed. 2006) (emphasis added).
136 500 So. 2d 1027, 1029 (Ala. 1986) (citing *Coulter v. Holder*, 254 So. 2d 420, 422 (Ala. 1971)).
137 *Id.*
138 *Id.*
139 *See e.g.* , *Foster v. Floyd*, 163 So. 2d 213, 215 (Ala. 1964) (deciding whether wanton conduct of the driver of a car could be imputed to its owner and stating that "it is now generally held that wantonness does not in and of itself remove a particular act from the agent's scope of authority").
140 *Kemp*, 145 So. 2d at 191.
141 *Id.* at 194 (citing 38 Am. Jur. Negligence § 173).
142 *Id.* (citing 65 C.J.S. Negligence § 174).
143 C. 160-161.
144 *Banks*, 500 So. 2d at 1029 (citing *Coulter*, 254 So. 2d at 422).
145 *See* C. 67-99; *see also*, *Miller v. Cleckler*, 51 So. 3d 379, 383 (Ala. Civ. App. 2010) (citing *S.B. v. Saint James Sch.* 959 So. 2d 72, 97 (Ala. 2006) (quoting *Martin v. Arnold*, 643 So. 3d 564, 567 (Ala. 1994))).
146 C. 91; 157-158; and 160-161.
147 C. 164.
148 C. 157-158.
149 C. 157-158.
150 C. 90-91 and 160-161.
151 *See* C. 88-94 and 160-161.
152 *Lemond Constr. Co. v. Wheeler*, 669 So. 2d 855, 862 (Ala. 1995) (emphasis added) (citing *Garner v. Covington County*, 624 So. 2d 1346 (Ala. 1993); *Marshall County v. Uptain*, 409 So. 2d 423 (Ala. 1981)); *see also*, *Miller*, 51 So. 3d at 383 (stating that "the question of proximate causation is a question of fact to be resolved by the jury; [and] that question must be decided by the jury if reasonable inferences from the evidence support the plaintiff's claim.") (emphasis added) (citing *Dixon v. Bd. of Water & Sewer Comm'rs of Mobile*, 865 So. 2d 1161, 1166 (Ala. 2003); *City of Mobile v. Largay*, 346 So. 2d 393, 395 (Ala. 1977)).
153 *Miller*, 51 So. 3d at 383 (citing *Nelson v. Meadows*, 684 So. 2d 145, 148 (Ala. Civ. App. 1996)).
154 43 So. 3d 564, 568 (Ala. 2009).
155 *Id.* at 57 0-71.
156 *Id.* at 5 6 9-7 3
157 *Id.* at 574, 583-84.
158 *Id.* at 582 (citing *Norris v. City of Montgomery*, 821 So. 2d 149, 155 n.8 (Ala. 2001) (quoting *Lemond Constr. Co. v. Wheeler*, 669 So. 2d 855, 862 (Ala. 1995))).
159 26 So. 3d 413, 415 (Ala. Civ. App. 2009).
160 *Id.*
161 *Id.* at 42 4.
162 *Id.* at 425 (quoting *Vines v. Plantation Motor Lodge*, 336 So. 2d 1338, 1339 (Ala. 1976)).
163 *Id.* (emphasis added).
164 *Id.*
165 *Id.*
166 *Id.* at 42 6.
167 *Kemp*, 145 So. 2d at 196.
168 C. 91; 157-158; and 160-161.
169 C. 91; 157-158; 160-161; and 164.
170 *Swanstrom*, 43 So. 3d at 568, 574, 583-84.
171 *Swanstrom*, 43 So. 3d at 573; *Galloway*, 26 So. 3d at 425.
172 *Swanstrom*, 43 So. 3d at 584; *Galloway*, 26 So. 3d at 426.
173 *Galloway*, 2 6 So. 3d at 42 6.

174 *See* C. 67-99; 686 So. 2d 291 (Ala. Civ. App. 1996).

175 *Butler*, 68 6 So. 2d at 2 93.

176 *Id.* at 292-93

177 *Id.* at 2 93 (citing *Harvard v. Palmer & Baker Enigneers, Inc.*, 302 So. 2d 228, 232 (Ala. 1974) (overruled on other grounds); *Ex parte Insurance Co. of North America*, 523 So. 2d 1064 (Ala. 1988) and citing 65 C.J.S. Negligence § 4(3) (1966)).

178 *Id.*

179 *Id.* at 294.

180 C. 91; 157-158; and 160-161.

181 C. 91; 157-158; 160-161; and 164.

End of Document