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AUTHENTICATION, FOUNDATION, REASONABLENESS AND CAUSATION: ADMISSION OF MEDICAL RECORDS AND THE BURDENS OF PROOF IN THE INJURY CASE
The Admission of Records and Satisfying the Burdens of Proof in the Injury Case Often Present Lawyers with a Myriad of Hurdles

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The admission of records and satisfying the burdens of proof in the injury case often present lawyers with a myriad of hurdles. This article arose out of my desire to answer questions that consistently presented themselves in case after case and it is a compilation of research, trial and error, and numerous discussions with experienced practitioners. With this in mind, this article will discuss the nature of these issues and proposes explanations and practical solutions to admission of records and the burdens of proof and production in the injury case, with respect to law and procedure in Alabama.

Authentication

Authentication or identification is the first evidentiary hurdle which a document or article of evidence must overcome in order to gain admissibility at trial. Authentication is simply accurate identification of an item of evidence to determine if that item is the “genuine article.” Authentication is the first step or the “preliminary” foundation for admission of records and it is totally separate from the requirements of establishing a foundation under the business record exception. “Authentication alone is never sufficient to admit a document as a business record over a party’s objection.¹ Although authentication and foundation are often used interchangeably, they are distinct evidentiary issues and I address them separately in this article.²

The authentication of a business record is a matter of proving that the record or document is *genuine and trustworthy*. According to the Alabama Rules Evidence 901(a), “[t]he requirement of authentication or identification ... is satisfied by evidence sufficient to support a finding that the matter in question is what the proponent claims.”³ In other words, the movant proves that the document or item of evidence is authentic or the real thing, the “genuine article,” that it really is what the movant says it is.

In a personal injury claim, a plaintiff’s medical records and bills must be authenticated by the appropriate medical provider before the documents are admissible at trial. In practical terms, the medical provider, usually the physician through deposition testimony or the custodian of records, is asked to identify the document and/or testify that the medical record is what it is claimed to be. Thus, the record is accurately identified by the appropriate person and is shown to be the genuine article. The person who actually authenticates the record does not have to be the custodian of record,⁴ or have first-hand or personal knowledge of the contents of the record,⁵ or be the person who actually prepared the original record⁶ i.e., the physician who dictated the medical report. However, even though the authenticating witness does not need to be the person who created the record or have specific knowledge of its contents, this witness must be able to explain and can be cross-examined as to the manner in which the businesses’ records were made, kept or stored.⁷

Once a business or medical record has been authenticated as genuine or certified as a true and correct copy, it has cleared an important preliminary hurdle, but it is still hearsay. The record cannot be admitted into evidence under the business records exception to the hearsay rule until a proper foundation is laid.⁸

Foundation

Once an article of evidence is authenticated, the second hurdle to admission is **foundation**. Foundation goes to the heart of the reliability of the record and/or its content. If authentication is the accurate identification of an item of evidence then foundation is factual proof of how the item of evidence was correctly prepared, stored, and retrieved. Foundation is simply explained as the chain-of-custody for an item of evidence to formally establish its reliability. Whereas, authentication may allow the introduction of the book into evidence, the trier of fact cannot open the book and read the first line of page one until its foundation is established.

Medical records are business records and are hearsay. But if these business records are qualified by the business records exception by the rules listed below, they are deemed exceptions to hearsay. In an injury claim, medical records are typically prepared in the ordinary course of business by a medical provider, therefore, they must be properly verified by establishing a

foundation for their admission to qualify as a hearsay exception. In order to achieve admissibility at trial, the practitioner must establish that the “foundation” of the documentary evidence is solid, reliable and trustworthy. If this cannot be established, the evidence is deemed hearsay and inadmissible.

The next logical question is how do you establish the foundation for the admission of medical records? Establishing the foundation is a four-step process. In Alabama, *384 the procedure is set forth in three separate rules that employ similar qualifying language.

First, according to *Rule 803 (6), Gamble’s Alabama Rules of Evidence*, the appropriate witness must testify that the transcribed statement in the business record:

- (1) is a record of that business;
 - (2) the witness knows the method used to make such records;
 - (3) it was the regular/routine practice of the business to make the records; and
 - (4) the record was made in the ordinary course of business or a reasonable time thereafter.⁹
- Second, the above-listed procedure for establishing the foundation of a business record is also set forth in [Rule 44\(h\) of the Alabama Rules of Civil Procedure](#), which reads:
“Any writing or record (medical record) ... made as a memorandum or record of any act, transaction, occurrence, or event shall be admissible in evidence as proof of such act, transaction, occurrence, or event, if it was made in the regular course of any business, ... and it was the regular course of the business to make such memorandum or record at the time of such act ... or within a reasonable time thereafter”¹⁰

Third, the statutory equivalent to [Rule 44\(h\)](#) and [Rule 803\(6\)](#) is the Alabama Business Record Act, [Section 12-21-43, Code of Alabama](#). A properly authenticated business record is admissible in evidence when a foundation is established by showing:

- 1) that the record or writing was made as a record of an act, transaction, ...
- 2) the record was made in the regular course of business to make such ... record at the time of such act ... or a reasonable time thereafter.¹¹

Finally, who is qualified to testify to establish the foundation by direct testimony? The procedural steps above, used to create a foundation are proven through the testimony of the custodian, a representative of the medical provider who prepared the record (the maker), the treating physician, or any employee of the business who can satisfy the required elements of the business record exception.¹² The person testifying to the foundational facts does *not* have to be the person who prepared the information, created the record, or documented the knowledge first-hand, ie) the declarant or typically in an injury case, the patient’s physician. The Alabama Supreme Court has held:

“The rule (44(h) A.R.Civ.P.) does not require that the person who made the entry be the witness who lays the foundation for the introduction of the records into evidence Any witness who knows the method used in the business of making records ... and knows that it was the regular practice of the business to make such *386 records at the time of the event in question or within a specified reasonable time thereafter is competent to lay the foundation by testifying that the exhibit is such a record.”¹³

Therefore, any employee of the business can testify and/or lay the foundation for admission of the evidence. Additionally, lack of personal knowledge (as to the truth contained in the record) concerning the entries in the business record by the entrant/custodian does not affect the admissibility of the record. Such lack of personal knowledge by the entrant/custodian does affect the weight of the evidence to be decided by the trier of fact.¹⁴ In *Reeves v. King* the Alabama Supreme Court held:

“... when an appropriate witness testifies that a statement, which derives from a declarant’s first-hand knowledge, in an authenticated business record was made and transmitted to the maker pursuant to a routine business duty, then the record can be introduced to prove the truth asserted in the statement and the maker’s lack of personal knowledge of the facts recorded presents an issue of credibility only.”¹⁵

But caution, the declarant or person who created the record and/or reported the information (ie. the physician) to the entrant/custodian, must possess personal or first-hand knowledge of the information in the record, or the information was not received in the regular course of business and it is hearsay.¹⁶

Hospital Record Exception to Hearsay

The State of Alabama considers **hospital records** trustworthy¹⁷ and the legislature codified a statutory procedure allowing

the introduction of certified copies of original hospital records, without having to call to trial or depose the business employee, custodian, or physician to authenticate and/or establish a foundation for introduction of the hospital records. [Section 12-21-5 to 7, Code of Alabama](#); [Pickett v. State, 456 So.2d 330 \(Ala.Crim.App.1982\)](#)¹⁸ Sections 12-21-5 to 7 provide a practical procedure whereby copies of a patient's medical records are admitted in court proceedings, without the unnecessary expense and delay in calling the hospital custodian to lay a foundation or predicate for admissibility.¹⁹

In practical terms, once the hospital custodian receives the subpoena duces tecum, the custodian must copy the patient's medical records, as provided in Section 12-21-6-7, and forward the certified medical records to the court's clerk for admission at trial. Once submitted to the court under this statutory procedure, the records are considered business records' exception to hearsay, they satisfy the statutory foundational requirements of [Section 12-21-43, Code of Alabama](#), and they are admissible in any state court without the additional testimony of the custodian.²⁰ Although the form below is not required verbatim,²¹ in § 12-21-7 the legislature codified a sample custodian of records' certificate, as follows:

“The certificate of the custodian of the hospital records provided for in [Sections 12-21-5 and 12-21-6](#) shall show the name of the parties to the *387 case or proceeding and the name of the court to which made, by appropriate caption, and said certificate shall be in form in substance as follows, to-wit: _____, hereby certify and affirm in writing that I am of _____ Hospital, a hospital organized or operated pursuant to or under the laws of Alabama, located in _____, Alabama, that I am custodian of the hospital records of said hospital and that the within copy of said hospital records are an exact, full, true and correct copy of said hospital records pertaining to _____. I further certify that I am familiar with and know, and knew when made and charged, the **reasonable** value and price for the various charges made and shown in said hospital records pertaining to _____ and that said charges are in my judgment just, **reasonable** and proper and in keeping with those generally charged in the county and community where said hospital is located. All of which I hereby certify and affirm on this _____ day of _____, 20____.”

But caution, medical records must still be relevant to be admissible²² and the Code sections do not allow the absolute or carte blanche admissibility of all hospital records.²³ For example, because causation goes to weight of the evidence and not to the admissibility or authenticity of the actual record, statements in a hospital record “concerning the *cause* or manner of injury, which do not refer to diagnosis or treatment in the record, are inadmissible hearsay.”²⁴ See [J.T.H. v. W.R.H., 628 So. 2d 894, 897 \(Ala.Civ.App. 1993\)](#). Further, note that the party objecting to the introduction of evidence in a medical record concerning “causation” or manner of injury cannot offer a broad objection but “must target *specific* portions of the medical record; however, objections to the medical record as a whole are properly overruled.”²⁵

Why is the evidence of a patient's diagnosis and treatment admissible under the hospital records exception, but evidence of causation in the records is not admissible? This question was answered in [Pickett v. State 456 So. 2d 330 \(Ala.Crim.App. 1982\)](#). *Pickett* was a sexual abuse case where the State issued a subpoena duces tecum to a hospital (under [Code sections 12-21-5 et al.](#)) directing the hospital to produce the victim's hospital record at trial. The hospital record was introduced to prove the victim experienced trauma as diagnosed by the emergency room physician. The evidence of trauma was not disputed and no evidence as to causation or manner of injury was listed in the records.

The criminal appeals court held that the victim's hospital records were admissible because first, they were “trustworthy.” Second, evidence of this patient's diagnosis and treatment were essentially “*documentary*,” or in other words, the clinical diagnosis of trauma was undisputed and “other medical experts would not have disagreed with the diagnosis.” The court also held that cross examination of the attending physician would not have shaken the foundation of the evidence or undermined its reliability.²⁶ Third, the hospital record did not mention the defendant or reveal that the defendant or anyone else caused the injury.

For an additional example, consider these facts. A person breaks their arm during a car collision. The physician's “documentary” diagnosis of a broken arm would generally not be disputed as it is considered reliable and trustworthy. However, evidence of who or what caused broken-arm-injury is “*testimonial*” evidence in nature. The testimonial evidence of causation is not consistently reliable and it is usually challenged. Therefore, the physician's testimonial opinion of causation cannot be admitted without sworn testimony and it is subject to cross-examination to give party the opportunity to either establish or refute the actual cause of injury. Testimonial evidence is also subject to cross-examination because evidence of causation is frequently subject to “divergent views from other experts” and cross-examination of the physician may cast doubt or expose the opinion to other expert opinions that might “shake the foundation of the record or undermine its reliability.”²⁷

Probable Cause In A Civil Case?

Causation is the third of four elements of proof that must be satisfied by a majority of evidence to prove negligence in the

civil case. In a personal injury or negligence case, it is the plaintiff's burden to prove by a majority of evidence that the injury complained of was caused by the defendant's negligent act. Negligence alone does not afford a cause of action. "Liability is only imposed when negligence is the proximate cause of injury and the natural and probable consequence of the negligent act."²⁸

The next question that must be answered is who is qualified to testify and/or give their opinion to establish the cause of an injury. First, as a general proposition, a lay witness may not testify that one thing caused another.²⁹ A "lay opinion as to the ultimate issue of proximate cause is not admissible evidence."³⁰ Therefore, although the plaintiff can testify as to certain matters relating to his/her injuries and damages,³¹ the plaintiff usually cannot testify as to the cause of his/her injuries.

Medical opinions and conclusions require expert testimony. "An expert witness may testify to the ultimate issue of causation in a tort action ... a treating physician is competent to give his opinion of the cause of his patient's injuries."³² "If the requisite predicate is laid for the expert testimony, and if the expert is duly qualified, he or she can give an opinion as to the cause of a wound and its effect."³³ In practical terms, this requires the plaintiff's physician to testify and render the opinion that the client's injuries were caused by act which is subsequently proved to be negligence. Causation can be established through the testimony of a physician, a medical doctor, and as the Alabama Supreme Court has recently held, a chiropractor.³⁴

First, expert testimony as to the *probable cause* of an injury establishes the necessary medical causation. The issue of medical causation must be established by probable rather than possible cause.³⁵ A physician does not have to testify that he or she is absolutely certain as to the cause of an injury. Moreover, in a civil claim, the plaintiff's traditional burden of proof as to causation is satisfied by a *majority* (probability) of the evidence. The Alabama Supreme Court stated:

"the mere possibility that an injury could cause a condition is not sufficient to support the burden of proof resting on the plaintiff. The testimony must establish a probability, not a mere possibility, of such causal connection."³⁶

*388 There is a long held myth in the legal profession that the burden of proof for causation is greater than establishing the *probability* of the cause. This problem is compounded by the common but vague legal term "to a reasonable degree of medical certainty," which confuses physicians and lawyers alike and is misleading as to the proper burden of proof in a civil case. "A reasonable degree of medical certainty" sounds strikingly similar to a defendant's burden of proof in a criminal case or "beyond a reasonable doubt." It also negatively implies that the burden of proof in a civil case is absolute scientific certainty or 90%, as opposed to the 50.1 percent probability burden of proof required in a civil case. In *Western Ry. of Ala. v. Brown*, the Alabama Supreme Court addressed the confusion and confirmed that the term "to a reasonable degree of medical certainty" is "an expression of an expert opinion that the plaintiff's condition was *probably* caused by his/her injury."³⁷ Note therefore that the ambiguous term, "a reasonable degree of medical certainty" and the "probability of causation" both mean 50.1 percent or the probable cause of an injury in a civil case.³⁸

Second, a physician's opinion as to causation is not limited to the physical examination of the patient. In addition to the examination and/or tests, the basis of the physician's opinion of probable causation can also be based on "statements made by the patient in the form of a medical history so long as the facts in the history are part of the basis of the physician's opinion of the nature and extent of the injury."³⁹ Therefore, to establish the probable cause and effect of an injury, the physician may testify to and base his/her expert opinion on the patient's statements and the patient's history of the case.⁴⁰

Unfortunately, physicians are occasionally reluctant to testify to the probable cause of a personal injury because they do not know the complete facts surrounding the patient's injury. The expert must understand that "[i]n Alabama an expert is allowed to testify whether certain facts *could or would* cause a result, but *not* whether they *actually* did."⁴¹ The expert does not have to personally witness the act that is alleged to have caused the injury and therefore the expert cannot testify that he or she has personal knowledge that specific act actually caused the injury. The expert can rely on the parties' facts to establish his/her expert opinion as to causation. The medical expert's testimony is not used to establish the patient's version of facts as the absolute truth, but in establishing an opinion, the expert can assume that patient's version of facts in the patient's history are true and taken as true, would have *probably caused* the resulting injury.

Reasonable Expenses And Necessary Treatment

In an injury/negligence claim, a plaintiff must also prove by a preponderance of the evidence that he or she incurred damage as a result of a defendant's negligence. With respect to damages, a plaintiff may only recover those "**reasonable and necessary**" medical *389 expenses specifically shown to have resulted from treatment made necessary by the negligent act of a defendant.⁴²

First, the question of reasonable expenses and necessary treatment is a question of fact but initially, it is also a procedural question requiring the trial court judge to determine whether there is substantial evidence to be submitted to the trier of fact.⁴³ Second, once evidence of reasonable treatment and necessary expenses is submitted to the jury, the jury must also determine by a majority of the evidence that treatment and expenses were reasonable and necessary. "Proof of an amount expended for medical treatment must include the element of reasonableness of the charge for the service *and* the necessity of treatment.

Each element is one of fact for the jury.”⁴⁴ The reasonableness and necessity of medical expenses is a substantive jury question and the jury is not bound to award medical expenses merely because they were incurred and introduced at trial.⁴⁵ Therefore, the jury or trier of fact has a twofold duty to determine whether the claimed medical expenses were reasonable and necessary *and* proximately caused by the defendant’s negligence.⁴⁶

The question of reasonable expenses and necessary treatment must be answered through the opinion testimony of an expert witness.⁴⁷ However, where the necessity of medical treatment is evident from the injury, like an immediate emergency room visit following an accident, the necessity of the charges may be admissible without expert testimony.⁴⁸ In *Dairyland Insurance Co. v. Jackson*, the Alabama Supreme Court determined the treating physician “is well-qualified to give an expert opinion as to whether the care given to a plaintiff was necessary and whether the charges were ‘fair and reasonable.’”⁴⁹ In *Dairyland*, the supreme court also held that an emergency room physician can give his opinion as to the reasonableness of a hospital’s emergency room expenses.⁵⁰

To save time and expenses and expedite trial, parties can submit requests for admissions to opposing parties to factually establish the reasonableness of charges or the necessity of treatment.⁵¹ If a party refuses to recognize the obvious, and it is later proven through deposition or trial testimony that the charges were in fact reasonable and the treatment was necessary, the moving party can request the court tax costs against the party denying the request.⁵² The issue of reasonableness of charges is usually apparent and this issue should be resolved prior to trial. I am not aware of a documented case where a treating physician testified that his/her charges were *not* “reasonable” or the patient’s treatment was not medically “necessary.” Nevertheless, the question must be asked, answered, and the witnesses’ answer must be presented to the trier of fact in order to satisfy the element of damages.

Stipulation Between The Parties

Pre-trial stipulations or agreements on the admissibility of evidence save time and expenses of the parties and medical personnel—who are often inconvenienced by missing work to appear at trial or deposition. Parties can stipulate to issues of causation and agree that charges were reasonable and medically necessary or undisputed medical evidence is authentic and admissible, without the formality of establishing a foundation for introduction at trial.

The pre-trial conference, as set forth in *Rule 16 A.R.C.P.*, provides the opportunity for litigants to take action “to obtain admissions of fact and of documents which will avoid unnecessary proof, stipulation regarding the authenticity of documents, and advance rulings from the court on the admissibility of evidence ... and the avoidance of unnecessary proof and cumulative evidence.”⁵³

Agreements and stipulations [concerning questions of law] made in a pre-trial order and admitted in court are binding on the parties and admissible into evidence.⁵⁴ Notwithstanding, although the parties can also stipulate to the issue of proximate cause, the stipulation must be consistent with the testimony and evidence presented at trial, as addressed below.

Verifying that charges were reasonable and medical treatment was necessary will not satisfy the plaintiff’s burden of proving proximate cause in a negligence case. A physician’s testimony that treatment for an injury was medically necessary does not prove that the injury was proximately caused by a negligent act. See *Stricklin v. *390 Skipper*.⁵⁵ Also, be aware that even where there is a pre-trial stipulation between the parties as to the reasonableness of charges and necessity of treatment, where the proximate cause of an injury is at issue, the court is not bound by the parties’ agreement if it is contrary to the evidence disclosed at trial.⁵⁶ In *Stricklin*, even where the parties stipulated to “the reasonable medical bills and necessary treatment of the plaintiff,” the court or the jury could reject the parties’ stipulation, when “the [factual] question of whether certain medical expenses were proximately caused by the accident are clearly at issue at trial.”⁵⁷

Footnotes

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1 *Hampton v. Bruno’s, Inc.*, 646 So. 2d 597, 599 (Ala. 1994) (the party introducing the document must “prove: 1) that the document was genuine or authentic; 2) that the document met all of the elements of the business records exception; and 3) that the document was relevant.” See also *Atmore Farm & Power Equipment Co. v. Glover*, 440 So. 2d 1042 (Ala. 1983). It is noteworthy that the supreme court in *Hampton* also held that a document is “automatically authenticated upon production” by a party following a discovery request. *Id* at 599.

- 2 For a brief lesson on the differences between authentication and foundation, see former Chief Justice Torbert's opinion in *Ex parte Frith*, 526 So. 2d 880, 883 (Ala. 1987). Authentication properly identifies an item or document but authentication will not overcome a "no foundation" objection. Besides, "... it is the business record foundation that establishes the *reliability* of the contents of the document, not its authenticity ... the two issues are separate and distinct."
- 3 See Section 901(a), *Gamble's Alabama Rules of Evidence* (1995). "Any party offering writings, (medical records), objects, and other real or demonstrative evidence must lay a foundation to show that the item is what the offering party purports it to be ..."
- 4 Section 803(6), *Gamble's Alabama Rules of Evidence*, footnote 9.
- 5 *Reeves v. King*, 534 So. 2d 1107, 1113, (Ala. 1988) ("lack of personal knowledge by the entrant may be shown to affect the weight of the admitted record ... but does not affect its admissibility."); *Meriwether v. Crown Inv. Corp.*, 268 So. 2d 780, 784-785 (Ala. 1972).
- 6 *Meriwether*, 268 So. 2d at 784-785; *Reeves*, 534 So. 2d at 1113; *Ikner v. Miller*, 477 So. 2d 387, 390 (Ala. 1985).
- 7 Section 803(6), *Gamble's Alabama Rules of Evidence* (1995), footnote 10; C. Gamble, *McElroy's Alabama Evidence*, Section 254.01(3) (3rd ed. 1977).
- 8 *Mester v. State*, 755 So. 2d 66, 74 (Ala.Crim.App. 1999); *Hampton*, 646 So. 2d at 599; Alabama Business Record Act, Section 12-21-43, *Code of Alabama*, 1975.
- 9 Section 803(6), *Gamble's Alabama Rules of Evidence* (1995), C. Gamble, *McElroy's Alabama Evidence*, Section 254.01(3) (3rd ed. 1977).
- 10 Rule 44(h), Alabama Rules of Civil Procedure.
- 11 Alabama Business Record Act, Section 12-21-43, *Code of Alabama*; *Ex parte Frith*, 526 So. 2d at 882; *Dix v. State*, 580 So. 2d 81, 84 (Ala.Crim.App. 1991).
- 12 *Ikner*, 477 So. 2d at 390; *Ex parte Frith*, 526 So. 2d at 883; *Elliott v. Standard Oil Co. of Louisiana*, 167 So. 295 (Ala. 1936); see also *Gamble's Ala.R.Evid.*, Rule 806(6), footnote 1; C. Gamble, *McElroy's Alabama Evidence*, Section 254.01(3) (3rd ed. 1977).
- 13 *Ikner*, 477 So. 2d at 390; citing *Austin v. State*, 354 So. 2d 40, 42 (Ala.Civ.App. 1977); *Bailey v. Tennessee Coal, Iron & Railroad Co.*, 75 So. 2d 117, 120-121 (Ala. 1954); C. Gamble, *McElroy's Alabama Evidence*, Section 254.01(3).

- 14 *Gamble's Ala.R.Evid.*, Rule 806(6), footnotes 11 & 12, *Meriwether v. Crown Inv. Corp.*, 268 So. 2d 780 (Ala. 1972); *Ikner*, 477 So. 2d at 390; *Reeves*, 534 So. 2d at 1113-1114.
- 15 *Reeves*, 534 So. 2d at 1113.
- 16 *Gamble's Ala.R.Evid.*, Rule 806(6), footnote 13, advisory committee's notes at Appendix p. A-131; McElroy Section 254.01(2); *Pan American Petroleum Corp. v. Mullack*, 167 So. 2d 728 (Ala. 1936); see also *Reeves*, 534 So. 2d at 1113-1114 (Ala. 1988) (to lay a proper foundation, the person who reports/prepares the information in the records must be an "authorized person" acting within the line and scope of the business who created the record and the authorized person must have first-hand knowledge of the information in the record to overcome a hearsay objection). Moreover, "[w]here the information comes to the entrant or maker from unauthorized persons, the record is inadmissible not because it contains hearsay, but because it was not made in the regular course of business." *Reeves*, 534 So. 2d at 1112. Please also see *Giddens v. State*, 565 So.2d 1277, 1279 (Ala.Crim.App. 1990) (the person with personal, first-hand knowledge of the contents of the report and who prepared the report, must be a "regular" employee of the business responsible for the report in order to qualify for admission under the business records exception or Section 12-21-43, *Code of Alabama*).
- 17 *Tomlin v. State*, 601 So. 2d 130 (Ala.Crim.App. 1991). "The very essence of the admissibility of a business record is its probability of trustworthiness." *quoted in Neal v. State*, 372 So. 2d 1331, 1343 (Ala.Crim.App. 1979).
- 18 Section 12-21-5 to 7, *Code of Alabama*; *Pickett v. State*, 456 So.2d 330 (Ala.Crim.App.1982); See Section 12-21-7 which provides a statutory form or the certificate the hospital custodian should complete in conjunction with the production of the patient's medical records. In my opinion, for efficiency and to save all parties time and expenses, the qualified admission of certified medical records should be extended to cover all licensed medical providers, not only hospitals. To date, the Alabama legislature has not extended this practical option to medical providers other than hospitals.
- 19 *Wyatt v. State*, 405 So. 2d 154 (Ala.Crim.App.1981).
- 20 *Reynolds v. State*, 484 So. 2d 1171 (Ala.Crim.App.1985); *Seay v. State*, 390 So. 2d 11, 12 (Ala. 1980).
- 21 *Shorts v. State*, 412 So. 2d 830 (Ala.Crim.App. 1981).
- 22 *Reynolds*, 484 So. 2d 1171.
- 23 *Whetstone v. State*, 407 So. 2d 854 (Ala.Crim.App. 1981). *Wyatt*, 405 So. 2d 154.
- 24 *J.T.H. v. W.R.H.*, 628 So. 2d 894, 897 (Ala.Civ.App. 1993); *Smith v. State*, 354 So. 2d 1167 (Ala.Cr.App. 1977); C. Gamble, *McElroy's Alabama Evidence*, Section 254.01(7), footnote 3, (3rd ed. 1977).
- 25 *Id.*, at 897.

- 26 *Pickett*, 456 So. 2d at 336.
- 27 *Pickett*, 456 So. 2d at 335-337.
- 28 *Nelson By Sanders v. Meadows*, 684 So. 2d 145, 150 (Ala.Civ.App. 1996); *Vines v. Plantation Motor Lodge*, 336 So. 2d 1338, 1339 (Ala. 1976).
- 29 C. Gamble, *McElroy's Alabama Evidence* Section 128.09 (3rd, Ed 1977); cited in *Dean v. City of Dothan*, 516 So. 2d 854, 855 (Ala.Cr.App. 1987).
- 30 *City of Birmingham v. Watkins*, 670 So. 2d 878, 880 (Ala. 1995).
- 31 Plaintiff can testify concerning their inability to work following injury, *Prescott v. Martin*, 331 So. 2d 240, 246 (Ala. 1976); their loss of weight, pain and insomnia following injury, *St. Louis & San Fran. R.R. v. Savage*, 50 So. 113 (1909); and a third-party lay witness can testify to a plaintiff's physical appearance and condition before and after an injury, *Piel v. Dillard*, 414 So. 2d 87, 90 (Ala.Civ.App. 1982). *But see Golden v. Stein*, 670 So. 2d 904, 908 (Ala. 1995) ("issue of proximate cause is not always beyond the keen of the average layman.") The average layman (juror), without the assistance of an expert, can recognize a causal connection between a negligent act and an apparent injury claimed by the plaintiff.
- 32 *Knapp v. Wilkins*, 2000 WL 1273670, page 5, (Ala. 2000); see also § 12-21-160, *Code of Alabama*, 1975; Rule 702, A.R.Evid.; A physician and/or expert is qualified to render an expert opinion by his study, education, licensure, practice, experience, and observation of the plaintiff/patient. *Radney v. State*, 342 So. 2d 942 (Ala.Cr.App. 1979); *Knapp* at 6; *Bird v. State*, 594 So. 2d 676 (Ala.Cr.App. 1991).
- 33 *Hampton v. State*, 621 So. 2d 376, 377 (Ala.Cr.App. 1993); citing *White v. State*, 423 U.S. 951 (1975).
- 34 *Knapp v. Wilkins*, 2000 WL 1273670 (Ala. 2000).
- 35 *Tidwell v. Upjohn Co.*, 626 So. 2d 1297, 1301 (Ala. 1993); *Willard v. Perry*, 611 So. 2d 358 (Ala. 1992).
- 36 *Western Ry. of Ala. v. Brown*, 196 So. 2d 392, 400 (Ala. 1967).
- 37 *Id.*, at 401.
- 38 *Id.*, From a practitioner's view, clever attorneys will use the term "reasonable degree of medical certainty" in a physician's deposition because it seemingly implies absolute certainty as to causation, which some physicians will feel uncomfortable testifying to, especially in soft-tissue injury cases. Attorneys must be aware of the equality of the terms "reasonable degree of medical certainty" and "probable cause" with respect to causation of

an injury.

39 *Stewart v. Lowery*, 484 So. 2d 1055, 1058 (Ala.1985);

40 *State Realty Co. v. Ligon*, 119 So. 672, 674 (1929); *Frazier v. State*, 366 So. 2d 360, 365- 66 (Ala.Cr.App. 1979); C. Gamble, *McElroy's Alabama Evidence*, Section 110.01(1).

41 *White v. Alabama*, 314 So. 2d 857, 862 (Ala. 1975); *cert. denied*, 96 S.Ct. 373 (1975).

42 *Birmingham Amusement Co. v. Norris*, 216 Ala. 138, 112 So. 633 (1927); *Aplin v. Dean*, 231 Ala. 320, 164 So. 737 (1935) (reasonable and proper charges); *Alabama Pattern Jury Instructions Civil* 11.09 (2nd ed. 2002); § 25-5-77 *Code of Alabama*, 1975.

43 See *Ex parte Hicks*, 537 So. 2d 486, 489 (Ala. 1988) (trial court improperly excluded evidence of reasonable hospital charges were it was shown that treatment was necessary and justified)

44 *Sweet v. Foust*, 419 So. 2d 260, 261 (Ala.Civ.App. 1982).

45 See *Leonard v. Steelman*, 693 So. 2d 476, 477 (Ala.Civ.App. 1997); *Shelby v. Phillips*, 694 So.2d 30, 31 (Ala.Civ.App. 1997); *Bennich v. Kroger Co.*, 686 So. 2d 1256, 1257 (Ala.Civ.App. 1996); *Nix v. Key*, 682 So. 2d 1371 (Ala.Civ.App. 1996); *Brannon v. Webster*, 562 So. 2d 1337, 1339 (Ala.Civ.App. 1990); *Union Telegraph Co. v. Green*, 47 Ala. App. 427, 255 So. 2d 896 (Ala.1971).

46 *Lynch v. Rowser*, 597 So. 2d 227, 229 (Ala.Civ.App. 1992). Further, once liability is established, the trier of fact must determine the injured party's damages. These damages must include an amount at least as high as the uncontradicted special damages or *reasonable* medical expenses related to treatment, as well as an amount as compensation for pain and suffering.

47 *Aetna Life Insur. Co. v. Hare*, 256 So. 2d 904 (Ala. 1972); *Hamrick v. Daniel*, 449 So. 2d 1247, 1248 (Ala.Civ.App. 1984).

48 *Posey v. McCray*, 594 So. 2d 152, 154 (Ala.Civ.App. 1992).

49 *Dairyland Insurance Co. v. Jackson*, 566 So. 2d 723, 727 (Ala. 1990).

50 *Id.* Emergency room physicians reluctant to testify about the reasonableness of a hospital's bills must be advised that their opinion is allowed even though they may be unfamiliar with their hospital's actual billing practices.

51 Rule 36, A.R.Civ.P.

52 Rule 54(d); Rule 37(a)4, A.R.Civ.P.

53 *Rule 16(c)(3) & (4), A.R.C.P.*

54 *Osborne Truck Lines, Inc. v. Langston*, 454 So. 2d 1317 (Ala. 1984); *Watson v. McGee*, 348 So. 2d 461 (Ala. 1977).

55 *Stricklin v. Skipper*, 545 So. 2d 55, 57 (Ala.Civ.App. 1988).

56 *Id.*

57 *Id.* The lesson of *Sticklin* is that stipulations concerning questions of law are binding, but stipulations concerning questions of fact are conditioned on acceptance by the jury, who is the supreme judge of the facts.

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