

KING & SPALDING LLP  
1185 Avenue of the Americas  
New York, New York 10036  
Telephone: (212) 556-2100  
Facsimile: (212) 556-2222  
Arthur Steinberg  
Scott Davidson

KIRKLAND & ELLIS LLP  
300 North LaSalle  
Chicago, IL 60654  
Telephone: (312) 862-2000  
Facsimile: (312) 862-2200  
Richard C. Godfrey, P.C. (admitted *pro hac vice*)  
Andrew B. Bloomer, P.C. (admitted *pro hac vice*)

*Attorneys for General Motors LLC*

**UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK**

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<b>In re</b>	: <b>Chapter 11</b>
	:
<b>MOTORS LIQUIDATION COMPANY, et al.,</b>	: <b>Case No.: 09-50026 (MG)</b>
<b>f/k/a General Motors Corp., et al.</b>	:
	:
<b>Debtors.</b>	: <b>(Jointly Administered)</b>
	:
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**SUPPLEMENTAL REPLY BRIEF BY GENERAL MOTORS LLC TO OBJECTION  
TO MOTION TO ENFORCE THE BANKRUPTCY COURT'S JULY 5, 2009  
SALE ORDER AND INJUNCTION, AND THE RULINGS IN CONNECTION  
THEREWITH, WITH RESPECT TO KIMBERLY McCALL AND TAMMY McCALL**

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General Motors LLC (“**New GM**”) submits this supplemental reply brief (“**Supplemental Reply**”) (i) to address the two issues raised by the Court at the May 30, 2019 hearing (“**Hearing**”) on the *Motion by General Motors LLC to Enforce the Bankruptcy Court’s July 5, 2009 Sale Order and Injunction and the Rulings in Connection Therewith, With Respect to Kimberly McCall and Tammy McCall* (April 10, 2019) (ECF No. 14477) (“**McCall Motion to Enforce**”);<sup>1</sup> (ii) in further support of the relief requested in the McCall Motion to Enforce; and (iii) in further response to the *Objection To Motion By General Motors LLC To Enforce Stay As To Kimberly and Tammy McCall* (May 15, 2019) (ECF No. 14509) (“**Objection**”).

### **PRELIMINARY STATEMENT**

At the Hearing, the Court requested supplemental briefing on two issues:

**ISSUE ONE:** Are the “punitive” damages exclusively allowed under Alabama’s Wrongful Death Act (“**Act**”) truly punitive damages or, as argued by the Alabama Attorney General in his Amicus Brief in *Old Carco LLC*, do they represent some novel, alternative legal construct?

**BRIEF ANSWER:** As confirmed by a legion of Alabama Supreme Court precedent and as most recently interpreted by the Southern District of New York in rejecting the Alabama Attorney General’s position in the appeal arising out of *Old Carco LLC*,<sup>2</sup> damages under Alabama’s Wrongful Death Act are exclusively and traditionally punitive, irrespective of the unique construct or legal implications of the Act.

**ISSUE TWO:** What types of compensatory damages are recoverable, if any, on contractual claims filed on behalf of decedents in personal injury actions applying Alabama law?

**BRIEF ANSWER:** In general, under Alabama law, a viable contract claim may seek the traditional expanse of compensatory damages for personal injuries incurred between the time of

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<sup>1</sup> Capitalized terms not otherwise defined herein shall have the meanings set forth in the McCall Motion to Enforce.

<sup>2</sup> The District Court’s decision in *In re Old Carco* has been appealed to the Second Circuit Court of Appeals.

the alleged injury-causing breach and death. These damages, for this time interval, could include pain and suffering, emotional and mental distress, medical expenses and lost wages.

## ARGUMENT

### **I. THERE IS NO BASIS TO DEVIATE FROM THE CONTROLLING AUTHORITY UNEQUIVOCALLY ESTABLISHING THAT ALABAMA WRONGFUL DEATH DAMAGES ARE PUNITIVE.**

Alabama's Attorney General argued in his Amicus Brief in the appeal of a proceeding emanating from *Old Carco LLC* that the punitive damages exclusively allowed under the Act are not "ordinary" punitive damages because the Act does not use the word "punitive" and there is an "obvious[]" compensatory aspect to Alabama's wrongful death damages. *See* State of Alabama's Amicus Brief in Support of Appellant and Reversal, *Old Carco LLC*, 1:18-CV-11290 (S.D.N.Y. February 22, 2019) (ECF No. 16), pp. 5-9 ("**Amicus Brief**").<sup>3</sup> There is no applicable precedent for this position.

#### **A. More Than a Century of Alabama Supreme Court Precedent Contradicts the Attorney General's Proposed Position, And Such Position Was Rejected by the District Court in *Old Carco*.**

More than 100 years ago, the Alabama Supreme Court interpreted the title and text of the Act, as then enacted, in holding that the only damages available for wrongful death are punitive damages intended to impose civil punishment – no different than traditional punitive or exemplary damages:

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<sup>3</sup> With respect to the McCalls, any argument that damages recoverable under the Act are compensatory and not punitive has been expressly renounced, abandoned and/or waived by the McCalls. *See, e.g.*, Hr'g Tr., May 30, 2019, at 27:3-9 (MR SNYDER: "I decided, after speaking with counsel, that we wouldn't do it the way everyone else did and try and argue that something that walks and talks and looks like a duck isn't a duck. The Alabama statute is a punitive damages statute. The pattern -- PJI says it's a punitive statute. The Supreme Court has said more than once it's a punitive damages statute [sic], as has Judge Bernstein in *Chrysler*"); *id.* at 33:3-9 (the McCalls' counsel stating that he "didn't agree" with the Alabama Attorney General's position); *see also Morales v. Kavulich & Assoc., P.C.*, 294 F.Supp.3d 193, 196 n. 2 (S.D.N.Y. 2018) ("Defendants did not oppose this argument in their opposition memorandum and thus waives any argument challenging Rosewall's vicarious liability."); *In re UBS AG Secs. Litig.*, No. 07 Civ. 11225 (RJS), 2012 WL 4471265, at \*11 (S.D.N.Y. Sept. 28, 2012) (recognizing that party "concedes through silence" arguments by its opponent that it fails to address).

Prevention of homicide is the purpose of the statute, and this it proposes to accomplish by such pecuniary mulct as the jury 'deem just.' ***The damages are punitive, and they are none the less so, in consequence of the direction the statute gives to the damages when recovered.*** They are assessed against the railroad '[to prevent homicides.]'

*Savannah & Memphis R.R. Co. v. Shearer*, 58 Ala. 672, 678 (1877) (emphasis added). Irrespective of the absence of the word "punitive" in the text of the Act, from that point forward, the Alabama Supreme Court has repeatedly construed its language to limit recovery to punitive damages without hesitation or reservation. *E.g., Stinnett v. Kennedy*, 232 So. 3d 202, 212 (Ala. 2016) (citing to the Act's settled history in noting that "the avowed public purpose of the wrongful death statute is to prevent homicide and to punish the culpable party . . . ."); *Omni Ins. Co. v. Foreman*, 802 So. 2d 195, 199 (Ala. 2001) (reiterating that "[i]t is hornbook law that in Alabama, the only damages a plaintiff is allowed to recover in an action for wrongful death are punitive damages."); *Lance, Inc. v. Ramanauskas*, 731 So. 2d 1204, 1221 (Ala. 1999) (holding that "the crushing weight of 150 years of *stare decisis* [has] consistently held that [the Act] allows for the recovery of punitive damages only."); *Tillis Trucking Co., Inc. v. Moses*, 748 So. 2d 874, 888-89 (Ala. 1999) (recognizing that "[f]rom the time the Legislature enacted the predecessor of [the Act] in 1852, this Court has understood the legislative intent behind the phrase 'such damages as the jury may assess' to be that the jury is to award punitive or exemplary damages."); *Campbell v. Williams*, 638 So. 2d 804, 812 (Ala. 1994) (holding that "the damages recoverable being punitive and exemplary in all cases under the [Act] – punitive of the act done and intended by their imposition to stand as an example to deter others from the commission of mortal wrongs or to incite the diligence in the avoidance of fatal casualties.") (internal citation omitted); *Eich v. Town of Gulf Shores*, 300 So. 2d 354, 356 (Ala. 1974) (holding that "the damages recoverable under [the Act] are entirely punitive and are based on the

culpability of the defendant and the enormity of the wrong, and are imposed for the preservation of human life”).

That legion of precedent rejects with equal force the notion that the Act’s punitive damages are non-traditional or compensatory in any way. *E.g.*, *Painter v. Tenn. Valley Auth.*, 476 F.2d 943, 944 (5th Cir. 1973) (“reject[ing] the argument that the damages awarded under the [wrongful death] statute are, regardless of the label applied by the Alabama courts, inherently compensatory to any extent”); *Trott v. Brinks, Inc.*, 972 So. 2d 81, 84 (Ala. 2007) (holding that the “only recoverable damages” in a wrongful death case “are punitive damages intended to punish the tortfeasor for its actions – not to compensate the plaintiff.”); *King v. Nat’l Spa & Pool Inst., Inc.*, 607 So. 2d 1241, 1247 (Ala. 1992) (holding that “[a] wrongful death claim does not provide compensation for injuries that cause death. Punitive damages are not compensation, and our system should not be contorted to treat them as such.”); *Bd. of Trustees of the Univ. of Ala. v. Harrell*, 188 So. 2d 555, 556, 57 (Ala. 1966) (stating that “[a]ny damages recovered under the wrongful death act are punitive in nature, not actual or compensatory”). Accordingly, the position taken by the Alabama Attorney General in his Amicus Brief is without merit.

**B. The District Court in the *Old Carco* Case Rejected the Attorney General’s Position.**

Varying arguments that the punitive damages available under the Act are somehow not the same as traditional punitive damages have been expressly rejected by, first the Bankruptcy Court and then the District Court in the *Old Carco* case. In *Old Carco LLC*, Judge Bernstein noted at the outset of his discussion on this issue that any “argument regarding the compensatory nature of an award under the [Act] ignores over 140 years of settled Alabama law.” *In re Old Carco LLC*, 593 B.R. 182, 192 (Bankr. S.D.N.Y. 2018), *aff’d*, *In re Old Carco LLC*, Case No. 18-cv-11290 (AJN), 2019 WL 2336849 (S.D.N.Y. May 31, 2019). Instead, Judge Bernstein

determined that the unequivocal language in the horde of Alabama Supreme Court opinions addressing the issue made clear that the Act was intended “to limit recovery to punitive damages and to exclude recovery of compensatory damages[.]” even though “the words ‘punitive’ or ‘exemplary’ do not appear in” the text of the Act. *Id.*

Judge Bernstein also readily dismissed any argument that the Internal Revenue Service’s treatment of punitive damages suggested a compensatory nature, concluding that “[t]he result in this case is not driven by federal tax policy.” *Id.* at 197. Rather, Judge Bernstein relied on the host of Alabama Supreme Court precedent – untouched by any action of the Alabama legislature – “consistently rul[ing] that the plaintiff in a wrongful death action may recover only punitive damages, and evidence supporting a compensatory award is irrelevant.” *Id.* at 198. In doing so, Judge Bernstein held that the plaintiff’s wrongful death claims were enjoined by the sale documents between Old Carco (*i.e.*, Old Chrysler) and New Chrysler, which excluded New Chrysler’s liability for punitive damages under the plaintiff’s Alabama wrongful death claim. *Id.*

On appeal, District Judge Alison Nathan recently affirmed Judge Bernstein’s decision, holding that the “Bankruptcy Court applied settled Alabama caselaw that has consistently construed the Wrongful Death Act to limit recovery to punitive damages only.” *See In re Old Carco LLC*, 2019 WL 2336849, at \*4 (citations omitted). In rejecting the Alabama Attorney General’s argument that “Alabama’s wrongful death damages contain characteristics of both compensatory and punitive damages[.]” the District Court reiterated that “Alabama authority is clear that the damages available are not punitive in name only. Rather, damages under the Wrongful Death statute are to punish tortfeasors, not to compensate victims.” *Id.* (citations omitted). The District Court was equally unpersuaded by the argument – additionally advanced in the Amicus Brief – that Alabama’s wrongful death damages “are not ‘punitive’ in the

traditional sense because one can recover under the Wrongful Death Act based on negligence,” noting that “the fact that recovery can occur based on mere negligence does not change the punitive nature of the damages[,] . . . [where] it is clear that damages under the Wrongful Death Act are punitive damages, meant to punish and deter rather than to compensate.”<sup>4</sup> *Id.* at \*5. Accordingly, the District Court affirmed the bankruptcy court’s decision in holding that it “correctly applied settled Alabama law and concluded that damages under Alabama’s Wrongful Death Act are punitive damages.” *Id.*

\* \* \*

The Amicus Brief is without colorable support of any sort. Purely *ipse dixit*, it ignores the identical interpretation of the Act by every Alabama court and commentator to have examined the issue, which the McCalls agree with. *See* Hr. Tr., May 30, 2019, at 27:6-9 (conceding that “[t]he Alabama statute is a punitive damage statute. The Supreme Court has said more than once that it’s a punitive damage statute, as has Judge Bernstein in Chrysler.”). In addition to every Alabama court to have addressed the issue, the Alabama Attorney General’s specific arguments have now been expressly rejected by District Judge Nathan and should be rejected here.

**II. IN GENERAL, A VIABLE CONTRACT CLAIM ALLOWS FOR THE RECOVERY OF TRADITIONAL COMPENSATORY DAMAGES INCURRED BETWEEN THE TIME OF THE ALLEGED INJURY AND DEATH OF THE PLAINTIFF.**

Alabama law provides that contract causes of action may survive the decedent’s death, regardless of whether or not they have been filed prior to death.<sup>5</sup> *See* Alabama Law of Damages

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<sup>4</sup> And particularly where, the District Court noted, “the degree of culpability is one of the elements a jury can consider in assessing the amount of the award.” *In re Old Carco LLC*, 2019 WL 2336849, at \*5 (internal citations omitted).

<sup>5</sup> The imposition of motor vehicle manufacturer/seller liability in Alabama based on a theory of breach of contract typically arises from: (a) an express warranty between the manufacturer and/or seller and the

§ 11:35 (6<sup>th</sup> ed.) (citing ALA. CODE § 6-5-462); *Benefield v. Aquaslide N Dive Corp.*, 406 So. 2d 873, 876 (Ala. 1981); *McCulley v. SouthTrust Bank of Baldwin County*, 575 So. 2d 1106, 1107 (Ala. 1991); *Nationwide Mut. Ins. Co. v. Wood*, 121 So. 3d 982, 986 (Ala. 2013)).<sup>6</sup>

A viable action for breach of warranty will allow the personal representative to recover lost wages, pain and suffering, medical expenses, and other compensatory damages that occurred between the time of the alleged breach and death of the decedent.<sup>7</sup> See Alabama Law of Damages § 32:5 (6<sup>th</sup> ed.) (citing *Simmons v. Clemco Indus.*, 368 So. 2d 509 (Ala. 1979)); see also, *Aquaslide*, 406 So. 2d at 875-76 (recognizing that when the injuries sued upon caused the death, the representative of the decedent's estate may simultaneously recover both for punitive damages under a wrongful death count and for compensatory damages under a warranty count);

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purchaser; or (b) Alabama's implied warranty of merchantability statute, ALA. CODE § 7-2-314, which establishes an implied warranty from the seller that the product be fit for the ordinary use for which it was intended. See Alabama Law of Damages § 32:5 (6<sup>th</sup> ed.).

<sup>6</sup> The Supplemental Reply's citations to the Alabama Law of Damages are collectively attached as **Exhibit "A."**

<sup>7</sup> As is typically the case, it is from the facts that the law arises. Accordingly, the viability of any particular contract claim must be evaluated on a case-by-case basis, as there are innumerable hurdles that might affect the successful maintenance of such a claim – e.g., an express warranty may have expired; the statute of limitations may have run; and/or the law may preclude the issuance of implied warranties from certain types of defendants. For example, here, the McCalls have not asserted a breach of warranty claim and it may be too late to amend the McCall Complaints and/or the McCalls may have waived such claim. In addition, the express warranty for the 2004 Chevrolet Suburban at issue appears to have been for the shorter of two years or 32,000 miles and, as such, offers no relief to the McCalls. The McCalls might also face fact-specific challenges as to any implied warranty claim based on provisions in the Sale Order and Sale Agreement, the statute of limitations, or the inability to qualify GM as a "seller" under Alabama's version of the Uniform Commercial Code. See, e.g., Sale Agreement, § 2.3(b)(xvi) (Retained Liabilities include "all Liabilities arising out of, related to or in connection with any (A) implied warranty or other implied obligation arising under statutory or common law without the necessity of an express warranty or (b) allegation, statement or writing by or attributable to Sellers"); Sale Agreement, § 6.15(b) (same); Sale Order, ¶ 56 ("Purchaser is not assuming responsibility for Liabilities contended to arise by virtue of other alleged warranties, including implied warranties and statements in materials such as, without limitation, individual customer communications, owner's manuals, advertisements, and other promotional materials, catalogs, and point of purchase materials"); *Trusky v. General Motors Co. (In re Motors Liquidation Co.)*, Case No. 09-50026 (REG), 2013 WL 620281, at \*2 (Bankr. S.D.N.Y. Feb. 19, 2013) ("New GM's warranty obligations are limited to honoring the specific terms of the Glove Box Warranty as to vehicles presented for repair to New GM dealers within the mileage and duration limitations of the Glove Box Warranty[.]"); ALA. CODE § 7-2-725(2) (establishing four-year statute of limitations); *Ex parte General Motors Corp.*, 769 So. 2d 903, 910-11 (Ala. 1999) (stating in case seeking damages for, among other issues, personal injuries, medical expenses, and emotional/mental distress, that GM, as the vehicle's manufacturer, would be due summary judgment on any implied warranty claims on the alternative ground that those claims are only applicable to sellers, not manufacturers).

Alabama Law of Damages § 32:9 (6<sup>th</sup> ed.) (stating that breach of warranty claims allow for recovery of all incidental and consequential damages, which include injury to the person proximately resulting from the breach of warranty) (citations omitted).<sup>8</sup>

In *Simmons*, the Alabama Supreme Court addressed a number of certified questions from a federal district court arising out of breach of warranty claims for personal injuries brought against the manufacture and distributor of a sandblasting hood. 368 So. 2d at 511. One of those questions related to the survivability of those warranty claims when the plaintiff died as a result of the alleged breach after the action had been brought and included specific reference to particular compensatory damages:

Does an action for breach of warranty brought by a plaintiff under [Alabama's version of the Uniform Commercial Code] survive the death of the plaintiff in favor of his personal representative, for the recovery of lost wages, pain and suffering, medical expenses and other damages which occurred between the time of the alleged breach of warranty and death of the plaintiff, in the circumstances where the plaintiff died as a result of the alleged breach of warranty, after the action had been brought by him?

*Id.* at 515. In answering the question in the affirmative, the court implicitly approved the recovery of the identified compensatory damages. *Id.* at 515-16.

Subsequent cases have not altered *Simmons'* allowance of the full gamut of compensatory damages for breach of warranty claims seeking recovery between the date of alleged injury and death. For example, *Aquaslide* reversed the dismissal of a warranty claim in holding that, despite the tortious characteristics of the claim, it remained one rooted in contract and survived in favor of the personal representative regardless of whether it was filed before the decedent's death:

Should breaching manufacturers be allowed to escape liability for compensatory contract damages sustained by the decedent before

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<sup>8</sup> The McCalls have not made an *Aquaslide*-type claim against New GM.

his death merely because he dies as a result of the breach? We think not. The breach of warranty (contract) claim is a separate and distinct claim from the wrongful death (tort) claim and seeks compensatory damages only, not for the wrongful death of the decedent but for the injuries suffered before his death.

406 So. 2d at 876. As a viable claim, it sought “recovery not for the death of the decedent but for the pain and medical expenses suffered by him between the date of his injury and the date of his death” nine days later. *Id.* at 874.

More than a decade later, the Alabama Supreme Court decided *King v. Nat’l Spa & Pool Inst., Inc.*, 607 So. 2d 1241 (Ala. 1992). While *King* concerned a tort claim filed before death and not a contract claim, it addressed the availability of compensatory damages for pre-death injuries and loss.<sup>9</sup> *King* also addressed the unavailability of compensatory damages (such as lost wages) for the time period after the death of the plaintiff. The *King* rationale should be applicable to both tort and contract claims seeking compensatory damages:<sup>10</sup>

Should this case proceed to trial, [the plaintiffs] will be able to present both [a claim for pre-death personal injuries and a claim for wrongful death] to the trier of fact. The estate's personal injury claim for compensatory damages to compensate for expenses and losses incurred up to the moment of death is not mutually exclusive or inconsistent with the heirs' wrongful death claim for punitive damages. That is, should [the estate] prove liability, [it] will be able to recover compensatory damages for [the decedent's] personal injuries up to the instant of his death. [The estate's] claim for damages based on [the decedent's] personal injuries would be presented exactly as any other claim based on personal injury. Losses and expenses and other compensable items recognized in a personal injury action, such as medical expenses, lost wages, and pain and suffering, would be recoverable by [the estate] on behalf of [the decedent] up to the amount of [his] death.

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<sup>9</sup> Similar cases across Alabama courts since *King* continue to seek these types of compensatory damages for personal injuries in breach of warranty cases. See e.g., *Billingsley v. Mike Schmitz Automotive Group*, No. 1:13-CV-412-WKW, 2014 WL 4230012 (M.D. Ala. 2014) (listing breach of implied warranty claims seeking compensatory damages for, among other issues, incurred medical costs and lost wages in non-death case).

<sup>10</sup> The McCalls have not sought compensatory damages under either a contract or tort theory.

Because [the Act] provides for punitive damages for the act causing death, it also displaces any claim for punitive damages in the personal injury action based on the same act. Accordingly, *[the estate's] personal injury claim will provide no recovery for punitive damages, or for any damage or loss, such as lost wages or any other item, that occurred, or might occur, at any time after [the decedent's] death.*

*King*, 607 So. 2d at 1247-48 (emphasis added).<sup>11</sup>

### CONCLUSION

For all of the foregoing reasons, New GM respectfully requests that this Court grant the relief sought in the McCall Motion to Enforce and for such other and further relief as the Court may deem just and proper.

Dated: New York, New York  
July 2, 2019

Respectfully submitted,

/s/ Arthur Steinberg  
Arthur Steinberg  
Scott Davidson  
KING & SPALDING LLP  
1185 Avenue of the Americas  
New York, New York 10036  
Telephone: (212) 556-2100  
Facsimile: (212) 556-2222

-and-

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<sup>11</sup> While not applicable here, *King* makes clear that a plaintiff may recover compensatory damages via tort claims that are filed before death. See ALA. CODE § 6-5-462. Where they are timely filed, *King* seemingly allows for the same recovery of compensatory damages allowed under a contract claim (and imposes the same prohibition on the recovery of punitive damages). 607 Ala. at 1247-48; Alabama Law of Damages, §§ 11:35, 32:5 (stating that a claim may exist for personal injuries of decedent and his death). An illustrative chart depicting New GM's overlay of Alabama's survivability statute with its wrongful death statute as to both tort and contract claims is attached hereto as **Exhibit "B."**

Richard C. Godfrey, P.C. (admitted *pro hac vice*)  
Andrew B. Bloomer, P.C. (admitted *pro hac vice*)  
KIRKLAND & ELLIS LLP  
300 North LaSalle  
Chicago, IL 60654  
Telephone: (312) 862-2000  
Facsimile: (312) 862-2200

*Attorneys for General Motors LLC*

# **Exhibit A**

§ 11:35.Survival of tort causes of action, Alabama Law of Damages § 11:35 (6th ed.)

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**Alabama Law of Damages § 11:35 (6th ed.)**

Alabama Law of Damages February 2019 Update  
Jenelle Mims Marsh

**Part I. Damages, Generally**

**Chapter 11. Actions; Pleading and Practice**

**E. Abatement, Revival, and Survival**

§ 11:35. Survival of tort causes of action

The prevailing common-law rule was that a personal cause of action in tort did not survive in favor of the personal representative of the deceased victim.<sup>1</sup> A tort cause of action likewise did not survive against the estate of the deceased tortfeasor.<sup>2</sup> This restriction on the survival of causes of action was expressed in the maxim *actio personalis moritur cum persona* (a personal right of action dies with the person).<sup>3</sup>

The general rule remains that where the cause of action sounds in torts and no action is filed before the death of the victim, it does not survive in favor of his personal representative.<sup>4</sup> However, if the cause of action was filed prior to the decedent's death, the cause of action survives to the personal representative.<sup>5</sup> This is so even if the injury in the tort cause of action results in the plaintiff's death.<sup>6</sup>

Contract causes of action survive the decedent's death, regardless of whether they have been filed prior to the decedent's death.<sup>7</sup>

In Alabama, by statute, personal tort causes of action survive against the personal representative of the deceased tortfeasor.<sup>8</sup> This is a statutory change in the historic common-law rule that such causes do not survive.<sup>9</sup>

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**Footnotes**

<sup>1</sup> Wynn v. Tallapoosa County Bank, 168 Ala. 469, 53 So. 228 (1910); City of Birmingham v. Walker, 267 Ala. 150, 101 So. 2d 250, 70 A.L.R.2d 464 (1958).

<sup>2</sup> Wynn v. Tallapoosa County Bank, 168 Ala. 469, 53 So. 228 (1910); Ex parte Holsonback, 236 Ala. 265, 182 So. 28 (1938).

<sup>3</sup> See Cage, Jr., Note: Torts—"Survival" of Actions—Testamentary Libel, 7 Ala. L. Rev. 211, 212 (citing reason for the rule to be that tort actions were criminal in nature and were designed to punish the wrongdoer, not to compensate the injured person; since the deceased wrongdoer could not be punished, the action died with him).

<sup>4</sup> Ala. Code § 6-5-462. Bates v. L & N Emp. Credit Union, 374 So. 2d 323 (Ala. 1979); Stacey v. Saunders, 437 So. 2d 1230 (Ala. 1983) (fraud). See also Cummings v. Food World, Brunos, Inc., 510 So. 2d 160 (Ala. 1987) (employee's workers'-compensation claim arising from her fall at her place of employment did not survive her death from lung cancer occurring 7 1/2 years later); Gillion v. Alabama Forestry Ass'n, 597 So. 2d 1315 (Ala. 1992) (an action for fraud did not survive the death of the allegedly defrauded party); Malcolm v. King, 686 So. 2d 231, 236 (Ala. 1996)

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(when plaintiff's decedent suffered personal injuries in automobile accident and claim was filed during his lifetime, but another claim, alleging medical malpractice in diagnosing of the injuries sustained in the automobile accident, was not filed until after the decedent's death, medical malpractice claim did not relate back to the claim for injuries suffered in the automobile accident because the subsequent medical treatment for the injury was not the same "conduct or occurrence"); *McDuffie v. Hopper*, 982 F. Supp. 817, 830 (M.D. Ala. 1997) (holding in dicta that medical malpractice claim did not survive when plaintiff died prior to filing); *A.W. Herndon Oil Co. v. Transamerica Occidental Life Ins. Co.*, 201 F. Supp. 2d 1213, 1215 (M.D. Ala. 2002) (when plaintiff's decedent filed suit claiming fraud during his lifetime, but suit was dismissed for lack of jurisdiction, suit refiled after his death did not survive); *Callens v. Jefferson County Nursing Home*, 769 So. 2d 273, 277 (Ala. 2000) (by complying with section 6-5-20, the personal-injury claim against the county survived decedent's death); *Abrams v. Ciba Specialty Chemicals Corp.*, 663 F. Supp. 2d 1259, 1274 (S.D. Ala. 2009); *Estate of Gilliam ex rel. Waldroup v. City of Prattville*, 639 F.3d 1041, 1047 (11th Cir. 2011), cert. denied, 132 S. Ct. 817, 181 L. Ed. 2d 526 (2011) (decedent's unfiled § 1983 claim did not survive the death of the putative plaintiff when there was no claim that the conduct alleged to violate § 1983 caused the decedent's death); *Bassie v. Obstetrics & Gynecology Associates of Northwest Alabama, P.C.*, 828 So. 2d 280, 285 (Ala. 2002) (applying statutory definition of death); *Georgia Cas. and Sur. Co. v. White*, 582 So. 2d 487, 491-92 (Ala. 1991).

5 Ala. Code § 6-5-462; *King v. National Spa and Pool Institute, Inc.*, 607 So. 2d 1241, 1246 (Ala. 1992); *Hogland v. Celotex Corp.*, 620 So. 2d 621, 622 (Ala. 1993); *Ex parte Burnham Service Co., Inc.*, 649 So. 2d 1270, 1273 (Ala. 1994) (personal representative is mandated to amend pending personal-injury action to add a claim of wrongful death).

6 *King v. National Spa and Pool Institute, Inc.*, 607 So. 2d 1241, 1246 (Ala. 1992).

7 Ala. Code § 6-5-462; *Benefield v. Aquaslide N Dive Corp.*, 406 So. 2d 873, 877 (Ala. 1981); *McCulley v. SouthTrust Bank of Baldwin County*, 575 So. 2d 1106, 1107 (Ala. 1991); *Nationwide Mut. Ins. Co. v. Wood*, 121 So. 3d 982, 986 (Ala. 2013) (insurance company is bound to an agreement negotiated on behalf of an injured minor, even if that minor dies before the scheduling of the court hearing necessary to obtain approval of the settlement agreement).

8 Ala. Code § 6-5-462.

9 *Standard Acc. Ins. Co. v. Whitset*, 270 Ala. 334, 118 So. 2d 922 (1960).

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**Part II. Damages Relating to Particular Subject Areas**

**Chapter 32. Products Liability**

**C. Breach of Warranty**

§ 32:5. Generally

A breach of warranty gives rise to strict liability, so that it does not depend upon any knowledge on the part of the seller or any negligence.<sup>1</sup> For a cause of action to arise for breach of warranty, either express or implied, three things must first occur: (1) the existence of a warranty; (2) breach of the warranty; and (3) damages proximately resulting from that breach.<sup>2</sup>

The implied warranty arises by operation of law when the parties have assumed a certain contractual relationship that causes the law to impose the warranty.<sup>3</sup> The contractual agreement or arrangement that gives rise to a warranty is a product sale. Where the price is negotiable, the sales contract is not completed until the agreement has been reached on the terms of sale by the parties.<sup>4</sup> Thus, whatever the terms and method of sale, when there first exists mutuality of obligation between the parties, at that time, the implied warranty arises. Warranty does not depend upon the passage of title but upon the existence of a contract between the parties.<sup>5</sup> The Uniform Commercial Code states clearly that a warranty is implied upon a contract of sale and not solely upon the execution of the sale itself.<sup>6</sup> Every sale of goods, including a sale by auction, includes an implied warranty of merchantability if the seller is a merchant with respect to the goods of that kind.<sup>7</sup>

“Express” warranties rest on the negotiated terms of the bargain and go to the essence of that bargain.<sup>8</sup>

An action for breach of warranty brought under Code provisions survives the death of the plaintiff in favor of his personal representative for the recovery of lost wages, pain and suffering, medical expenses, and other damages that occurred between the time of the alleged breach of warranty and death of the plaintiff, in the circumstances where the plaintiff died as a result of the alleged breach of warranty, after the action had been brought by him.<sup>9</sup>

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Footnotes

<sup>1</sup> *Vann v. McCord*, 22 Ala. App. 241, 114 So. 418 (1927); *Geohagan v. General Motors Corp.*, 291 Ala. 167, 279 So. 2d 436, 12 U.C.C. Rep. Serv. 993 (1973). See also McDonnell, *The New Privity Puzzle: Products Liability under Alabama’s Uniform Commercial Code*, 22 Ala. L. Rev. 455 (1970). See § 9:22 (discussing the Magnuson-Moss Act as another basis, outside the Uniform Commercial Code, for bringing a consumer warranty action).

<sup>2</sup> *Storey v. Day Heating & Air Conditioning Co., Inc.*, 56 Ala. App. 81, 319 So. 2d 279, 17 U.C.C. Rep. Serv. 1208 (Civ. App. 1975); Ala. Code § 7-2-314. See also *Rhodes v. General Motors Corp., Chevrolet Div.*, 621 So. 2d 945, 947, 21 U.C.C. Rep. Serv. 2d 34 (Ala. 1993). Claims based on the breach of a manufacturer’s warranty to repair a good or to render certain services do not arise until the manufacturer actually fails or refuses to perform its obligation to repair the good or to render a service under the warranty. *American Suzuki Motor Corp. v. Burns*, 81 So. 3d 320,

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325 (Ala. 2011); *Brown v. General Motors Corp.*, 14 So. 3d 104, 113, 67 U.C.C. Rep. Serv. 2d 924 (Ala. 2009).

3 Ala. Code § 7-2-314; *Redman Industries v. Binkey*, 49 Ala. App. 595, 274 So. 2d 621, 12 U.C.C. Rep. Serv. 436 (Civ. App. 1973); *Russell v. Wilson*, 991 So. 2d 745, 749 (Ala. Civ. App. 2008) (sales representatives for pharmaceutical drug manufacturer were not “sellers” of the drug, but were instead agents of the seller; thus, a breach of warranty claim was viable only against the manufacturer).

4 *Hamm v. Continental Gin Co.*, 276 Ala. 611, 165 So. 2d 392 (1964).

5 *Mitchell-Huntley Cotton Co., Inc. v. Waldrep*, 377 F. Supp. 1215, 15 U.C.C. Rep. Serv. 317 (N.D. Ala. 1974).

6 Ala. Code § 7-2-314.

7 *Bradford v. Northwest Alabama Livestock Ass’n*, 379 So. 2d 609, 28 U.C.C. Rep. Serv. 1009 (Ala. Civ. App. 1980).

8 Ala. Code § 7-2-313.

9 *Simmons v. Clemco Industries*, 368 So. 2d 509, 25 U.C.C. Rep. Serv. 1088 (Ala. 1979).

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**Part II. Damages Relating to Particular Subject Areas**

**Chapter 32. Products Liability**

**C. Breach of Warranty**

§ 32:9. Damages

The topic of warranty damages is given an in-depth treatment as regards sales in Chapter 35. Suffice it to say here, however, that where the buyer has accepted the goods, the basic recovery for the defective goods themselves is the difference at the time of acceptance between the value of the goods accepted and the value that they would have had if they had been as warranted.<sup>1</sup> This formula of recovery is part of the broader rule that the buyer may recover as damages, for any nonconformity of tender, the loss resulting in the ordinary course of events from the seller's breach.<sup>2</sup> The buyer may likewise recover incidental<sup>3</sup> and consequential damages.<sup>4</sup> Consequential damages include losses resulting from the general or particular foreseeable requirements and needs of the seller,<sup>5</sup> as well as injury to person or property proximately resulting from the breach of warranty.<sup>6</sup> This latter provision has been recognized as allowing the recovery of consequential damages in cases involving injuries to personal property resulting from a breach of warranty.<sup>7</sup> As regards damages for personal injury, it should be remembered that the seller's warranty extends to any natural person who might reasonably be expected to use, consume, or be affected by the goods.<sup>8</sup>

The exclusion of warranties provision in the Uniform Commercial Code<sup>9</sup> expressly recognizes the power of the seller and buyer to liquidate<sup>10</sup> and limit damages.<sup>11</sup> If parties settle on an amount that is reasonable, they may state by agreement an amount that will be paid as liquidated damages upon breach of the contract.<sup>12</sup> The parties likewise may provide for substitute remedies and alter the measure of damages as otherwise called for in Article 2 of the Code.<sup>13</sup> Such provisions are not binding if the circumstances cause the exclusive or limited remedy to fail of its essential purpose.<sup>14</sup> Consequential damages may be limited or excluded unless such is unconscionable.<sup>15</sup> Any limitation of consequential damages for personal injury from consumer goods is prima facie unconscionable while a limitation as to commercial loss is not.<sup>16</sup> The seller may not modify or limit contractually the buyer's remedy for injury to the person in the case of consumer goods.<sup>17</sup>

The Alabama Supreme Court has ruled that a wrongful-death action cannot be based upon a breach of warranty.<sup>18</sup> The rationale for this ruling lies in the fact that an allegation of breach of warranty sounds in contract, and the punitive nature of the wrongful-death statute is incompatible with such an action.<sup>19</sup>

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Footnotes

<sup>1</sup> Ala. Code § 7-2-714(2). See also *Massey-Ferguson, Inc. v. Laird*, 432 So. 2d 1259, 36 U.C.C. Rep. Serv. 437 (Ala. 1983).

<sup>2</sup> Ala. Code § 7-2-714(1).

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3 Ala. Code § 7-2-715(1).

4 Ala. Code § 7-2-715(2). See also *Caldwell v. Brown Service Funeral Home*, 345 So. 2d 1341, 21 U.C.C. Rep. Serv. 999 (Ala. 1977); *Winchester v. McCulloch Bros. Garage, Inc.*, 388 So. 2d 927, 30 U.C.C. Rep. Serv. 212 (Ala. 1980).

5 Ala. Code § 7-2-715(2)(a).

6 Ala. Code § 7-2-715(2)(b).

7 *Atkins v. American Motors Corp.*, 335 So. 2d 134, 19 U.C.C. Rep. Serv. 756 (Ala. 1976).

8 Ala. Code § 7-2-318.

9 Ala. Code § 7-2-316(4).

10 Ala. Code § 7-2-718.

11 Ala. Code § 7-2-719.

12 Ala. Code § 7-2-718(1).

13 Ala. Code § 7-2-719(1)(a).

14 Ala. Code § 7-2-719(2). See also *Winchester v. McCulloch Bros. Garage, Inc.*, 388 So. 2d 927, 30 U.C.C. Rep. Serv. 212 (Ala. 1980); *Volkswagen of America, Inc. v. Harrell*, 431 So. 2d 156, 36 U.C.C. Rep. Serv. 553 (Ala. 1983); *Massey-Ferguson, Inc. v. Laird*, 432 So. 2d 1259, 36 U.C.C. Rep. Serv. 437 (Ala. 1983); *Ex parte Miller*, 693 So. 2d 1372, 1377, 32 U.C.C. Rep. Serv. 2d 839 (Ala. 1997) (generally, a warranty fails when the seller limits the buyer's remedies to repair or replacement of the product, and the seller refuses to perform within a reasonable time).

15 Ala. Code § 7-2-719(3). See also *Fleming Farms v. Dixie Ag Supply, Inc.*, 631 So. 2d 922, 22 U.C.C. Rep. Serv. 2d 1039 (Ala. 1994) (summary judgment was proper upon defendant's establishing a prima facie case that the limitation-of-liability clause was not unconscionable, and plaintiff failed to present substantial evidence to the contrary). For a discussion of the exclusion or limitation of damages in a commercial setting, see § 35:2.

16 Ala. Code § 7-2-719(3).

17 Ala. Code § 7-2-719(4). See also *Atkins v. American Motors Corp.*, 335 So. 2d 134, 19 U.C.C. Rep. Serv. 756 (Ala. 1976).

18 *Geohagan v. General Motors Corp.*, 291 Ala. 167, 279 So. 2d 436, 12 U.C.C. Rep. Serv. 993 (1973); *Alabama Powersport Auction, LLC v. Wiese*, 143 So. 3d 713, 721, 82 U.C.C. Rep. Serv. 2d 52 (Ala. 2013); *Gaylord v. Lawler Mobile Homes, Inc.*, 477 So. 2d 382, 42 U.C.C. Rep. Serv. 131 (Ala. 1985). See *Boyd*, Note: Torts—Wrongful Death—An Action for Wrongful Death Cannot be Maintained in Alabama for Breach of Implied Warranty, 26 Ala. L. Rev. 273 (1973).

19 *Geohagan v. General Motors Corp.*, 291 Ala. 167, 279 So. 2d 436, 12 U.C.C. Rep. Serv. 993 (1973); *Gaylord v. Lawler Mobile Homes, Inc.*, 477 So. 2d 382, 42 U.C.C. Rep. Serv. 131 (Ala. 1985). See also *Boyd*, Note: Torts—Wrongful Death—An Action for Wrongful Death Cannot be Maintained in Alabama for Breach of Implied Warranty, 26 Ala. L. Rev. 273 (1973). See § 37:3.

# **Exhibit B**

**Analysis of Alabama's Wrongful Death Act and Survivability Statute**

TYPE CLAIM	SURVIVES TO PERSONAL REP	ALLOWS COMPENSATORY*	ALLOWS PUNITIVE**
Tort Claim filed Pre-Death	YES (Ala. Code §6-5-462)	YES (King v. National Spa)	NO
Tort Claim filed Post-Death	NO (Ala. Code §6-5-462)		
Contract Claim filed Pre-Death	YES (Ala. Code §6-5-462)	YES (Benefield v. Aquaslide)	NO
Contract Claim filed Post-Death	YES (Ala. Code §6-5-462)	YES (Benefield v. Aquaslide)	NO
Wrongful Death Contract Claim	NO (AL Powersport v. Weise)		
Wrongful Death Tort/AEMLD Claim	YES (Ala. Code § 6-5-410)	NO	YES (Ala. Code § 6-5-410)

Alabama Code § 6-5-410, Alabama's wrongful death statute, states: "A personal representative may commence an action and recover such damages as the jury may assess . . . for the wrongful act, omission, or negligence of any person, persons, or corporation . . . whereby the death of the testator or intestate was caused, provided the testator or intestate could have commenced an action for the wrongful act, omission, or negligence if it had not caused death. . . [.]"

Alabama Code § 6-5-462, Alabama's survival statute, states: "In all proceedings not of an equitable nature, [(1)] all claims upon which an action has been filed and [(2)] all claims upon which no action has been filed on a contract, express or implied, and [(3)] all personal claims upon which an action has been filed, except for injuries to the reputation, survive in favor of and against personal representatives . . . ."

Alabama Powersport Auction, LLC v. Weise, 143 So.3d 713 (Ala. 2013) (holding that a breach-of-warranty claim cannot be maintained under Alabama's wrongful-death statute).

King v. National Spa and Pool Institute, 607 Ala. 1241 (Ala. 1992) (holding that survival statute allows one to maintain both a tort-based personal injury action for pre-death compensatory damages and a wrongful death action for punitive damages if the personal injury action is filed before the decedent's death).

Benefield v. Aquaslide 'N' Dive Corp., 406 So.2d 873 (Ala. 1981) (citing survival statute in holding that when the injuries sued upon caused the death, the representative of the decedent's estate may simultaneously recover both for the punitive damages under a wrongful death count and for pre-death compensatory damages under a warranty count, whether or not the warranty count was filed before the decedent's death).

\* As King and Aquaslide make clear, the allowance of compensatory damages is limited to those incurred between the time of injury and death but, within that timeframe, may include damages for pain and suffering, emotional/mental distress, lost wages, etc.

\*\* The punitive damages available in a wrongful death claim are exclusively intended to punish the tortfeasor for its actions – not to compensate the plaintiff. Trott v. Brinks, Inc., 972 So. 2d 81, 84 (Ala. 2007) Further, because the wrongful death statute provides for punitive damages for the act causing death, it displaces any claim for punitive damages in a personal injury action based on the same act. Accordingly, such pre-death claims (whether in contract or

**EXHIBIT B**