

THE IMPLICATIONS OF *BARNES V. NORFOLK SOUTHERN RAILWAY CO.* ON ALABAMA'S FORMER TESTIMONY EXCEPTION TO THE HEARSAY RULE

I. INTRODUCTION

The Supreme Court of Alabama decided *Barnes v. Norfolk Southern Railway Co.*¹ in October 2001. The case holds important implications for litigators throughout the state regarding Alabama's former testimony exception to the hearsay rule, Alabama Rule of Evidence 804(b)(1). According to *Barnes*, for the former testimony of a witness to be admissible, both the party against whom the evidence is offered and the party offering the evidence must be substantially the same.²

The purpose of this Comment is to determine whether the decision reached in *Barnes* is in accord with the intent of the drafters of Rule 804(b)(1). The issue is whether Rule 804(b)(1) was designed to require that only the party against whom the evidence is offered to be substantially the same, or whether both the party against whom the evidence is offered and the party offering the evidence must be substantially the same. Because Rule 804(b)(1) was intended to restate preexisting Alabama caselaw,³ a thorough examination of previous caselaw is essential. In analyzing the cases, special attention should be paid to: (1) the public policy rationale behind the rule, particularly in criminal cases; (2) the extent of privity required by the rule; and (3) the application of the rule in regards to the party offering the evidence.

It must then be determined whether the court's decision reflects this caselaw. If not, the court should be petitioned to rehear *Barnes* or at least to reexamine the caselaw for future similar cases. If the court's decision is in line with preexisting caselaw, the court or legislature should be encouraged to change or clarify the rule. For the sake of judicial efficiency and to emphasize substance rather than form, a new Rule 804(b)(1) should clarify that only the party against whom the evidence is offered must be substantially the same as the party in the previous case.

In any event, it is important to remember that the identity of parties requirement only applies to Rule 804(b)(1). As the *Barnes* court pointed out in footnote one, the former testimony may be admissible either because it is

1. 816 So. 2d 27 (Ala. 2001).
2. *Barnes*, 816 So. 2d at 30.
3. ALA. R. EVID. 804(b)(1) advisory committee's note.

definitionally not hearsay to begin with, or because it falls under another exception to the hearsay rule.⁴

II. *BARNES V. NORFOLK SOUTHERN*

A. *Jefferson County Circuit Court*

Willie Alex Barnes brought suit against his employer of twenty-nine years, Norfolk Southern, under the Federal Employers' Liability Act.⁵ Barnes allegedly suffered severe injury to his body, including his respiratory system, occupational disease, and mental anguish as the result of his exposure to asbestos and materials containing asbestos.⁶ Norfolk Southern denied the allegations and charged that Barnes's own conduct had caused his injuries.⁷

An evidentiary issue arose concerning the deposition of Dr. Max Rogers, a resident of North Carolina and the chief surgeon and medical director at Norfolk Southern from 1966 to 1983.⁸ Norfolk Southern took the deposition in cases pending against them in Tennessee.⁹ These previous cases also involved employees who were suing Norfolk Southern for negligently exposing them to asbestos.¹⁰ Norfolk Southern filed a motion in limine with the trial court to preclude Barnes from introducing this evidence at trial.¹¹ The trial court entertained arguments from counsel, then granted the motion in limine, precluding the admission of the deposition.¹² At trial, outside the jury's presence, Barnes moved to introduce Dr. Rogers's deposition testimony.¹³ The trial court heard arguments of counsel and then excluded Dr. Rogers's deposition, holding that it failed to satisfy the requirements of Rule 804(b)(1) of the Alabama Rules of Evidence.¹⁴ The court noted that the Alabama interpretation is more restrictive than the federal.¹⁵ The Jefferson County Circuit Court entered judgment on a jury verdict in favor of Norfolk Southern.¹⁶ Barnes appealed on the ground that the trial court erred in excluding Dr. Rogers's testimony.¹⁷

4. *Barnes*, 816 So. 2d at 30.

5. *Id.* at 28.

6. *Id.*

7. *Id.*

8. *Id.*

9. *Barnes*, 816 So. 2d at 28.

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Barnes*, 816 So. 2d at 30.

15. *Id.*

16. *Id.*

17. *Id.* at 28.

B. Supreme Court of Alabama

In October 2001, the Supreme Court of Alabama decided *Barnes*, and brought Alabama's former testimony exception to the hearsay rule to the forefront of the minds of practicing lawyers throughout the state.¹⁸ The court first considered Alabama Rule of Evidence 804(b)(1), which states:

(b) *Hearsay Exceptions.* The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) *Former Testimony.* Testimony of a witness, in a former trial or action, given (A) under oath, (B) before a tribunal or officer having by law the authority to take testimony and legally requiring an opportunity for cross-examination, (C) under circumstances affording the party against whom the witness was offered an opportunity to test his or her credibility by cross-examination, and (D) *in litigation in which the issues and parties were substantially the same as in the present cause.*¹⁹

The court focused on the rule's requirement that both parties must be substantially the same in the former and present cause. The court noted that it had not yet interpreted Rule 804(b)(1).²⁰ It also noted that the federal rule only required that "the party *against whom* the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination."²¹ The court explained that the Alabama rule is unlike the federal rule in that it requires that both the party against whom the evidence is sought to be admitted and the party offering the evidence must be substantially the same as they were in the original suit.²²

The advisory committee notes to Rule 804(b)(1) state that the adoption of the former testimony exception "is intended as a restatement of preexisting Alabama law with regard to the 'former testimony' exception to the hearsay rule."²³ Neither *Barnes* nor the court were able to point to any Alabama caselaw holding that the party offering the evidence need not have been a party in the prior proceeding.²⁴ The court affirmed the judgment of the lower court, stating that because *Barnes* was neither a party to, nor a representative of, the offering party in the prior proceeding, the deposition testimony of Dr. Rogers was inadmissible under Rule 804(b)(1).²⁵

18. *Id.*

19. *Barnes*, 816 So. 2d at 29 (quoting ALA. R. EVID. 804(b)) (emphasis added).

20. *Id.* at 29.

21. *Id.* (quoting FED. R. EVID. 804(b)(1)) (emphasis added); see also James A. George, *Hearsay: Recognizing It and Handling the Objection*, 10 AM. J. TRIAL ADVOC. 489, 520 (1987).

22. *Barnes*, 816 So. 2d at 29.

23. *Id.* at 29 (quoting ALA. R. EVID. 804(b)(1) advisory committee's note).

24. *Id.*

25. *Id.* at 30.

It is important to note footnote one of the court's opinion, in which it stated:

Noteworthy, the proponents of Dr. Rogers's deposition did not argue that it was admissible as the admission of a party uttered by an agent or employee of that party within the scope of his agency or employment under Rule 801(d)(2)(D), Ala. R. Evid. ("A statement is not hearsay if . . . [t]he statement is offered against a party and is . . . a statement by the party's agent or servant concerning a matter within the scope of the agency or employment.").²⁶

III. THE BASIS OF THE COURT'S DECISION

Pursuant to the drafters' intention, as communicated through the advisory committee's notes, the court considered preexisting Alabama caselaw to interpret the meaning of Rule 804(b)(1).²⁷ It focused on the rule's fourth requirement, that the issues and parties must be substantially the same in the present cause as they were when the testimony was given.²⁸ The court first cited its earlier decision in *Clealand v. Huey*.²⁹ In *Clealand*, the defendants sought to introduce a witness to testify as to what a deceased witness stated in a former trial. The former trial was on the same issue, but was between the plaintiff and the defendant's testator, not the defendant himself. The plaintiffs argued that because the parties were not the same, the evidence of what the deceased witness stated should not be allowed. The Alabama Supreme Court held, "The admissibility . . . of such testimony does not depend on the precise nominal identity of the parties to the suit, for if the second trial of the same subject matter is between those, who represent the parties to the first, by privity in blood or estate, the evidence is admissible."³⁰ The court affirmed the lower court's decision to allow the evidence to be offered by this different defendant against the same plaintiff.³¹

The court then referred to its decision in *Hill v. McWhorter*.³² In *Hill*, the plaintiff testified as a witness in a previous trial in which the judge ordered a mistrial and continued the cause. After the first trial, the plaintiff died and the cause was revived in the name of his administrator. The defendant objected to evidence given by the plaintiff in the former trial, arguing that the issues in the two suits and the parties were not the same. The Alabama Supreme Court stated, "If the issues and parties are substantially the same in the two trials, [the Rule] is satisfied though there may be a nominal

26. *Id.* at 30 n.1.

27. *Barnes*, 816 So. 2d at 30 (citing ALA. R. EVID. 804(b)(1) advisory committee's note).

28. *Id.* at 29.

29. 18 Ala. 343 (1850).

30. *Clealand*, 18 Ala. at 347.

31. *Id.* at 348.

32. 187 So. 494 (Ala. 1939).

change of parties or counts in the complaint.”³³ The court noted that it is not necessary that the party *against* whom the evidence is being offered was even personally present at the trial, so long as he was represented by counsel who had the opportunity to cross-examine.³⁴ The court held, “[W]here the issues and parties were substantially the same as those in the second trial, and where an opportunity to cross-examine the witness existed and was not denied, the death of the witness makes his former evidence admissible in the later trial.”³⁵ Therefore, the court allowed evidence to be admitted against a party to the original suit, although not offered by a precise party to the original suit.

Next, the court considered its decision in *Julian v. Woolbert*,³⁶ wherein a new party was added by amendment to the cause: the representative of certain creditors as the administrators *de bonis non* of the decedent's insolvent estate. The Alabama Supreme Court began by saying that a party added by amendment is entitled to be present when adverse testimony is taken in the suit.³⁷ It clarified the statement, saying, “Where, however, the matters in issue and the parties are essentially the same—privies in blood, in law, or in estate—testimony formerly taken is competent evidence, though new personal representatives are thereafter made parties by revivor.”³⁸ The court held that there was no error in the introduction of the testimony taken in the instant cause before the revivor, and allowed the evidence to be admitted against a party added after the testimony was taken.³⁹

Finally, the court discussed *Gwin v. State*,⁴⁰ a criminal case in which the defense counsel attempted to introduce the testimony of the defendant's brother at the brother's trial. The circuit court refused to allow the admission of this prior testimony. The court explained that the testimony of an unavailable witness given at a previous trial of another person is not admissible, even if it pertains to the same offense with which the current defendant is charged.⁴¹ The court affirmed the circuit court's refusal of the evidence, holding, “The now-governing Alabama rule is that if either the party now offering the former testimony, or the party against whom it is offered, was not a party or the successor of a party to the former litigation, the former testimony is not receivable for or against either.”⁴²

Applying this caselaw to the drafter's intention that Rule 804(b)(1) restate the common law rule, the court in *Barnes* held that both the offering

33. *Hill*, 187 So. at 495.

34. *Id.*

35. *Id.*

36. 81 So. 32 (Ala. 1919).

37. *Julian*, 81 So. at 35.

38. *Id.*

39. *Id.* at 36.

40. 456 So. 2d 845 (Ala. Crim. App. 1984).

41. *Gwin*, 456 So. 2d at 851-52.

42. *Id.* at 852 (quoting CHARLES W. GAMBLE, MCELROY'S ALABAMA EVIDENCE § 245.07(7) (3d ed. 1977) [hereinafter MCELROY]).

party and the opposing party must be substantially the same as the parties in the prior proceeding for former testimony to be admitted.⁴³

IV. ANALYZING THE PRIOR CASELAW

Underlying the caselaw cited in *Barnes* are three issues of significant importance when determining whether former testimony is admissible. First, the admission of former testimony is critically different between the civil arena and the criminal arena. Second, what degree of privity must exist between two parties for the evidence to be admitted? Finally, the most pertinent question raised by *Barnes* is whether the preexisting law in Alabama intended for the parties offering the evidence to be in privity, or whether this requirement applies only to the parties *against* whom the evidence is offered.

A. *Distinguishing Former Testimony in Civil and Criminal Trials*

In a criminal case, the party against whom former testimony is offered must have been a party to the prior proceeding.⁴⁴ Even if the accused was a party, the exception still applies only if the accused had an opportunity to cross-examine the witness during that proceeding.⁴⁵ Whether the accused took the opportunity to cross-examine is not essential, it is only essential that the accused had the opportunity to do so.⁴⁶ Similarly, when the criminal defense offers former testimony against the prosecution, and the government was a party to the prior proceeding, the admissibility depends on whether the government had an opportunity to cross-examine the witness in the prior proceeding.⁴⁷

In the civil arena, the party against whom the testimony is offered or that party's predecessor in interest must have been a party to the prior proceeding.⁴⁸ A predecessor in interest is defined as "one with whom the party . . . has a relationship in the nature of privity."⁴⁹ Therefore, "unlike criminal cases, the testimony may be offered against a civil party who was not a party to the prior proceeding."⁵⁰ Before such prior testimony can be admitted against the party or predecessor in interest, it must be established that the party or predecessor had the "opportunity and similar motive to develop the witness' testimony by direct, cross, or redirect examination."⁵¹

43. *Barnes*, 816 So. 2d at 30.

44. CHARLES W. GAMBLE, *GAMBLE'S ALABAMA RULES OF EVIDENCE* § 804(b)(1), at 34 (1995).

45. MCELROY, *supra* note 42, § 245.07(5)(a)(1).

46. *Id.*

47. *Id.* § 245.07(5)(a)(2).

48. GAMBLE, *supra* note 44, § 804(b)(1), at 314.

49. *Id.*

50. MCELROY, *supra* note 42, § 245.07(5)(b).

51. GAMBLE, *supra* note 44, § 804(b)(1), at 314.

In *Simmons v. State*,⁵² the defendant was convicted of murder in the second degree. The defense had attempted to introduce the testimony of a witness for the state, since deceased, in the trial of a person other than the defendant. The trial court refused to admit such evidence. On appeal, the Supreme Court of Alabama stated, "The evidence of a deceased or absent witness given upon the former trial is only admissible upon the second trial between the same parties or their privies, and in relation to the same subject-matter."⁵³ Because the defendant was not the same party as the defendant in the previous trial, the court affirmed that the witness's prior testimony was properly excluded.⁵⁴

Distinguishing between former testimony in criminal and civil trials is an important first step. Public policy concerns and constitutional guarantees weigh heavily on a criminal defendant's right to cross-examine a person offering testimony against him or her. Each criminal defendant has a right to his or her own trial and should not be subjected to testimony offered against someone other than himself or herself. However, in a civil trial, the predecessor in interest or privity requirement allows for a more relaxed application of the rule. This is sensible considering that civil defendants do not face the potential punishment of death or imprisonment. Also, allowing former testimony to be offered where privity exists provides for greater judicial efficiency.

B. Privity Requirement

The traditional rule regarding former testimony is that the parties to the prior litigation must be the same as the parties to the present litigation for the testimony to be admissible.⁵⁵ However, the requirement of identical parties was abandoned well before the Alabama Rules of Evidence were adopted.⁵⁶ As the rule now stands, if either the party offering the prior testimony or the party against whom the evidence is offered was not a party to the former action and is not now a successor to a party in the former action, the testimony is inadmissible.⁵⁷ The reason for the "identity of parties" requirement is to insure that the testimony was adequately developed through direct, cross, or redirect examination by a party with motives similar to

52. 29 So. 929 (Ala. 1901).

53. *Simmons*, 29 So. at 930.

54. *Id.*; see also *Flowers v. State*, 799 So. 2d 966, 974 (Ala. Crim. App. 1999) (stating that the witness is required to have given former testimony during a judicial proceeding between the "parties litigant"); *Finch v. State*, 715 So. 2d 906, 913 (Ala. Crim. App. 1997) (stating that witness "testimony qualified under the 'firmly rooted' prior testimony exception to the hearsay evidence rule"); *Scroggins v. State*, 727 So. 2d 123, 127 (Ala. Crim. App. 1997) (holding that whether a witness is unavailable within the meaning of the former testimony exception to the hearsay rule is within the sound discretion of the trial court).

55. MCELROY, *supra* note 42, § 245.07(8).

56. *Id.*

57. *Id.*

those of the current party.⁵⁸ Where a present party has the same interests involved as the parties to the former action, they are said to be a privy or a successor to that former party, and the former testimony is receivable.⁵⁹ A nominal change in the parties does not affect the application of the former testimony exception.⁶⁰

The advisory committee notes following Rule 804(b)(1) expressly reject the result reached on the privity issue by the Sixth Circuit in *Clay v. Johns-Manville Sales Corp.*⁶¹ In *Clay*, suit was brought against asbestos manufacturers for damages resulting from exposure to asbestos. Plaintiffs sought to introduce the deposition of the defendant's only full-time physician, taken in a previous case involving neither of the parties to the current proceeding. The witness worked for the defendants for twenty-two years and had acquired extensive knowledge about asbestos disease; therefore, his deposition was particularly relevant. The court explained, "[I]f it appears that in the former suit a party having a like motive to cross-examine about the same matters as the present party would have, was accorded an adequate opportunity for such examination, the testimony may be received against the present party."⁶² They went on to note that a previous party having a like motive to develop the testimony about the same material facts is essentially a predecessor in interest to the present party.⁶³ The court determined that the defendants in the prior case had a similar motive in confronting the witness as the defendants did in the current litigation.⁶⁴ Therefore, it held that the deposition was admissible.⁶⁵

C. Was the Privity Requirement Only Intended to Apply to the Adverse Party?

The former testimony exception typically arises when testimony is offered against the same party it was offered against in the prior proceeding.⁶⁶ However, the rule also applies when the testimony is offered against the party who offered the evidence in the prior proceeding.⁶⁷ What result, then, when a different party offers the same testimony against the same defendant against whom it was offered in the prior litigation?

58. *Id.*; GAMBLE, *supra* note 44, § 804(b)(1), at 314.

59. MCELROY, *supra* note 42, § 245.07(b).

60. *Id.*

61. 722 F.2d 1289 (6th Cir. 1983); *see also* MCELROY, *supra* note 42, § 245.07(8) n.6.

62. *Clay*, 722 F.2d at 1295 (quoting *Lloyd v. Am. Exp. Lines, Inc.*, 580 F.2d 1179, 1187 (3d Cir. 1978)) (internal quotation marks omitted).

63. *Id.*

64. *Id.*

65. *Id.*

66. MCELROY, *supra* note 42, § 245.07(6).

67. *Id.*; *see also* Gregory S. Cusimano & Michael L. Roberts, *Proposed Alabama Rules of Evidence: What's the Same? What's Different?*, 45 ALA. L. REV. 109, 137 (1993).

Before *Barnes*, the answer appeared much clearer. Francis H. Hare, Jr., Andrew T. Citrin, and Mitchell K. Shelly provided an example of the popular understanding of the former testimony rule before the *Barnes* decision:

[S]uppose Plaintiff "Smith" calls "Aging Bob" as an unique expert engineering witness in a products liability action against the Acme Corporation for injuries caused by defective widgets. Suppose further that Aging Bob gives damning testimony concerning the defectiveness of the design utilized by Acme and then dies or retires to Belize. May a subsequent plaintiff use Aging Bob's testimony against the Acme Corporation in a later products liability lawsuit involving a defective widget? Assuming all other requirements are met, the answer under both Alabama and federal law is "yes". However, suppose that a later plaintiff wants to use Aging Bob's testimony against a *different manufacturer* of widgets . . . for injuries caused by a similar defect. Suppose the design . . . is the same design that Aging Bob criticized in the case against Acme. Is Aging Bob's testimony admissible under the former testimony rule? Under Alabama law, the answer is "no". However, the answer under federal law is not so clear Under the broad interpretation afforded the term "predecessor in interest" by courts like the Sixth circuit in *Clay, supra*, it would appear that Aging Bob's testimony would be admissible.⁶⁸

However, this was not the result reached in *Barnes*. The former testimony evidence in *Barnes* was found to be inadmissible although offered against the same defendant it was offered against in the previous trial.⁶⁹

Was this the drafters' intent? It is undisputed that the drafters intended the adoption of Rule 804(b)(1) to perpetuate preexisting Alabama law regarding the hearsay exception.⁷⁰ The advisory notes make clear, "This subsection is taken almost verbatim from language continually quoted by Alabama courts It is intended as a restatement of preexisting Alabama law with regard to the 'former testimony' exception to the hearsay rule" ⁷¹ It is therefore imperative to turn to the common law existing before the adoption of Rule 804(b)(1).

In *Patton v. Pitts*,⁷² the defendants offered to prove the testimony of a witness, then deceased, from a former trial regarding the delivery of a deed. The trial court excluded the evidence. On appeal, the Alabama Supreme Court recited the standard for admitting former evidence:

68. Francis H. Hare, Jr., Andrew T. Citrin, & Mitchell K. Shelly, *The Admissibility of Former Testimony: A Five Step Approach*, 13 ALA. TRIAL LAW. J. 8, 10 (1993).

69. *Barnes*, 816 So. 2d at 30.

70. MCELROY, *supra* note 42, § 245.07(1).

71. *Id.* § 245.07(1) (citing ALA. R. EVID. 804(b)(1) advisory committee's note).

72. 80 Ala. 373 (1885).

The conditions, on which the evidence of a deceased witness on a former trial may be reproduced on the trial of a subsequent suit, are that the matters in issue, and the parties are essentially the same in both actions—parties as thus used comprehending privies in blood, in law, or in estate. A mere technical or nominal variation of parties will not exclude the evidence; *but the adversary parties on both trials must be substantially the same*. It is not sufficient, that the party, *against whom the evidence is offered*, was also a party to the former action. The evidence, being hearsay, is prima facie inadmissible, and it is incumbent on the party offering it to establish the existence of the conditions, on which its competency depends.⁷³

The court held that the defendants were not privies in estate to the defendant in the former action, and therefore the evidence was not admissible *against* the defendants *or in their favor*.⁷⁴

In *Smith v. Keyser*,⁷⁵ the defendant offered the deposition of a deceased witness taken in a former suit between the two parties. The plaintiff's counsel argued that the two suits were not between the same parties because the first was brought in the name of the plaintiff as an individual and the second was brought in her representative capacity as executrix. The court cited the standard from *Patton*,⁷⁶ and then held, that because the parties in both these suits were substantially or essentially the same, and the adverse parties had the opportunity to cross-examine the witness, the evidence was admissible.⁷⁷

Somewhat more recently, in *Employers Insurance Co. of Alabama v. Cross*,⁷⁸ the plaintiff sought to introduce the testimony of a witness outside the State of Alabama who had testified in a previous trial. It appeared that the previous trial was a suit for damages resulting from a collision of the two automobiles involved in the current suit. The current suit, however, was between one of the automobile owners and that owner's insurance company. The court stated that, in order for former testimony to be admitted, "it must have been [given] under such circumstances as [would] afford the adverse party an opportunity for cross-examination to test its credibility."⁷⁹ Because there was no opportunity for cross-examination in the former trial, the testimony was held to be inadmissible.⁸⁰ Although the Alabama Supreme Court focused on the adverse party's opportunity to cross-examine, the result affirmed its position that the parties must be substantially the same.

73. *Patton*, 80 Ala. at 375 (internal citations omitted) (emphasis added).

74. *Id.* at 376.

75. 22 So. 149 (Ala. 1897).

76. *Patton*, 80 Ala. at 375.

77. *Id.* at 150.

78. 226 So. 2d 161 (Ala. 1969).

79. *Employers Ins.*, 226 So. 2d at 165.

80. *Id.*

Although often ambiguous, caselaw does seem to support the Alabama drafters' intention that even the party offering the evidence must be in privity with a party to the former trial.⁸¹ Wigmore, however, offers a different result.⁸² Essential to Wigmore's justification of the rule is that the opponent had the opportunity to cross-examine the witness.⁸³ It follows that unless the parties were the same in motive and interest, there is no adequate opportunity for cross-examination, "for the present *opponent* cannot be fairly required to abide by the possible omissions, negligence, or collusion of a different party, whose proper utilization of the opportunity he has no means of ascertaining."⁸⁴ Similarly, the issues in the two cases must be substantially the same; otherwise "the cross-examination would not have been directed to the same material points of investigation, and therefore could not have been an adequate test for exposing inaccuracies and falsehoods."⁸⁵ Wigmore cites numerous authorities, all of whom apply the privity of parties requirement to the party *against whom* the evidence is offered: "[The present trial] must be between the same parties, because otherwise you dispossess your *adversary* of the liberty to cross-examine;"⁸⁶ "offering a deposition . . . *against* a person not a party to the original suit . . . cannot be done . . . because such person has it not in his power to cross-examine;"⁸⁷ and "[a] deposition cannot be given in evidence *against* any person that was not a party to the suit; and the reason is because he had not liberty to cross-examine the witness, and it is against natural justice that a man should be concluded by proofs in a cause to which he was not a party."⁸⁸

Essentially, Wigmore explains that the reason for the requirement that the parties be the same is so the interest to "sift the testimony thoroughly" is the same for both the original and current party.⁸⁹ If the interest of the original party was determined to result in equally as thorough cross-examination as the current party would have achieved, the current party has adequate protection for the same end.⁹⁰ Therefore:

81. See *Johns v. A.T. Stephens Enterprises, Inc.*, 815 So. 2d 511 (Ala. 2001) (stating that "substantially the same" standard was met; although other defendants were added, the plaintiffs were substantially the same); *Wellden v. Roberts*, 67 So. 2d 69 (Ala. Ct. App. 1952) (allowing properly admitted former testimony where issues and parties were substantially the same); *Wells v. Am. Mortgage Co. of Scot.*, 20 So. 136 (Ala. 1896) (admitting former testimony in suit revived against administrator of defendant's estate and against a defendant added by amendment); *Goodlett v. Kelly*, 74 Ala. 213 (1883) (admitting testimony from former suit although previous defendants were plaintiffs in current suit, and vice versa, and one party was added as a defendant); *Long v. Davis*, 18 Ala. 801, 802 (1851) ("[T]estimony is not restricted to the party in the former cause, but it is admissible as against those who are privy to him.").

82. See 5 JOHN H. WIGMORE, EVIDENCE § 1386 (Chadbourn rev. 1974).

83. *Id.*

84. *Id.* (emphasis added).

85. *Id.*

86. *Id.* (citing CHIEF BARON GILBERT, EVIDENCE 68 (1726)) (emphasis added).

87. WIGMORE, *supra* note 82, § 1386 (citing MANSFIELD, L.C.J., in *Goodright v. Moss*, Cowp. 591, 594 (1777)) (emphasis added).

88. *Id.* (citing BULLER, TRIALS AT NISI PRIUS 239 (1767)) (emphasis added).

89. *Id.* § 1388.

90. *Id.*

[T]he requirement of identity of parties is after all only an incident or corollary of the requirement as to identity of issue.

It ought, then, to be sufficient to inquire *whether the former testimony was given upon such an issue that the party-opponent in that case had the same interest and motive in his cross-examination that the present opponent has . . .*⁹¹

In quoting Judge Matthews in *Damm v. Damm*,⁹² “Admissibility of such depositions is not dependent upon exact identity of parties and causes of action, but rather upon the identity of the question being investigated and the opportunity of the party *against whom the deposition is offered to cross-examine*.”⁹³

The Alabama Rules of Evidence reject the federal version of Rule 804(b)(1).⁹⁴ For instance, Alabama has not accepted the reasoning that if the party against whom the testimony was offered in the former litigation had an adequate opportunity to cross-examine the witness on essentially the same issue, then the testimony is admissible, even against a party who was not a party to the former litigation.⁹⁵ In fact, the Alabama Rules of Evidence expressly reject this rule.⁹⁶

Still, the issue remains: What if only the party offering the evidence is different? As long as the issue is substantially the same and the party against whom the evidence is offered had adequate opportunity to cross-examine the witness, it would seem that the evidence would be admissible. The *Barnes* court circumvents the issue by saying only, “Barnes does not provide, and we have not found, any Alabama caselaw holding that the party offering the evidence *need not* have been a party in the prior proceeding.”⁹⁷ But is the inverse true? Did Alabama caselaw intend to require that the party *offering* the evidence must be the same as in the prior proceeding if the party against whom it is offered is the same? Before *Barnes*, it seemed that the answer to this question was universally “no.”⁹⁸ Now *Barnes* clarifies that both the offering party and the opposing party must be substantially the same as the parties in the prior proceeding.⁹⁹

91. *Id.* (emphasis in original).

92. 266 P. 410 (Mont. 1928).

93. *Damm*, 266 P. at 412, quoted in WIGMORE, *supra* note 82, § 1388 (emphasis added).

94. Charles W. Gamble, *Drafting, Adopting, and Interpreting the New Alabama Rules of Evidence: A Reporter's Perspective*, 47 ALA. L. REV. 1, 23 (1995) [hereinafter *Reporter's Perspective*].

95. MCELROY, *supra* note 42, § 245.07

96. *Id.*; see also *Reporter's Perspective*, *supra* note 94, at 23.

97. *Barnes v. Norfolk S. Ry. Co.*, 816 So. 2d 27, 29 (Ala. 2001) (emphasis added).

98. See Hare, *supra* note 68, at 10.

99. *Barnes*, 816 So. 2d at 30.

V. A PROPOSED NEW ALABAMA
RULE OF EVIDENCE 804(B)(1)

In clarifying Alabama's stance on the former testimony exception, *Barnes* made waves throughout the state in the litigation arena.¹⁰⁰ The implication of *Barnes* is that in serial lawsuits, mass torts, or multi-district litigation, for example, an identical witness will necessarily be deposed multiple times on an identical issue, often even by the same attorney.¹⁰¹ The concern is that the *Barnes* ruling encourages judicial inefficiency and elevates form over substance.¹⁰² The concern is surely not without merit. It is therefore proposed that the strict identity of parties requirement found in Rule 804(b)(1) be relaxed, or clarified, in this regard: Only the party *against whom* the former testimony is offered must be substantially the same, or in privity, or a successor in interest, to the original party against whom the evidence was offered. This would assure that the party against whom the evidence is offered had the motive and opportunity to cross-examine the witness, but eliminate the need to depose the same witness multiple times on the exact same issue. A proposed Rule 804(b)(1) might simply read:

(b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) Former testimony. Testimony of a witness, in a former trial or action, given (A) under oath, (B) before a tribunal or officer having by law the authority to take testimony and legally requiring an opportunity for cross-examination, (C) under circumstances affording the party against whom the witness was offered an opportunity to test his or her credibility by cross-examination, and (D) in litigation in which the issues *and the party against whom the testimony was offered* were substantially the same as in the present cause.

There are basically three ways to change Rule 804(b)(1). First, if it can be determined that preexisting caselaw meant for only the party against whom the evidence was offered to be substantially similar, the Alabama Supreme Court might be encouraged to change the rule, either upon rehearing of *Barnes* or in the next similar case.¹⁰³ However, the caselaw is, at best, ambiguous,¹⁰⁴ and at least, to quote the court in *Barnes*, void of evidence that "the party offering the evidence need *not* have been a party in the prior

100. Interview with Skip Finkbohner, Partner, The Finkbohner Law Firm, in Mobile, Alabama (Feb. 1, 2002).

101. *Id.*

102. *Id.*

103. Interview with Charles W. Gamble, preeminent authority on Alabama evidence law (to quote *Scroggins v. State*, 727 So. 2d 131 (Ala. 1998)), in Tuscaloosa, Ala. (Feb. 21, 2002) [hereinafter Gamble interview].

104. *See Hare*, *supra* note 68, at 10.

proceeding.”¹⁰⁵ Second, the supreme court might be persuaded to activate the rulemaking committee on evidence and apply to have the rule changed.¹⁰⁶ Finally, the legislature could be persuaded to create a statute specifically allowing the admission of former testimony where the party against whom the evidence offered is substantially the same.¹⁰⁷

VI. FOOTNOTE ONE

Before *Barnes* is allowed to create too much havoc in the world of litigation, it is essential to reexamine the court’s language in footnote one of the *Barnes* opinion:

Noteworthy, the proponents of [the deposition found to be inadmissible] . . . did not argue that it was admissible as the admission of a party uttered by an agent or employee of that party within the scope of his agency or employment under Rule 801(d)(2)(D), Ala. R. Evid. (“A statement is not hearsay if . . . [t]he statement is offered against a party and is . . . a statement by the party’s agent or servant concerning a matter within the scope of the agency or employment.”)¹⁰⁸

In other words, the requirement that both parties must be substantially similar only applies to Rule 804(b)(1). There are other rules under which testimony excluded by former testimony is, in fact, admissible. In *Barnes*, for example, the unavailable witness was a former employee of Norfolk Southern. Therefore, his testimony might have been admissible under Rule 801(d)(2)(D).

Another example is that “a deposition or former testimony, *not offered as such*, is not subject to” Rule 804(b)(1).¹⁰⁹ If the former testimony “is offered, not as evidence of the truth of the facts asserted in it, but merely as an utterance having an indirect bearing,” Rule 804(b)(1) does not come into play.¹¹⁰ Similarly, if “the deposition or testimony embodies an *admission by the opponent*, it is not subject to the . . . rule.”¹¹¹ Therefore, before ruling out a former testimony on the grounds that the parties to the two suits are not substantially the same, lawyers must first determine whether the evidence is admissible under the definition or any exception to the hearsay rule.

105. *Barnes*, 816 So. 2d at 29 (emphasis added).

106. Gamble interview, *supra* note 103.

107. *Id.*

108. *Barnes*, 816 So. 2d at 30.

109. WIGMORE, *supra* note 82, § 1387 (emphasis in original).

110. *Id.*

111. *Id.* (emphasis in original).

VII. CONCLUSION

*Barnes v. Norfolk Southern Railway Co.*¹¹² interpreted, or at least clarified, Alabama Rule of Evidence 804(b)(1) as it pertains to the substantial identity requirement of the former testimony rule. According to *Barnes*, both a party offering testimony given in a previous case and the party against whom the testimony is offered must be substantially the same as the parties in the previous case.¹¹³ This decision brought into question the ability of lawyers to use the same deposition or trial testimony of a witness against the same defendant in a subsequent suit.

In following the expressed intent of the advisory committee notes, the Alabama Supreme Court examined preexisting Alabama caselaw to determine whether the identity of parties issue applied specifically to the party offering the evidence, or only the party against whom the evidence was offered.¹¹⁴ Three issues underlie the caselaw examined by the court: (1) the difference in the identity requirement in civil and criminal trials; (2) the degree of privity required under the rule; and (3) most importantly, whether the substantial identity rule was intended to apply to both the party offering the evidence and the party against whom the evidence was offered.

The caselaw cited revealed that there is a critical difference in the privity requirement in civil and criminal cases: in criminal cases public policy requires that the party against whom evidence is offered must be exactly the same, while in civil cases, the former party need only be a successor in interest to the current party.¹¹⁵ Second, Rule 804(b)(1) requires privity to the extent that the party against whom the evidence was offered had the opportunity to test the witness's credibility through cross-examination. Exact nominal identity is not required.¹¹⁶

Regarding the third issue, the court found no indication that "the party offering the evidence *need not* have been a party in the prior proceeding."¹¹⁷ By the same token, however, there does not seem to be any Alabama caselaw unequivocally demanding that the parties offering the evidence be substantially the same. Most cases address only the identity of the party against whom the evidence is offered, or make no distinction between the party offering and the party offered against. It is not unreasonable to conclude, however, that the drafters of Rule 804(b)(1) intended that the identity of parties requirement apply to the party against whom the evidence was offered, in light of the rule's language requiring only that "the party *against whom* the witness was offered [have] an opportunity to test his or her credibility by cross-examination."¹¹⁸

112. 816 So. 2d 27 (Ala. 2001).

113. *Barnes*, 816 So. 2d at 30.

114. *Id.*

115. *See supra* Subpart IV.A.

116. *See supra* Subpart IV.B.

117. *Barnes*, 816 So. 2d at 29 (emphasis added).

118. ALA. R. EVID. 804(b)(1) (emphasis omitted).

To allow for greater judicial economy and to prevent the elevation of form over substance, the rule should be changed to reflect the intention that only the party against whom the evidence is offered must be substantially the same. Such a change might be affected by asking the supreme court for a rehearing or a different decision in the next applicable case, by asking the supreme court to activate the rulemaking committee on evidence, or by asking the legislature to create a statute changing or clarifying Rule 804(b)(1). In any event, before determining that former testimony is not admissible, lawyers should be certain that the evidence is not admissible under the definition or an exception to hearsay. Examples include offering the evidence for a purpose other than the truth of the matter asserted, as an admission by the party-opponent, or as an admission by an agent or employee of the party.

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