DIAGNOSING SECTION 6-5-551 OF THE ALABAMA MEDICAL LIABILITY ACT AND THE INADMISSIBILITY OF COLLATERAL ACTS AND OMISSIONS AGAINST HEALTH CARE PROVIDERS

Alabama Rule of Evidence 402 states, "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States or that of the State of Alabama, by statute, by these rules, or by other rules applicable in the courts of this State. Evidence which is not relevant is not admissible."[1] In other words, although proffered evidence may satisfy the liberal relevancy test found in Rule 401,[2] evidence may still be inadmissible because of statutory or constitutional law, or because of other rules of evidence or procedure.[3] Unfortunately for attorneys, Rule 402 requires not only a complete analysis under the Alabama Rules of Evidence but also a comprehensive search of extrinsic sources.[4] One example of an evidentiary principle extrinsic to the Alabama Rules of Evidence that affects admissibility is the Alabama Medical Liability Act of 1987.[5]

The Alabama Medical Liability Act of 1987[6] was passed for the purpose of "insur[ing] that quality medical services continue to be available at reasonable costs to the citizens of the State of Alabama."[7] The AMLA consists of a set of procedural and evidentiary rules designed to combat the "increasing threat of legal actions for alleged medical injury," which "contributes to an increase in health care costs and places a heavy burden upon those who can least afford such increases,"[8] and which "constitutes a danger to the health and safety of the citizens of this state."[9] Examples of provisions found within the AMLA include the requirement that an expert testifying against a "health care provider" be similarly situated as the defendant,

1. ALA. R. EVID. 402. The Alabama Rules of Evidence, which are patterned after the Federal Rules of Evidence, were adopted in 1996.

2. CHARLES W. GAMBLE, GAMBLE'S ALABAMA RULES OF EVIDENCE: A TRIAL MANUAL FOR MAKING AND ANSWERING OBJECTIONS § 401(b) (1995).

3. Charles W. Gamble, *Drafting, Adopting and Interpreting the New Alabama Rules of Evidence: A Reporter's Perspective*, 47 ALA. L. REV. 1, 8 (1995).

4. *Id.*

5. GAMBLE, *supra* note 2, § 402. The entire text of the Alabama Medical Liability Act may be found in ALA. CODE §§ 6-5-540 to -581 (1993). The Alabama Medical Liability Act of 1987 is also supplemented by the Alabama Medical Liability Act No. 513 of the 1975 Regular Session of the Alabama Legislature, which is found in ALA. CODE §§ 6-5-480 to -488 (1993).

6. The Alabama Medical Liability Act of 1987 will be hereinafter referred to as the "AMLA."

7. ALA. CODE § 6-5-540 (1993).

8. *Id.*

9. *Id.*

meaning the expert must be trained or board certified in the same field,[10] and the abolition of the collateral-source rule.[11]

Another example of a statutory provision affecting the admissibility of evidence is section 6-5-551, which states:

> In any action for injury, damages, or wrongful death, whether in contract or in tort, against a health care provider for breach of the standard of care, whether resulting from acts or omissions in providing health care, or the hiring, training, supervision, retention, or termination of care givers, the Alabama Medical Liability Act shall govern the parameters of discovery and all aspects of the action. The plaintiff shall include in the complaint filed in the action a detailed specification and factual description of each act and omission alleged by plaintiff to render the health care provider liable to plaintiff and shall include when feasible and ascertainable the date, time, and place of the act or acts. The plaintiff shall amend his complaint timely upon ascertainment of new or different acts or omissions upon which his claim is based; provided, however, that any such amendment must be made at least 90 days before trial. Any complaint which fails to include such detailed specification and factual description of each act and omission shall be subject to dismissal for failure to state a claim upon which relief may be granted. Any party shall be prohibited from conducting discovery with regard to any other act or omission or from introducing at trial evidence of any other act or omission.[12]

In essence, section 6-5-551 bars plaintiffs from introducing collateral "acts or omissions" of health care providers. The restrictive nature of this statute taken in conjunction with subsequent interpretations by the Alabama Supreme Court has provided a substantial shield for health care providers faced with medical malpractice claims and has left plaintiffs' attorneys searching for viable methods of circumventing the Act. The following analysis, therefore, focuses on potential methods of circumvention and on their potential for success.

I. APPLICABILITY

The most traditional approach for circumventing a statute is to argue that the statute does not apply. In order to circumvent section 6-5-551 based on inapplicability, a plaintiff must successfully show that either the defen-

10. ALA. CODE § 6-5-548 (Supp. 1996).
11. ALA. CODE § 6-5-545 (1993).
12. ALA. CODE § 6-5-551 (Supp. 2000).

dant in question is not a health care provider or that he is a health care provider but the act in question does not qualify as health care services.[13]

"Health care provider" is defined in section 6-5-542(1) as a "medical practitioner, dental practitioner, medical institution, physician, dentist, hospital, or other health care provider as those terms are defined in section 6-5-481."[14] Section 6-5-481 provides more specific definitions for each of the persons or entities listed in section 6-5-542(1). One exception exists, however. By including the amorphous term "other health care provider,"[15] which is defined as "[a]ny professional corporation or any person employed by physicians, dentists, or hospitals who are directly involved in the delivery of health care services,"[16] as a component of "health care providers," the Alabama legislature provided a flexible definition, which has been successful in broadening the scope of section 6-5-551.

In interpreting what job descriptions fall within the term "other health care provider," many of the Alabama Supreme Court's decisions have yielded predictable and intended results. Examples of individuals who have been found to qualify as "other health care providers" include an administrator and director at a nursing home,[17] a registered nurse working pursuant to a contract with HealthSouth at an outpatient rehabilitation clinic,[18] and the American Red Cross who was under contract with a UAB hospital to collect, process, and supply blood.[19] The common link between these individuals is that all were working pursuant to some type of contractual relationship with a physician, dentist, or hospital,[20] and all were "directly involved in the delivery of health care services."[21]

Moreover, the court has ruled that podiatrists and chiropractors are not covered by the Act.[22] The reasoning for the exclusion of these two professions, which arguably fall within the health care industry, can be found in *Sellers v. Picou*. In *Sellers*, the court correctly reasoned that by definition, a "medical practitioner"[23] is a person "licensed to practice medicine or osteopathy."[24] The practice of medicine and osteopathy have separate licensing requirements from those of podiatrists.[25] As a result, the court concluded

13. *Id.* Section 6-5-551 applies only to "health care providers" engaged in health care services.

14. Section 6-5-481 is found within the original Alabama Medical Liability Act (Act No. 513 of the 1975 Regular Session of the Alabama Legislature). Section 6-5-541 of the AMLA of 1987 states that the 1987 Act is intended to supplement the original AMLA, meaning both Acts must be consulted when defining key terms.

15. ALA. CODE § 6-5-542 (1993); ALA. CODE § 6-5-481(8) (1993).

16. ALA. CODE § 6-5-481(8) (1993).

17. Husby v. S. Ala. Nursing Home, 712 So. 2d 750, 753 (Ala. 1998).

18. *Ex parte* Main, 658 So. 2d 384, 387 (Ala. 1985).

19. Wilson v. Am. Red Cross, 600 So. 2d 216, 219 (Ala. 1992).

20. "Hospital" is defined in section 6-5-481 in reference to ALA. CODE § 22-21-21 (1997). By definition, a nursing home qualifies as a "hospital."

21. ALA. CODE § 6-5-481(8) (1993).

22. Baker v. McCormeck, 511 So. 2d 170, 171 (Ala. 1987); Sellers v. Picou, 474 So. 2d 667, 669 (Ala. 1985).

23. ALA. CODE § 6-5-481 (1993).

24. *Sellers*, 474 So. 2d at 669.

25. *See* ALA. CODE § 34-24-50 (2002); ALA. CODE § 34-24-230 (2002).

"that the legislature intended to exclude podiatrists from the Medical Liability Act's coverage."[26] Moreover, "[t]his finding is bolstered by the Act's express coverage of the practice of dentistry, . . . since the qualifications and licensure of those practicing dentistry are controlled by a separate board."[27] Additionally, the court held that the more inclusive term "other health care providers" is not applicable since the classification applies only to "person[s] employed by physicians, dentists or hospitals who are directly involved in the delivery of health care services."[28] Under normal circumstances, podiatrists do not meet these criteria. In *Baker v. McCormeck*,[29] the court applied the same reasoning found in *Sellers* to conclude that chiropractors are also excluded from the Act's coverage.[30]

While the aforementioned decisions are founded on solid statutory grounds, other rulings seem to indicate a judicial willingness to expand the scope of the Act. For instance, pharmacists who are licensed by an independent state board[31] and who with rare exception are not under contract with "physicians, dentists or hospitals" would seem to be excluded based on the reasoning of *Sellers* and *Baker*.[32] However, in *Cackowski v. Wal-Mart Stores, Inc.*,[33] the court held that a pharmacist is an "other health care provider" for purposes of the AMLA.[34]

Without question, the distribution of medicine involves pharmacists directly in the "delivery of health care services."[35] However, section 6-5-481(8) additionally requires that the delivery of those services be pursuant to an employment relationship with a "physician, dentist or hospital." Using Webster's Collegiate Dictionary, the court found that the "term 'employ' means 'to make use of,' as well as 'to use advantageously,' 'to devote or direct [one's time or energies, for example] toward a particular activity or person,' 'to use or engage the services of,' or 'to provide with a job that pays wages or a salary.'"[36] Citing this questionable definition as well as *Tuscaloosa Orthopedic Appliance Co. v. Wyatt*,[37] in which the AMLA was found to apply despite "neither an employment relationship nor a contractual relationship"[38] between the treating physician and the orthotist, the

26. *Sellers*, 474 So. 2d at 669.

27. *Id.* The express provision including dentists within the meaning of "health care provider" is found in ALA. CODE § 6-5-542 (1993) and ALA. CODE § 6-5-481 (1993). The licensing requirements of dentistry may be found in ALA. CODE §§ 34-9-1 to -65 (2002).

28. *Sellers*, 474 So. 2d at 668-69 (quoting ALA. CODE § 6-5-481(8) (1993)).

29. 511 So. 2d 170 (Ala. 1987).

30. *Baker*, 511 So. 2d at 171.

31. ALA. CODE § 34-23-1 (2002).

32. *Sellers*, 474 So. 2d at 669 (holding that the Act did not cover podiatrists); *Baker*, 511 So. 2d at 171 (holding that chiropractors were excluded).

33. 767 So. 2d 319 (Ala. 2000).

34. *Cackowski*, 767 So. 2d at 325.

35. *Id.*

36. *Id.* at 324 (quoting MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 379 (10th ed. 1997)).

37. 460 So. 2d 156 (Ala. 1984).

38. *Cackowski*, 767 So. 2d at 325. However, the text of *Tuscaloosa Orthopedic* does not explicitly state that an employment relationship was absent.

court found pharmacists to fall within the protective definition of "other health care provider."[39]

Based on *Cackowski*, the court seems willing to apply the AMLA to individuals rendering health care services despite the absence of any employment relationship with a "physician, dentist or hospital." As the further analysis will show, *Cackowski* is one piece of evidence indicating the court's tendency to read the AMLA in the most liberal light so as to facilitate the goal of providing the most affordable health care possible to the people of the State of Alabama by reducing the number of successful medical malpractice lawsuits.

Another example of the Alabama Supreme Court's willingness to interpret the AMLA broadly can be found in *Mock v. Allen*,[40] in which the plaintiff, Mock, filed suit for sexual assault against his treating physician, Dr. Allen. The complaint alleged that on multiple occasions, Dr. Allen, while performing physical examinations and treating Mock for pain in his neck, back, hip, and groin area, fondled Mock's genitals.[41] Testifying at trial, a similarly situated physician stated that an "examination of Mock based on his complaints would not have required touching his genitals."[42]

The court, in holding that Dr. Allen was covered by the AMLA, stated that "[a]lthough the AMLA applies only to medical-malpractice actions, a plaintiff cannot avoid application of the AMLA by 'creative pleading.'"[43] As a result, the court declined to accept Mock's argument that the conduct in question did not qualify as medical services.[44] In so doing, the court distinguished previous holdings from the facts before it. First, the court distinguished *Mock* from *Gunter v. Huddle*[45] in which the Alabama Court of Civil Appeals found that a sexual relationship between a doctor and a patient was beyond the scope of medical services.[46] *Mock* was further distinguished from *St. Paul Ins. Co. v. Cromeans*[47] in which a physician who masturbated in front of young girls, filmed them while they were naked, and fondled them was found not to enjoy the protection of the AMLA because the doctor's "actions [bore] no relation to medical treatment and that they could not have been unintentionally or carelessly done."[48] As these cases represent, and as the court itself points out, cases holding that a physician's conduct was not within the scope of medical services generally "involved either an intimate sexual relationship or sexual misconduct having no connection with the rendering of professional services."[49] "By contrast, in cases where

39. *Id.*
40. 783 So. 2d 828 (Ala. 2000).
41. *Mock*, 783 So. 2d at 830.
42. *Id.* at 831.
43. *Id.* at 832.
44. *Id.* at 833.
45. 724 So. 2d 544 (Ala. Civ. App. 1998).
46. *Mock*, 783 So. 2d at 832.
47. 771 F. Supp. 349 (N.D. Ala. 1991).
48. *St. Paul*, 771 F. Supp. at 353 (emphasis omitted).
49. *Mock*, 783 So. 2d at 832-33; *see also* McQuay v. Guntharp, 986 S.W.2d 850, 853 (Ark. 1999)

the alleged sexual misconduct occurs as part of a physician's examination and/or treatment of a patient, the conduct is considered to have occurred during the delivery of professional services,"[50] and therefore, falls under the protective shield of the AMLA.

Understandably, the court is reluctant to allow creative pleading as a means of circumventing the AMLA. However, in cases such as *Mock*, alleged sexual molestation perpetrated under the guise of medical examination or treatment allows the defendant to benefit from the Act. Certainly, reasonable minds can differ as to whether the legislature intended the AMLA to cover such conduct. But agree or disagree, the great pains to which the Alabama Supreme Court went in distinguishing *Mock* from other cases provides support for the conclusion that the AMLA is interpreted as comprehensively as possible.[51]

Historically, the most successful method of circumventing a statute is to show that the statute is inapplicable to the case in question. With regards to the AMLA, inapplicability is certainly still a viable argument as shown by the fact that podiatrists and chiropractors have been found to be excluded by the Act. However, this appears to be the exception rather than the rule. The Alabama Supreme Court's decision to effectively eliminate the employment relationship requirement for "other health care providers" and to classify alleged sexual molestation occurring during the examination of a patient as health care services not only creates precedent, which plaintiffs must overcome in certain situations, but also indicates a willingness by the court to liberally and consistently construe the statute in favor of "health care providers." As a result, alternative methods of circumvention must be explored.

II. CONSTITUTIONALITY

In addition to showing inapplicability, another traditional approach for circumventing a statute is to successfully argue that the statute is unconstitutional. Constitutional challenges can come in a variety of forms. The following discussion focuses upon the probable outcome of potential constitutional challenges with regard to section 6-5-551.

(holding fondling of a patient's breasts during examination did not constitute malpractice).

50. *Mock*, 783 So. 2d at 833.

51. Other examples of the classification of otherwise tortious acts as having occurred during the course of professional services and therefore as covered by the AMLA include: *Ex parte Sonnier*, 707 So. 2d 635, 638 (Ala. 1997) (holding intentionally false representations made by a doctor to a patient that she had ovarian cancer and was in need of a hysterectomy occurred "during the course of a doctor-patient relationship . . . and are governed by the AMLA.") and *Mobile Infirmary v. Delchamps*, 642 So. 2d 954, 957 (Ala. 1994) (holding that, where plaintiff had a device implanted in his jaw, which deteriorated and caused bone degeneration, the AMLA "applies to all actions alleging 'liability' as well as 'error, mistake, or failure to cure, whether based on contract or tort.' This language encompasses contract claims alleging breach of express and implied warranties, as well as tort claims alleging liability under the AEMLD and alleging negligence in the design, manufacture, sale, or distribution of a product and negligence in the failure to warn of dangers associated with its use.").

Section 6-5-551 on its face treats "health care providers" differently from other defendants by prohibiting plaintiffs in medical malpractice cases from "conducting discovery with regard to any other act or omission or from introducing at trial evidence of any other act or omission" than those specifically pleaded.[52] As a result, an equal protection analysis is appropriate. In interpreting the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, courts have determined:

> [A]ny law that does not employ a classification based on race, sex, national origin, or legitimacy of birth and does not impinge upon a fundamental right, is subject to the "rational relationship" analysis. Under this analysis, any law rationally related to a legitimate governmental objective will withstand an equal protection challenge.[53]

According to *Marsh v. Green*,[54] the AMLA was "enacted to protect the public from increased costs . . . by imposing strict standards on actions against health-care providers."[55] Clearly, treating a non-suspect class of individuals different from others for the purpose of lowering health care costs is a legitimate government objective. Additionally, other sections of the AMLA such as section 6-5-545, which abrogates the collateral source rule in medical malpractice cases, and section 6-5-482, which creates a different statute of limitations for minors possessing medical malpractice claims than minors possessing other tort claims, have been upheld against federal equal protection challenges.[56] As a result, section 6-5-551 will most likely withstand a federal equal protection challenge.

Similarly, equal protection claims raised under the Alabama Constitution will likely yield the same result though their analysis is more complicated. Equal protection jurisprudence in Alabama has a long and confused history, especially with regards to whether any equal protection guarantee even exists. However, *Ex parte Melof*[57] provides a definitive answer. The Alabama Constitution of 1901 contains no equal protection clause and "any equal protection guarantee in the State of Alabama [stems] solely from the Fourteenth Amendment."[58] Therefore, the federal equal protection analysis discussed above is determinative.

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52. ALA. CODE § 6-5-551 (1993).

53. *Ex parte* Melof, 735 So. 2d 1172, 1181 (Ala. 1999) (quoting *Ex parte* Robertson, 621 So. 2d 1289, 1291 (Ala. 1993)).

54. 782 So. 2d 223 (Ala. 2000).

55. *Marsh*, 782 So. 2d at 228.

56. *Id.* at 230-32 (discussing section 6-5-545); Reece v. Rankin Fite Mem'l Hosp., 403 So. 2d 158, 160-62 (Ala. 1981) (discussing section 6-5-482).

57. 735 So. 2d 1172. For a historically sound and detailed understanding of the confusion as to whether the Alabama Constitution of 1901 contains an equal protection clause, see the majority opinion by Justice Houston. The concurring opinions by Chief Justice Hooper, Justice Maddox, and Justice See also provide a similar account.

58. *Melof*, 735 So. 2d at 1185.

In addition to equal protection claims, due process challenges are also common.

> Due process, which is guaranteed in civil trials by § 13 of the [Alabama] Constitution ("that every person, for any injury done him, in his lands, goods, person, or reputation, shall have a remedy by due process of law"), guarantees a person notice, a hearing according to that notice, and a judgment entered in accordance with the notice and hearing and restricts the legislature from making unreasonable, arbitrary and oppressive modifications of fundamental rights.[59]

In *Marsh*, section 6-5-545, which abrogates the collateral source rule in Alabama, was found not to violate the "right-to-a-remedy portion of § 13" since "[n]o remedy . . . was curtailed after the injury had occurred and the right of action vested."[60] Similarly, the same reasoning most likely will govern due process challenges to section 6-5-551.

Another constitutional challenge that has failed but which is also worth noting is found in Article IV, section 104, of the Alabama Constitution:

> The legislature shall not pass a special, private, or local law in any of the following cases: . . .
> (9) Exempting any individual, private corporation, or association from the operation of any general law. . . .
> The legislature shall pass general laws for the cases enumerated in this section . . . .[61]

In *Clements v. Stewart*,[62] the Alabama Supreme Court analyzed the AMLA to determine if the definition of "substantial evidence" for the purposes of medical malpractice cases,[63] which differs from the definition for all other civil actions[64] was violative of Article IV, section 104. Finding that "[h]ealth care providers are not united or acting together" and are therefore not an "'association,' as [the] word is used in § 104 of the Constitution,"[65] and that the AMLA is a general law applicable throughout the entire state, the court held that the AMLA does not violate Article IV, section 104.[66]

Creative attorneys frequently find constitutional grounds upon which to challenge a statute. However, while by no means exhaustive, this analysis supports a conclusion that section 6-5-551 is constitutionally sound with

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59. *Marsh*, 782 So. 2d at 232 (internal citations omitted) (quoting American Legion Post No. 57 v. Leahey, 681 So. 2d 1337, 1347-48 (Ala. 1996) (Houston, J., dissenting)).
60. *Id.*
61. ALA. CONST. of 1901, art. IV, § 104 (1975).
62. 595 So. 2d 858 (Ala. 1992).
63. ALA. CODE § 6-5-542(5) (1993).
64. ALA. CODE § 12-21-12 (1995).
65. *Clements*, 595 So. 2d at 861.
66. *Id.* at 861-62.

regard to the three challenges discussed. Moreover, this analysis taken in conjunction with two judicial doctrines: (1) "courts uniformly approach the question [of constitutionality] with every presumption and intendment in favor of its validity"[67] and (2) "courts do not hold statutes invalid because they think there are elements therein which are violative of natural justice or in conflict with the court's notions of natural, social, or political rights of the citizen, not guaranteed by the constitution itself,"[68] weighs heavily in favor of section 6-5-551 withstanding any future constitutional challenges.

III. SPECIFIC PLEADING

Because of the restrictive nature of section 6-5-551, plaintiffs' attorneys continue to search for methods to circumvent the statute. An example of such a method may be found in the textual language of the Act itself.[69] The Act states, "plaintiff shall include in the complaint filed in the action a detailed specification and factual description of each act and omission alleged by plaintiff to render the health care provider liable to plaintiff."[70] Parties are then prohibited from conducting discovery or introducing evidence of "any other act or omission" outside of those alleged.[71] A plain reading of this language would expressly support the conclusion that "[c]ollateral acts of misconduct . . . offered merely to prove that the sued-upon act was part of a pattern or practice, would be shielded because these other acts are not an essential or integral part of the plaintiff's theory of liability."[72] However, if the "plaintiff's theory is not based upon the single act of negligence but upon a theory that the defendant engaged in a systemic failure by negligently hiring, training or supervising its employees," then prior acts and omissions would be admissible.[73]

In fact, plaintiffs succeeded in this allegation in *Ex parte McCullough*,[74] where McCullough's complaint alleged that her grandmother's death was caused by negligent hiring, supervision, and entrustment, which resulted in a "systemic [*sic*] failure to adopt, promulgate, monitor and/or enforce policies and procedures . . . to prevent or minimize the risk of such acts and

67. Reese v. Rankin Fite Mem'l Hosp., 403 So. 2d 158, 161 (Ala. 1981).

68. *Reese*, 403 So. 2d at 161. In response to *American Legion Post No. 57 v. Leahey*, 681 So. 2d 1337 (Ala. 1996), the Alabama Supreme Court struck down section 12-21-45, a statutory companion to section 6-5-545 of the AMLA which abrogated the collateral source rule, because the statute "chang[ed] the law of evidence without expressing the effect on the law of damages, the prejudicial effect on the subrogation rights of a plaintiff's insurer, and the admission into evidence of the fact that the plaintiff is insured without a concomitant admission of evidence that the defendant is insured." The Alabama Supreme Court stated "[t]hese concerns deal with the wisdom of legislative policy rather than constitutional issues. Matters of policy are for the Legislature and, whether wise or unwise, legislative policies are of no concern to the courts." Marsh v. Green, 782 So. 2d 223, 231 (Ala. 2000).

69. CHARLES W. GAMBLE, MCELROY'S ALABAMA EVIDENCE § 22.01 (5th ed. 1996).

70. ALA. CODE § 6-5-551 (Supp. 2000).

71. *Id.*

72. GAMBLE, *supra* note 69, § 22.01.

73. *Id.*

74. 747 So. 2d 887 (Ala. 1999).

omissions and the reasonably foreseeable harm and . . . death proximately caused thereby."[75] In finding that other acts and omissions were indeed discoverable and admissible under this theory, the court reasoned that notice and knowledge of the risks must be proven and that "[t]he degree of culpability of [the defendant's] conduct would be directly related to the number of similar incidents . . . that could be traced to the . . . 'systemic failure.'"[76]

The success of this approach in circumventing the AMLA was short-lived, though. Less than two years after *McCullough*, the Alabama legislature amended section 6-5-551 to cover "breach of the standard of care, whether resulting from acts or omissions in providing health care, *or the hiring, training, supervision, retention, or termination of care givers.*"[77] The 2000 Amendment, which became retroactively effective May 9, 2000,[78] appears to be in direct response to *McCullough*. In fact, within months of the Amendment, the Alabama Supreme Court, in *Ex parte Ridgeview Health Care Center*,[79] readdressed the "systemic [*sic*] failure" theory and held that the 2000 Amendment "makes it clear that a claim against a health-care provider alleging that it breached the standard of care in hiring, training, supervising, retaining, or terminating its employees is governed by the Alabama Medical Liability Act" and is therefore superceded by statute.[80] Even though *Ridgeview* sounds the death knell for the "systemic failure" claim as a means of discovering and admitting other negligent acts and omissions, specific acts of negligent hiring, supervision, and entrustment may still be discovered and admitted if specifically pleaded.[81]

Several conclusions may be drawn from considering *McCullough* and *Ridgeview* together. First, creative plaintiffs' attorneys will continue to attempt to circumvent the AMLA. Second, the legislature seems intent on maintaining the broad comprehensive scope of the Act. Finally, the Alabama Supreme Court seems willing to construe that legislative intent broadly.

IV. CURATIVE ADMISSIBILITY[82]

A fourth possible method of circumventing section 6-5-551 of the AMLA occurs in situations where the defendant "opens the door" to otherwise inadmissible evidence. These situations may arise, for example, when the defendant health care provider takes the stand and testifies that "nothing like this has ever occurred before" or that "our facility has an impeccable

75. *McCullough*, 747 So. 2d at 889.
76. *Id.* at 891.
77. ALA. CODE § 6-5-551 (Supp. 2002) (amending ALA. CODE § 6-5-551 (1993)) (emphasis added).
78. *Ex parte* Ridgeview Health Care Ctr., 786 So. 2d 1112, 1113 n.1 (Ala. 2000).
79. 786 So. 2d. 1112 (Ala. 2000).
80. *Ridgeview*, 786 So. 2d at 1116.
81. *Id.* at 1116-17.
82. The doctrine of curative admissibility is also referred to as the "open the door" doctrine, "fight fire with fire" doctrine, and the "reply-in-kind" doctrine. GAMBLE, *supra* note 69, § 14.01; *see also*, GAMBLE, *supra* note 2, § 106(b).

record of caring for our patients,"[83] thus allowing plaintiffs to argue that the doctrine of curative admissibility enables the introduction of prior acts or omissions to rebut the defendant's assertions.[84]

The doctrine of curative admissibility, which "exist[s] outside the Alabama Rules of Evidence under preexisting common law"[85] allows that "[w]henever one party goes into a matter, even if impermissibly so, the opponent then has the right to bring out so much of the relevant remainder as will rebut that proven in the first instance."[86] In other words, "if a party introduces illegal evidence, the opponent has the right to rebut such evidence with other illegal evidence."[87] For example, in *Crowne Investments, Inc. v. Reid*,[88] counsel for the nursing facility cross-examined a plaintiff's witness "regarding services rendered to other patients and what her impression was as to the quality of health care rendered to [others] who were residents at the same facility."[89] On redirect, plaintiff elicited testimony about specific treatment of other patients.[90] Finding that the plaintiff's inquiry was proper, the Alabama Supreme Court noted that the questioning, although generally prohibited by section 6-5-551, cannot be objected to when the "opposing party introduces similar evidence."[91]

Analogously, in *Ex parte D.L.H.*,[92] the Alabama Supreme Court addressed the appropriate outcome when the Rape Shield Law,[93] which with limited exception, prohibits the introduction of a victim's sexual history in rape prosecutions, and the doctrine of curative admissibility come into conflict. Writing for a unanimous court, Justice Johnstone explained:

> When one party opens the door to otherwise inadmissible evidence, the doctrine of "curative admissibility" provides the opposing party with "the right to rebut such evidence with other illegal evidence." "[T]he law [is] that even though a party introduces evidence that may be immaterial or illegal, his opponent has the right to rebut such evidence and this right is unconditional." "'A party who has brought out evidence on a certain subject has no valid complaint as to the trial court's action in allowing his opponent or adversary to introduce evidence on the same subject.'"[94]

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83. "There is no limit to the number of situations in which the present doctrine is applicable." GAMBLE, *supra* note 69, § 14.01 (5th ed. 1996).
84. *See supra* note 82.
85. GAMBLE, *supra* note 2, § 106(b).
86. *Id.*
87. GAMBLE, *supra* note 69, § 14.01.
88. 740 So. 2d 400 (Ala. 1999).
89. *Crowne Investments*, 740 So. 2d at 408.
90. *Id.*
91. *Id.*
92. 806 So. 2d. 1190 (Ala. 2001).
93. Rule 412 "merely incorporated Alabama's preexisting rape shield statute." GAMBLE, *supra* note 2, § 412.
94. *Ex parte* D.L.H., 806 So. 2d 1190, 1193 (Ala. 2001) (citations omitted). Although the court

Crowne Investments and *Ex parte D.L.H.*, therefore, stand for the unyielding proposition that evidence that may be rendered legally irrelevant by a statute, be it section 6-5-551 or the Rape Shield Law, may still be admissible under the "reply-in-kind" doctrine. Thus, one viable method of circumventing section 6-5-551 occurs when a defendant "health care provider" sufficiently "opens the door" with regard to prior acts or omissions, making the otherwise legally irrelevant evidence admissible and allowing an astute plaintiff's attorney to introduce incriminating rebuttal evidence.

V. CONCLUSION

Critics of the Alabama Medical Liability Act argue that plaintiffs covered by the Act often suffer double—once at the hands of health care providers and once at the hands of the law. Moreover, opponents condemn portions of the Act as tort reform enacted through procedural and evidentiary rules due to the persuasion of powerful special interests. Nevertheless, the AMLA, including section 6-5-551, serves a legitimate and important public interest by attempting to keep the price of health care lower than would otherwise be the case in Alabama's litigious society.

Because section 6-5-551 prohibits plaintiffs from presenting collateral "acts and omissions" committed by the defendant "health care providers," plaintiffs encounter a practical, even if not theoretical, disadvantage of proving their case, procuring an acceptable reward, and preventing the "health care provider" from engaging in similar tortious conduct in the future. As a result, plaintiffs wishing to introduce collateral acts by the defendant must find methods of circumventing the statute.

This Comment has explored four potential methods of circumventing the Act: arguing inapplicability to the case in question, attacking the constitutionality of the statute, creative pleading, and curative admissibility. Used correctly, the doctrine of curative admissibility always succeeds as a viable method of circumventing the Act. However, its success is contingent first on a defense attorney or witness making a mistake, which is beyond the control of plaintiffs, and second on plaintiffs recognizing the opportunity presented.

Limited success may be expected from the remaining three possible methods of circumvention. First, no viable constitutional objections appear to exist. That is not to say, however, that constitutional challenges will never succeed because this Comment is not an exhaustive analysis and the composition of the Alabama Supreme Court is always subject to change. Second, any success plaintiffs have in avoiding application of the statute through creative pleading seems sure to be legislatively eliminated and judicially restricted. Finally, avoiding application of the Act to the facts presented by a particular case, while certainly still a viable method of circum-

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found that the prosecution did not sufficiently "open the door" to the victim's prior sexual history, had the opposite been true, the doctrine of curative admissibility would have allowed the defendant to overcome the Rape Shield Law in admitting the victim's prior sexual acts. *D.L.H.*, 806 So. 2d at 1193.

venting the statute, has proven progressively more difficult with each Alabama Supreme Court ruling. The conclusion that may be drawn from this analysis, therefore, is that while section 6-5-551 is not absolutely exclusionary, the current legislature and judiciary of Alabama seem intent on insuring that the section 6-5-551 of the Alabama Medical Liability Act proves as broadly exclusionary as possible.

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