



## Todd Kelly

Shareholder

Bar admissions: Alabama, 1991

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### Practice Areas

- Appellate practice
- Hospital law
- General litigation

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### Profile

Mr. Kelly's practice covers a wide range of civil litigation, with an emphasis on medical malpractice and appellate law. He has handled appeals involving many areas of the law, including medical malpractice, patent infringement, fraud, bad faith, employment law, premises liability, workers' compensation, education law, and civil rights claims.

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### Representative Cases

Mr. Kelly has won over 100 appeals. Published decisions in favor of his clients include—

- *Bain v. Colbert County-Northwest Alabama Health Care Authority d/b/a Helen Keller Hospital*, \_\_\_\_ So.3d \_\_\_\_, 2017 WL 541912 (Ala. 2017): Mr. Kelly orally argued this case in the Alabama Supreme Court. The plaintiff asserted wrongful death and medical malpractice claims against the defendant hospital, based on the alleged negligence of an emergency physician and nurses in the ER. The emergency physician was an independent contractor, but the plaintiff argued that the hospital should be liable for his conduct based on apparent authority, or under a nondelegable duty theory. The Supreme Court declined to adopt new apparent authority law from other jurisdictions, and held that the plaintiff had not proven a claim under existing Alabama apparent authority law. The Court also held that the hospital did not owe a nondelegable duty to ensure that the emergency physician complied with the standard of care. The Court also affirmed a summary judgment for the hospital on a claim based on the alleged negligence of its nurses, holding that the plaintiff failed to present sufficient evidence that the nurses' conduct contributed to cause the patient's death.
- *Kindred Nursing Centers East, LLC, v. Jones*, 201 So.3d 1146 (Ala. 2016): The issue in this case was whether there was an enforceable arbitration agreement that covered the medical malpractice claims asserted by a nursing home resident. The Alabama Supreme Court reversed the trial court's order denying the nursing home's motion to compel arbitration. The Court rejected the resident's argument that her daughter did not have apparent authority to sign the arbitration agreement on her behalf. The Court also held that the evidence did not show that the resident was mentally incompetent when she was admitted to the facility.

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## Representative Cases (continued)

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- *Ross v. Marion*, 196 So.3d 250 (Ala. 2015): This was a wrongful death and medical malpractice case where the jury returned a verdict for the plaintiff on her claims against two defendants, but returned a verdict in favor of a third defendant, an anesthesiologist. The Supreme Court held that the two losing defendants were entitled to a new trial due to improper communications between the trial court and the jury. The plaintiff argued that she should also be entitled to a new trial on her claims against the anesthesiologist, but the Supreme Court refused to grant a new trial of those claims.
- *Laurel v. Prince*, 154 So.3d 95 (Ala. 2014): This was a medical malpractice case where the plaintiff sought to recover damages for mental anguish based on her fear of developing HIV or some other disease after receiving an injection from a contaminated syringe. The Alabama Supreme Court reversed an order denying the defendants a summary judgment, holding that the plaintiff could not recover for fear of a future injury where there was no medical basis for concluding that she was actually at risk of developing a disease.
- *Baron Services, Inc. v. Media Weather Innovations, LLC*, 717 F.3d 907 (Fed. Cir. 2013): Mr. Kelly orally argued this case at the Federal Circuit in Washington. This was a patent infringement action where the trial court entered a summary judgment for the defendant and awarded attorney fees. Mr. Kelly represented the plaintiff on appeal. The Federal Circuit reversed the summary judgment and vacated the attorney fee award, ruling that the trial court erred in granting summary judgment without allowing the plaintiff to obtain the defendant's source code and conduct other relevant discovery.
- *Waddell v. Colbert County-Northwest Alabama Healthcare Authority d.b.a. Helen Keller Hospital*, 97 So.3d 178 (Ala. Civ. App. 2012): This was a premises liability case filed by a hospital visitor injured in an elevator accident. The Alabama Court of Civil Appeals affirmed a summary judgment in the hospital's favor, because the plaintiff did not prove that the hospital failed to use reasonable care in inspecting and maintaining the elevator.
- *Ex parte Stenum Hospital*, 81 So.3d 314 (Ala. 2011): The Alabama Supreme Court in this case granted a petition for mandamus and ordered the trial court to dismiss claims against a hospital and others. The plaintiff in the case was injured in an accident at a mall, and then underwent surgery which left her paralyzed. She sued the mall, and the mall then asserted third-party contract and tort claims against the surgeons and a hospital in Germany where the surgery occurred. The Supreme Court ruled that the mall did not have standing to assert the claims.
- *Johnson v. Layton*, 72 So.3d 1195 (Ala. 2011): In this medical malpractice case, the Supreme Court affirmed a summary judgment in favor of the defendant physician and his medical group. The court rejected the plaintiff's argument that the physician's affidavit in support of the summary judgment motion was technically deficient.
- *Poole v. Prince*, 61 So.3d 258 (Ala. 2010): The Supreme Court reversed a summary judgment in the defendants' favor in a case involving a dispute over sharing of attorney fees

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## Representative Cases (continued)

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from mass-tort litigation. The court concluded that jury questions were presented concerning contract terms and performance. The court also held that the contract could not be unenforceable on the basis that it violated the Alabama Rules of Professional Conduct governing lawyers.

- *Precise v. Edwards*, 60 So.3d 228 (Ala. 2010): The Supreme Court in this medical malpractice case affirmed a summary judgment for the defendants on the basis that the claims were barred by the statute of limitations. The court held that the evidence showed that, even though the complaint was filed within the limitations period, the plaintiff lacked a bona fide intent to have the defendants immediately served.
- *The North River Insurance Company v. Overton*, 59 So.3d 1 (Ala. 2010): This was a garnishment action against an insurance company to recover \$3 million in default judgments entered against its insureds. The Supreme Court reversed a summary judgment for the plaintiffs, holding that a jury question was presented concerning whether the insurer received notice of the claims against the insureds.
- *Norandal USA, Inc. v. Graben*, 133 So.3d 386 (Ala. Civ. App. 2010): This was the second appeal in this workers' compensation case. In the first appeal, the Court of Civil Appeals reversed a judgment awarding permanent total disability benefits to the employee, and adopted a new test for awarding non-scheduled benefits based on pain resulting from an injury to a scheduled member. On remand, the trial court found the employee to be permanently and totally disabled under the new test. The employer again appealed, and the Court of Civil Appeals again reversed the trial court's judgment, holding that the employee failed to prove that he was entitled to non-scheduled benefits under the new standard.
- *Bedsole v. Clark*, 33 So.3d 9 (Ala. Civ. App. 2009): This case involved claims by an inmate against jail officials, based on allegations that the officials were deliberately indifferent to the inmate's serious medical needs. The Court of Civil Appeals affirmed a summary judgment in the defendants' favor.
- *Norandal U.S.A., Inc. v. Graben*, 18 So.3d 405 (Ala. Civ. App. 2009): Mr. Kelly orally argued this case in the Alabama Court of Civil Appeals. This was a workers' compensation case where the Court of Civil Appeals reversed a judgment awarding permanent total disability benefits to the employee. Following oral argument, the court adopted a new standard, proposed by Mr. Kelly, for determining when an employee may recover non-scheduled benefits due to pain resulting from an injury to a scheduled member. The court remanded the case to the trial court so that it could decide the case under the new standard.
- *Harris v. Health Care Authority of the City of Huntsville d.b.a. Huntsville Hospital*, 6 So.3d 468 (Ala. 2008): In this medical malpractice case, the Supreme Court affirmed a summary judgment in favor of the defendants. The court held that the trial court did not abuse its

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## Representative Cases (continued)

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discretion in denying a continuance of the summary judgment hearing, and that the plaintiff failed to present substantial evidence to support his malpractice claim.

- *Landers v. Lowe's Home Centers, Inc.*, 14 So.3d 144 (Ala. Civ. App. 2007): This was a workers' compensation case in which the Court of Civil Appeals affirmed the trial court's award of permanent partial disability benefits, rejecting the employee's argument that he was permanently and totally disabled.
- *Health Care Authority of the City of Huntsville d.b.a. Huntsville Hospital v. Holly*, 925 So.2d 160 (Ala. 2005): The Supreme Court affirmed an order granting a new trial after the jury awarded \$2 million in damages to the plaintiff in this medical malpractice case. The supreme court ruled that the trial court did not abuse its discretion in granting a new trial based on a juror's failure to properly respond to voir dire questions concerning past disputes with the defendant hospital.
- *Wilson v. Athens-Limestone Hospital*, 894 So.2d 630 (Ala. 2004): This was a medical malpractice action in which the Supreme Court affirmed an order granting the defendant hospital's motion for judgment as a matter of law. At trial, the plaintiff's medical expert testified that a pediatrician employed by the hospital had a duty to intervene in the care provided by an emergency physician to a patient in the emergency room. Resolving an issue of first impression in Alabama, the Supreme Court ruled that there was no duty to intervene in the care provided by another physician.
- *Ex parte Athens-Limestone Hospital*, 858 So.2d 960 (Ala. 2003): In this medical malpractice case, a hospital filed a third-party claim for indemnity against a physician whose actions were the basis for a vicarious liability claim asserted against the hospital. The trial court permitted the third-party claim, but severed the indemnity claim from the plaintiff's medical malpractice claim against the hospital. The Supreme Court granted the hospital's petition for a writ of mandamus and directed the trial court to vacate its order severing the indemnity claim. The court concluded that the trial court abused its discretion in severing the claims, because trying the claims together would not unduly complicate the case.
- *Tuck v. Health Care Authority of the City of Huntsville d.b.a. Huntsville Hospital*, 851 So.2d 498 (Ala. 2002): This was a medical malpractice case in which the Supreme Court affirmed the trial court's order granting the defendant hospital's motion for a judgment as a matter of law. The motion was granted on the ground that the plaintiff failed to present the testimony of a qualified expert to establish that the hospital breached the standard of care. The Supreme Court rejected the plaintiff's argument that expert testimony was not required in a case involving the use of restraints on a hospital patient. The court also concluded that the trial court correctly ruled that the plaintiff's proffered expert did not meet the statutory qualifications for a similarly situated health care provider, that the testimony of the hospital's own experts did not establish a breach of the standard of care, and that the trial court did not abuse its discretion in preventing the plaintiff from calling an expert who was not disclosed in the plaintiff's answers to the hospital's interrogatories.

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## Representative Cases (continued)

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- *Crowl v. Kayo Oil Company*, 848 So.2d 930 (Ala. 2002): This was a premises liability case in which the trial court entered a summary judgment in the defendant's favor on the basis that the claim was barred by the statute of limitations because the plaintiff did not make valid use of fictitious party pleading. The Supreme Court affirmed the judgment, holding that the plaintiff did not use due diligence in discovering the defendant's identity, and that the trial court did not abuse its discretion in refusing to grant a continuance to permit the plaintiff to conduct discovery to oppose the motion for summary judgment.
- *Water and Wastewater Board of the City of Madison v. Anderson*, 850 So.2d 1230 (Ala. 2002): In this case, the Alabama Supreme Court reversed the trial court's order directing a city water board to provide service to property owned by the plaintiff. The water board adopted a policy under which service would be available to property located outside the city limits only if the landowner filed a petition to have the property annexed into the city. The plaintiff, who owned a tract of land located outside the city, contended that it was improper for the water board to condition service on annexation. The trial court issued a writ of mandamus requiring the water board to serve the plaintiff's property. In reversing that order, the supreme court held that the water board had established a reasonable rationale for the annexation requirement.
- *Ex parte Maple Chase Company*, 840 So.2d 147 (Ala. 2002): The Supreme Court granted a petition for mandamus and directed the trial court to vacate an order requiring the defendant to pay the plaintiff's travel expenses and translation costs related to discovery. Resolving a question of first impression about the proper allocation of the costs of translating foreign documents produced in discovery, the court adopted the rule that each party must bear the special costs related to its own discovery requests.
- *Davis v. J. F. Drake State Technical College*, 854 So.2d 1151 (Ala. Civ. App. 2002): The plaintiff in this case was a college employee who was given a notice of termination during his probationary period, but continued to work pursuant to a written employment contract for several months after the probationary period expired. The plaintiff argued that he became a non-probationary employee under the terms of the Alabama Fair Dismissal Act (FDA), and that the college had violated the FDA by terminating him without a hearing. The Court of Civil Appeals affirmed a summary judgment in favor of the college and its president.
- *Ex parte Showers*, 812 So.2d 277 (Ala. 2001): The Supreme Court denied the plaintiff's petition for a writ of mandamus in this medical malpractice action, holding that the writ could not be used to obtain review of a partial summary judgment or to require the trial court to certify the judgment as final or issue the statement required for a permissive appeal.
- *Continental Grain Company v. Maier*, 842 So.2d 670 (Ala. Civ. App. 2001): In this case, the Court of Civil Appeals reversed the trial court's order requiring an employer to pay for surgery performed on an employee who was injured on the job. The surgeon was not an

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## Representative Cases (continued)

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authorized treating physician, but the trial court ruled that the employer was required to pay for the surgery because it had neglected or refused to provide necessary medical care. In reversing the order, the Court of Civil Appeals concluded that the employer had met all of its obligations under the Workers' Compensation Act and that no grounds existed for requiring the employer to pay for unauthorized medical treatment.

- *Mutual Assurance Inc. v. Chancey*, 781 So.2d 172 (Ala. 2000): The Supreme Court in this case held that a liability insurer was not entitled to intervene in a suit against its insured physician for the purpose of requesting interrogatories or special verdict forms to ascertain the basis for the jury's verdict.
- *Wells v. Storey*, 792 So.2d 1034 (Ala. 1999): In this medical malpractice case, the Supreme Court addressed a question of first impression in Alabama in holding that nurses and hospitals do not have an independent duty to obtain the informed consent of a patient.
- *Ex parte Martin*, 733 So.2d 392 (Ala. 1999): In this action against a plant manager arising out of the deaths of three workers in an explosion, the Supreme Court granted the defendant's petition for certiorari and reversed the decision of the Court of Civil Appeals, holding that the defendant was entitled to a summary judgment because the plaintiffs failed to prove that the defendant was substantially certain that injuries would follow from his actions.
- *Saunders v. North Alabama Neurological, P.A.*, 770 So.2d 612 (Ala. Civ. App. 1999): In this medical malpractice action, the Court of Civil Appeals held that the plaintiffs' claims were barred by the doctrine of judicial estoppel because the plaintiffs obtained a bankruptcy discharge without disclosing the existence of their claims, even though they knew or should have known they had potential claims to be asserted against the defendants.
- *Gipson v. Younes*, 724 So.2d 530 (Ala. Civ. App. 1998): The Court of Civil Appeals answered a question of first impression in this medical malpractice case, holding that the trial court did not err in excluding evidence that the defendant physician had twice failed the medical board certification exams, even though the physician testified as an expert in his own behalf.
- *Ex parte Dunlop Tire Corporation*, 706 So.2d 729 (Ala. 1997): The Supreme Court decided a question of first impression in this workers' compensation case, holding that the employer was entitled to a set-off or credit for disability plan benefits, regardless of whether the benefits were fringe benefits or benefits provided pursuant to a union-negotiated contract.
- *Alexander v. Pace Industries, Inc.*, 710 So.2d 450 (Ala. Civ. App. 1997): In this retaliatory discharge action, the Court of Civil Appeals affirmed a summary judgment in favor of the employer because the plaintiff did not prove that she was willing and able to return to work.

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## Representative Cases (continued)

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- *Crawford v. Sundback*, 678 So.2d 1057 (Ala. 1996): In this action against co-employees arising out of the deaths of three workers in an on-the-job accident, the Supreme Court affirmed a summary judgment in favor of several co-employees because the plaintiffs did not exercise due diligence in adding the defendants to the lawsuit.
- *Smith v. Dunlop Tire Corp.*, 663 So.2d 914 (Ala. 1995): In this retaliatory discharge action, the Supreme Court answered a question of first impression by holding that an employer may lawfully terminate an employee for missing work due to an on-the-job injury, where the termination is pursuant to a “no fault” absence policy under which absences occasioned by occupational accidents are not excused.
- *Peek v. State Auto Mutual Ins. Co.*, 661 So.2d 737 (Ala. 1995): After hearing oral argument, the Supreme Court answered a question of first impression by declining to recognize an independent tort cause of action for spoliation of evidence.
- *Mann v. Health Care Authority of the City of Huntsville*, 653 So.2d 941 (Ala. 1995): In this medical malpractice action, the Supreme Court affirmed a directed verdict in favor of the defendant hospital on claims for negligent training and supervision of a nurse, concluding that the jury’s verdict in favor of the nurse meant that there could be no valid claim against the hospital.
- *Steiger v. Huntsville City Bd. of Educ.*, 653 So.2d 975 (Ala. 1995): In affirming a summary judgment entered in favor a city school board, the Supreme Court held that the board could not be liable in contract or in tort for injuries received by a teacher who was assaulted at school.
- *Milligan v. Albertville City Bd. of Educ.*, 661 So.2d 254 (Ala. Civ. App. 1995): The Court of Civil Appeals affirmed a judgment in favor of a board of education on a former employee’s claims that her termination violated her rights to freedom of speech and association.
- *Johnson v. Huntsville Hospital*, 660 So.2d 1017 (Ala. Civ. App. 1995): The Court of Civil Appeals in this case affirmed a summary judgment in favor of a hospital on a claim for services rendered to a patient, holding that the hospital was entitled to the amount charged for services rendered, even though no statutory hospital lien arose.
- *City of Huntsville v. City of Madison*, 24 F.3d 169 (11th Cir. 1994): This declaratory judgment action arose out of a dispute concerning a city’s obligation to make tax equivalent payments to other municipalities and counties to which the city supplied electricity purchased from the Tennessee Valley Authority. The Eleventh Circuit held that there was no federal question jurisdiction because, even though the dispute centered on a contract between the city and TVA that would require the court to interpret the federal TVA Act, this would not confer jurisdiction because the federal statute does not provide for a private remedy.

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## Representative Cases (continued)

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- *Ex parte Mayo*, 652 So.2d 201 (Ala. 1994): This was a criminal matter in which Mr. Kelly represented a city in its prosecution of a defendant for DUI. After hearing oral argument, the Supreme Court found that the State Department of Forensic Sciences had not adopted adequate rules for administering chemical breath alcohol tests, but affirmed the DUI conviction on the basis that the prosecution nonetheless had established a sufficient predicate for admission of the defendant's test result under traditional evidentiary rules for admitting scientific test results.
- *Saccuzzo v. Krystal Co.*, 646 So.2d 595 (Ala. 1994): The Supreme Court in this case held that a restaurant that had been the scene of substantial criminal activity was not liable for the wrongful death of an individual who was standing on the premises of an adjacent business when shot by a person standing in the parking lot of the restaurant.
- *Miller v. Alabama Central Credit Union*, 662 So.2d 270 (Ala. Civ. App. 1994): In this action against a credit union based on alleged wrongful conduct in allowing property to be sold at a liquidation auction, the Court of Civil Appeals affirmed a summary judgment on claims for conversion, breach of fiduciary duty, and fraud.
- *Robinson v. Huntsville Hospital*, 647 So.2d 766 (Ala. Civ. App. 1994): In this workers' compensation case, the Court of Civil Appeals affirmed a judgment in the employer's favor on the ground that the trial court could have properly concluded that the employee was not injured on the job.
- *Harrington v. Guaranty National Ins. Co.*, 628 So.2d 323 (Ala. 1993): The Supreme Court answered a question of first impression in this case by holding that an insurer could not be liable for bad faith where it negligently made a mistake of law about the applicability of a policy exclusion.
- *Hurst v. Nichols Research Corp.*, 621 So.2d 964 (Ala. 1993): In this case in which a former corporate officer claimed that he had not been given stock options promised in the course of negotiations related to his employment contract, the Supreme Court affirmed a summary judgment in favor of the corporation and its CEO on the plaintiff's claims for fraud and breach of contract.
- *Irons v. Service Merchandise Co., Inc.*, 611 So.2d 294 (Ala. 1992): In affirming a summary judgment in favor of the defendant employer, the Supreme Court adopted the standards for determining whether a constructive discharge occurred in a retaliatory discharge action brought pursuant to the Alabama Workers' Compensation Act.

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## Professional Associations

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Alabama Bar Association

Huntsville-Madison County Bar Association

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## **Court Admissions**

U.S. Supreme Court

U.S. Court of Appeals for the Federal Circuit

U.S. Court of Appeals for the Eleventh Circuit

U.S. Court of Appeals for the Sixth Circuit

U.S. District Court for the Northern District of Alabama

U.S. District Court for the Eastern District of Tennessee

All Alabama state courts

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## **Education**

J.D., 1991, University of Alabama, Tuscaloosa, AL

B.S., 1987, University of North Alabama, Florence, AL

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