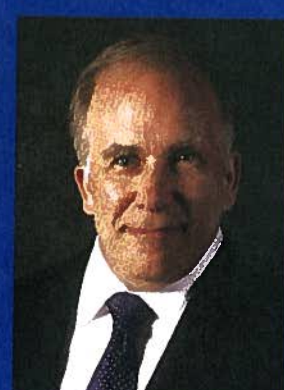
ANATOMY of an Alabama Co-employee WILFUL MISCONDUCT CASE FOR REMOVAL OR FAILURE TO Install, Repair, or Maintain a SAFETY GUARD or DEVICE



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With this article we examine the anatomy of an action against co-employees for violation of § 25-5-11(c)(2), Ala. Code (1975). The elements of the cause of action – that a safety guard or device must be "provided by the manufacturer" of the machine, that the safety guard must be "removed" from the machine, and that the removal must have "occurred with knowledge" that injury of death would likely or probably result – are examined from the standpoint of evidence found sufficient or insufficient to meet the elements.

Pertinent Statute[1]

> § 25-5-11(a) "... If a party ... is an officer, director, agent, or employee of the same employer, ... the injured employee, or his or her dependents in the case of death, may bring an action against ... the ... person ... only for willful conduct which results in or proximately causes the injury or death."
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> § 25-5-11(b) "If personal injury or death to any employee results from the willful conduct, as defined in subsection (c) herein, of any officer, director, agent, or employee of the same employer ..., the employee shall have a cause of action against the person ...."
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> § 25-5-11(c) "As used herein, 'willful conduct' means any of the following:
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> (1) A purpose or intent or design to injure another ....
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> (2) The willful and intentional removal from a machine of a safety guard or safety device provided by the manufacturer of the machine with knowledge that injury or death would likely or probably result from the removal; provided, however, that removal of a guard or device shall not be willful conduct unless the removal did, in fact, increase the danger in the use of the machine and was not done for the purpose of repair of the machine or was not part of an improvement or modification of the machine which rendered the safety device unnecessary or ineffective."

What Constitutes a Safety Guard or Safety Device

In *Moore v. Reeves*, 589 So. 2d 173, 176 (Ala. 1991), the Court rejected the defendant's contention that an automobile door and its closure mechanism were not safety devices. Finding no legislative definition of the terms, it adopted the following definitions:

- the terms "safety device" and "safety guard" mean an invention or contrivance intended to protect against injury, damage, or loss that insures or gives security that an accident will be prevented.

- a "safety device" or "safety guard" is that which is provided, principally, but not exclusively, as protection to an employee, which provides some shield between the employee and danger so as to prevent the employee from incurring injury while he is engaged in the performance of the service required of him by the employer: it is not something that is a component part of the machine whose principal purpose is to facilitate or expedite the work.

Items Identified in the Case Law as Safety Guards or Devices

1. Front ballast weights on a tractor. *Elliott v. Montgomery*, 59 So. 3d 663 (Ala. 2010).

2. Safety relief valve on vacuum hose (but not provided by the hose or vacuum manufacturer). *Ford v. Carylon Corp.*, 937 So. 2d 491 (Ala. 2006).

3. Release lever for pinch roller. *Ex parte Newton*, 895 So. 2d 851 (Ala. 2004).

4. Guard for table saw. *Ex parte Canada*, 890 So. 2d 968 (Ala. 2004).

5. Brakes on a van. (Actual holding is that -(c)(2) does not require intent to injure). *Pettibone v. Tyson*, 794 So. 2d 377 (Ala. 2001).

6. Safety shut-off bar and cables for abrasive planer. *Jackson v. Hill*, 670 So. 2d 917 (Ala. 1995). precision of the grinding). Smith v. Wallace, 681 So. 2d 1034 (Ala. 1995).

8. Foot pedal activation device to bypass dual palm press buttons to activate press. *Cunningham v. Stern*, 628 So. 2d 576 (Ala. 1993).

9. Door and door closure mechanism of automobile. *Moore v. Reeves*, 589 So. 2d 173 (Ala. 1991).

10. Guard for press. (Court holds that manufacturer did not provide any guard, so no cause of action). *Harris v. Simmons*, 585 So. 2d 906 (Ala. 1991).

11. Dual palm controls for press. *Harris v. Gill*, 585 So. 2d 831 (Ala. 1991).

12. Guard rail for lifter. *Pressley v. Wiltz*, 565 So. 2d 26 (Ala. 1990).

13. Guard to prevent hands from entering nip point between belt and pulley. *Bailey v. Hogg*, 547 So. 2d 498 (Ala. 1989).

14. Modification of saw blade guard to increase exposed blade from 15 to 30 inches (but holding is that the modification was made before any current co-employees came to work so none of them could be liable). *Burkett v. Loma Mach. Mfg., Inc.*, 552 So. 2d 134 (Ala. 1989).

15. Safety guard that covered forming die area of sausage biscuit packaging machine. *Haddock v. Multivac, Inc.*, 703 So. 2d 969 (Ala. Civ. App. 1996).

Items Held Not To Be Safety Guard or Safety Device

1. Ergonomic keyboard (not provided by the manufacturer of the computer so no holding on whether it was a safety device). *Wadsworth v. Jewell*, 902 So. 2d 664 (Ala. 2004).

2. Door for entry into vat. *Cooper v. Nicoletta*, 797 So. 2d 1072 (Ala. 2001).

3. Protective clothing – the worker's body is not a machine. *Thermal Components, Inc. v. Golden*, 716 So. 2d 1166 (Ala. 1998).

4. Safety glasses – not part of a machine. *Lane v. Georgia Cas. and Sur. Co.*, 670 So. 2d 889 (Ala. 1995).

5. Bracing for a trench that collapsed (actual holding is that -(c)(2) does not require intent to injure; no issue raised as to whether a trench is a machine). *Haisten v. Audubon Indem. Co.*, 642 So. 2d 404 (Ala. 1994).

6. A pump in a mine, which is not a machine. *Layne v. Carr*, 631 So. 2d 978 (Ala. 1994).

7. Roof support timbers in a coal mine – a mine is not a machine. *Mallisham v. Kiker*, 630 So.2d 420 (Ala. 1993).

8. Fire extinguishers – not part of a machine. *Moore v. Welch*, 29 So. 3d 185 (Ala. Civ. App. 2009).

Elements of the Cause of Action

In *Harris v. Gill*, 585 So. 2d 831 (Ala. 1991), the Court adopted the following as "four elements that [a plaintiff] must establish in order to make out a prima facie case:"

1. The safety guard or device must have been provided by the manufacturer of the machine;

2. The safety guard or device must have been removed from the machine;

3. The removal of the safety guard or device must have occurred with knowledge that injury would probably or likely result from that removal; and,

4. The removal of the safety guard or device must not have been part of a modification or an improvement that rendered the safety guard or device unnecessary or ineffective.

585 So. 2d at 835 (emphasis added). The Court has not subsequently repeated this as a four-element test, but most of the cases turn on one of the first three "elements," which are derived directly from the statute in any event.

1. "Provided By The Manufacturer"

Harris v. Gill holds that a "manufacturer" can include "a subsequent entity that substantially modifies or materially alters the product through the use of different components and/or methods of assembly." 585 So. 2d at 836. Harris's employer "purchased a 40-year-old punch press that was unusable and unworkable when purchased, and reconstructed and/or modified into a usable, workable machine." 585 So. 2d at 836.

The Supreme Court of Alabama has affirmed summary judgments for co- employees where the alleged safety device was not provided by the manufacturer of the machine. *Ford v. Carylon Corp.*, 937 So. 2d 491 (Ala. 2006) (finding no evidence that manufacturers of vacuum or of hose provided the safety relief valves that plaintiff's employer used); *Wadsworth v. Jewell*, 902 So. 2d 664 (Ala. 2004) (co-employees did not remove an ergonomic keyboard because the manufacturer of the computer did not provide it); *Harris v. Simmons*, 585 So. 2d 906 (Ala. 1991) (manufacturer of the press did not provide safety guard).

2. "Removed From The Machine"

The Court has construed "remove" as the equivalent of failure to install, bypassing, and failure to repair or maintain a safety guard or device:

- "The willful and intentional failure to install an available safety guard equates to the willful and intentional removal of a safety guard." *Bailey v. Hogg*, 547 So. 2d 498, 500 (Ala. 1989) (emphasis added).

- "The act of 'bypassing' a safety device of a particular machine that would prevent an injury ... is encompassed within the word 'removal.'" *Harris v. Gill*, 585 So. 2d at 837 (emphasis added).

- "The failure to maintain and/or repair a safety guard or device provided by the manufacturer of a particular machine would be tantamount to the 'removal of' or the 'failure to install' a safety guard or device." *Moore v. Reeves*, 589 So. 2d 173, 178-79 (Ala. 1991) (emphasis added).

3. "Occurred With Knowledge"

First, it is helpful to recall that § 25-5-11(a) and (b) provide a cause of action against any "officer, director, agent, or employee of the same employer." Thus, the statute itself contemplates liability of officers and directors.

An interesting dynamic has arisen in the cases. The actual language of -(c)(2) is: "The willful and intentional removal from a machine of a safety guard or safety device provided by the manufacturer of the machine with knowledge that injury or death would likely or probably result from the removal." The cases establish that the person who has knowledge does not have to be the same person who actually removed the safety guard or safety device. He simply has to know or have notice that it was done. The test is whether the defendant co-employee knew – or should have known – that the removal, failure to install, bypassing, or failure to maintain repair was done.

- In *Bailey v. Hogg*, defendant Hogg was a vice president of Hooper Concrete, the superintendent of the Greenville facility, and he directed the assembly of the plant. Hogg testified "that he knew that this guard and other guards had been delivered ... and that he knew that they had not been installed." *Bailey v. Hogg*, 547 So. 2d 498, 499 (Ala. 1989). This was sufficient for a jury to "find that Hogg's failure to have the safety guard installed was willful and intentional." Id. at 500.

- In *Harris v. Gill*, defendant Moore was manager of fabrication operations and he reported to Gill, vice president of manufacturing. *Harris v. Gill*, 585 So. 2d 831, 833 (Ala. 1991). The evidence of their knowledge was concisely summarized in a later case:

- Even though neither of the co-employees was present at the time of the accident, the co-employees' relationship with the plaintiff was in a supervisory capacity.

- The co-employees were familiar with the press, the palm control buttons, and the alternative foot control.

- The co-employees had observed the press in operation at the plant.

- They were aware that when the alternative foot control was being used, the palm control buttons could not be activated. The co-employees knew or should have known that the safety device had been by-passed and, therefore, posed a safety risk for co- employees who used the press.

- The co-employees knew or should have known that the safety device had been bypassed and therefore posed a safety risk for co-employees who used the press.

Cunningham v. Stern, 628 So. 2d 576, 577 (Ala. 1993), summarizing the evidence found sufficient in Harris v. Gill, 585 So. 2d at 837-38 (emphasis added).

- In *Moore v. Reeves*, 589 So. 2d 173 (Ala. 1991), the Court found sufficient evidence against a safety director and a supervisor who was responsible for maintaining and repairing vehicles in that they "were aware that the door ... did not function properly; they had been aware of this problem several months prior to the accident but had not repaired the door." 589 So. 2d at 175 (emphasis added).

- In *Moore*, the safety director "reported to and answered to" the vice president of finance of the college, and the Court reversed the summary judgment as to the vice president with no further analysis. The Court also reversed the summary judgment as to the president of the college, but without any statement as to his individual liability either.

- In *Cunningham v. Stern*, 628 So. 2d 576 (Ala. 1993), defendant Bailey was responsible for setting up the press, and making sure the safety device was adjusted properly for each employee; defendant Stern was responsible for the safety of the employees in his department. 628 So. 2d at 577. It found sufficient evidence against them based on the following analysis of the facts:

  - Bailey and Stern's relationship with Cunningham was in a supervisory capacity.

  - They were familiar with the press, the palm control buttons, and the alternative foot control.

  - They had observed the press in operation at the plant.

  - They were aware that when the alternative foot control was being used, the palm control buttons could not be activated.

  - A jury "might find that they knew or should have known that the safety device had been bypassed and, therefore, posed a safety risk for co-employees who used the press."

628 So. 2d at 577-78 (emphasis added). This "should have known" language allows a finding of "willful conduct" based on notice to a supervisor or officer that an available safety guard has been "removed" from a machine.

- *Haisten v. Audubon Indemnity Co.*, 642 So. 2d 404 (Ala. 1994) includes two strong principles:

  - "Subsection -(c)(2) at least arguably allows recovery under a finding that a reasonable person had or should have had 'knowledge that injury or death would likely or probably result,' even if the defendant co-employee did not subjectively expect or intend to cause injury." 642 So. 2d at 407 (emphasis added).

  - "The offending employee could subjectively believe that the safety device ... was ineffectual or unnecessary and that no harm would come from the removal of the device ..., and yet be liable under an objective standard." 642 So. 2d at 407 (emphasis added).

- Smith v. Wallace, 681 So. 2d 1034 (Ala. 1995), holds that a tool rest is a safety device and reverses summary judgment for four individual co-employees, analyzing their safety responsibilities in the most detailed passage of its kind:

  - Jim Wallace "by virtue of his position as the shop and field maintenance superintendent, was responsible for '[monitoring the plant] for unsafe conditions and potential hazards [and for directing] corrective action.' 681 So. 2d at 1037 (alteration in original; emphasis added).

  - Marian Rhodes, "as the general field maintenance supervisor, had among his duties '[promoting] safety and housekeeping [and *developing and coordinating the] safety program*.'" *Ibid.* (alteration in original; emphasis added).

  - Carl Stumpe, "as plant safety manager, was responsible for '[investigating] safety complaints ... [and monitoring] the workplace for unsafe conditions.'" *Ibid.* (alteration in original; emphasis added).

  - Charlie Wilson, "as industrial relations manager, was also responsible, in part, for '[promoting] ... safe work practices' and '[managing the activities of the Safety [Department].'" *Ibid.* (alteration in original; emphasis added).

  - Plaintiff "had asked Carl Stumpe, the plant safety manager, to service the grinder, but Stumpe told him that 'he wouldn't guarantee ... that he could get it fixed.'" *Id.* at 1036 (emphasis added).

  - "Stumpe ... sent a monthly safety report, to Jim Wallace, the shop and field maintenance superintendent, with a copy also sent to others, including Charlie Wilson, the industrial relations manager; in that report, Stumpe noted that the grinder's wheel needed to be dressed." *Ibid.* (emphasis added).

  - "Rhodes ... stated that he would normally receive a copy of a safety report and 'possibly' did receive this report." *Ibid.*

- All of the co-employee defendants – Wallace, Rhodes, Stumpe, and Wilson – were in positions of safety responsibility." *Id.* at 1037 (emphasis added).

- *Jackson v. Hill*, 670 So. 2d 917 (Ala. 1995): Jackson presented substantial evidence that Hill "knew or should have known that the safety devices had been removed from the planer and that Jackson could be injured by operating the machine." 670 So. 2d at 918 (emphasis added).

- *Haddock v. Multivac, Inc.*, 703 So. 2d 969 (Ala. Civ. App. 1996). The safety guard had been bypassed by a jumper wire. Defendant McClanahan was the director/supervisor of the maintenance department.

  - He knew safety guards are important.

  - He knew that injury or death can result if they do not function properly.

  - He delegated the hands-on maintenance to the employees working in his department.
  - He did not check their maintenance schedules to ensure that they were maintaining the safety devices.

  - He gave them the maintenance schedule manuals and entrusted them to properly perform the required maintenance, but he never checked their records or asked them whether they were performing maintenance checks.

703 So. 2d at 972 (emphasis added).

- *Pettibone v. Tyson*, 794 So. 2d 377 (Ala. 2001). In emphasizing that -(c)(2) does not require intent to injure, Pettibone states that:

  - "Subsection (c)(2) at least arguably allows recovery under a finding that a reasonable person had or should have had 'knowledge that injury or death would likely or probably result,' even if the defendant co-employee did not subjectively expect or intend to cause injury." *Pettibone*, 794 So. 2d at 380, quoting *Haisten*, 642 So. 2d at 407 (emphasis added).

  - Under (c)(2), "the offending employee could subjectively believe that the safety device ... was ineffectual or unnecessary and that no harm would come from the removal of the device ..., and yet be liable under an objective standard." *Pettibone*, 794 So. 2d at 380, quoting *Haisten*, 642 So. 2d at 407 (emphasis added).

- *Ex parte Canada*, 890 So. 2d 968 (Ala. 2004) reverses a summary judgment based on "substantial evidence that the shift supervisor had knowledge that the safety guard was defective."

  - Co-employees who, by virtue of their supervisory roles, would have known that the failure to repair a safety device would cause an injury were subject to liability under § 25-5-11(c)(2). 890 So.2d at 972 (emphasis added).

  - Conflicting evidence on the issue whether maintenance personnel were aware of the inoperative condition of a guard established a genuine issue of material fact under -(c)(2). 890 So. 2d at 973.

  - The fact that the plaintiff does not know the safety function of the device or guard is not a defense. *Ex parte Canada*, 890 So. 2d at 972; *Ex parte Newton*, 895 So. 2d 851, 856 (Ala. 2004) (*Ex parte Newton* reversed a summary judgment for the owner, the manager, and a supervisor).

Co-Employees With Safety Responsibilities May Be Sued

Smith v. Wallace, 681 So. 2d 1034 (Ala. 1995), is helpful in understanding how to identify such culpable co-employees. There, the issue was whether the failure to maintain the proper tolerance or space between a tool rest and the grinding wheel was an actionable failure to maintain a safety device. Plaintiff "had asked Carl Stumpe, the ***plant safety manager***, to service the grinder." *Id.* at 1036. Stumpe "sent a monthly safety report to Jim Wallace, ***the shop and field maintenance superintendent***, with a copy also sent to others, including Charlie Wilson, ***the industrial relations manager*** ; in that report Stumpe noted that the grinder's wheel needed to be dressed." *Id.* at 1036. Marion Rhodes, ***the general field maintenance supervisor***, testified that he was unable to recall whether he had received a copy of the report, but "stated that he would normally receive a copy of a safety report and 'possibly' did receive this report." *Ibid.* No repairs were made, and Smith was injured, losing his thumb in the grinder.

The *Smith v. Wallace* Court reversed the summary judgment for the four co- employee defendants with the following helpful language:

> We further hold that the evidence was sufficient to create a genuine issue of material fact, and, therefore, the summary judgment for Wallace, Rhodes, Stumpe, and Wilson was inappropriate. We note that, according to Reynolds's job descriptions, Wallace, by virtue of his position as the shop and field maintenance superintendent, ***was responsible for "[monitoring the plant] for unsafe conditions and potential hazards [and for directing] corrective action."*** Rhodes, as the general field maintenance supervisor, had among his duties ***"[promoting] safety and housekeeping [and developing and coordinating the] safety program."*** Stumpe, as plant safety manager, was responsible for ***"[investigating] safety complaints*** ... [and ***monitoring] the workplace for unsafe conditions."*** Wilson, as industrial relations manager, was also responsible, in part, for ***"[promoting] ... safe work practices" and "[managing] the activities of the Safety [Department]."***
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> As stated above, according to Smith, Stumpe inspected the grinder; Stumpe later indicated in his safety report that the grinder wheel needed dressing. As further noted above, notice of the needed repair had been given in copies of the safety report issued to Wallace and Wilson; Rhodes, although not listed on the report, testified that he "possibly" received a copy. The fact that the grinder wheel was in disrepair would necessarily alter the tolerance and thus the effectiveness of

the tool rest in preventing Smith's injury. Stumpe's report made after the accident supports this conclusion. ***All of the co-employee defendants – Wallace, Rhodes, Stumpe, and Wilson – were in positions of safety responsibility.*** We hold that there are genuine issues of material fact regarding whether Wallace, Rhodes, Stumpe, and Wilson, as reasonable men, would have known that Smith's injury was substantially certain to follow from a failure to repair the grinder. The evidence provides a sufficient basis from which a jury could conclude that, ***but for their failure to maintain the tool rest (as well as the grinding stone) so as to achieve the proper tolerance on the grinder, Smith would not have been injured.*** Therefore, the trial court erred in entering the summary judgment in favor of Stumpe, Wallace, Rhodes, and Wilson. That judgment is reversed.

681 So. 2d at 1037-1038. [2]

Ex parte Newton, 895 So. 2d 851 (Ala. 2004), held that a fact question was presented against supervisory co-employees. "Newton sued three co-employees – George Wright, ***the owner of the company;*** Georgette Wright, the ***manager***; and Guy Wright, a ***supervisor.***" *Id.* at 852. Without analyzing the individual liability of these three defendants, the Supreme Court held that there was substantial evidence that the fact that a safety device on a press (an "upper-roll release lever") had been welded shut constituted a willful removal of a safety device, and reversed the summary judgment as to all three defendants. *Id.* at 855-6.

In *Ex parte Canada*, 890 So. 2d 968 (Ala. 2004), the Supreme Court reversed an affirmance by the Court of Civil Appeals of a summary judgment for a ***shift supervisor who "had specific safety responsibilities that included inspecting the saw on a daily basis."*** *Id.* at 969. The plaintiff had also sued three other supervisory co- employees, but did not appeal from the summary judgments in their favor. Id. at 970. *Ex parte Canada* is helpful principally in that it discusses and effectively approves of *Smith v. Wallace*. It also cites *Moore v. Reeves*, 589 So. 2d 173 (Ala. 1991) as holding "that a supervisor is guilty of the willful and intentional removal of a safety device under § 25-5-11(c)(2) if the supervisor fails to repair a safety device." 890 So. 2d at 972, citing Moore, 589 So. 2d at 178. Canada quotes the following from *Moore*:

> "To hold otherwise would allow supervisory employees to neglect the maintenance and repair of safety equipment provided to protect co- employees from injury, which by its very nature is a clear violation of public policy."

890 So. 2d at 972, quoting 589 So. 2d at 178-79.

Moore v. Reeves, 589 So. 2d 173 (Ala. 1991) concerned an unsafe door on a car driven by Moore, a security guard at Oakwood College.

> Defendant James Patterson was a ***sergeant with the Security Department*** at the college and was Moore's immediate supervisor; he was ***responsible for maintaining and repairing the vehicles*** in the security department. Defendant D'Andrade was the ***safety director*** at the college, and he had assigned the responsibility for maintaining and repairing the vehicles in the security department to James Patterson.
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> D'Andrade reported to and answered to Defendant Robert Patterson, who was ***Vice President of Finance*** of the college. Defendant Reeves was the ***president*** of the college.

589 So. 2d at 175. The Court reversed and remanded as to all four defendants without analyzing their individual liability.

In *Harris v. Gill*, supra, the defendants were supervisory co-employees Nelson Gill and K. D. Moore.

> [Plaintiff] Harris reported directly to Bill Henderson, the second shift supervisor in the pressing department. Henderson reported to K. D. Moore (a superior of Harris and ***manager of fabrication operations***); and Moore, in turn, reported to Gill (a superior of Harris and ***vice-president of manufacturing)***. Gill and Moore generally were responsible for ***maintaining in a reasonably safe condition*** the punch press at which Harris was working and generally were responsible for supervising and providing all safety practices and procedures utilized by Coyne [(the employer)].

585 So. 2d at 833.

The description in *Harris v Gill* of the knowledge of the two supervisory co- employees is also helpful:

> Having determined that the act of bypassing a safety device may constitute "removal," we turn to the question whether Gill and Moore had knowledge that Harris's injury would likely or probably result from such "removal."
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> In Creel v. Bridewell, 535 So. 2d 95, 97 (Ala. 1988), this Court held that "[a] duty to provide co-employees with a safe workplace naturally encompasses a duty to provide co-employees with machines that function properly and safely." Although it is undisputed that neither Moore nor Gill was present in the plant at the time of the accident, the record in this case contains evidence that Gill and Moore's relationship with Harris was in a supervisory capacity; that they were ***familiar with the punch press***, the palm control buttons, and the alternative foot control; that they had ***observed the press in operation*** at the plant; that they were aware that when the alternative foot control was being used, the palm control buttons could not be activated; and that they ***knew or should have known that the safety device had been bypassed*** and, therefore, posed a safety risk for co-employees, such as Harris, who used it.

585 So. 2d at 837.

In *Jackson v. Hill*, 670 So. 2d 917 (Ala. 1995), "at the time of Jackson's injury, the yellow shut-off bar and cables that served as emergency switches were not on the machine. These safety devices were on the floor under the planer." *Id.* at 918. David Hill, ***the supervisor of the stock room where the planer was located, had the "responsibility to see that all machines in the stock room were properly maintained."*** *Id.* at 917. The Court reversed a summary judgment for Hill and remanded for further proceedings.

In *Cunningham v. Stern*, 628 So. 2d 576 (Ala. 1993), on the authority of *Harris v. Gill*, the Court reversed a summary judgment where the issue was whether the addition of a foot pedal activation device to bypass dual palm press buttons constituted removal of a safety device. The Court described the two supervisory co-employees as follows:

> Lawrence Bailey was Cunningham's immediate supervi-

sor, and Charles Stern was Bailey's supervisor. Bailey was *responsible for setting up the press* Cunningham was operating at the time of the accident, and he was responsible for making sure the safety bracelets [supposedly an additional safety device, but which failed to prevent Cunningham's injury] were adjusted properly for each employee who operated the press. Stern was *responsible for seeing that the production schedule was met and for the safety of the employees in his department.*

628 So. 2d at 577.

Summary of Co-Employees Potentially Liable for Violations of § 25-5-11(c)(2)

Based on *Smith v. Wallace, Ex parte Newton, Ex parte Canada, Moore v. Reeves, Harris v. Gill, and Cunningham v. Stern,* plaintiffs can argue that if there is evidence they have notice of the removal, bypassing, failure to install, or failure to maintain a safety device, the following personnel can be held liable:

- company owner
- president
- vice president of finance
- vice president of fabrication operations
- manager
- safety director
- plant safety manager
- manager of fabrication operations
- shop and field maintenance superintendent
- industrial relations manager
- general field maintenance supervisor
- shift supervisor
- supervisor

Furthermore, all co-employees with the following supervisory responsibilities are also potentially liable:

- seeing that the production schedule is met *(Cunningham v. Stern)*
- monitoring the plant for unsafe conditions *(Smith v. Wallace)*
- monitoring the plant for potential hazards *(Smith v. Wallace)*
- directing corrective action *(Smith v. Wallace)*
- promoting safety *(Smith v. Wallace)*
- promoting housekeeping *(Smith v. Wallace)*
- developing a safety program *(Smith v. Wallace)*
- coordinating a safety program *(Smith v. Wallace)*
- investigating safety complaints *(Smith v. Wallace)*
- monitoring the work place for unsafe conditions *(Smith v. Wallace)*
- promoting safe work practices *(Smith v. Wallace)*
- managing the activities of the safety department *(Smith v. Wallace)*
- setting up the machine in question *(Cunningham v. Stern)*
- inspecting the machine in question *(Ex parte Canada)*
- maintaining the machine in a reasonably safe condition *(Harris v. Gill)*
- maintaining the machine *(Moore v. Reeves)*
- repairing the machine *(Moore v. Reeves)*

An Additional Theory of Liability Against Supervisory Co-Employees: Ala. Code § 25-1-1(a)

> Every employer shall furnish employment which shall be reasonably safe for the employees engaged therein and *shall furnish and use safety devices and safeguards and shall adopt and use methods and processes reasonably adequate* to render such employment and the places where the employment is performed *reasonably safe* for his employees and others who are not trespassers, and he shall *do everything reasonably necessary to protect the life, health and safety of his employees* and others who are not trespassers.

"Employer" as defined for § 25-1-1 "includes every ... agent, manager, representative, foreman or other person having control or custody of any employment, place of employment or of any employee." § 25-1-1(c)(1).

One case allows plaintiffs to sue co-employees for willfully violating the safety duties imposed by § 25-1-1(a), Ala. Code 1975. In *Powell v. United States Fidelity & Guaranty Co.*, 646 So. 2d 637 (Ala. 1994), the Court held that *an injured employee may sue co-employees for willfully violating this section*, but may not sue them for negligently or wantonly violating this section. Because these duties imposed under § 25-1-1(a) are broader than the narrow definitions of "willful conduct" in § 25-5-11(c) this at least arguably gives a broader field of liability than the specific "willful conduct" definitions of § 25-5-11(c). To explore potential liability under this principle, it will be fair to question co-employees about whether they met their duty to "furnish and use safety devices and safeguards," "adopt and use methods and processes reasonably adequate to render such employment and the places where the employment is performed reasonably safe," and even to "do everything reasonably necessary to protect the life, health and safety" of employees.

The Supreme Court in Ex parte Progress Rail Services Corp., 869 So. 2d 459 (Ala. 2003), held that the exclusivity provisions of the Worker's Compensation Act preclude tort claims *against the employer* for breach of these duties imposed by § 25-1-1. This is a long opinion by Justice Harwood discussing a number of cases and overruling the holding of *Etheredge v. Flowers*, 766 So. 2d 842, 846 (Ala. Civ. App. 1999), holding that the exclusivity provisions limit the cause of action under § 25-1-1 "to only those instances where the breach of this duty is willful or intentional." The holding of the Supreme Court overruling *Etheredge* is expressly limited only to a suit directly against the *employer:*

> To the extent that this statement in Etheredge relies on Powell [v. United States Fidelity & Guaranty Co., 646 So. 2d 637, 639 (Ala. 1994)] as authority for the proposition that the exclusivity provisions of the act do not preclude a cause of action under § 25-1-1 against the employer where the breach of the duty is willful or intentional, that reliance is misplaced.
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> ...
>
> ... If Etheredge is to be understood as addressing and allowing a safe-workplace claim made directly against the employer in a situation where the employees' injury is covered under the Act, it is incompatible with [Ex parte McCartney Constr. Co., 720 So. 2d 910 (Ala. 1998)] and to that extent is hereby overruled.

869 So. 2d at 472-73 (emphasis in original). This concerns *only* the liability of the *employer.*

In *Powell v. United States Fidelity and Guaranty, supra,* the Court affirmed a summary judgment in an action against co-employees under § 25-1-1 but only because the plaintiff alleged only negligence:

> The exclusivity provisions of § 25-5-53 and § 25-5-11 do not preclude a cause of action under § 25-1-1 for failure to provide a safe workplace; however, the exclusivity provisions have limited this cause of action under § 25-1-1 to only those instances where the breach of this duty is willful or intentional. ...
>
> Construing § 25-1-1 with the changes brought by § 25-5-53 and § 25-5-11, we reaffirm the principle that an injured employee may maintain an action under § 25-1-1 against a co-employee for failure to maintain a safe workplace, ***if the failure was willful and intentional.***

646 So. 2d at 639-40 (emphasis added). Progress Rail pointedly does not overrule this part of Powell, but only holds that the Court of Civil Appeals in Etheredge erroneously relied upon Powell to hold that § 25-1-1 will support an action against the ***employer.***

CONCLUSION

Proof of a cause of action under § 25-5-11 requires proof of "willful conduct." But proof of "willful conduct" under (c)(2) does not require proof of "intent to injure." Instead, it focuses on whether the defendant co-employees knew or should have known that a safety guard or safety device had been removed from the machine. Based on the policy of protecting workers from attempts to evade safety responsibility, the Court has construed "removal" to include failure to install an available safety device, bypassing a safety device, and failure to maintain a safety device. Co-employees with supervisory or safety responsibilities may be held liable if they knew or should have known that a safety guard or safety device had not been installed, or had been removed or bypassed, or had been rendered dysfunctional by failure to maintain or repair it – knew or should have known, but did nothing about it. The Court is to be commended for interpreting this important safety provision in a way that disincentivizes lax attitudes towards important safety devices and guards on dangerous machines in the workplace.

ENDNOTES

1 We omit quotation and discussion of § 25-5-11(c)(3), willful intoxication, and (c)(4), willful violation of a safety rule after highly specific written notice of prior violation.

2 Note that this opinion improperly applies the (c)(1) standard of knowing that injury was substantially certain. Thus, even under that higher standard, the Court held that these allegations and this evidence of knowledge of the need for repair of the safety device were sufficient to present a jury question.