RECENT DECISIONS OF THE ALABAMA SUPREME COURT AND THE ALABAMA COURT OF CIVIL APPEALS

CIVIL LAW

SUMMER CONFERENCE FOR CIRCUIT JUDGES AND DISTRICT COURT JUDGES

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INDEX

A**NTI-TRUST-TRADE REGULATION -**

A LAW FIRM WAS A DEBT COLLECTOR FOR THE PURPOSES OF LIABILITY UNDER THE FAIR DEBT COLLECTION PRACTICES ACT

***REESE V. ELLIS, PAINTER, RATTERREE & ADAMS LLP*;**
678 F.3d 1211 (11th Cir. 2012)

SUMMARY:

Borrowers brought a putative class action lawsuit against a law firm that represented lender alleging that the firm's demand letter violated the Fair Debt Collection Practices Act. The United States District Court for the Northern District of Georgia dismissed the Complaint for failure to state a claim and the borrowers appealed.

HOLDINGS:

Circuit Judge Carnes held that

(1) the Complaint sufficiently alleged that the firm's dunning letter and enclosed documents were an attempt to collect a "debt," within the meaning of the Fair Debt Collection Practices Act ("FDCPA");

(2) the Complaint sufficiently alleged that the firm's dunning letter and enclosures were an attempt to "collect" borrowers' debt;

(3) the fact that the dunning letter relates to the enforcement of a security interest does not prevent it from also relating to the collection of the debt within the meaning of the FDCPA; and

(4) the Complaint plausibly alleged that the firm was a "debt collector" within the meaning of the FDCPA.

DISCUSSION:

The Reeses defaulted on a loan they had secured by giving the lender a mortgage on their property. A law firm representing the lenders sent the Reeses a letter and documents demanding payment of the debt and threatening to foreclose if they did not pay it. The Reeses then filed the class action lawsuit at issue.

The District Court found that the law firm was not a "debt collector" and that the letter and documents were not covered by Section 1692(e).

In the Dunning letter from the law firm was this disclaimer:

> **THIS LAW FIRM MAY BE ATTEMPTING TO COLLECT A DEBT ON BEHALF OF THE ABOVE REFERENCED LENDER.**

A second document sent was entitled **"NOTICE REQUIRED BY THE FAIR DEBT COLLECTION PRACTICES ACT**, 15 U.S.C. 1601 et. seq. as Amended."

The third document enclosed stated that **"This law firm is acting as the debt collector attempting to collect a debt."**

I. The Promissory Note is "Debt" within the plain meaning of _ 1692(a)(5)

Judge Carnes found that the Promissory Note is a "debt" within the plain language of Section 1692(a)(5). The Court then found that the letter from the Ellis Law Firm in the enclosed documents was "an attempt to 'collect' that debt". Further, documents disclosed that the law firm was acting as a debt collector in attempting to collect the debt; therefore, the notice was a communication related to the "collection of the debt" within the meaning of Section 1692(e).

II. Communications Regarding the Enforcement of a Security Agreement are Still Subject to the Fair Debt Collection Practices Act.

The Ellis firm argued that the letter and documents were not debt collection activity because the purpose was simply to inform the Reeses that Provident intended to enforce its right to the property through the process of non-judicial foreclosure.

Judge Carnes noted that the firm's argument wrongly assumed that a communication cannot have dual purposes. The Court refused to adopt the rule of the Ellis firm urged with the finding that any communication that attempts to enforce a Security Agreement regardless of whether it also attempts to collect the underlying debt is exempt from the provisions of Section 1692(e).

III. The Firm's History in Doing Extensive Debt Collection Established an Inference that the Firm was "Debt Collector" for the Purposes of the Statute

Finally, the Court found that the Complaint included enough factual content to allow a reasonable inference that the Ellis Law Firm is a "debt collector" because it regularly attempts to collect debts. The Complaint alleges in part that the year before the Complaint was filed, the Ellis firm had sent to more than 500 people "dunning notices" containing "the same or substantially similar language" to that found in the documents at issue.

The case was reversed and remanded.

ARBITRATION – **THE ARBITRATION AGREEMENT REFERENCED THE RULES OF THE AMERICAN ARBITRATION ASSOCIATION AND, THEREFORE, THE QUESTION OF ARBITRABILITY WAS FOR THE ARBITRATOR, NOT THE COURT.**

***Auto Owners Insurance, Inc. v. Blackmon Insurance Agency, Inc.*, 2012 WL 677526** (Ala.) (March 2, 2012).

SUMMARY:

An insurance agency brought a declaratory judgment action against insurance company seeking a judgment regarding the arbitrability of a dispute between the parties. An arbitration proceeding between Blackmon and Auto Owners was pending in Michigan. The insurance company moved to dismiss or compel arbitration. The trial court denied the motion and the insurance company appealed.

HOLDINGS:

Chief Justice Malone held that:

(1) The issue regarding whether the claim was subject to arbitration was to be decided by the arbitrator and

(2) The issue regarding venue was to be decided by the arbitrator.

The case was reversed and remanded with instructions. Justices Woodall and Parker concurred. Justice Murdock dissented.

DISCUSSION:

Blackmon signed a declaration as to the arbitrabiltiy of a dispute between Blackmon and Auto Owners as to which Auto Owners had already initiated an arbitration proceeding in Michigan. Auto Owners contended that the trial court did not have jurisdiction to rule on Blackmon's claims in that issues as to scope were pending in the Michigan arbitration proceeding.

The trial court denied Auto Owners' motion to compel arbitration and rejected Auto Owners contention that the trial court did not have subject matter jurisdiction to adjudicate Blackmon's declaratory judgment action.

I. The issue for the court was whether the dispute "arose from the relationship described in the arbitration clause," not whether the dispute arose out of the contract.

The court emphasized that whether the dispute arose from the contract containing the arbitration clause was not at issue but the issue was instead **"whether the dispute arose from**

the relationship described in the arbitration clause." *Thompson Tractor Co. v. Fair Contracting Co.*, 757 So. 2d 396, 399 (Ala. 2000).

Blackmon argued that the 2005 document he executed did not contain an arbitration provision and was a stand alone contract that did not incorporate the language of the 1995 agreement that did include an arbitration provision. The court resolved that issue by looking to the scope of the arbitration provision in the 1995 agreement.

II. The issue of scope and arbitrability was for the arbitrator to decide in that the agreement incorporated the procedures of the American Arbitration Association and the AAA rules state that the arbitrator has the power to rule on his or her on jurisdiction, including any objections as to the existence, scope or validity of the arbitration agreement.

The court noted that the 1995 agreement expressly incorporated the "procedure of the American Arbitration Association" particularly as to Rule R-7(a) of the AAA commercial arbitration rules which provides as follows:"

"The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement."

Therefore, the court found that whether any alleged breach by Blackmon under the disputed 2005 document was within the scope of the arbitration provision was to be decided by the arbitrator in that the court had previously held on the basis of pertinent federal authority" that "an arbitration provision that incorporates rules that provide for the arbitrator to decide issues of arbitrability clearly and mistakenly evidences the parties' intent to arbitrate the scope of the arbitration provision." *CitiFinancial Corporation v. Peoples*, 973 So. 2d 332, 340 (Ala. 2007).

III. As to whether or not the 2005 document that did not contain an arbitration agreement was encompassed within the 1995 agreement that did include an arbitration agreement was for the arbitrator to decide, not the trial court.

IV. The only issue before the trial court was whether it was "arguable" that the 2005 document was encompassed by the 1995 agreement and it clearly was arguable that that was the case; therefore, the court should have granted the motion to compel arbitration and either stayed the proceedings and dismissed the case.

The only task to be decided by the trial court was whether it was "arguable" that the 2005 document was encompassed by the 1995 agreement.

In that it clearly was arguable, the court found that the trial court should have granted Auto Owners' motion to compel arbitration and either issued a stay of the proceedings pending arbitration or dismissing the case.

Justices Stuart, Bolin, Main, and Wise, concurred.

Justices Woodall and Parker concurred in the result.

D**issent – Murdock found that the contract issue was to be decided by the trial court and also dissented as to the court's use of the term "arguable."**

Justice Murdock filed a dissenting opinion.

Justice Murdock contended that a disagreement about whether an arbitration clause in a concededly binding contract applied to a particular type of controversy was for the court, not the arbitrator.

Justice Murdock also took issue with the court's analysis of the issue of whether or not the claim in regarding to scope was "arguable."

ARBITRATION – CLAIM FOR WRONGFUL DEATH WAS SUBJECT TO ARBITRATION AND THE DECISION AS TO ARBITRABILITY WAS TO BE DECIDED BY THE ARBITRATOR, NOT THE TRIAL COURT.

***Wells Fargo Bank v.* Chapman, 2012 WL 593279 (February 24, 2012).**

SUMMARY:

A father brought an action individually and is administrator of his daughter's estate against the bank and its employee for a wrongful death, breach of contract, fraudulent misrepresentation, fraudulent suppression, and negligence and wantonness alleging that the bank and the employee wrongfully released funds to his daughter who used the funds to buy illegal narcotic drugs and subsequently died of a drug overdose.

The trial court denied the motion to compel arbitration and the bank and its employee appealed.

HOLDINGS:

In a *Per Curiam* opinion, the court held that:

(1) The original bank account regulations applied – rather than those of the successor banks;

(2) The father was required to submit his claim to arbitration;

(3) The issue of whether the arbitrator had the authority under the arbitration agreement to arbitrate was for the arbitrator to decide; and

(4) The claims against the Bank employee must be arbitrated.

The case was affirmed in part, reversed in part and remanded with instructions.

DISCUSSION:

The bank account at issue was opened in **May 2003** when the decedent was approximately 15 years old. She opened a checking account with SouthTrust that was a multiple party with survivorship account and her father and she signed the signature card which included an arbitration provision. SouthTrust merged with Wachovia and Wachovia too had arbitration requirements. At some point after the decedent's death, Wachovia merged with Wells Fargo.

Chapman held a CD in his name as "custodian" for his daughter with Wachovia. On **April 2, 2009**, Chapman went to the bank branch where the individual defendant worked and spoke with her about his child's ability to access the funds. Chapman was advised the banker that his daughter could not access the funds without his signature. Chapman advised the banker that if his daughter received the funds it would place her in severe danger of either injury or death. Despite these assurances, on that day the decedent who was 21, redeemed the CD, purchased drugs and died the day after.

I. The account regulations of SouthTrust, Wachovia, and Wells Fargo contained an arbitration provision.

In support of the motion to compel arbitration, the defendants produced account regulations of SouthTrust, Wachovia, and Wells Fargo. Each of the regulations contained an arbitration clause. Chapman argued that neither his daughter nor he had been advised of the mergers of the respective banks or changes to the account regulation and that the individual banker was not entitled to rely on the arbitration agreement.

Chapman contended that he did not sign the original SouthTrust card but the court noted that the evidence disputed that. Therefore, the court found that Chapman too was bound by the arbitration provisions in the SouthTrust agreement.

II. The fact the decedent was a minor at the time of the execution of the arbitration agreement was not at issue since she did not disaffirm the contract during her minority.

Chapman argued that the arbitration agreement was not enforceable because his daughter was a minor when she opened the account. The court agreed that the decedent was entitled to disaffirm her contract during her minority within a reasonable time after she reached the age of majority. *Standard Motors, Inc. v. Raue*, 37 Ala. App. 211, 65 So. 2d 829 (1953). She at no time did that prior to her death.

III. The SouthTrust agreement was not superseded by subsequent agreements; therefore, the fact that Wells Fargo's regulations had never been provided was not at issue.

The court did agree that Wells Fargo and the banker had never provided copies of the Wells Fargo regulations but did not accept Chapman's argument that the original SouthTrust agreement was superseded by agreements of the subsequent banks.

The court relied on the case of *SouthTrust Bank v. Williams*, 775 So. 2d 184 for the proposition that "amendments to the conditions of unilateral contract relationships [like those between a bank and its customers] with notice of the changes conditions are not inconsistent with the general law of client contracts." 775 So. 2d at 190-191.

Mutual assent to the terms of a contract containing an arbitration agreement may be inferred from other conduct of the parties or example having been mailed the contract, having received the contract, having been designated as a party to the contract, and having benefited from or having relied upon other terms of the contract. *Ex parte Rush*, 730 So. 2d 1175, 1178

(Ala. 1999). The court agreed that there was no evidence in the record regarding the provision of notices of the various changes in regulations over the years to the decedent or to Chapman but despite that found that the original SouthTrust arbitration agreement controlled.

IV. The wrongful death claim was within the scope of the arbitration agreement since the father signed the original SouthTrust arbitration agreement.

As to Chapman's contention that the wrongful death claim was not within the scope of the arbitration agreement, the court disagreed relying on *Entrekin v. Internal Medicine Associates of Dothan,* 764 F. Supp 2d. 1290, 1294-96 (M.D.Ala.2011). In *Entrekin,* the court did find that the wrongful death action was not subject to the arbitration agreement because the right to sue for wrongful death came into effect only after the death of the decedent.

The Alabama Court of Civil Appeals, however, noted that the Alabama Supreme Court had found differently and had found that arbitration agreements were enforceable in wrongful death claims when the personal representatives had themselves been signatory to the arbitration agreements. *Carraway v. Beverly Enterprises, Alabama, Inc.*, 978 So. 2d 27 (Ala. 2007); and *Briarcliff Nursing Home, Inc. v. Turcotte*, 894 So. 2d 661 (Ala. 2004).

V. In that the arbitration agreement provided for the rules of the American Arbitration Association, the questions as to scope and arbitrability were to be decided by the arbitrator, not the court.

As to whether the CD and issues regarding it were within the scope of the arbitration agreement, the court noted that the arbitration agreement provided that "arbitration will be administered by the American Arbitration Association ('AAA') under its arbitration rules for the resolution of consumer-related disputes." The bank argued that under those rules, the arbitrator was empowered "to rule on his or her own jurisdiction including any objections with respect to the evidence, scope, or validity of the arbitration agreement." Therefore, the court also relying on *CitiFinancial Corporation, LLC v. Peoples,* 973 So. 2d 332 (Ala. 2007) in which the Alabama Supreme Court decided an almost identical issue, the court found that because the arbitration agreement incorporated the rules of the AAA meant that the arbitration provision incorporated rules that provided for the arbitrator to decide issues of arbitrability "clearly and unmistakably evidences the parties' intent to arbitrate the scope of the arbitration provision." 973 So. 2d at 340.

VI. The claims against the individual banker were subject to arbitration because she was acting within the line and scope of her employment and not out of wholly personal motives or desires.

As to Chapman's contentions that the individual banker was not entitled to arbitrate the claims against her, the court found that a non-signatory employee is entitled to rely on the arbitration agreement of his or her employer when the employee is sued for conduct occurring in the line and scope of his or her employment. *Monasanto Company v. Benton Farm,* 813 So. 2d 867, 874 (Ala. 2011).

The court found that nothing that the banker said or could have said "emanated from wholly personal motives of [the banker] and was committed to gratify wholly personal objectives

or desires of [the banker]." *Hendley v. Springhill Memorial Hospital*, 575 So. 2d 547, 550 (Ala. 1990). The court also cited to the opinion of the Alabama Supreme Court in *Joe Hudson Collision Center v. Dymond*, 40 So. 3d. 704, 712 (Ala. 2009) in which the court found that a supervisor who allegedly assaulted the plaintiff was able to arbitrate the claims against him because the complaint described the supervisor as "acting in the line and scope of his employment."

The court reversed the judgment of the trial court and remanded the case to either be stayed or dismissed.

Judge Thompson, Pittman, Bryan, Thomas, and Moore concurred. Concurred in this *per curiam* opinion.

CIVIL PROCEDURE –

A PARTY OBJECTING TO EVIDENCE AND AN AFFIDAVIT SUBMITTED IN SUPPORT OF A MOTION FOR SUMMARY JUDGMENT MUST BOTH FILE A FORMAL OBJECTION AND A MOTION TO STRIKE OR THE EVIDENCE WILL BE ADMISSIBLE.

Ex Parte Secretary of Veterans Affairs, 2012 WL 415479 (Ala.) (February 10, 2012)

SUMMARY:

Mortgagees that had acquired title to home via foreclosure sued the mortgagor seeking ejectment. The trial court entered summary judgment for the mortgagee.

The court of civil appeals reversed and remanded. The mortgagee petitioned for a writ of certiorari which was granted.

HOLDINGS:

Justice Bolin held that the mortgagor waived his objection regarding the trial court's consideration of affidavit and unsworn, uncertified, and unauthenticated documents in support of the mortgagee's motion for summary judgment.

The case was reversed and remanded.

DISCUSSION:

An assistant vice president of the Bank of America, Hiatt, executed an affidavit regarding his "personal familiarity" with the account at issue. Along with that affidavit for the foreclosure, the secretary submitted an uncertified copy of the mortgage and uncertified copies of the subsequent assignments of the mortgage, an uncertified copy of the auctioneer's deed and an unauthenticated copy of an affidavit by an publisher by Alabama Messenger, and an unauthenticated copy of a letter from an attorney representing the secretary to the owners demanding that the owners vacate the premises.

I. The Court of Civil Appeals held that Frank was not obligated to move to strike the documents because he had objected to their inadmissibility in his "response to plaintiff's motion for summary judgment."

On appeal to the Court of Civil Appeals, Frank argued that Hiatt's affidavit did not comply with Rule 56(e) because he did not state how he had acquired personal knowledge of the information in the affidavit and was competent to provide the testimony and nor were certified sworn documents submitted.

The secretary contended that Frank had waived that argument because he did not move to strike the documents at issue.

The Court of Civil Appeals reversed the judgment relying on *Ex parte Elba General Hospital & Nursing Home, Inc.* 828 So. 2d 308 (Ala. 2001) in which the court found that an objection to a trial court's consideration of unauthenticated materials submitted in support of a summary judgment motion **may not be in any particular form.**

The Court found that a party challenging the admissibility of an affidavit and inadmissible evidence must object to the evidence and also move to strike it. Citing to *Ex parte Diversey Corp.*, 742 So. 2d 1250, 1253-54 (Ala. 1999); *Elizabeth Holmes, LLC v. Cato*, 968 So. 2d 1, 4 (Ala. 2007); and *Ware v. Deutsche Bank National Trust Company*, 75 So. 3d 1163 (Ala. 2011).

The Court held that objecting to evidence is not sufficient, and that the objecting party must also file a motion to strike. As a result, Frank waived his right to object to the inadmissible evidence.

The case was reversed and remanded.

Justices Woodall, Stuart, Main and Wise concurred.

Justices Parker, Murdock, and Shaw dissented with Murdock writing.

Justice Murdock wrote that the additional requirement of filing a motion to strike when a proper objection had been made was "unnecessary and overly formalistic." Murdock further urged that the procedure also was not consistent with the language of the Alabama Rules of Civil Procedure, Alabama Precedent, and the Majority of Analogous Federal Cases.

Justice Murdock also cited extensively to other case law and Alabama and Federal Practice and Procedure Treatises and noted that "when objections are made to evidence other than affidavits, the authorities are equally, if not more, clear, that a motion to strike is unnecessary."

CIVIL PROCEDURE COSTS --

-UNDER ALABAMA'S LITIGATION ACCOUNTABILITY ACT THE COURT MUST SET OUT SPECIFIC FACTUAL OR LEGAL SUPPORT OF THE AWARD AND COMPLIANCE WITH THE ACT.

***Wooten v. Morton*, 2012 WL 1760227 (Ala.Civ.App.) (May 18, 2012)**.

SUMMARY:

At issue in the case was a dispute regarding Executor Deeds which the trial court found were to be corrected to align with the parent's Will and a finding that the Deeds to Grantees were null and void. The trial court further ordered the husband to pay attorney's fees.

The grandchildren sought to vacate the notice to move for additional attorney's fees and were awarded additional fees. After transfer from the Supreme Court, the grandchildren moved to dismiss the appeal.

HOLDINGS:

Judge Thomas held as follows:

1. **The husband had standing to appeal from the award of attorney's fees against him, notwithstanding his waiver or lack of standing as to other appellate claims.**

2. **The remand of the attorney fee award was required in order for the trial court to state its findings in accordance with the Alabama Litigation Accountability Act.**

DISCUSSION:

Joyce Wooten was the Executrix of her father's Estate until she became ill. Her husband, Paul Wooten, was the Successor Executor. Paul, as Executor, executed two (2) Executor's Deeds disposing of the Estate's property. One Deed conveyed to his wife 166.8 acres that had been purportedly bequeathed to Joyce in her father's Will. This property was conveyed in Fee Simple. The second Executor's Deed conveyed to Joyce a Life Estate in another parcel, and the remainder was conveyed to the surviving grandchildren.

On the same day, March 2, 2004, as the execution of the two (2) Executor's Deeds, via Power of Attorney for his wife, Paul conveyed the 166.8 acres to his brother and sister-in-law, and also, conveyed to them the mineral rights.

The grandchildren did not learn of the transfer of the property until 2006. Paul was made his wife's Conservator in January, 2008, but his rights as Conservator were limited in that he could not "convey, transfer, mortgage, lease, or otherwise, encumber any real estate owned by Joyce."

In December, 2008, Paul sued the grandchildren individually, as the Representative of the Horton's Estate, and as the Conservator of his wife's Estate. His brother and sister-in-law were also plaintiffs in the lawsuit.

The plaintiffs sought a declaration of the rights of the various parties under the Will and under the Executor's Deeds executed by Paul.

The trial court entered an Order in 2010 declaring that the Executor's Deeds had to be corrected to align with the Will and declaring that the Deeds to Paul's brother and sister-in-law were null and void. The 2010 Order reserved jurisdiction over the attorney fee request made by the grandchildren.

Three (3) months prior to the trial court's July, 2010 Order, the Probate Court had removed Paul as his wife's Conservator. In August, a Successor Conservator filed a Rule 59 motion seeking to vacate the trial court's July, 2010 Order. The trial court denied the motion because no motion to substitute Tate, the new Conservator, had been made pursuant to Rule 25(c), ARCP.

The trial court entered a Supplementary Order declaring that the Deeds had to be corrected to conform with the Will and that the Deeds to the brother and sister-in-law were null and void. This Order also ordered Paul to pay Ten Thousand Dollars ($10,000.00) toward the grandchildren's' attorneys' fees. No appeal was taken from this October, 2010 Order.

In June, 2011, Paul filed a Rule 60(b) Motion for Relief for numerous reasons. Paul argued that his wife was not adequately represented by Paul at the time of the entry of the Orders.

In September, 2011, the trial court entered a Judgment denying Paul's Motion to Set Aside the Orders and substituted the new Conservator as next friend of Joyce. The trial court taxed the costs of the action to Paul and ordered that he pay an additional Fourteen Thousand Dollars ($14,000.00) toward the grandchildren's' attorneys' fee.

In response to Paul's appeal, the grandchildren contended that he lacked standing to assert the claims on appeal.

I. The court's ruling in regard to standing.

The court noted that it was not convinced that Paul would have standing; however, the court affirmed the trial court's Order removing Paul as next friend.

As to the other aspects of the trial court's judgment, the court concluded that the grandchildren were correct in contending that Paul lacked standing to prosecute the appeal.

II. The award of attorneys' fees under Alabama's Litigation Accountability Act.

No party characterized the attorney fee award as one being made pursuant to the Alabama Litigation Accountability Act. Based on the claims, the court concluded that the grandchildren did seek an award of attorneys' fees pursuant to that Act.

The court found that the trial court failed to comply with the requirements imposed on it by the Alabama Litigation Accountability Act. Therefore, the court reversed as to the award of attorneys' fees and remanded the case for the trial court to set out specific factual or legal support for the award in compliance with the Alabama Litigation Accountability Act and pursuant to ***Pacific Enterprises Oil Co. v. Howell Petroleum Corp.*, 614 So.2d 409, 418 (Ala. 1993).**

CIVIL PROCEDURE – AS A MATTER OF FIRST IMPRESSION

"TO MY KNOWLEDGE AND BELIEF" DID NOT MEET THE PERSONAL KNOWLEDGE REQUIREMENT FOR THE ADMISSIBILITY OF AFFIDAVIT TESTIMONY.

***Howard Ross v. West Wind Condominium,* 2012 WL 1560235 (Ala. Civ. App.) (May 4, 2012).**

SUMMARY:

After a condo association conducted a foreclosure sale on four units owned by an owner who allegedly defaulted on association dues, and then sold the four units to three subsequent purchasers, the unit owner brought an action against the association and the purchasers to set aside the foreclosure sales and for redemption of units.

The trial court granted the purchasers' motion to strike the owners' second amended complaint and entered summary judgment in favor of the two purchasers and the association. Claims against the third purchaser were disposed of by a default judgment. The owner appealed the summary judgment in favor of the first purchaser and the association.

HOLDINGS:

Judge Bryan held that:

1. As a matter of apparent first impression, summary judgment affidavits stating that facts recited therein were true "to my knowledge and belief" did not meet the personal knowledge requirement;

2. In light of the owners' attorneys' apparent authority to receive notice, advance notice of foreclosure was reasonable; and

3. The trial court was warranted in striking the owners' second amended complaint because the claims were the subject of a final judgment thereby barring the owners from prosecuting those claims.

CIVIL PROCEDURE -- **STANDING - THE LOAN SERVICING COMPANY DID NOT HAVE "LEGAL TITLE" TO THE PROPERTY AT THE TIME OF FORECLOSURE UNDER §6-6-280(b).**

Sturdivant v. BAC Home Loans Servicing, **2012 WL 6275697 (December 16, 2011)**

SUMMARY:

A home loan servicing company brought an ejectment action against a mortgagor. The trial court granted the loan servicing company's motion for summary judgment and ordered that a writ of possession be issued. The mortgagor appealed.

HOLDINGS:

Judge Thompson held that the loan servicing company lacked standing to bring an ejectment action against the mortgagor.

DISCUSSION:

I. At issue was the standing of the loan servicing company to maintain the foreclosure action.

On appeal of the trial court summary judgment, Sturdivant contended that the summary judgment in favor of BAC was improper because BAC failed to make a *prima facie* showing that it had the authority to and did validly foreclose on the property.

II. The Issue of Standing Cannot be Waived.

BAC countered that Sturdivant did not raise that issue before the trial court and therefore could not raise that assertion on appeal.

The Court disagreed finding that the argument of Sturdivant implicated the issue of standing which involved whether the court had subject matter jurisdiction to consider BAC's ejectment action. Citing to *Cadle Company v. Shabani*, 950 So. 2d 277, 279 (Ala. 2006).

The issue of lack of standing may not be waived and an argument concerning standing may be asserted for the first time on appeal. *RLI Insurance Company v. MLK Avenue Redevelopment Corporation*, 925 So. 2d 914, 918 (Ala. 2005).

III. The Loan Servicing Company Did Not Have Legal Title to the Property at the Time of the Foreclosure Required under §6-6-280(b) Because at the Time of the Foreclosure It Did Not Hold the Mortgage.

BAC's rights arose under §6-6-280(b), *Ala. Code*. 1975 which provides in part as follows:

"An action for the recovery of land or the concession thereof and the nature of an action and ejectment may be maintained without a statement of any lease or demise to the plaintiff or ouster by casual or nominal ejector, and the complaint is sufficient if it alleges that the plaintiff was possessed of the premises or **has the legal title thereto…."**

Sturdivant argued that BAC lacked the authority to foreclose because at the time it initiated the foreclosure proceedings, it did not hold the mortgage and therefore had no valid right to sell the property at foreclosure.

With regard to the authority to sell mortgage property at foreclosure, §35-10-1, *Ala. Code* (1975) provides that "where power to sell lands is given to the grantee and any mortgaged, or other conveyance intended to secure the payment of money, the power is part of the security, and may be executed by any person or the personal representative of any person, who, by assignment or otherwise becomes entitled to the money thus secured. …"

Section 35-10-9, *Ala. Code* (1975) further provides that "all sales of real estate, made under powers contained in mortgages or deeds of trust contrary to the provisions of [statutory law governing the power of sale pursuant to the terms of a mortgage], shall be null and void, notwithstanding any agreement or stipulation to the contrary."

IV. The Court contrasted the cases of Berry (a case in which there was an irregularity in the process) and Cadle (a case in which standing and legal title was at issue).

The court distinguished *Berry v. Deutsch Bank National Trust Co.*, 57 So. 3d 142 (Ala. Civ. App. 2010) finding that "in this case, the issue is not whether there has been some irregularity that creates a factual question involving the proprietary or fairness of the foreclosure proceedings or the foreclosure sale, as was the issue in *Berry*.

Rather, this case is similar to *Cadle Co. v. Shabani*. In that case the cattle company claimed it held title and the right to a possession of the property, but the evidence indicated that the cattle comp any did not have title to the property through which it could also claim a right to possession of the property."

The court vacated the trial court's summary judgment and dismissed the appeal.
Judge Moore concurred specially with which Thomas joined.

V. The Dissenting Judges Contended That the Case Was Distinguishable from *Cadle* Because in *Cadle* the Party Had No Paper Title to the Property and in the Present Case the Loan Servicing Company Had a Foreclosure Deed.

Judge Pittman and Judge Bryan dissented.

Judge Pittman in dissenting disagreed that the case presented an issue of standing. He contended that in *Cadle Company v. Shabani*, Cadle Company had no paper title to the property. To the contrary, BAC produced a foreclosure deed which Judge Pittman contended satisfied the burden of ownership.

CONTRACTS --

REAL ESTATE CONTRACTS FOR THE SALE OF USED PROPERTY THAT INCLUDE THE LANGUAGE "AS IS" PRECLUDE FRAUD CLAIMS

Benton v. Clegg Land Co. Ltd, (Ala. Civ. App.) **2012 WL 2362628 (June 22, 2012)**

SUMMARY:

The purchaser of real estate sued the seller and the seller's real estate agent and the seller's real estate broker claiming various forms of fraud in regard to alleged misrepresentation that a lake on property was low due to the drought and there was no problem with the lake.

Trial court entered summary judgment for the defendant and the purchaser's appealed.

HOLDINGS:

Judge Bryan held that:

(1) the Defendants Did Not Have a Duty to Disclose to the Purchasers the Existence of Alleged Defect in the Lake Even Though the Plaintiffs Inquired as to the Condition of the Lake.

(2) the "As Is" Clause in the Real Estate Contract Barred the Purchasers' Misrepresentation and Suppression Claim; and

(3) the Purchasers Did Not Establish a Breach of Contract Claim.

DISCUSSION:

I. The Seller's Knowledge of the Defect Was Not a Bar to the Defense of *Caveat Emptor*.

The purchasers contended that their claims were not barred by *caveat emptor* because the sellers and agents knew that there was a defect in the lake, and the defect was not readily discoverable which created a duty to disclose the defect. Further, the purchasers had specifically inquired as to the condition of the lake.

II. The only exception to the rule of *caveat emptor* in the sale of used real estate is if there was a fiduciary relationship causing a duty to disclose.

Further they contended that one of the purchasers did not sign the contract, they had not drafted a contract, they had not had access to the property between the date of the purchase and the date of the closing. Relying on *Moore v. Prudential Residential Services Partnership*, 849 So. 2d 914, 927 – 25 (Ala. 2002), the court noted that there were few exceptions to the rule of

caveat emptor in the sale of the used real estate. Those exceptions were under § 6-5-102, *Ala. Code* 1975, if the seller had a fiduciary relationship with the buyer and therefore a duty to disclose or if the buyer specifically inquired about material condition then the seller had a duty to disclose known defects. The same duty applied, as well, to the selling agent.

In affirming the ruling of the trial court, the court relied on the cases of *Moore, Leatherwood, Inc. v. Baker*, 619 So. 2d 1273 (Ala. 1992); *Haygood v. Burl Paunders Realty, Inc.*, 571 1086 (Ala. 1990); and *Massey v. Weeks Realty Co.*, 511 So. 2d 171 (Ala. 1987) and the more recent case of *Teer v. Johnston*, 60, So. 3d 253 (Ala. 2003).

III. The Fact That the Sellers Told the Buyers That the Lake Problems Related to the Drought Still Did Not Create a Claim since the Purchases Thereafter Signed an as Is Contract.

The court noted that after the statements of the sellers regarding the problems with the lake being related to the drought, the purchasers then signed an "as is" contract which barred the fraud claims.

The court further found that the "as is" provision barred the negligence claims, the breach of contract claims, the unjust enrichment claim. They further denied the bad faith claim in that the appellant failed to argue that issue on appeal.

IV. The Denial of the Rule 56(f) Motion Would Not Support a Reversal in That the Discovery Sought Would Not Have Defeated the Motions for Summary Judgment and Was Cumulative.

In regard to the denial of the Rule 56(f) motion, the court affirmed that as well because the evidence sought would have been cumulative, because the subjects to be addressed would not have defeated the summary judgment motions and because of the plaintiffs' delay in seeking additional affidavit testimony.

CONTRACTS- NON PARTY TO CONTRACT CAN CLAIM ILLEGALITY AS A DEFENSE

***White Spunner Construction v. Construction Completion Company, LLC,* 2012 WL 2362637 (June 22, 2012)**

SUMMARY:

Subcontractor brought an action against a general contractor and its surety alleging that the contractor had failed to pay for labor and materials provided by the subcontractor. The trial court granted the subcontractor a summary judgment but dismissed the bad faith and fraud claims against the surety**.**

HOLDINGS:

On cross appeals, Justice Stuart held that the subcontractor's agreement with a third party for the provision of labor on a construction project was illegal because the third party was an unlicensed contractor which precluded the general contractor's liability for alleged payments owed to the subcontractor**.**

DISCUSSION:

The general contractor and the surety appealed the summary judgment and the award of attorneys' fees in favor of the subcontractor, CCC. CCC alleged that the general contractor, White Spunner ("WS"), failed to pay it for labor and materials provided on a public works project at Auburn University. CCC argued that the trial court erred in dismissing its bad faith and fraud claims against Hartford which issued payment bond.

CCC subcontracted with Buena Vista Construction ("Buena Vista"), a Florida company. Buena Vista provided the workers that CCC needed to fulfill its agreement with WS. The Buena Vista workers wore CCC Uniforms on the site and were at all times controlled by the owner of CCC and employee of CCC. Buena Vista was not licensed in Alabama. A dispute arose as to what WS was to pay CCC. CCC quit work on the project when it was owed a balance of $698,468.93. CCC then sent a letter to Hartford demanding payment under the payment bond issued pursuant to Alabama's Little Miller Act.

In its initial Complaint, CCC named WS, Hartford, and Buena Vista. In addition to demanding the monies owed by WS and, therefore, Hartford, CCC also disputed the amounts claimed by Buena Vista in invoices it had submitted to CCC and set a declaratory judgment setting the amount owed to Buena Vista.

CCC moved for a summary judgment against Buena Vista arguing that it was an unlicensed contractor at the time it performed the work for CCC and accordingly it could not

recover any amounts allegedly owed to it by CCC because their contract was void. Buena Vista contended that it had not acted as a contractor but only provided laborers to CCC but it had never engaged in construction activities, had no supervisory duties, and never acted as superintendent on the project. CCC and Buena Vista reached an agreement and filed a joint stipulation of dismissal.

WS and Hartford objected to the dismissal. WS later amended its counterclaim to seek a declaratory judgment regarding the rights of the parties in light of the alleged illegal and unenforceable contract between CCC and Buena Vista.

The trial court dismissed WS's counterclaim seeking a declaratory judgment as to the rights of the parties in light of the alleged illegal contract between CCC and Buena Vista. The trial court also dismissed CCC's bad faith failure to pay and fraud claims against Hartford.

On May 11, 2011, the trial court entered a final judgment in favor of CCC and against WS and Hartford reaffirming the $825,931.20 in damages awarded to CCC and awarding CCC an additional $289,075.90.

WS and Hartford contended that CCC could not recover the monies owed because Buena Vista was an unlicensed contract and the contract between Buena Vista and CCC was illegal and void thereby depriving CCC of the right to recover the monies owed CCC as well. CCC disputed that its contract with Buena Vista was illegal but also contended that WS and Hartford had no standing to challenge the status of that contract.

The court relied on its opinion in *Bankers & Shippers Insurance Company of New York v. Blackwell*, 255 Ala. 360, 51 So. 2d 498 (1951) for the proposition that **"the party to the legal contract that was a stranger to the illegal contract could avoid making payment to the party involved in both the legal and illegal contracts – notwithstanding the fact that its own contract with that party was valid – if a later party cannot 'establish [its] case without reference to or in reliance upon [the alleged] illegal act or transaction"**. 255 Ala. at 366, 51 So. 2d at 502.

In regard to whether or not the contract between CCC and Buena Vista was illegal, the trial court found that as in that Buena Vista was not directing the activities of its loaned workers that it was not required to be a licensed contractor under §34-8-1. WS and Hartford disagreed contending that (1) the language of §34-8-1, Ala. Code 1975 is unambiguous and contains no "labor broker" exception and (2) there is a genuine issue of material fact as to whether Buena Vista acted as a mere labor broker based on the level of involvement of Buena Vista and CCC in the day to day operations.

The Court reversed and adopted the rationale of the Supreme Court of West Virginia and found that Buena Vista was engaged in general contracting and violated Alabama law by failing to obtain the necessary license. Chief Justice Malone, and Justices Shaw and Wise concurred. Justice Parker concurred in the result.

MEDICAL LIABILITY - **LIABILITY RELATED TO POST OPERATIVE CARE**

EVIDENCE - **IN DIRECT EXAMINATION MEDICAL EXPERT COULD REFER TO TREATISES ON WHICH HE HAD NOT RELIED TO FORM HIS OPINIONS**

***Hrynkiw v. Trammell,* 2012 WL 1650358 (Ala.)(May 11, 2012)**.

SUMMARY:

Patient and his wife brought a medical malpractice and loss of consortium claims against the neurosurgeon and the professional corporation in which he was a member relating to fusion surgery on his spine and post operative care.

The trial court entered judgment on the jury's verdict awarding compensatory damages of $1.65 Million Dollars to the patient and $500,000.00 to the wife.

HOLDINGS:

Justice Bolin affirmed the judgment and found that:

(1) the evidence established proximate causation of medical malpractice claim relating to post operative case and

(2) under Alabama's version of the hearsay exception for learned treatises, the patient's medical expert could refer to medical treatises during his direct examination even though the expert had not relied on any treatises to form his opinion regarding the defendant neurosurgeon's actions.

DISCUSSION:

Dr. Hrynkiw performed 2 surgeries on Thomas' spine. One surgery was performed on July 15, 2005 and a second surgery was performed on July 25, 2005. After the first surgery, Thomas immediately demonstrated symptoms of Cauda Equina Syndrome which is a compressive neuropathy involving multiple nerve roots affecting motor, sensory, bowel, bladder, and sexual function. After the second surgery, Thomas' condition did not improve and he is partially disabled.

In the lawsuit filed by Thomas and his wife, they alleged a violation of the Alabama Medical Liability Act and contended that Dr. Hrynkiw negligently diagnosed, cared for, and treated Thomas by negligently performing the surgery on July 15, and by performing negligent post operative care. Barbara Thomas asserted a claim for loss of consortium.

A jury found in favor of Mr. Thomas in the amount of $1.65 Million Dollars and Mrs. Thomas in the amount of $500,000.00.

The burden of proof for a medical malpractice claim is

(1) the appropriate standard of care;

(2) the healthcare provider's deviation from that standard; and

(3) a proximate causal connection between the healthcare providers' act or omission constituting the breach and the injury sustained by the plaintiff. *Giles v. Brookwood Health Services, Inc*., 5 So.3d 533, 549 (Ala. 2008).

A. ISSUES ON APPEAL.

Hrynkiw raised two issues on appeal.

(1) Whether the trial court erred by not granting Hrynkiw's judgment as a matter of law on the Trammells' claim relating to Dr. Hrynkiw's post operative care because the Trammells failed to present substantial evidence that any of Thomas' injuries were probably caused by Dr. Hrynkiw's post operative care; and

(2) Whether the trial court erred in allowing hearsay testimony under the learned treatise exception when the foundation requirements of 803(18) Alabama Rule of Evidence were not met.

The appeal did not relate to the doctor's negligence of performing the original surgery on July 15, 2005.

B. TESTIMONY OF PLAINTIFF'S EXPERT, DR. HASH, REGARDING THE POST OPERATIVE CARE

1. HASH TESTIFIED THAT DR. HRYNKIW DID NOT RESPOND TO CLEAR SIGNS OF DISTRESS DURING POST OPERATIVE CARE.

Dr. Hrynkiw did not examine Thomas following the first surgery even though Thomas was exhibiting classic signs and symptoms of Cauda Equina Syndrome ("CES"). Dr. Hash described CES as a medical emergency requiring prompt action by the physician to relieve the compression. Despite being notified of the symptoms being experienced by Thomas, Dr. Hrynkiw never performed a physical or neurological examination of Thomas following the first surgery.

Dr. Hash testified that Dr. Hrynkiw in violation of the applicable standard of care

performed the original surgery in a manner that compressed the nerves of the Cauda Equina resulting in a need for immediate surgery. Hash testified that based on a reasonable medical probability, Dr. Hrynkiw's ten (10) day delay in performing a second surgery on Thomas resulted in a bad neurological outcome and that his outcome probably would have been substantially and significantly improved if it had occurred within forty-eight (48) hours.

2. WHETHER THE TESTIMONY OF THE EXPERT IN WHICH HE EXPLAINED HIS INCONSISTENT DEPOSITION TESTIMONY WAS CREDIBLE WAS A QUESTION FOR THE JURY.

In regard to his deposition responses to certain questions, counsel for the Trammells clarified that his response was intended to mean that a doctor could not guarantee a better result not that it was speculative to say that there was a probability of a better result.

In regard to the expert's testimony, the court noted that the jury determines the credibility of the expert witnesses and the weight given to their opinions. Therefore, it was for the jury to decide whether it believed Dr. Hash's explanation of his earlier testimony in his deposition.

3. THE EXPERT'S RELIANCE ON STATISTICAL EVIDENCE DID NOT RENDER HIS TESTIMONY SPECULATIVE, AND IT WAS UNDISPUTED THAT TRAMMELL SUFFERED FROM CES.

Hrynkiw contended that the testimony was speculative because Dr. Hash stated that his testimony was based on statistical evidence. The court distinguished the case relied on by Hrynkiw, *Shanes v. Kiser*, 729 So.2d 319 (Ala. 1999).

In *Shane*, the failure medically to determine the actual cause of the mother's death was fatal to the medical malpractice action. Therefore, the jury in *Shane* would have had to speculate as to the cause of the death. In the present case, it is undisputed that Thomas Trammell suffers from CES. The court found that Dr. Hash's testimony that the decompression of the compressed Cauda Equina within forty-eight (48) hours probably resulted in a significant improvement establishes merely that his opinion was based on a reasonable probability of medical certainty, not absolute medical certainty. It was not necessary for Dr. Hash to testify that Thomas would not suffer injury from CES if decompression surgery had been performed within forty-eight (48) hours of the original injury.

4. THE EXPERT'S TESTIMONY REGARDING TREATISES WAS PERMITTED EVEN THOUGH HE DID NOT RELY ON THEM TO FORM HIS OPINION. THEY SIMPLY BOLSTERED HIS OPINION THAT PROMPT TREATMENT WOULD HAVE PLACED THE PATIENT IN A BETTER POSITION.

Hrynkiw then argued that Hash's testimony amounted to evidence of a mere loss of change to achieve a better medical outcome.

5. THERE IS NO RECOVERY FOR LOSS OF ANY CHANCE OF RECOVERY.

Citing to *McAfee v. Baptist Medical Center*, 641 So.2d 265 (Ala. 1994). The court noted that there is no recovery for the loss of any chance of recovery resulting from medical malpractice. Instead, when there is an issue of dilatory diagnosis in treatment, there must be sufficient evidence that prompt diagnosis and treatment would have placed the patient in a better position than she was in as a result of the inferior medical care. *DCH Healthcare Authority v. Duckworth*, 883 So.2d 1214 (Ala. 2003).

In regard to discussions of medical treatises, Hrynkiw argued that the trial court erred in allowing Dr. Hash to reference certain medical treatises because he stated during voir dire that he did not rely on any treatises to form his opinion regarding Dr. Hrynkiw's actions. Hrynkiw argued that under Rule 803(18), Alabama Rules of Evidence, that in order for a treatise to be admissible, Hash must have relied upon a treatise to form the basis of his opinion. Trammell argued and the court agreed that the scope of Rule 803(18) is broader and that a learned treatise can be "relied upon" to bolster, corroborate, or better explain the expert's opinion. Therefore, the court found that the trial court did not exceed its discretion in allowing Dr. Hash to reference medical treatises during his direct testimony under Rule 803(18).

Chief Justice Malone and Justices Woodall, Stuart, Parker, Main and Wise concurred and Justices Murdock and Shaw concurred in the result.

MORTGAGES –

REDEMPTION PRICE WAS THE PRICE PAID BY THE BANK AT FORECLOSURE NOT THE PRICE PAID BY THE PARTY THAT PURCHASED THE PROPERTY FROM THE BANK.

***600, LLC v. Virani,* 2012 WL 165065 (Ala). (January 20, 2012)**

SUMMARY:

A mortgagor's assignee filed an action against a third party who purchased property from the purchaser at a foreclosure sale.

The trial court entered judgment that the redemption price was the price paid by the third party at the subsequent sale plus allowable charge and not the price paid at the foreclosure sale.

HOLDINGS:

Justice Parker held that the redemption price was the price paid by the first purchaser at the foreclosure sale plus interest allowed for owed money judgment and other allowable charges and not the price paid when the purchaser later sold the property to a third party.

DISCUSSION:

Virani sued 600, LLC ("600") attempting to redeem real property that 600 purchased from the bank that had foreclosed on the property. After a bench trial, the trial court entered a judgment establishing the amount that Virani was required to pay to redeem the property was the amount paid to the bank by 600, not the amount paid by the bank. The bank paid substantially more for the property than did 600. 600 appealed arguing that the amount the judgment that Virani was required to pay was not correct. The LLC appealed arguing that the amount the judgment required him to pay was incorrect. The court reversed and remanded.

The purchase price at the foreclosure sale was $511,000. The foreclosing bank then sold the property to 600 LLC for $275,000. Included with Virani's complaint to redeem the property was a check for $288,742.31 which Virani interpleaded. 600 filed an answer and counterclaim seeking rent and the eviction of Virani from the property. **The court found that 600 was entitled to twice what it paid the bank for the property.**

Justice Parker relied on Section 6-5-253(a) *Ala. Code 1975*, which stated in pertinent part:

"Anyone entitled and desiring to redeem real estate under the provisions of this article must also pay or tender to the purchaser or his or her **transferee the purchase price paid at the sale…".**

600 argues that the word "sale" as used in §6-5-253(a) should be read in light of §6-5-247 which refers to "any execution, judgment, or foreclosure sale . . ." The court agreed.

The opinion of the trial court was reversed and remanded with directions.

Chief Justice Malone, and Justices Stuart, Shaw, and Wise concurred.

MORTGAGE –

THE BANK FAILED TO GIVE THE REQUIRED NOTICE OF THE MORTGAGE ACCELERATIONS AND AS A RESULT, THE SUMMARY JUDGMENT IN FAVOR OF THE BANK WAS REVERSED AND THE CASE REMANDED IN REGARD TO THE BREACH OF CONTRACT CLAIM.

***Jackson v. Wells Fargo Bank,* 2012 WL 517482 (February 17, 2012)**

SUMMARY:

Mortgagors brought an action against a mortgagee alleging negligent foreclosure and breach of contract. The trial court granted the mortgagee a summary judgment and the mortgagor appealed.

HOLDINGS:

Justice Woodall held that

(1) mortgagors could not recover on their claims of negligent and wrongful foreclosure in the absence of any evidence that the mortgagee used the power of sale for any purpose other than to secure the debt owed; and

(2) the mortgagee failed to give required notice of mortgage accelerations.

DISCUSSION:

I. An action for wrongful foreclosure can be maintained if the mortgagee uses the power of sale for a purpose other than to secure the debt.

Alabama's Supreme Court has recognized a cause of action for wrongful foreclosure when "a mortgagee uses the power of sale given under a mortgage for a purpose other than to secure the debt owed by the mortgagor." *Reeves Cedarhurst Development Corporation v. First American Federal Savings and Loan Association* 607 So. 2d 180, 182 (Ala. 1992).

If a foreclosure is attempted to "revert the power from its legitimate purpose and to use it for the purpose of oppressing the debtor of enabling the creditor to apply the property himself, a court of equity will enjoin a sale or set it aside if maybe." *Wittmeier v. Tidwell*, 147 Ala. 354, 47 963 (1906).

As noted in *Castleman v. Knight*, 215 Ala. 429, 110 So. 911 (1927), "if he uses the power to sale, which he gets for that purpose, for another purpose, from any ill motive, to effect means

and purposes of his own, or to serve the purposes of other individuals, the court considers that to be what it calls a fraud in the exercise of the power, because it is using the power for a purpose foreign to the legitimate purposes for which it was intended." Cited with approval in *Paint Rock Properties v. Shewmake*, 393 So. 2d 982, 983 – 84 (Ala. 1981).

The court noted that the Jacksons had not argued that the power of sale was exercised for any purpose other than to secure the debt owed.

II. The mortgagors could maintain the breach of contract action in that they demonstrated that the bank failed to comply with the terms of the mortgage in regard to acceleration in that the bank failed to notify the mortgagors regarding the required "notice of intent to accelerate."

As to the breach of contract claim asserted by Jackson, the court found it stood "on better ground." The court noted that there was confusion on "the difference between notice of actual acceleration and notice merely of intent to accelerate." The court found that the acceleration letter sent to the mortgagor was simply a notice that the debt had been accelerated, not a notice of intent to accelerate. The only option contemplated by the letter was the payment of the entire debt. Therefore, the court found that the Jacksons had provided substantial evidence that essential notice under the mortgage was not given, resulting in failure of the acceleration, and consequently, failure of the foreclosure sale conducted on August 15, 2008.

The case was affirmed in part, reversed in part and remanded in regard to the breach of contract claim.

Chief Justice Malone and Chief Justices Bolin, Murdock, and Main concurred.

STATE AGENT IMMUNITY –

TWO OF THE PLAINTIFFS MET THEIR BURDEN THAT OFFICERS WILLFULLY, MALICIOUSLY, FRAUDULENTLY, IN BAD FAITH, OR BEYOND THEIR AUTHORITY THEREBY PRECLUDING THE ENTRY OF A SUMMARY JUDGMENT. TWO OF THE PLAINTIFFS COULD PROSECUTE CLAIMS AGAINST THE CITY FOR NEGLIGENT HIRING, TRAINING OR SUPERVISION.

***EX PARTE CITY OF MONTGOMERY*, 2012 WL1139143 (Ala.) (APRIL 6, 2012)**

SUMMARY:

The trial court denied the defendants' motion for summary judgment and the defendants filed a petition for writ of mandamus. Disabled citizens who were detained by the city police officers brought actions against the city and police officers asserting several claims including negligence, wantonness, negligent hiring, and assault and battery.

HOLDINGS:

Justice Bolin held that:

(1) The citizens failed to establish that the officers acted beyond their authority by failing to discharge duties pursuant to detailed rules and regulations;

(2) The police officer was engaged in law enforcement functions for which state agent immunity would be available when the officer encountered a disabled citizen who was a paraplegic;

(3) The officer did not act willfully, maliciously, fraudulently, in bad faith, or beyond his authority in handcuffing the disabled citizen;

(4) A genuine issue of material fact as to whether an officer acted willfully, maliciously, fraudulently, in bad faith, beyond his authority or under mistaken interpretation of the law during the encounter with two of the disabled citizens precluded summary judgment;

(5) The officer failed to demonstrate a clear legal right to relief sought as to two of the citizens' claims for negligence; and

(6) Police officers were engaged in law enforcement functions for which state agent immunity would be available when officers encountered one disabled citizen who was

upset and angry; and

(7) As to two of the citizens, the city was not entitled to summary judgment on ground of immunity as to claims for negligent hiring, training, or supervision**.**

DISCUSSION:

I. DASHAD BERRY

Dashad Berry is a T-4 paraplegic who is paralyzed from the chest down. Two associates of Berry, Beamon and Roberson, picked Berry up at his house to go purchase cigarettes. They left Berry's wheelchair at Berry's house. One mile from Berry's residence, the trio encountered a drivers license checkpoint. The driver could not produce a drivers license and was directed to move his vehicle to a parking area.

Another police officer on the scene smelled marijuana coming from the vehicle and asked the three persons in the car to get out of the vehicle. Berry told the officer that he was a paraplegic and could not get out of the vehicle. Berry testified that Officer Oglesby asked him **"what paraplegic meant and that Berry responded that it meant he had a 'complete injury' and that he could not get out of the vehicle without his wheelchair."**

According to Berry, another officer told him that if he did not get out of the car he would be "tased." Berry asked if he could get his mother to bring his wheelchair to the scene and the officer replied that "they did not want any mama drama there." Berry asked that Beamon telephone his mother and the officers told Beamon that if he picked up his cell phone he would be placed in the back of a patrol car. Berry placed his hands behind his back and was handcuffed and was then removed from the car by Officers Oglesby and Kennedy and was carried a short distance to a patrol car. While Berry was sitting on the edge of the backseat of the patrol car, he slid off the seat and fell to the ground striking his head on the bottom frame of the patrol car. Berry was then lifted up by the officers and placed in the backseat of the patrol car again. The officers denied that the discussions outlined by Berry occurred and stated that the safety of the officers necessitated removing Berry from the car and that Oglesby contacted an emergency room nurse before removing Berry to determine if there were any special precautions that needed to be taken. Oglesby testified that Berry was handcuffed because he would be in close proximity to the officers while they were carrying Berry.

There were marijuana seeds and stems in the car, however, no one was arrested. Beamon was ticketed for failing to have a drivers license and the three men were released. Berry was diagnosed with abrasions on his back that would take longer to heal because of his paralysis.

II. KAMESSA WILLIAMS

Plaintiff Kamessa Williams suffered from a vascular necrosis and had two hip replacement surgeries. Two officers made a traffic stop in the area of the mobile home of Williams' mother. A large group of people gathered and while the officers were conducting the

were fired in their direction from a group that had gathered near the mobile home of Williams' mother.

The officers drew their weapons and ordered the crowd to get down on the ground and found Williams crouched behind the passenger door of a car. One of the officers testified that Williams had her hands tucked between her legs. Williams testified that her hands were open and that she told the officers that she was disabled. One of the officers stated that he could not see Williams' hands because he thought she might have had a weapon. He placed his foot on her back and pushed her to the ground. Williams stated that the officer kicked her in the back and then stomped her in the back.

The officer testified that while Williams was on the ground she told them that she was disabled, that she was injured, and that she was being bitten by fire ants. The officer testified that Williams was on the ground for no longer than two (2) minutes prior to being lifted to a chair and the officers called for an ambulance and medical assistance.

III. MIGUEL JOHNSON

The third plaintiff, Miguel Johnson, was thirty-eight (38) years old and weighed approximately 360 pounds and had previous knee and hip surgeries. He stated that he suffered from spinal stenosis which caused back pain. Johnson had car trouble resulting in a flat tire and he sat on the curb to change the tire. Johnson was written a ticket for not having proof of insurance. Johnson had previously given the officer his wallet in which he had $800.00 and Johnson alleged that the officer left the scene without returning his wallet.

Another officer located the wallet and returned it to Johnson. Johnson said seven of the eight $100.00 bills in the wallet were missing. Johnson called 911 to report that a police officer had stolen his money.

The wrecker driver's boss called 911 because Johnson was accusing the driver of the wrecker of having taken his money.

Johnson admitted that he was "upset" and "angry" when Officer McMahon arrived at the scene. McMahon called for backup and two or three patrol units and "a lot of" officers soon arrived. McMahon allegedly yelled obscenities which included statements that **Johnson should be shot and tased because Johnson said he would kill an officer**.

Johnson testified that he had been roughed up and had tried to explain to the police officers that he was disabled and that they should not handcuff him due to his bad shoulder. Johnson testified that while he was in the "booking room" he grabbed a pair of scissors and tried to cut his wrist in desperation.

IV. CLAIMS OF IMMUNITY UNDER § 6-5-338(a) and *CRANMAN*

The city and officers contended that they were immune from suit pursuant to Section 6-5-338(a) and the Doctrine of State Agent Immunity set forth in *Ex parte Cranman*, 792 So.2d 392 (Ala. 2000).

A. §6-5-338(a) – PEACE OFFICER IMMUNITY FOR DISCRETIONARY FUNCTIONS

Section 6-5-338(a) provides in part that peace officers "shall have immunity from tort liability arising out of his or her conduct in performance of any **discretionary function** within the line and scope of his or her law enforcement duties."

B. *CRANMAN ANALYSIS.*

The court noted that the restatement of state agent immunity as set out by the court in *Cranman* governs the determination of whether a peace officer is entitled to immunity under Section 6-5-338(a).

> "A state agent *shall* be immune from civil liability in his or her personal capacity when the conduct made the basis of the claim against the agent is based upon the agent's
>
> "(1) formulating plans, policies or designs; or
>
> (2) exercising his or her judgment in the administration of a department f agency of government, including, but not limited to, examples such as:
>
> ("a) making administrative adjudications;
>
> (b) allocating resources;
>
> (c) negotiating contracts;
>
> (d) hiring, firing, transferring, assigning, or supervising personnel; or
>
> "(3) discharging duties imposed on a department or agency by statute, rule, or regulation, insofar as the statute, rule or regulation prescribes the manner for performing the duties and the State agent performs the duties in that manner; or
>
> "(4) exercising judgment in the enforcement of the criminal laws of the State, including, but not limited to, law-enforcement officers' arresting or

attempting to arrest persons; or

"(5) exercising judgment in the discharge of duties imposed by statute, rule, or regulation in releasing prisoners, counseling or releasing persons of unsound mind, or educating students.

"Notwithstanding anything to the contrary in the foregoing statement of the rule, a State agent *shall not* be immune from civil liability in his or her personal capacity

"(1) when the Constitution or laws of the United States, or the Constitution of the State, or laws, rules or regulations of this State enacted or promulgated for the purpose of regulating the activities of a governmental agency require otherwise; or

"(2) **when the State agent acts willfully, maliciously, fraudulently, in bad faith, beyond his or her authority, or under a mistaken interpretation of the law."**

Ex parte Cranman 792 So. 2d 392, 405 (Ala. 2000).

1. The Burden Shifting Process:

The state agent asserting state agent immunity "bears the burden of demonstrating that the plaintiff's claims arise from a function that would entitle the state agent to immunity."

a. Plaintiff must prove that "the state agent acted willfully, maliciously, fraudulently, in bad faith or beyond his or her authority" and can prove that the agent acted beyond his authority if he failed "to discharge duties pursuant to detail rules or regulations such as those stated on a checklist."

After the state makes such a showing, the burden shifts to the plaintiff to show the two categories of exceptions to state immunity is applicable. In the present case, the plaintiffs allege that "the state agent acted willfully, maliciously, fraudulently, in bad faith, or beyond his or her authority." One of the ways in which a plaintiff can show that a state agent acted beyond his or her authority is by offering evidence that the state agent failed to "discharge duties pursuant to detailed rules or regulations such as those stated on a checklist.

b. Some of the Plaintiffs did not prove their claims against the defendant officers and the city.

(1) Violating the "Law Enforcement and Disabilities Manual" was not a violation of "detail rules or regulations such as those stated on a checklist."

The plaintiffs contended that the officers violated the "Law Enforcement and Disabilities

Manual". The defendants countered that the manual is not a detailed set of rules or regulations adopted by the city. The court found that the manual was not as "detailed rules or regulations such as those stated on a checklist."

(2) Berry did not meet his burden of proof demonstrating that the officer acted "willfully, maliciously, fraudulently, in bad faith, or beyond his authority."

The court concluded that the plaintiffs failed to establish that the officers acted beyond their authority by failing to discharge duties pursuant to detailed rules and regulations.

As to Berry's claims against Oglesby that Oglesby acted "willfully, maliciously, fraudulently, in bad faith, or beyond his authority" the court found that Officer Oglesby was entitled to a summary judgment as to the claims against him.

(3) Claims Asserted by Kamessa Williams - Williams satisfied her burden under *Cranman* by providing evidence that could be viewed as showing that the officer acted "willfully, maliciously, fraudulently, in bad faith."

Officer Stewart satisfied his burden in demonstrating that at the time of the incident he was engaged in law enforcement functions for which state agent immunity would be available under Section 6-5-338(a) and under *Cranman* as modified by *Hollis*.

Williams satisfied her burden under *Cranman* by presenting evidence that could be viewed as showing that Officer Stewart acted "willfully, maliciously, fraudulently, in bad faith, or beyond his authority, or under mistaken interpretation of the law" during his encounter with Williams. Therefore, the court found that Officer Stewart was not entitled to summary judgment as to Williams' claims against him.

(4) Claims Asserted by Miguel Johnson - One of the officers was entitled to summary judgment and three other officers were not.

The court found that Officer McMahon was entitled to summary judgment as to Johnson's claims because Johnson did not meet his burden or showing that the officer acted "willfully, maliciously, fraudulently, in bad faith, beyond his ... authority, or under mistaken interpretation of the law so as to remove Officer McMahon from the cloak of state agency immunity."

(a) Caffey, Stewart, and Commander were not entitled to summary judgment and the city, likewise, was not entitled to summary judgment as to the claims regarding vicarious liability.

Officer Caffey was not entitled to summary judgment due to the claims that he pushed Johnson into the car. In that the court found that Officers Stewart, Commander, and Caffey were not entitled to summary judgment as to the claims asserted against them, the city likewise was not entitled to a summary judgment as to the claims vicariously asserted against it.

2. The city did not prevail as to the claims for negligent hiring, training, or supervision as to some of the officers.

As to negligent hiring, negligent training, and negligent supervision, the city failed to carry its burden under Cranman as to the negligent hiring, training, or supervision claims asserted against it.

STATE - **THE WARDEN WAS IMMUNE FROM SUIT UNDER ARTICLE I, SECTION 14 OF THE ALABAMA CONSTITUTION**.

***Ex parte Burnell,* 2012 WL 517483 (Ala.) (February 17, 2012)**

SUMMARY:

A county jail inmate brought an action against the county, the sheriff, and the jail warden alleging claims of negligence and wantonness arising from an incident in which the inmate slipped and fell in a shower.

The trial court granted the motion to dismiss as to the claims against the county and sheriff but denied dismissal of the claims against the warden.

HOLDINGS:

Justice Wise held that the warden was entitled to state immunity from the inmate's claims.

DISCUSSION:

I. **The warden acted both as a warden and a deputy sheriff**.

Affidavit testimony was offered by the sheriff that the warden supervised the jail but also performed the duties of a deputy including patrolling the county, answering calls, writing reports and other duties.

The warden himself offered affidavit testimony that he was an APOST [Alabama Peace Officers' Standards and Training Commission] certified peace officer and worked under the expressed condition that he perform the regular duties of a deputy in addition to his duties as the warden.

II. **Plaintiff opposed this evidence by contending that the fact that the warden may also be a deputy sheriff or have certain certifications would not affect his being sued in his capacity as warden**.

In addition to the Sheriff having immunity as an executive officer of this state, deputy sheriffs are also immune from suit in that their acts are the acts of the Sheriff; **and they are the alter ego of the sheriff and therefore immune from suit under Article I, Section 14, Constitution of Alabama 1901..** *Carr v. City of Florence, Alabama*, 916 F. 2d 1521, 1526 (11th. Cir. 1990). *Wright v. Bailey*, 611 So. 2d 300, 303 (Ala. 1992).

It is undisputed that the injury occurred in the jail while the defendant Burnell was the

warden.

III. The court distinguished *Ex parte Shelley* in which it held that a jailer was not an executive officer of the State entitled to immunity by finding that in *Shelley* the Warden had no obligation to perform duties of a Deputy Sheriff.

Plaintiff Kelley distinguished Burnell's duties as warden from duties as a deputy sheriff because she contended that the court in *Ex parte Shelley*, 53 So. 3d 887 (Ala. 2009) rejected any blanket immunity for jailers as alter egos of sheriffs. The Alabama Supreme Court noted in *Shelley* that "none of this court's cases have extended a sheriff's state immunity to any sheriff's employees other than deputy sheriffs. We decline to extend state immunity beyond that limit in this case." 53 So. 3d at 895-97.

IV. **Deputy sheriffs are the alter ego of the sheriffs and therefore due absolute immunity as an executive officer of the State**.

This court distinguished *Shelley* by finding in addition to being a warden, Burnell was also a deputy sheriff.

Therefore, the petition for writ of mandamus was granted and the writ issued.

Chief Justice Malone and Justices Stuart, Parker, and Shaw concurred.

STATE **– STATE AGENT IMMUNITY – THE BOARD OF EDUCATION, THE BOARD MEMBERS, AND THE DEFENDANT TEACHER WERE ENTITLED TO STATE AGENT IMMUNITY.**

***Ex Parte Montgomery County Board of Education,* 2012 WL 247932 (January 27, 2012)**

SUMMARY:

The mother of a third grade student who was injured when she fell while attempting to climb the school's restroom door stall brought an action against the County Board of Education and the student's teacher.

The defendants were denied a motion for summary judgment on the basis of immunity and petitioned for writ of mandamus.

HOLDINGS:

Justice Main held that:

(1) the County Board of Education members were absolutely immune from suit;

(2) the members of the Board of Education and teacher were immune from suit in their official capacities; and

(3) the teacher was immune from liability in her individual capacity.

DISCUSSION:

When the child attempted to leave the restroom stall, the door jammed. She tried to climb over the stall door as a result. She was injured when she fell.

All defendants contended they had state agent immunity, that the child was contributorily negligent and was playing in the restroom and that the child failed to exhaust all administrative remedies.

I. **The Board was due absolute immunity as an agency of the State under Article I, § 14 of the Alabama Constitution**.

As to the claims against the Board, the Board claimed immunity under Article I, Section 14, Alabama Constitution 1901 from the tort claims. "It is well settled in Alabama that '[l]ocal school board or agencies of the state, not of the local governmental units they serve, and they are entitled to the same absolute immunity as other agencies of the state." *Ex parte Bessemer Board of Education*, 68 So. 3d, 782, 789 (Ala. 2011). See also *Ex parte Monroe County Board of Education*, 48 So. 3d 621 (Ala. 2010).

II. The board members and the teacher in their official capacity were immune from suit in that the state cannot be sued indirectly by suing an officer in his or her official capacity.

As to the claims against the board members and the teacher in their official capacity, the court agreed with the board members and the teacher in their official capacities were also immune from suit. "Not only is the state immune from suit under Section 14, but 'the state cannot be sued indirectly by suing an officer in his or her official capacity'". Quoting *Alabama Department of Transportation v. Harbert International, Inc.*, 990 So. 2d 831, 839 (Ala. 2008), *Ex parte Dangerfield,* 49 So. 3d 675, 681 (Ala. 2010) and *Bessemer Board of Education,* 68 So. 3d at 789.

State officials cannot be sued for damages in their official capacities. *Burgoon v. Alabama State Department of Human Resources,* 835 So. 2d 131, 132-33 (Ala. 2002).

III. The teacher was immune from suit in her individual capacity in that she neither acted willfully, maliciously, fraudulent, fraudulently, in bad faith or beyond her authority.

As to the claims against the teacher in her individual capacity, the teacher claimed that she was entitled to state agent immunity in that the claims were based on acts arising from her performance of official duties and exercising discretion as a teacher for the Montgomery County Board of Education. The court cited to *Cranman* for the following propositions:

> "A state agent *shall* be immune from civil liability in his or her personal capacity when the conduct made the basis of the claim against the agent is based upon the agent's
>
> "(1) formulating plans, policies or designs; or
>
> (2) exercising his or her judgment in the administration of a department f agency of government, including, but not limited to, examples such as:
>
> (a) making administrative adjudications;
>
> (b) allocating resources;
>
> (c) negotiating contracts;
>
> (d) hiring, firing, transferring, assigning, or supervising personnel; or
>
> (3) discharging duties imposed on a department or agency by statute, rule, or regulation, or insofar as the statute, rule or regulation prescribes the manner for performing the duties and the State agent performs the

duties in that manner; or

(4) exercising judgment in the enforcement of the criminal laws of the State, including, but not limited to, law-enforcement officers' arresting or attempting to arrest persons; or

(5) exercising judgment in the discharge of duties imposed by statute, rule, or regulation in releasing prisoners, counseling or releasing persons of unsound mind, or educating students.

"Notwithstanding anything to the contrary in the foregoing statement of the rule, a State agent *shall not* be immune from civil liability in his or her personal capacity

(1) when the Constitution or laws of the United States, or the Constitution of the State, or laws, rules or regulations of this State enacted or promulgated for the purpose of regulating the activities of a governmental agency require otherwise; or

(2) when the State agent acts willfully, maliciously, fraudulently, in bad faith, beyond his or her authority, or under a mistaken interpretation of the law."

Ex parte Cranman 792 So. 2d 392, 405 (Ala. 2000).

A. The teacher met her burden of establishing that the claims arose from a function that entitled her to state agent immunity.

As to the burden shifting process, in order to claim state agent immunity, a state agent bears the burden of demonstrating that the plaintiff's claims arise from a function that entitle the state agent to immunity. *Giambrone v. Douglas*, 874 So. 2d 1046, 1052 (Ala. 2003).

B. The plaintiff did not meet her burden that the teacher had acted "willfully, maliciously, fraudulently, in bad faith, or beyond his or her authority.

The court found that the teacher had met that burden and that the burden then shifted to the plaintiff to "show that the state agent acted willfully, maliciously, fraudulently, in bad faith, or beyond his or her authority, 874 So. 2d at 1052.

1. The teacher did not act beyond her authority because she did not fail to discharge duties pursuant to details rules or regulations such as those stated on a checklist.

"A state agent acts beyond authority and is therefore non immune when he or she 'fails to

discharge duties pursuant to detailed rules or regulations such as those stated on a checklist." *Giambrone*, 874 So. 2d at 1052 (quoting *Ex parte Butts*, 775 So. 2d 173, 178 (Ala. 2000).

2. The court distinguished *Caldwell* in that there were no established rules or checklists in regard to accompanying children to the restroom and there were rules and standards reached in *Caldwell* which allegedly resulted in the rape.

The minor student attempted to analogize the facts to the case of *N.C. v. Caldwell, MS.*, 1081434, April 22, 2011. In *Caldwell*, a student was raped in the boy's locker room after gym class. The court determined that a genuine issue of material fact existed as to whether the teacher, Caldwell, had appointed the student who allegedly raped the minor child to serve as a student aid and whether he had exceeded his authority in doing so.

Also at issue was whether Caldwell had previously received complaints and the impact of the school's faculty handbook had expressly provided that "any student not scheduled for a class should not attend that class."

The minor plaintiff also cited to ***Ex parte Monroe County Board of Education*** in which the court held that a teacher against whom claims had been asserted for negligence, wantonness, and **assault arising out of a spanking incident** had not established that she was entitled to state agent immunity because the teacher had violated certain board and written policies. The teacher had thereby exceeded the scope of her authority.

In the present case, the court noted that although the teacher did not accompany the minor to the restroom, there were no policies or rules requiring a teacher to accompany students to the restroom. Therefore, the court found that the burden shifted to the minor plaintiff to show that the teacher exceeded her discretion in allowing the child to go to the restroom without an adult.

3. The fact that the teacher was informed that the child suffered from Attention Deficient Hyperactivity Disorder did not create a genuine issue of material fact as to whether the teacher exceeded her discretionary authority in allowing the child to go to the restroom without the teacher.

Evidence was submitted that the parent of the child had written to the teacher and informed her that the child suffered from Attention Deficient Hyperactivity Disorder and should not be allowed to wander around the school unattended. The court rejected the argument that that evidence alone gave rise to a level of creating a genuine issue of material fact as to whether the teacher exceeded her discretionary authority in permitting the child to go to the restroom without accompanying her.

The petition was granted and the writ issued.

Chief Justice Malone, and Justices Woodall, Stuart, Bolin, Parker, Murdock, Shaw, and Wise concurred.

STATE IMMUNITY –

DEPUTY SHERIFF IMMUNE FROM SUIT BECAUSE PLAINTIFF ALLEGED THAT HE WAS ACTING IN THE LINE AND SCOPE OF HIS EMPLOYMENT.

***Ex parte Walker*, 2012 WL1890694 (May 25, 2012).**

SUMMARY:

A deputy sheriff petitioned for a writ of mandamus directing the trial court to enter an Order holding him immune from a negligence action brought by an injured motorist.

HOLDING:

Justice Bolin held that the deputy was immune from suit since he was acting within the line and scope of his employment at the time of the accident.

DISCUSSION:

Petition was granted.

DISCUSSION - FACTS:

Harris sued the county commission, the county, and Deputy Walker. Walker was sued both in his individual and official capacities. Harris claimed that Walker negligently or wantonly caused or allowed a motor vehicle he was operating to collide with a vehicle driven by Harris. Harris contended that Walker was acting in the regular course and scope of his employment for the county Sheriff's Department.

The county defendants contended that they could not be held vicariously liable for any tortious act of the sheriff or his deputies because the Alabama Constitution denominates sheriffs and deputies as members of the state's executive department.

The trial court granted the motion to dismiss of the county defendants, but denied Walker's motion based on a finding that there was no evidence as to whether Walker was acting in the line and scope of his duties as the sheriff's deputy at the time of the accident.

In his Petition for Writ of Mandamus, Walker argued that he is an Executive Officer of the State of Alabama pursuant to Article V Section 112, Alabama Constitution 1901 and is, therefore, immune from suit pursuant to Article I Section 14, Alabama Constitution 1901 for money damages for actions taken while he was executing his duties as a deputy sheriff.

The Court noted that it had previously held that deputy sheriffs are immune from suit to the same extent sheriffs are immune because the deputy sheriff is the alter ego of the sheriff. *Hereford v. Jefferson Co*., 586 So.2d 209, 210 (Ala. 1991). The Court noted that in *Ex parte Haralson*, 853 So.2d 928, 932 (Ala. 2003). "The Court noted in *Haralson* that "we cannot conclude, at this early stage of the proceedings, without evidence showing that at the time of the accident he was acting within the line and scope of his employment, that Deputy Haralson is entitled to immunity."

The Court found that the facts at issue were distinguishable from those in *Ex parte Haralson* and found the facts to be more akin to those presented in *Ex parte Blankenship*, 893 So.2d 303 (Ala. 2004). In *Blankenship* it was alleged in the Complaint and admitted in the Answer that Blankenship was acting in the line and scope of his duties at the time of the accident.

The Court is charged with accepting the allegations of the Complaint as true. In his Complaint, Harris specifically alleged on two occasions that Walker was acting within the line and scope of his employment with the county sheriff's department at the time of the accident. Further, there were no allegations in the Complaint that Walker had deviated from the normal scope of his duties as an employee of the sheriff's department. The Court noted that it is well established "that a party is bound by what it states in its pleadings."

The Court granted the Petition for Writ of Mandamus and directed the trial court to dismiss the claims against Walker.

Chief Justice Malone, Justices Woodall, Stuart, Parker, Shaw, Main and Wise concurred.

TORTS - **PEMCO DID NOT ESTABLISH A FALSE REPRESENTATION OR A MATERIAL FACT SUPPRESSED AND COULD NOT MAINTAIN AN ACTION FOR FRAUD**

***GE CAPITAL AVIATION SERVICES, INC. v. PEMCO WORLD AIR SERVICES, INC.*, 2012 WL 1071500 (Ala.)(March 30, 2012)**.

SUMMARY:

A provider of aircraft maintenance and conversion services ("PEMCO") brought an action against an aircraft owner ("GE") for breach of contract and fraudulent misrepresentation. GE brought a counterclaim against PEMCO for breach of contract, negligent and wantonness conduct, fraud, and conversion.

Following a jury trial, a jury entered a judgment in favor of PEMCO for approximately $8.65 Million Dollars. GE appealed.

HOLDINGS:

Chief Justice Malone found that:

(1) there was no evidence of a false representation by GE regarding services to be performed so as to support the claim for fraudulent misrepresentation,

(2) there was no evidence of suppression of material fact by GE regarding pre-delivery condition of the aircraft and the standard of work that GE would require so as to support PEMCO's fraudulent suppression claim,

(3) the issue of whether GE breached the contract was for the jury, and

(4) recovery on theory of implied contract was improper.

The case was reversed and remanded with directions and rehearing was denied.

DISCUSSION:

The court withdrew its opinion of December 2, 2011 and substituted this Opinion.

PEMCO and GE have been litigating this commercial contract dispute since 2004. Both GE and PEMCO each sought punitive damages in addition to compensatory damages. The verdict was the outcome of a jury trial that lasted approximately three (3) weeks.

The jury awarded PEMCO $2,147,129.00 in compensatory damages and $6.5 Million Dollars in punitive damages, and returned a verdict in favor of PEMCO on all of GE's counterclaims.

GE appealed from the aspect of the judgment entered in favor of PEMCO on its claims and from the trial court's Order denying GE's post judgment motions. GE did not appeal from the aspect of the judgment in favor of PEMCO on GE's Counterclaims.

PEMCO performed maintenance inspections on GE aircraft dictated by the manufacturer's requirements. In addition, PEMCO performed other maintenance on the aircraft that arose from an abnormal condition referred to in the industry as a discrepancy that was detected during an inspection. The FAA requires that any "discrepancy" that may impact safety or airworthiness must be repaired.

In the early 2000's, PEMCO developed a proprietary process it uses to convert Boeing 737 passenger aircraft into cargo freighter aircraft. PEMCO was authorized by the FAA to do perform this procedure. Essentially, the procedure involves gutting the aircraft and installing a cargo door which requires strengthening of the aircraft hull and the installation of a cargo handling system.

The conversions at issue involve two (2) years of work and $4,000,000.00 to $5,000,000.00 spent by PEMCO.

Some of the aircraft at issue had been retired by passenger airlines and were then to be converted by PEMCO.

Two (2) GE planes had already been leased to a Belgian freight delivery company; therefore, GE wanted the maintenance on those two planes to be performed simultaneously. As to four (4) other planes, GE planned to lease them to Chinese companies, which required a different kind of conversion - to retrofit the airplane so that it could be used for either passengers or cargo. The Belgian airplanes were the subject of the dispute.

PEMCO'S FAILURE TO INSPECT THE PLANES

At the time that PEMCO submitted a bid, it did not request that it be permitted to inspect the aircraft, nor did it request any information from GE. PEMCO bid the job based on the predicted hours necessary to complete the maintenance and conversions.

THE DISPUTE AROSE OVER COSTS OF MAINTENANCE OF NON ROUTINE ITEMS

PEMCO's claims essentially arose out of the maintenance of non-routine items that were not done pursuant to a fixed price agreement and additional services requested by GE.

Disagreements between a GE representative and PEMCO's employees arose immediately. GE's representative ordered PEMCO to redo the completed work and repeatedly demanded that work be stopped. The work at issue was started in January, 2003 and was completed by the end of June, 2003, which was fifty-six (56) days past the delivery date. GE's requirements at issue were not included as exhibits to the agreement, but GE contended those requirements controlled the performance of the contract.

The difference in the bid and the costs ultimately submitted to GE was approximately $4,000,000.00. PEMCO would not allow GE have the planes until it paid the invoices which GE contended it paid under protest to meet its delivery obligations. The first lawsuit was filed by GE against PEMCO in New York. Shortly thereafter, PEMCO filed a Complaint against GE in the Alabama Circuit Court. The New York and Alabama courts determined that the litigation should proceed in Alabama.

I. FRAUDULENT MISREPRESENTATION - THE COURT FOUND THAT PEMCO DID NOT PROVE THAT GE MADE A FALSE REPRESENTATION REGARDING THE NATURE OF THE MAINTENANCE WORK.

PEMCO needed to establish:

(1) that GE made a false representation,

(2) that the misrepresentation involved a material fact,

(3) that PEMCO relied on the misrepresentation, and

(4) that the misrepresentation damaged PEMCO.

At issue was whether PEMCO successfully proved the first element, i.e., that GE made a false representation. The alleged false representation was that GE's intent was to require significantly more services and the correction of significantly more discrepancies than were required under industry standards. The court found that PEMCO did not successfully demonstrate a false representation and the issues at issue was simply a contract claim; therefore, the court concluded as a matter of law that the false fraudulent misrepresentation claim should not have been submitted to the jury.

II. SUPPRESSION - THE COURT FOUND THAT GE DID NOT SUPPRESS AN EXISTING MATERIAL FACT REGARDING THE CONDITION OF THE AIRPLANES.

The court noted that in order to prove a claim of fraudulent suppression, PEMCO had to establish:

(1) that GE had a duty to disclose an existing material fact,

(2) that GE suppresses that existing material fact,

(3) that GE had actual knowledge of the fact,

(4) that GE's suppression of the fact induced PEMCO to act or refrain from acting, and

(5) that PEMCO suffered actual damage as a proximate result.

The court noted that the dispositive issue was whether PEMCO proved that GE suppressed that existing material fact.

The fact at issue relied on by PEMCO was that GE's representatives confirmed to PEMCO that all would be required would be standard checks and standard inspections and cleaning, and GE knew that more services were required. PEMCO contended that as a result of this existing material fact that was suppressed, PEMCO substantially underbid the work. The fraudulent suppression claim was based on two (2) material facts that were suppressed. One, the pre-delivery condition of the aircraft, and (2) the standard of work it would require.

GE countered that PEMCO knew that it was standard practice to store aircraft that was not in use in the Mojave Desert. As a result, GE contended that PEMCO knew that the airplanes at issue were "filthy."

The court found that there was no evidence presented to the jury indicating that GE suppressed from PEMCO any material fact and found that the fraudulent suppression claim should not have been submitted to the jury.

III. BREACH OF AN EXPRESSED CONTRACT.

To establish a breach of contract, PEMCO needed to prove (1) the existence of a valid contract, (2) PEMCO's performance under the contract, (3) GE's non-performance, and (4) damages.

The court found that PEMCO submitted evidence necessary to satisfy all four requirements and that the breach of contract claim should be submitted to the jury.

IV. BREACH OF AN IMPLIED CONTRACT.

PEMCO's claim relating to breach of an implied contract arose out of the facts and circumstances of the case and the intention of the parties as indicated by their conduct

The court found that it could not find any evidence that would support an implied contract theory. Therefore the court concluded that the charge regarding an implied contract should not have been submitted to the jury.

V. DISPOSITION OF GE'S MOTION FOR A JML.

The portion of the trial court's Order denying GE's Motion for a JML as to PEMCO's fraud and breach of an implied contract claim is reversed. The trial court did not err in submitting the breach of an express contract claim to the jury. The court remanded the case for a new trial.

Justices Woodall, Stuart, Bolin, Parker, Shaw and Wise concurred. Justice Murdock concurred in the result.

TORTS - **NEGLIGENCE, ALABAMA'S GUEST STATUTE BAR THE CLAIM AGAINST THE DRIVER.**

WANTONNESS - FALLING ASLEEP WAS NOT SUFFICIENT EVIDENCE OF WANTONNESS.

***Glass v. Clark*, 2012 WL1890395 (Ala.Civ.App., May 25, 2012).**

SUMMARY:

The mother of a minor who was injured in an accident brought a negligence action against the driver of the car. The trial court entered summary judgment for the driver.

HOLDING:

Judge Pittman held that the vehicle occupant was a "guest" rather than a paying passenger pursuant to Alabama's Guest Statute which provided that a person responsible for operation of a motor vehicle shall not be liable for loss or damage arising from injuries to the guest while being transported without payment.

Bryan concurred in the result. Moore concurred in part and descended in part and filed an Opinion in which Thomas joined.

DISCUSSION:

On appeal, Glass contended that the evidence presented a genuine issue of material fact as to whether Knight was a guest and further that there was substantial evidence of wantonness so as to subject Clark to liability notwithstanding the applicability of the Guest Statute.

The evidence was undisputed that the driver, Clark, and Knight had consumed alcohol and had little sleep on the day before the accident. Prior to the accident, the last thing Clark remembered was driving in the far right lane and that Knight was asleep. Clark did not know whether she had fallen asleep, blacked out, or was cut off by another driver.

I. Clark was a Guest Because the Only Benefit Conferred on the Driver was Companionship.

The investigating officer testified that Clark had told him that she had fallen asleep due to a lack of sleep the night before. The paramedics recorded the same account. The Court relied in part on *Neal v. Sem Ray, Inc*., 68 So.3d 194 (Ala.Civ.App. 2011). In *Neal*, the driver was a dump truck driver who was accompanied by the daughter of a mother, a cousin, who the driver asked to accompany him on the trip. At issue in Neal was whether a benefit was conferred on the passenger. In *Neal*, the Court agreed with the driver's argument that the undisputed evidence

demonstrated that the "only benefit [the occupant had] provided to [the driver] was companionship." *Neal*, 68 So.3d at 199).

Clark contended that Knight was a guest because

(1) she would not have gone to the beach unless Clark had gone;

(2) Knight did not share in the cost of the gas;

(3) Clark did not ask Knight to share in the cost of the gas;

(4) Knight's accompanying Clark on a ride back to Huntsville gave Clark only the benefit of companionship; and

(5) there was no business relationship or purpose underlying Knight's having accompanied Clark on the ride home.

In *Sellers v. Sexton*, 576 So.2d 172 (Ala. 1991), that "if the transportation of the rider confers the benefit only on the person to whom the ride is given, and no benefits other than such as are incidental to hospitality, good will or the like on the [driver], the rider as a guest." *Sellers*, 576 So.2d at 174. The Court found that the only benefit that Clark received from being accompanied by Knight was companionship.

II. Falling Asleep Does Not Prove Wantonness Despite the Fact that Knight had been Previously Been Drinking and Partying the Night Before.

As to wantonness, the Court found that "the fact that the driver had not had enough sleep was not sufficient to establish that the driver had "consciously and intentionally [committed] some wrongful act or omitted some known duty which produced the injury."

Tew v. Jones, 417 So.2d 146 at 147 (Ala. 1982). The Court disagreed with Knight's contention there was evidence presented to support the assertion that Clark had been "partying" at all the night before the accident and found instead that the record established only that Clark had smoked cigarettes the night before nor was there any evidence that she felt sleepy prior to falling asleep at the wheel. Justices Moore and Thomas contended that the judgment of the trial court in granting the summary judgment on the wantonness claim should be reversed and the case remanded for a jury trial on the wantonness issue.

TORTS -- **IN THIS PRODUCTS LIABILITY ACTION, THE COURT FOUND THAT THE ISSUE OF WHETHER THE MANUFACTURER WANTONLY FAILED TO ADDRESS THE INJURY RISK FROM ROLLOVERS WAS FOR THE JURY.**

***McMahon v. Yamaha Motor* Corporation, (Ala.) 2012 WL 677548 (March 2, 2012)**

SUMMARY:

Purchasers of an off road utility vehicle brought an action against a manufacturer alleging products liability claim, negligence, breach of warranty, and loss of consortium after vehicle passenger sustained injuries in a rollover.

HOLDINGS:

Justice Stuart held that:

(1) any error in the trial court's failure to submit the purchasers' negligence to the claim to the jury was harmless;

(2) issue of whether the manufacturer wantonly failed to address injury risk from rollovers was for the jury; and

(3) the trial court did not abuse its discretion in finding that evidence referencing fatalities resulting from accidents in an off road vehicle was not admissible.

The judgment of the trial court was affirmed in part, reversed in part and remanded.

Woodall filed an opinion concurring in part, dissenting in part, joined by Bolin.

Murdock filed an opinion concurring in the result in part and dissenting in part.

DISCUSSION:

I. Only the AEMLD claim was submitted to the jury and the jury found in favor of the defendant.

After the conclusion of the evidence at trial, the plaintiffs withdrew their breach of warranty claim and the court granted Yamaha's JML as to negligence and wantonness and submitted the AEMLD claim to the jury.

After the jury returned a verdict in favor of the Yamaha defendants, the trial court entered a final judgment, plaintiffs appealed in regard to the judgment on the negligence and wantonness claims.

II. Any error in granting a JML as to the negligence claim was harmless in that the AEMLD claim was submitted to the jury in that the jury essentially must find the same elements to be true to find in favor of the plaintiff on either a negligence or an AEMLD claim.

The court found as to the injury of the JML on the negligence claim, that any error committed by the court was harmless and the court agreed.

The court noted that an AEMLD claim and a common law negligence claim have different elements that must be proven and that an AEMLD claim does not subsume a common law negligence claim. *Tillman v. RJ Reynolds Tobacco Co.*, 871 So. 2d 28, 35 (Ala. 2003).

With regard to either an AEMLD claim or a common law negligence claim, the jury must be persuaded that the product at issue is defective before the plaintiff can prevail. Therefore, in returning a verdict in favor of Yamaha on the AEMLD claim, the jury of necessity concluded (1) that the plaintiff failed to establish that the vehicle was an unsafe product or (2) that the defendant successfully established that the defendant successfully established that the accident was the result of contributory negligence on the part of the driver. Either of those conclusions would have required a verdict in favor of the defendants on the plaintiff's claim which therefore made the court's JML order in regard to negligence harmless if error at all.

III. As to the wantonness claim, the court found that that claim should have submitted to the jury in that the plaintiff presented an internal email regarding the need for a door on the vehicle at issue and subsequent modifications of the vehicle at issue added a door.

As to wantonness, the court noted that contributory negligence was not a bar to a wantonness claim citing to *Tyler v. City of Enterprise*, 577 So. 2d 876, 878 (Ala. 1991). The plaintiffs presented a 2001 internal Yamaha email that accidents involving the vehicle at issue would likely be of a rollover variety and specifically identified the risk of the injury sustained by the plaintiff. The expert opined that Yamaha should have replaced a door on the vehicle and eventually did do so. Therefore, the court found that the JML as to the wantonness claim is due to be reversed.

IV. The trial court's refusal to submit evidence of other fatal accidents to the jury was in the discretion of the trial court.

As to plaintiff's contention of evidence of other fatal accidents should have been submitted to the jury, the court noted that the trial court's ruling on the admission of evidence would be reversed only if it is shown that the trial court exceeded its discretion in so ruling relying on *Jimmy Day Plumbing& Heating, Inc. v. Smith*, 964 So. 2d 1, 7, (Ala. 2007).

The court held that the trial court did not exceed its discretion by excluding the evidence regarding the fatalities.

Chief Justice Malone, and Justices Parker, Main and Wise, concurred.

V. Dissent and Special Concurrence.

A. Woodall concurred in part and dissented in part in that as to the court's reversal of the trial court as to the grant of the JML on the wantonness claims. Woodall referenced specifically the fact that the injured plaintiff was not wearing her seatbelt at the time of the rollover.

B. Murdock dissented from the result reached in regard to the reversal of the JML as to wantonness and agreed with the result in regard to the negligence claim but did not agree with the analysis of the majority.