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

CIRCUIT AND DISTRICT JUDGES SUMMER CONFERENCE

JULY 14 - 16, 2014

Ann McMahan
SIMPSON, MCMAHAN, GLICK & BURFORD, PLLC
2700 Highway 280, Suite 203W
Birmingham, Alabama 35223-2468

INDEX

2014 Ala. LEXIS 62 (May 2, 2014)

THE RULE 54(b) CERTIFICATION WAS IMPROPER IN THAT THE REMAINING CLAIMS WERE TOO CLOSELY INTERTWINED WITH THE CLAIMS AGAINST THE OIL COMPANY.

ALTHOUGH NEITHER McDOWELL NOR HUNT RAISED A JURISDICTIONAL ISSUE, THE ALABAMA COURT OF CIVIL APPEALS RAISED IT *EX MERO MOTU*.

CIVIL PROCEDURE – VENUE – THE WRIT OF MANDAMUS WAS NOT DUE TO BE GRANTED BASED ON *FORUM NON* CONVENIENS UNDER THE INTEREST OF JUSTICE PRONG OF ALA. CODE §6-3-21.1(a) BECAUSE THE NEXUS TO MOBILE COUNTY WAS PURELY FORTUITOUS.

ALABAMA RULES OF CIVIL PROCEDURE – SERVICE BY PUBLICATION UNDER RULE 4.3(B)(1) – MOTION TO SET ASIDE A DEFAULT JUDGMENT PURSUANT TO A.R.C.P. 60(B)(4).

THE EVIDENCE SUBMITTED BY THE PROCESS SERVER WAS INSUFFICIENT TO ESTABLISH THAT THE REGISTERED AGENT FOR THE CLUB WAS AVOIDING SERVICE; THEREFORE, THE RULE 60(B)(4) MOTION WAS DUE TO BE GRANTED.

CONTRACTS – PROMISSORY NOTE – DESPITE THE FACT THAT IN THE MOST RECENT PROMISSORY NOTE EXECUTED BY THE DEFENDANTS, THE NOTE INDICATED THAT ELIZABETH HEAD "DOES NOT PROMISE TO PAY THE NOTE," THE COURT FOUND THAT THE PROVISIOSN OF THE 2008 NOTE CONTROLLED.

ARBITRATION **IGNORING ALABAMA LAW WAS NOT SUFFICIENT TO ESTABLISH THAT THE ARBITRATORS EXCEEDED THEIR AUTHORITY.**

THE APPELLANT DID NOT ESTABLISH "MISCONDUCT" ON THE PART OF THE ARBITRATION PANEL.

Tucker v. Ernst & Young, LLP, **2014 Ala. LEXIS 87 (June 13, 2014).**

HOLDINGS:

1. **Courts were required to enforce awards entered in arbitration proceedings conducted pursuant to the Federal Arbitration Act unless the challenging party established that vacatur was appropriate based on one of the grounds enumerated in 9 USC §10(a).**

2. **While the challenging party here claimed that the arbitration panel exceeded its authority by ignoring Alabama law in several key aspects, the challenging party bargained for the arbitrators' interpretation of Alabama law, and its argument that the panel "ignored" or disregarded key aspects of Alabama had to be rejected.**

3. **The challenging party's failure to timely object to the submission to the arbitration panel of the accounting firm's "equitable" affirmative defenses resulted in waiver of that issue.**

4. **The challenging party had not established "misconduct" on the part of the arbitration panel.**

DISCUSSION:

Tucker brought a shareholder derivative action against Ernst & Young on

behalf of HealthSouth Corporation. Tucker contended that Ernst & Young failed to discover, and if discovered, failed to report accounting fraud. Ernst & Young sought leave to file a dispositive Motion at the close of HealthSouth's case in chief and the arbitrators permitted it.

I. By imputing the knowledge of HealthSouth's Corporate Employees to the Shareholders, the Arbitrators dismissed all of the claims asserted in the Shareholders' derivative action.

On December 18, 2012, the arbitration panel issued its unanimous decision denying and dismissing all of HealthSouth's claims. The arbitrators imputed to HealthSouth the conduct and knowledge of HealthSouth's Corporation's employees and concluded that several Alabama legal doctrines barred recovery by HealthSouth.

II. The Arbitrators relied on *Hinkle* in which the Court found that a person cannot maintain a cause of action based in whole or in part on an illegal or immoral act to which he is a party.

The arbitrators first relied on the "Hinkle Rule" enunciated by the Alabama Supreme Court in *Hinkle v. Railway Express Agency*,242 Ala. 374, 378, 6 So.2d 417, 421 (1942) finding that "a person cannot maintain a cause of action if, in order to establish it, he must rely in whole or in part on an illegal or immoral act or transaction to which he is a party."

III. Further, the arbitration panel concluded that HealthSouth's claims were due to be dismissed under the doctrine of *in pari delicto* finding that HealthSouth, the company that committed the fraud, is far more at fault than is Ernst & Young.

IV. The panel found that all negligence claims were barred by the doctrine of contributory negligence.

On appeal HealthSouth argued that the arbitrators exceeded their powers by disregarding binding principles of Alabama law that the parties agreed would govern. The Trial Court found that HealthSouth's arguments were not well taken and affirmed the award of the arbitration panel. HealthSouth appealed.

V. The Court found that the arbitrators had not engaged in prejudicial misconduct when they made arbitrary procedural rulings and refused to consider relevant evidence unfavorable to Ernst & Young.

The Court found that the arbitrators did not exceed their powers and by "ignoring foundational rules of Alabama law repeatedly invoked by HealthSouth."

Justices Stuart, Bolin, Wise and Bryan concurred in the opinion authored by Justice Main.

Chief Justice Moore, Justice Parker, Justice Murdock and Justice Shaw concurred in the result.

ATTORNEYS – JURISDICTION FOR RESOLVING FEE DISPUTE.

WHETHER OR NOT THE "ADMINISTRATIVE SERVICE EXPENSE CHARGE" WAS PERMITTED UNDER THE TERMS OF THE CONTRACT WAS AT ISSUE WHICH WAS WITHIN THE JURISDICTION OF THE COURT, NOT THE ALABAMA STATE BAR.

THERE WERE NO CLAIMS THAT THE FEE CHARGED WAS UNETHICALLY EXCESSIVE; AND, THEREFORE, THE CLAIM WAS WITHIN THE JURISDICTION OF THE COURT, NOT THE BAR.

***Hall v. Environmental Litigation Group, P.C.*, 2014 Ala. LEXIS 93(June 20, 2014).**

SUMMARY:

The law firm moved to dismiss claiming that at issue was a fee dispute that was within the jurisdiction of the Alabama State Bar. The trial court dismissed the Complaint.

HOLDING:

The Court found that the core of the contract dispute was whether the attorney-client contract actually allowed the charging of the fee at issue and not whether the contract itself mandated payment by the client of a fee that was unethically excessive; therefore, the issue before the Court was properly before the Court and was not within the jurisdiction of the Alabama State Bar.

DISCUSSION:

1. **Plaintiffs contended that the "administrative service expense charge" was merely an extra attorney's fee over and above the 40% contingency**

fee charged.

The Plaintiffs filed a declaratory judgment action seeking a ruling that the "administrative service expense charge" charged to them by the attorneys who represented them in a class action related to asbestos claims was not permitted under the terms of the employment of the contract by which they employed the attorneys. The Plaintiffs argued that the administrative service expense charge was nothing more than extra attorney fee over and above the 40 percent contingency fee charged.

2. Plaintiffs claim that the lawyers had been unjustly enriched by their "wrongful activities."

The Plaintiffs claim that the lawyers had been unjustly enriched by their wrongful activities and that the Plaintiffs were due monetary relief and that the Plaintiffs were entitled to recover an attorney fee and reasonable expenses related to their prosecution of the claim against their former attorneys.

3. The Court did not agree that at issue was whether or not the fee was unethically excessive.

The attorneys filed a 12(b)(6) Motion to Dismiss and subsequently filed a supplement stating that "in essence [plaintiffs] asserted that ELG has charged its clients an excessive fee and [they] ask this court enter a declaratory judgment to that effect." Further, ELG contended that that issue was to be decided by the Alabama State Bar and that a declaratory judgment by the Court would constitute only an advisory opinion by the Circuit Court.

4. The Plaintiffs responded that their claim was not based merely on an ethics charge of excessive fees but was instead based on an allegation that ELG had breached the terms of the attorney employment agreement.

The Trial Court denied ELG's Motion to Dismiss and ordered review by the Alabama State Bar and then stayed the proceedings pending that review.

ELG responded that in that the Bar had jurisdiction over the matter that the Trial Court did not and ultimately the Trial Court dismissed the claims against ELG

with prejudice.

5. The Court found that the Plaintiffs had not raised any issue as to whether or not ELG had breached the provisions of the Alabama Rules of Professional Conduct and that instead the "crux" of the Plaintiffs' claims was whether ELG had breached the attorney employment agreement by taking a greater fee than 40 percent of the settlement proceeds.

Therefore the Court found that unlike the case of *BWT v. Haynes and Haynes, P.C.*, 20 S.3d 815 (Ala.Civ.App. 2009), there was no need in this case for the Alabama State Bar to be a party and the claims arising out of the attorney client contract fell within the subject matter jurisdiction of the Trial Court. The Court denied the Motion to Dismiss and reversed and remanded. In *BWT* the fee agreement entitled the law firm to 45 percent of all amounts recovered as a result of judgment or settlement plus expenses incurred by the law firm. In addition, the law firm was entitled to 100 percent of any attorney fee award assessed against the adverse party. In *BWT* the law firm proposed to give BWT only $127,034.82 of the $437,920.00 that was recovered. In that case, BWT alleged that the issue was whether the retention of $310,885.18 constituted a double recovery and was therefore a violation of Rule 1.5 Alabama Rules of Professional Conduct. BWT also argued that the fee was unfair, excessive, and unconscionable under the Rules of Professional Conduct.

Unlike *BWT*, the Plaintiffs in *Hall* made no claims that related in any manner to the Alabama Rules of Professional Conduct and stated their claim simply as a breach of a contract for employment.

ATTORNEYS - THE ELEVENTH CIRCUIT CERTIFIED THIS QUESTION TO THE ALABAMA SUPREME COURT AS A MATTER OF FIRST IMPRESSION:

> **"IS AN ATTORNEY WHOM AN INSURANCE COMPANY HIRES AS AN ATTORNEY AGENT PROVIDING A 'LEGAL SERVICE' WITHIN THE MEANING OF ALABAMA CODE § 6-5-574 WHEN HE PERFORMS A TITLE SEARCH, FORMS AN UNWRITTEN OPINION ABOUT THE STATUS OF TITLE, AND THEN ACTS ON THAT UNWRITTEN OPINION BY ISSUING A COMMITMENT TO INSURE OR AN INSURANCE POLICY?"**

***Mississippi Valley Title Insurance Company v. Thompson*, 2014 U.S. App. LEXIS 11514 (June 19, 2014).**

HOLDINGS:

1. In an action brought by a title insurance company against an attorney who committed errors in title searches, no Alabama Appellate decision spoke directly to the issue of whether an attorney agent provided a legal service for purposes of the statute of limitations under Alabama Code §6-5-574(a) when he conducted a title search and then insured title based on an informal opinion about the insurability of title; and

2. The United States Court of Appeals for the 11th Circuit submitted a certified question to the Alabama Supreme Court pursuant to Alabama Rules of Appellate Procedure 18 to resolve the issue.

DISCUSSION:

1. The District Court found that the statute of limitations provided as to claims against a legal service provider did not apply to an attorney who worked under contract for a title insurance company.

The issue before the 11th Circuit Court of Appeals was whether an "attorney agent" who works under a contract for a title insurance company provides a "legal service" within meaning of Alabama Code §6-5-574, when he performs a title search, analyzes documents in the chain of title, forms an unwritten opinion on the status of title documents based on those documents and then issues a commitment to insure or an insurance policy based on his unwritten opinion.

The District Court answered this question in the negative and did not subject the action to Alabama statute of limitations for "legal service liability actions against … legal service providers."

The District Court then granted Summary Judgment to the Plaintiff Appellee Mississippi Valley Title Insurance Company and its affiliate Old Republic National Title Insurance Company (collectively "Mississippi Valley").

2. The 11th Circuit instead concluded that the appeal presented an issue of first impression that needed to be resolved by the Alabama Supreme Court.

Mississippi Valley brought the lawsuit against Thompson in September 2011 for events that occurred in November 2011 and October 2003 well beyond four years after the events occurred which would bar the claim if the statute of limitations in §6-5-572(2) applied.

3. The Alabama Supreme Court had previously held in 1974 that non-attorney agents who reviewed title records and issued commitments were not engaged in the unauthorized practice of law.

In *Land Title Insurance Company of Alabama v. State ex rel. Porter*, 292 Ala. 691, 299 So. 2d 289, 290-91 (Ala. 1974), the State of Alabama sought to enjoin a title insurance company's non-attorney agents from reviewing title records and issuing commitments with specified conditions on the theory that they would get engaged in the unauthorized practice of law. The Alabama Supreme Court held that these actions by non-attorney agents did not constitute the unauthorized practice of law.

However, in *Upton v. Mississippi Valley Title Insurance Company*, 469 So. 2d 548 (Ala. 1985), the Alabama Supreme Court emphasized the narrowness of

Land Title and noted that a non-lawyer engages in the unauthorized practice of law when he renders a title opinion before issuing insurance.

4. In a subsequent opinion issued in 1997, the Alabama Supreme Court found that a title insurance company's attorney agent provided a "legal service."

Finally, in *Mississippi Valley Title Insurance Company v. Hooper*, 707 So. 2d 209, 211 (Ala. 1997), the Alabama Supreme Court interpreted Alabama Code § 6-5-574 and found that a title insurance company's attorney agent provided a "legal service" within the meaning of Alabama Code §6-5-574 when he wrote title opinions and acted on them to issue insurance policies.

The 11th Circuit noted that the district court adopted a narrow reading of *Land Title*, *Upton*, and *Hooper* finding that an attorney agent provides a legal service only when the legal opinion upon which he bases his decision to insure (or commit to insure) title is a formal, written one.

The 11th Circuit found that instructions from the Alabama Supreme Court would be necessary in that it could find no Alabama Supreme Court opinions that interpreted the meaning of "legal service" in Alabama Code §6-5-574. As a result, the 11th Circuit sought an opinion from the Alabama Supreme Court regarding the definition of "legal service."

The question certified to the Supreme Court of Alabama is the following:

> Is an attorney whom an insurance company hires as an attorney agent providing a 'legal service' within the meaning of Alabama Code § 6-5-574 when he performs a title search, forms an unwritten opinion about the status of title, and then acts on that unwritten opinion by issuing a commitment to insure or an insurance policy?

ATTORNEYS **ATTORNEYS' FEES LIENS HAVE FIRST PRIORTY OVER THE RIGHTS OF THE CLIENT TO RECEIVE THE PROCEEDS OF THE SETTLEMENT.**

Ex parte Lambert Law Firm, LLC, **2014 Ala. LEXIS 62 (May 2, 2014)**

SUMMARY:

No part of the proceeds of the settlement could be disbursed to the client because the total amount of the attorneys' fees liens would consume most of the monies paid in the settlement of the claim.

HOLDINGS:

Attorney's fee liens under Alabama Code §34-3-61 had first priority and therefore the Trial Court erred in disbursing half of the client's recovery to the client prior to determining the amount of two law firms' attorney's fee liens, given that the remaining funds would be insufficient to reimburse the attorneys if both liens were valid. In this per curiam opinion, the Court granted the Petition for Writ of Mandamus.

DISCUSSION:

I. Lambert Law Firm petitioned for a Writ of Mandamus directing the Circuit Court to set aside an Order awarding to the Respondent, Brechbill, a portion of certain funds held by the Circuit Court Clerk.

II. Two law firms had a lien on the proceeds of the State Farm settlement for breach of contract and bad faith failure to pay an insurance claim.

Brechbill was represented by the Morris Law Firm when he sued State Farm for breach of contract and bad faith failure to pay an insurance claim.

Later the law firm withdrew its representation and the Trial Court held a

hearing and issued an Order stating that Morris would have a lien under Alabama Code 1975 §34-3-61 against any settlement or judgment. Brechbill then hired Lambert to continue the litigation. Lambert's agreement required a $5,000.00 retainer, payment of $200 per hour plus expenses and a payment of $30,000.00 prior to trial, $7,000.00 of which would be paid toward the Morris bill.

Brechbill received a judgment. Lambert withdrew and the Judge entered an Order granting Lambert a lien on any recovery.

III. State Farm appealed but paid to the Circuit Clerk one half of the amount of the verdict and both law firms moved to compel the funds held by the Circuit Clerk.

During the appeal, Morris and Lambert moved to condemn the funds held by the Circuit Clerk and Brechbill also moved the Court to release the funds to him.

IV. The Trial Court released enough monies to pay a Court Reporter and released to the Plaintiff one-half of the total amount that had been paid by State Farm.

V. The Court found that given the mandatory nature of §34-3-61 and the priority of the two liens and the limited funds available that the Trial Court had to determine the amount of any fees owed prior to disbursing any monies to the successful Plaintiff.

At a hearing, the Trial Court held that the amounts owed to Morris and Lambert were "sharply disputed" in deferred ruling on the attorneys' Motions and indicated that after the appeal a hearing would be conducted to receive testimony and evidence regarding the claims of the respected lawyers. The Court did release the monies to pay a court reporter and released Brechbill one-half the total amount that had been paid by State Farm.

Lambert petitioned for Mandamus relief.

In answer to Lambert's petition, the Trial Court acknowledged that it did not provide a full blown evidentiary hearing and that it had an obligation to do so before it made a final ruling on the claims for attorneys' fees but explained that it was unaware of the dispute between Brechbill and its former attorneys over the fees

and had allotted too little time for a hotly contested attorney fee trial.

The Court found that given the mandatory nature of §34-3-61 and the priority of the two liens and the limited funds available, that the Trial Court had to determine first the amount of any fees owed to insure that any preliminary disbursement would not divest the fund of money by which another party would have a priority in interest. Finding that Lambert had demonstrated a clear legal right to relief, the Court granted petition and the Writ issued.

Justices Stuart, Bolin, Parker, Murdock, Shaw, Main, Wise and Bryan concurred. Chief Justice Moore dissented.

CIVIL PROCEDURE **THE RULE 54(b) CERTIFICATION WAS IMPROPER IN THAT THE REMAINING CLAIMS WERE TOO CLOSELY INTERTWINED WITH THE CLAIMS AGAINST THE OIL COMPANY.**

ALTHOUGH NEITHER McDOWELL NOR HUNT RAISED A JURISDICTIONAL ISSUE, THE ALABAMA COURT OF CIVIL APPEALS RAISED IT *EX MERO MOTU.*

***McDowell v. Hunt Oil Co.*, 2014 Ala. Civ. App. LEXIS 15 (Jan. 24, 2014).**

SUMMARY:

McDowell sued Hunt Oil as well as certain individuals. Hunt Oil moved for a Summary Judgment based on the doctrine of collateral estoppel and based on Hunt's contention that McDowell could not prevail on the merits of her claim.

HOLDINGS:

1. **Alabama Rule of Civil Procedure 54(b) certification of an order granting Summary Judgment in favor of certain Oil Company Defendants in Plaintiff's action regarding her purported interest in certain mineral rights was error because the claims asserted by Plaintiff against the other individual Defendants were too closely intertwined with the claims against the Oil Company Defendants to allow for the separate resolution of the claims against the two groups of Defendants.**

2. **As the Rule 54(b) Certification was improper, the Order granting Summary Judgment was considered an interlocutory Order that the Appellate Court lacked jurisdiction to consider.**

DISCUSSION:

I. McDowell sought to quiet title to and obtain a judgment declaring her interest in certain mineral rights.

McDowell sued several Hunt Oil Defendants as well as certain individual Defendants. The Hunt Oil Defendants moved for Summary Judgment claiming that McDowell's claims against Hunt were barred by the doctrine of collateral estoppel and even if the claims were not barred that McDowell had not demonstrated that she could prevail on the merits of her claim.

II. Although neither McDowell nor Hunt raised a jurisdictional issue, the Alabama Court of Civil Appeals raised it *ex mero motu.*

III. The Court found that McDowell's claims against Hunt seeking payment of royalties are dependent on her unadjudicated claims asserted against the individual Defendants.

The Court found that in that McDowell has alleged that she has an interest in certain mineral rights as a result of the provisions of the Will of C.F. Stewart and she sought a declaration of her interest and the interest of the individual Defendants in those mineral rights and in that McDowell sought payment from the Hunt Oil Defendants from royalties from her purported interest, the Court found that McDowell's claims against Hunt seeking payment of royalties are dependent on her unadjudicated claims asserted against the individual Defendants. Therefore, the Court concluded that the Rule 54(b) certification was improper and dismissed the appeal.

CIVIL PROCEDURE – VENUE

THE WRIT OF MANDAMUS WAS NOT DUE TO BE GRANTED BASED ON *FORUM NON CONVENIENS* UNDER THE INTEREST OF JUSTICE PRONG OF ALA. CODE §6-3-21.1(a) BECAUSE THE NEXUS TO MOBILE COUNTY WAS PURELY FORTUITOUS.

***Cruz v. J&W Enterprises, LLC,* 2014 Ala. LEXIS 45 (March 28, 2014).**

SUMMARY:

The accident at issue occurred in Mobile County. The Plaintiff was from Texas, the employer of the truck driver had a principal office in Clarke County and the individual truck driver lived in Clarke County. The Defendant's only basis for the Petition for a Writ of Mandamus was that the case should have been transferred to Mobile County based on *forum non conveniens* under the interest of justice prong.

HOLDINGS:

1. **A Texas motorist's action that arose from a truck accident in Mobile County was properly brought in Clarke County because the individual truck driver resided there and the corporate employer that owned the truck had a principal office there pursuant to Alabama Code §6-3-2(a)(3) and §6-3-7(a)(2).**

2. **The truck owner/driver were not entitled to a Writ of Mandamus to direct the transfer the action to Mobile County based on *forum non conveniens* under the interest of justice prong of Alabama Code §6-3-21.1(a) because Mobile County's nexus to the action was purely fortuitous and Clarke County's connection to the action was not markedly weak.**

DISCUSSION:

Justice Main authored this opinion in regard to the petition for Writ of Mandamus filed by J&W and Ezell Coates, both Defendants in the underlying action. J&W petitioned the Court for a Writ of Mandamus directing the Clarke County Court to transfer the action to Mobile. The Court denied the petition.

I. Cruz is a resident of Brownsville, Texas and Coates is a resident of Clarke County. J&W's principal place of business is also located in Clarke County. Other than Cruz and Coates, there are no other witnesses to the accident.

The accident at issue was investigated by the Mobile Police Department.

II. The Defendant argued that the case was to be transferred "for convenience of parties and witnesses" and "in the interest of justice."

Cruz sued for negligence and wantonness and negligent and wanton entrustment of the tractor-trailer rig to Coates and asserted that J&W had negligently and/or wantonly hired, retained, or trained Coates. J&W and Coates that under §6-3-21.1, Alabama Code 1975, Alabama's *forum non conveniens* statute, that the case was to be transferred "for the convenience of parties and witnesses" and "in the interest of justice."

III. Cruze submitted an Affidavit from the investigating Police Officer who testified that it was not inconvenient for him to travel to Clarke County to testify in the case.

Cruz also submitted an Affidavit stating that because his lawyer is located in Clarke County that venue in Clarke County was more convenient for him and noted that Coates and J&W could not claim inconvenience since they were both residents of that county. Cruz further stated that because the actions giving rise to the alleged negligent and/or wanton entrustment occurred in Clarke County that the "interest of justice" prong of the *forum non conveniens* statute compelled that the case remain in Clarke County. The Court noted that there was no dispute that Clarke County was proper venue for the case. Despite that, the Court noted that Alabama's *forum non conveniens* statute permits a transfer of the civil action from one appropriate

venue to another appropriate venue "for the convenience of parties and witnesses or in the interest of justice." The Defendant moving for a transfer has the initial burden showing that a transfer is justified on the basis of the convenience of the parties and witnesses or based on the interest of justice.

IV. The Court agreed that the action could have been filed in Mobile, the county in which the accident occurred, but noted that when venue is appropriate in more than one county, the Plaintiff's choice of venue is generally given great deference. *Ex parte Perfection Siding, Inc.*, 882 So.2d 307, 312 (Ala. 2003).

Coates and J&W argued that the interest of justice prong compelled the transfer to Mobile.

V. There was no strong connection between Mobile County and the claims asserted.

The interest of justice prong of §6-3-21.1 requires "the transfer of the action from a county with little, if any, connection to the action, to the county with a strong connection to the action." *Ex parte National Security Ins. Co.*, 727 So.2d 788, 790 (Ala. 1998). The Court stated that it had often ruled that "the fact that the injury occurred in the proposed transferee county is often assigned considerable weight in an interest of justice analysis." *Ex parte Wachovia Bank, N.A.*, 77 So.3d 570, 573-574 (Ala. 2011).

VI. The only nexus to Mobile County was that the accident occurred on the interstate in Mobile County.

In *Ex parte Southeast Alabama Timber Harvesting, LLC*, 94 So.3d 371, 373 (Ala. 2012) the Court found that transfer to the county where the accident occurred was proper because the Plaintiff suffered serious injuries and was treated in that county and the Police Officers and emergency personnel from that county responded to the accident. Also, the only known eyewitnesses to the accident lived and worked in the county in which the accident occurred. In that case, the Court found that the sole connection of the county in which the lawsuit was filed was that the timber harvesting company's principal place of business was in the county in which the lawsuit was filed and the connection was "weak in comparison to Lee County's connection with the case." 94 So.2d at 376.

The Court denied the petition finding that the facts in the present case demonstrated that Mobile County's nexus to the action was purely fortuitous and that it was the place on the interstate where the accident occurred. The Court did not find that the connection of Mobile County with the case was significant enough to merit transfer of venue based on the "interest of justice prong of §6-3-21.1.

The petition for Writ of Mandamus was denied.

Chief Justice Moore and Justices Stuart, Bolin, Parker, Shaw, Wise and Bryan concurred and Justice Murdock concurred in the result.

ALABAMA RULES OF CIVIL PROCEDURE -
SERVICE BY PUBLICATION UNDER RULE 4.3(B)(1) – MOTION TO SET ASIDE A DEFAULT JUDGMENT PURSUANT TO A.R.C.P. 60(B)(4).

THE EVIDENCE SUBMITTED BY THE PROCESS SERVER WAS INSUFFICIENT TO ESTABLISH THAT THE REGISTERED AGENT FOR THE CLUB WAS AVOIDING SERVICE; THEREFORE, THE RULE 60(B)(4) MOTION WAS DUE TO BE GRANTED.

Volcano Enterprises, Inc., d/b/a Club Volcano v. Peggy Bender Rush, et al., **2014 Ala. LEXIS 69 (May 9, 2014).**

HOLDING:

1. **The Trial Court erred in denying a club's A.R.C.P. 60(b)(4) Motion to Set Aside a Default Judgment entered against it in Plaintiff's wrongful death action;**

2. **The conclusory statements in a process server's Affidavit that the Club's registered agent was avoiding service, along with the process server's failed attempts to perfect service on him, was insufficient to show avoidance of service so as to allow service by publication under Alabama Rules of Civil Procedure 4.3(b)(1); and,**

3. **The averments of the Affidavit established only that the process server simply did not find the registered agent at the Club on the three occasions he visited there.**

DISCUSSION:

A police officer, Kendrick, met a friend of his who was an off-duty police officer at Club Volcano after Kendrick's shift had ended. Kendrick consumed a substantial amount of alcohol while sitting in a parked car in the parking lot after which he entered the club with his friend. Kendrick remained in the Club for

several hours and became visibly intoxicated and despite that he was served additional alcohol and was allowed to leave in an intoxicated condition. Kendrick later killed Rush's son as a result of a motor vehicle accident.

1. The five attempts by a process server to serve the registered agent at the club during a two-week period was not sufficient to establish that the registered agent was avoiding service.

Rush sued Kendrick and the Club and attempted to serve the Club by personal service on the Club's owner, Williams. The address of Williams was at a location where the house had been destroyed as a result of an April 2011 tornado. Rush attached to a Motion for Extension of Time to Serve Volcano via publication an Affidavit from a process server. In that Affidavit, the process server stated:

> I have made the following efforts to serve Darrell Williams, the registered agent for Volcano Enterprises, at Club Volcano.

On the first occasion, the process server spoke with someone that Williams was not the manager and that the manager instead was Leonard Smith but that Smith was not in.

On the next day, the process server returned but he could not get into the bar.

One week later, the process server returned but could not get into the bar on two occasions during that day and later on that same day the process server returned to the bar for a third time and no one admitted to being or knowing Darrell Williams.

Six days later, the process server again went to the bar but no one would admit knowing Williams.

2. The process server added that the Club "is aware of the many efforts I have made to perform service. [Volcano Enterprises] employees have been informed of the nature of the papers to be served and that there is a lawsuit pending against Volcano Enterprises."

Six days later, the process server signed a return of service stating that Volcano Enterprises had "avoided service."

In the Motion for Service by Publication, the attorney stated in part that:

> Plaintiffs' counsel, through their process server, has been informed that Darrell Williams cannot be found in the State of Alabama and that his home was destroyed by the April tornado. Plaintiffs' counsel moved the Court to deem these circumstances as evidence of service under Rule 4.3(c) and allow service by publication to Defendant Volcano Enterprises.

Subsequent to meeting the requirements by service by publication, Rush filed an application for default. Kendrick defended the action and an award was entered against him for $3.25 million and the Court entered a final Order against the Club for $37 million in damages.

3. The Club's Rule 60(b)(4) Motion was due to be granted in that despite the fact that his home had been destroyed by a tornado, Williams testified that (1) he still received mail at that address and had received no mail regarding the lawsuit, (2) Williams alleged that he did not manage the Club nor participate in its daily functions and (3) the managers were not authorized to accept service on behalf of the Club.

Twenty-eight days later, the Club filed a "Motion to Alter, Vacate, or Amend or in the Alternative, Motion for a New Trial." The Club contended that the judgment was void due to lack of personal jurisdiction and that the facts did not warrant service by publication.

In an Affidavit, Williams testified that he had continued to receive mail at his Spring Street address and had received no mail concerning the subject lawsuit. Williams indicated that he did not manage the Club and did not participate in its daily functions and that the managers were not authorized to accept service on behalf of the Club. Williams stated that he first learned about the lawsuit when an acquaintance told him that he had heard about the judgment.

4. The Trial Court found that Williams' Affidavit was not credible in that

over 30 filings had been mailed to Williams' home address and none had been returned and in that Williams signed ABC documents, violation notices, and in a lawsuit had contended that he had 20 years of experience in owning, managing, and operating adult entertainment clubs.

In opposition, Rush offered records showing that over 30 filings had been mailed to Williams' home address during the course of the lawsuit and that none of the filings had been returned as undelivered. Further, evidence was offered that Williams signed and filed documents with the ABC Board on behalf of the Club and that Williams had signed violation notices as well as a lawsuit in which Williams alleged that he had 20 years of experience owning, managing, and operating an adult entertainment clubs.

The Trial Court denied the Motion to Set Aside the Default Judgment finding Williams' Affidavit not to be credible.

5. Justice Murdock found that the process server's Affidavit demonstrated only that there was a mere failure on the process server's part to find the Defendant, that service by certified mail had not been attempted and that the Affidavit did not detail sufficiently the process server's attempts to talk with an employee of the Club.

In an opinion authored by Justice Murdock, he agreed that the Affidavit of the process server did not demonstrate the culpability necessary to find avoidance of service but instead was rather a mere failure on the process server's part to find the Defendant.

Justice Murdock reasoned that "despite having a mailing address for Williams at which he had clearly received a great deal of mail in this case, Rush did not attempt service by certified mail. She attempted personal service in two ways," via the Sheriff and via the process server. The Court found that the Affidavit of the process server merely reflected that he had visited the Club on three occasions and the Affidavit did not address whether or not the process server had attempted to return and talk with a man identified by an employee as Leonard Smith.

6. The burden of proving avoidance of service is on the Plaintiff. *Nicholas v. Pate,* 992 So.2d 734, 737 (Ala. Civ. App. 2008); and no evidence was

presented via Affidavits or testimony by the persons with whom the process server allegedly spoke.

Rush did not identify any of the persons with whom the process server spoke, none of them were called as witnesses and there is no evidence indicating that any of them did, in fact, know Williams. As a result, the Court found that there was no direct evidence that any of these employees had been instructed by Williams to lie on his behalf.

The Court in *Fisher v. Amaraneni*, 565 So.2d 84, 87-88 (Ala. 1990), observed that "more than mere inability to find the defendant is required because of the use of the term 'avoidance' of service."

7. There must be culpability before there is justification for service by publication.

The Court noted that in *Gross v. Loewen*, 522 So.2d 306 (Ala. Civ. App. 1988), the Court found that the wife's Affidavit stating that her husband was "avoiding service as service attempted by certified mail was returned undelivered" was an insufficient averment of fact that permitted service by publication.

The Court found that the process server's Affidavit was not sufficient to establish avoidance of service.

Chief Justice Moore and Justices Stuart, Bolin, Parker, Shaw, Main, Wise and Bryan concurred in the opinion authored by Murdock.

CONTRACTS – PROMISSORY NOTE

DESPITE THE FACT THAT IN THE MOST RECENT PROMISSORY NOTE EXECUTED BY THE DEFENDANTS, THE NOTE INDICATED THAT ELIZABETH HEAD "DOES NOT PROMISE TO PAY THE NOTE," THE COURT FOUND THAT THE PROVISIONS OF THE 2008 NOTE CONTROLLED.

***Merchants Bank v. Elizabeth Head*, 2014 ALA.LEXIS 78 (May 30, 2014).**

HOLDINGS:

1. The Bank's breach of a promissory note claim should have been resolved in a borrower's favor because the undisputed evidence showed that a corrected note was the true representation of the borrower's debt, and the unambiguous language thereof indicated that the borrower signed the note as a maker.

2. Pursuant to Alabama Code §7-3-116(a), Head and her husband were jointly and severally liable for the obligations on the note because the proceeds were knowingly used by the husband for a business loan which constituted sufficient consideration for Elizabeth Head's liability.

DISCUSSION:

It was undisputed that David and Elizabeth Head executed a 2008 promissory note for a $400,000.00 loan that was paid to Mr. Head's business. The line was secured by the personal residence of the Heads.

1. The Bank relied on a July 11 note in which Ms. Head indicated that she did not promise to pay the note; and despite the fact that a subsequent agreement was signed, the Bank relied on the earlier 2011 agreement as the basis of its lawsuit.

The 2008 promissory note included a box as did all subsequent promissory

notes that indicated as follows: "any person who signs within this box does so to give you a security interest in the property described on this page. This person does not promise to pay the note. 'I' as used in this security agreement will include the borrower and any person who signs within this box." In the 2008 note and all subsequent notes the box was left blank. However, in July 2011, the Heads executed a note in which Elizabeth signed within the box indicating that she did not promise to pay the note. A subsequent note was executed in July which corrected the problem and in the subsequent note Elizabeth did not sign in the block.

When the Bank sued to collect the debt, the bank attached the initial July 2011 note, not the corrected version.

The trial court entered a judgment in favor of Elizabeth Head, and the Bank appealed. On appeal Elizabeth cited to the note itself that was described by the Bank as the initial July 2011 note as well as that the Bank examined only her husband's financial information and that she did not deal directly with anyone at the Bank. The Court stated that:

> However, as noted previously, Clolinger testified that Merchants Bank had mistakenly attached the initial July 2011 note to its complaint and that the corrected July 2011 note should have been included instead. The correct July 2011 note was admitted into evidence without any objection from Elizabeth. Clolinger did acknowledge that it was Merchants Bank's general practice to have signatories initial the bottom of each page of a promissory note. However, he did not testify, and Elizabeth has cited no evidence indicating, that a failure to initial the pages rendered the promissory note invalid, Elizabeth has also failed to cite any evidence contradicting Clolinger's testimony that the corrected July 2011 note was executed after the initial July 2011 note because the corrected July 2011 note was intended to fix mistake on the initial July 2011 note.

2. Elizabeth argued that was insufficient consideration for her signing the promissory note. The Court found that Elizabeth had cited no authority supporting her position that the $400,000.00 transferred to David in

2008 could not constitute consideration for her signature on the note.

Elizabeth relied on *Kittle v. Sand Mountain Bank*, 437 So. 2d. 100 (Ala. 1983), in arguing that "the receipt by David of the loan proceeds from the 2008 promissory note does not constitute consideration flowing to her because consideration is required with respect to each spouse when a married couple contracts with a third party."

3. The Court distinguished *Kittle* on the basis that that the husband and wife in that case executed a mortgage as security for a pre-existing debt because the 2008 note, not subsequent notes executed by Ms. Head, was at issue.

The Court said that *Kittle* was not applicable because the Heads signed the 2008 promissory note to secure a new debt. The Court found that "there is no evidence indicating that David and Elizabeth executed the promissory note to secure a pre-existing debt of David's loan. Instead, they signed the 2008 promissory note to secure a new debt, and the plain language of the promissory note indicates that the debt is owed by each signatory." The Court found that David and Elizabeth were jointly and severally liable for the obligations set forth in the corrected July 2011 note and that she could not avoid liability by contending that she did not receive any of the proceeds of the 2008 business loan.

The case was reversed and remanded.

Justice Bryan authored the opinion.

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

CONTRACT **A CONTRACT PROVIDING FOR A PARTY TO USE ITS "BEST EFFORTS" DOES NOT IMPOSE ON THAT PARTY EXPOSURE FOR DAMAGES IF THE BEST EFFORTS WERE NOT SUFFICIENT TO SATISFY THE TERMS OF THE CONTRACT. THE RISK OF FAILURE LIES WITH THE OBLIGEE.**

DAMAGESBECAUSE THE CLASS ACTION INCLUDED CLAIMS AGAINST PEBCO FOR ITS OWN ALLEGED WRONGFUL ACT, PEBCO WAS NOT ENTITLED TO BE INDEMNIFIED FOR DEFENDING AGAINST THOSE CLAIMS PREMISED ON PEBCO'S OWN ALLEGED WRONGFUL ACTS.

Nationwide Retirement Solutions, Inc., v. PEBCO, **2014 Ala. LEXIS 43 (March 28, 2014).**

HOLDINGS:

1. **The class action arose because of Nationwide's fulfillment of its contractual duty to make sponsorship payments to the corporation, and the agreement did not impose on the insurance company responsibility for the legal sufficiency of the contribution plan documents but instead imposed a duty only to assist in the creation of those documents.**

2. **PEBCO did not allege that the insurance company failed to assist it in preparing the relevant plan documents or the request for rulings on those documents.**

3. **PEBCO was not entitled to fees on fees for litigating in the severed action its claim for indemnification of fees in the class action.**

DISCUSSION:

The opinion was authored by Chief Justice Moore. Nationwide appeals from a judgment awarding PEBCO $1,074,027.50 in attorney's fees and $29,132.01 in expenses.

I. Participants in a deferred compensation plan for State Employees brought a class action against Nationwide, the Alabama State Employment Agency Association and PEBCO claiming breach of fiduciary duty, conversion, and breach of contract in the administration of the plan.

In November 2007, participants in the State of Alabama Public Employees Deferred Compensation Plan filed a class action against Nationwide, the Alabama State Employment Agency Association and PEBCO alleging breach of fiduciary duty, conversion, and breach of contract in the administration of the plan.

II. Nationwide paid $15.5 million and $2.9 million in attorney's fees to settle the claims against all of the Defendants.

The parties filed a stipulation of settlement which the Trial Court approved. Pursuant to the settlement, Nationwide paid $15.5 million to the participants in the plan and $2.9 million in attorney's fees to settle class claims against all Defendants, including the Alabama State Employees Association and PEBCO. In its findings of fact, the Trial Court stated the Alabama State Employees Association is being permitted to retain more than $12 million in sponsorship payments that it allegedly received unlawfully and the Alabama State Employees Agent Association is receiving full relief from any liability.

III. The settlement also barred all future claims by the Association and PEBCO against Nationwide except for indemnification for attorney's fees and cost based on a 2004 Administrative Services Agreement.

The Agreement which provided for an annual sponsorship fee to PEBCO of at least $1.2 million contained an indemnification clause providing that Nationwide agrees to indemnify and hold harmless the Association and PEBCO for an action

taken against any of them arising as a result of Nationwide's failure to perform its duties under this Agreement.

IV. Nationwide refused to pay PEBCO's cost of litigating the class action as a part of its settlement payment.

PEBCO in turn refused to surrender its claim for fees and costs in exchange for Nationwide's shouldering the complete financial burden of the settlement.

V. Prior to the settlement, the Trial Court precluded the other Defendants from seeking indemnification except as to claims for attorney's fees and costs, and the Trial Court severed the cross-claim filed by the Association and PEBCO for fees and costs.

A day before the parties filed their stipulation of settlement, Nationwide moved for an Order barring the Association and PEBCO from filing any indemnification claims. The Trial Court granted the Order except for claims for attorneys' fees and costs. The Trial Court stated that if the Association and PEBCO filed a cross-claim for fees and costs within 30 days it would sever that claim for separate adjudication. The Trial Court ordered severance of the Association and PEBCO's claims for fees and directed the Clerk of the Court to docket that claim as a separate and independent action.

Ultimately the Trial Court ordered Nationwide to pay PEBCO $863,988.50 in attorney's fees and $15,297.54 in expenses for the class action litigation and $210,039.00 in attorney's fees and $13,834.47 in expenses for litigating the severed cross-claim. Nationwide appealed.

VI. The question for the Court therefore was whether the class action arose "as a result of Nationwide's failure to perform its duties" under the Agreement.

The indemnification clause in the Agreement states that Nationwide would "hold harmless" PEBCO "for an action taken against it arising as a result of Nationwide's failure to perform its duties under this agreement." The Court noted that without question the class action that named PEBCO as a Defendant was an action taken against PEBCO.

VII. Nationwide's agreement to use its "best efforts" to assist in the preparation of the plan did not impose on Nationwide responsibility for the ultimate legal sufficiency of the plan documents.

The Court noted that the Complaint of the participants alleged breach of fiduciary duty, wantonness, and breach of contract in the administration of the plan all related to the sponsorship payments mandated by the Agreement. PEBCO argues that by fulfilling its contractual obligation to make millions of dollars in sponsorship payments to PEBCO, Nationwide breached the following portion of the Agreement:

> Nationwide hereby agrees to utilize its best efforts and to provide appropriate personnel to include Nationwide legal counsel, where necessary: **to assist** the Association and PEBCO in the preparation of a deferred compensation plan and its attendant agreements together with appropriate request for rulings so that all such documents met the requirements, in the opinion of the Attorney General of the State of Alabama, of House Bill 91, the Internal Revenue Service, the Securities and Exchange Commission, and Alabama's statutes and Constitution.

The Court found that this section of the Agreement does not impose responsibility upon Nationwide for the ultimate legal sufficiency of the plan documents but instead only required Nationwide to "utilize its best efforts." The Court found that by its plain terms this section did not impose on Nationwide's responsibility for the legal sufficiency of the Plan documents but instead imposed a duty only to assist in the creation of those documents – using its best efforts.

Citing to Blacks Law Dictionary, the Court noted that **a best efforts contract is one "in which a party undertakes to use best efforts to fulfill the promises made rather than to achieve a specific result … although the obligor must use best efforts, the risk of failure lies with the obligee**." The Court found that "PEBCO cannot complain that Nationwide failed to subject the Agreement to the scrutiny of regulators when, with PEBCO's assent, that Agreement was unknown to the regulators."

VIII. Also the Court found that Alabama does not permit a party to be

indemnified for defending against claims premised on its own allegedly wrongful actions.

In *Jack Smith Enterprises v. Northside Packing Co.,* 569 So.2d 745 (Ala. Civ. App. 1990), the Court of Civil Appeals noted "There is considerable authority holding that an indemnitee is precluded from recovering attorney fees where the indemnitee has been required to demand accusations which encompass its own separate wrongful acts." 569 So.2d at 246.

The class action claims unquestionably encompassed PEBCO's own allegedly wrongful acts and PEBCO defended those acts for its own benefit.

IX. PEBCO was a Defendant in the class action because Nationwide performed its duties to make the allegedly wrongful sponsorship payments to PEBCO and not because Nationwide failed to perform its duties under the agreement.

Further as to the fees and expenses incurred in litigating its claim for indemnification in the severed action, the Court noted that it has stated that indemnification for attorney's fees "does not extend the services rendered in establishing the right of indemnity." *Stone Building Co., v. Star Electric Contractors, Inc.,* 796 So.2d 1076, 1091 (Ala. 2000). The Court concluded that PEBCO was a Defendant in the class action not "as a result of Nationwide's failure to perform its duties under the Agreement" but precisely because Nationwide did perform its duty to make the allegedly wrongful sponsorship payments to PEBCO. As to PEBCO's arguments that Nationwide had a contractual obligation to steer it away from any legal pitfalls, the Agreement states only that Nationwide shall use its best efforts to assist PEBCO in that effort.

The case was reversed and remanded. Justices Stuart, Bolin, Parker and Wise concurred and Justices Murdock and Shaw concurred in the results.

GOVERNMENT – STATUTORY CAP

THE STATUTORY CAP DOES NOT APPLY TO A MUNICIPAL EMPLOYEE IF THE CLAIMS AGAINST HIM FALL WITHIN THE "WILLFUL OR WANTON" EXCEPTION.

***Morrow v. Caldwell,* 2014 Ala. LEXIS 36 (June 28, 2014).**

SUMMARY:

At issue was whether the claims against a municipal employee sued in his individual capacity were subject to the statutory cap of Alabama Code §11-47-190, when those claims fell within the "willful or wanton" exception to the doctrine of state agent immunity.

HOLDINGS:

1. **The second sentence of §11-47-190 limits the damages a person or corporation could recover from a municipality in those limited situations in which the municipality could be held liable.**

2. **§11-47-190 did not apply to claims against municipal employees who were sued in their individual capacities as the limitation on recovery was intended to protect the public coffers of the municipality, not municipal employees from claims against them in their individual capacities.**

3. **The $100,000 statutory cap on recovery set forth in §11-47-190 did not apply to the mother's claims against the employee, individually.**

DISCUSSION:

Justices Stuart, Bolin, Parker, Main, Wise and Bryan concurred in this *per curiam* opinion. Justice Murdock concurred specially and Chief Justice Moore concurred in the result.

1. Morrow filed a permissive appeal pursuant to Rule 5, Ala. Rules of Appellate Procedure from a Trial Court's Order denying Morrow's request for a judgment declaring that the $100,000.00 cap on damages in §11-47-190 applied to Morrow, a municipal employee who was sued in his individual capacity.

The Alabama Supreme Court affirmed the Trial Court's Order.

2. An electrical inspector with the City cleared the premises for service so that Alabama Power could restore electrical service to a commercial building.

Morrow, an electrical inspector with the City had to clear the premises for service before Alabama Power could restore electrical service to a commercial building. Morrow stated there was a raised concrete pad at the back of the building and that there was an air conditioning system on the raised concrete pad. Morrow also stated that there was a chain-link fence around the entire concrete pad, that the entry to the system was by a locked gate and that the top of the fence was also enclosed by a chain-link fence that went over the air conditioning system and was secured to the building. Morrow found that above the concrete pad there was an electrical source that could be used to install a floodlight and that the electrical source was covered by a circular, weatherproof junction box. Morrow found no electrical defects or dangerous conditions. On January 30, 2009, Alabama Power restored power to the premises.

On June 30, 2009, a minor staying with his grandmother who lived next door was playing on the concrete pad and was electrocuted when he came in contact with the chain-link fence.

3. When the incident occurred, the gate in the fence was broken, the top part of the enclosure had been rolled back and was resting against the wall of the building, and the wires from the electrical source were not

covered by a junction box. The wires had come in contact with a portion of the fence.

4. The Court had previously denied Morrow's petition for a Writ of Mandamus when the Trial Court denied his Motion for Summary judgment on the basis of State-Agent Immunity under *Cranman*.

As to Morrow, the Plaintiff that he had negligently, recklessly, and/or wantonly inspected the premises and had negligently, recklessly, and/or wantonly allowed electrical service to be restored to the premises. Morrow responded that he was entitled to State Immunity, to State-Agent Immunity and to qualified immunity.

Morrow filed a Motion for Summary Judgment in which he argued that he was entitled to State-Agent Immunity under *Ex parte Cranman*, 792 So.2d 392 (Ala. 2000). Caldwell contended that Morrow was not entitled to State-Agent Immunity under *Cranman* because he "failed to enforce the National Electrical Code as he was required and failed to follow the dictates of the Electrical Ordinance of the City of Montgomery in a willful manner and in complete disregard for the safety of others." The Trial Court denied the Motion and Morrow filed a petition for Writ of Mandamus. The Court denied the petition without ordering an answer and briefs.

5. As to the Trial Court's decision that the statutory limits of liability did not apply, Morrow sought and received the certification necessary for an interlocutory appeal pursuant to Rule 5.

Morrow then filed a Motion asking the Trial Court for a judgment declaring the statutory limits of liability of $100,000.00 pursuant to Ala. Code 1975 §11-47-190 were applicable to Morrow in this case. Caldwell contended that the statutory cap would not apply because the claims were brought against Morrow in his individual capacity and because she alleged that Morrow had acted recklessly, wantonly, or willfully. The Trial Court provided the certification necessary for an interlocutory appeal pursuant to Rule 5 of the Alabama Rules of Appellate Procedure.

The question presented for permissive appeal was as follows:

Whether the claims against a municipal employee, sued in

his individual capacity, are subject to the statutory cap of Ala. Code 1975 §11-47-190, when those claims fall within the willful or wanton exception to the doctrine of State-Agent Immunity under *Ex parte Cranman*, 792 So.2d 392 (Ala. 2000).

6. The Court determined that the addition of the second sentence beginning with "however" indicates that the second sentence modifies the preceding sentence as a result of the use of the word "however," and that the second sentence limits only the amount of damages to be recovered from a municipality.

At issue was the Court's interpretation of §11-47-190, Ala. Code 1975 which provides as follows:

> No city or town shall be liable for damages for injury done to or wrong suffered by any person or corporation, unless such injury or wrong was done or suffered through the neglect, carelessness, or unskillfulness of some agent, officer, or employee of the municipality engaged in work therefore and while acting in the line of his or her duty, or unless the said injury or wrong was done or suffered through the neglect or carelessness or failure to remedy some defect in the streets, alleys, public ways, or buildings after the same had been called to the attention of the council or other governing body or after the same had existed for such an unreasonable length of time as to raise a presumption of knowledge of such defect on the part of the council or other governing body and whenever the city or town shall be made liable for damages by reason of the unauthorized or **wrongful** acts or negligence, carelessness, or unskillfulness of any person or corporation, then such person or corporation shall be liable to an action on the same account by the party so injured. **However, no recovery may be had under any judgment or combination of judgments, whether direct or by way of indemnity under §11-47-24, or otherwise, arising out of a single occurrence, against a**

municipality, and/or any officer or officers, or employee or employees, or agents thereof, in excess of a total $100,000 per injured person up to a maximum of $300,000 per single occurrence, the limits set out in the provisions of §11-93-2 notwithstanding.

The Court found that by amending §11-47-190 in 1994 to add the second sentence, the Legislature clarified the fact that the limitation on recovery against a municipality also limits the amounts for which a municipality may indemnify a negligent employee. The sentence at issue is "However, no recovery may be had under any judgment or combination of judgments, whether direct or by way of indemnity under §11-47-24, or otherwise, arising out of a single occurrence, against a municipality, and/or any officer or officers, or employee or employees, or agents thereof, in excess of a total $100,000 per injured person up to a maximum of $300,000 per single occurrence, the limits set out in the provisions of §11-93-2 notwithstanding."

7. Based on the language of that sentence, the Court found that there was no language in §11-47-190 that suggests it isn't intended to apply to claims against municipal employees who are sued in their individual capacities.

The Court found that rather when the statute is read as a whole it is clear that the limitation on recovery in the second sentence of §11-47-190 is intended to protect the public coffers of the municipality, not to protect municipal employees asserted against them in their individual capacity. In a footnote, the Court noted that "Under §11-47-24(a), **the City would not be required to indemnify Morrow for any judgment against him that was based on damage resulting from his intentional, willful, or wanton conduct.**"

Justices Stuart, Bolin, Parker, Main, Wise, and Bryan concurred in the *per curiam* opinion. Justice Murdock concurred specially and Chief Justice Moore concurred in the result.

8. Special concurrence by Justice Murdock.

In his special concurrence, Murdock reasoned that:

> Thus, the fact and amount of liability by a municipal employee in his or her individual capacity were not and are not proper, or intended, subjects of the legislature's enactment of §§11-47-190 and 191 and their predecessors. Instead, employees, officers, and agents of a municipality find themselves referenced in the last sentence of §11-47-190 simply because of the need to be clear that governmental liability is limited to $100,000 even where that liability is a function of an action against one of those persons in his or her official capacity or of the special statutory indemnity obligation imposed on the municipality by §11-47-24, Ala. Code 1975. The legislature's use of the work 'however' to introduce the second sentence of §11-47-190, and the relationship between the first and second sentences of §11-47-190 that, as discussed in the main opinion, it reflects, simply reinforces this understanding.

Murdock concluded that "any such liability [of the employee], however, would of course depend as **a threshold matter on the existence of a duty that was personal to the employee,** (not merely a duty of his or her employer) and that ran to the plaintiff (and not merely from the employee to his or her employer).

This and other questions concerning the prospective liability of a municipal employee in Wayne Morrow's position are not before us, and the main opinion should not be understood as implying any answer to them.

INSURANCE – ALABAMA'S LITTLE MILLER ACT

DESPITE THE FACT THAT THE INSURED CONTRACT WAS NOT RESPONSIBLE FOR THE CLAIMS ASSERTED BY THE MATERIALS SUPPLIER, THE COURT FOUND THAT THE LITTLE MILLER ACT DID NOT REQUIRE PRIVITY AND THAT THE TERMS OF THE STATUTE THE CONTRACT FELL WITHIN THE SCOPE OF THE LITTLE MILLER ACT.

***Johnson Controls, Inc., v. Liberty Mutual Ins. Co.*, 2014 Ala. LEXIS 68 (May 9, 2014)**

HOLDINGS:

1. **The payment bond limited claimants to those having a direct contract with a contractor or subcontractor, which the supplier contended was immaterial, as the bond was issued to satisfy §39-1-1; therefore, the Act's requirements had to be read into it;**

2. **The supplier established entitlement to recover on the bond with evidence that it supplied the materials for work on the public project at issue, that it was not paid for them, that it had a good faith belief that the materials furnished were for the project, and that the jurisdictional requirements (timely notice and filing of suit) had been met.**

DISCUSSION:

Johnson appealed from the Summary Judgment entered in favor of Liberty Mutual.

Batson Cook contracted to renovate the Roanoke Health Care Authority

Medical Center. To avoid certain taxes, Batson Cook and the Health Care Authority entered into a purchasing agent agreement.

1. The Court found that the contract fell within the scope of "Alabama's Little Miller Act." Section 39-1-1 et seq. Ala. Code 1975.

Batson Cook secured a payment bond from Liberty Mutual. Batson Cook entered into a subcontract with the Hardy Corporation to perform mechanical work. Hardy was to provide all material, labor, supervision, and equipment.

2. The Health Care Authority, not Batson Cook, made all payments to suppliers and subcontractors.

Batson Cook specified that all purchases of tangible personal property be incorporated into the job and subcontractors/vendors would be paid directly by the Health Care Authority but the payments would be addressed to Batson Cook who would then forward them on to the Health Care Authority for payment. The Health Care Authority would then issue payments directly to the material supplier.

JCI furnished certain equipment and materials to a subcontractor, Hardy. Hardy informed JCI that the monies would be paid by the Health Care Authority but that the invoices would be transmitted to Batson Cook which would then forward the invoices to the Health Care Authority.

Subsequently, Hardy submitted a purchase order to JCI for equipment to be shipped to the medical center in care of Batson Cook. The purchase order contained the following notation "PO, Randolph County Medical Center c/o Batson Cook Company." A representative of Hardy testified that he included this note because the purchase order was actually on behalf of Roanoke Health Care and the equipment would be billed directly to it.

3. Batson Cook and Liberty Mutual contended that the Authority, and not Batson Cook and Liberty Mutual, was responsible for the payments.

Batson Cook subsequently received written notice from the Health Care Authority that the renovation project had been suspended. Batson Cook notified Hardy that the project was suspended because the Health Care Authority had run out of funds and was seeking a buyer.

Batson Cook sent Hardy a letter stating that the Health Care Authority, not Batson Cook was responsible for paying Hardy and therefore JCI. Pursuant to the provisions of the Little Miller Act, JCI notified Liberty Mutual, the Authority, Batson Cook and Hardy of its claim on the payment bond. The letters identified Batson Cook as the general contractor and Hardy as the debtor. Liberty Mutual denied the claim.

4. Liberty Mutual contended that because there was no liability or right of recovery against Batson Cook, then there was no right of recovery against Liberty Mutual, the surety, on a payment bond.

JCI contended that Liberty Mutual's argument that the materials furnished by JCI were outside the scope of the contract was inconsistent with the fundamental purpose of Alabama's Little Miller Act which was **"to ensure that a materialman receives full payment for labor or materials that he supplies to a public works project."** *SGB Construction Services, Inc., v. Ray Sumlin Construction Co.*, 644 So.2d 892, 895 (Ala. 1994).

JCI contended that it had met all of the requirements for recovery and had demonstrated

(1) That the materials were supplied for work on the public project;

(2) That JCI was not paid;

(3) That JCI had a good faith belief that the materials furnished were for the project in question; and

(4) That the jurisdictional requisite regarding timely notice and filing of suit had been met.

The Trial Court granted Summary Judgment to Liberty Mutual in that the materials and equipment purchased were purchased directly from JCI by the Health Care Authority.

5. Alabama's Little Miller Act does not address privity.

The Court noted that unlike the Federal Miller Act, the Little Miller Act adopted by several sister states was silent as to the issue of privity. The Court found that when the payment bond shows on its face that it was executed in compliance with the Little Miller Act that a Court is authorized to read into the bond the provisions of the statute and to give the bond the form and affect the statute contemplated regardless of the contents of the bond.

6. The Court distinguished the cases relied on by Liberty Mutual by finding that the *Magic City Paint & Varnish Co., v. American Surety Co., of New York*, 228 Ala. 40, 152 So.42 (1934) was governed by the Federal Heard Act and not an act modeled after the Federal Miller Act.

The Court reversed and remanded.

The opinion was authored by Justice Parker and was concurred in by Stuart, Bolin, Murdock, Main, Wise, and Bryan.

7. Dissent by Chief Justice Moore.

Chief Justice Moore dissented because the terms of the bond were clear that Batson Cook had to be liable to JCI before Liberty Mutual could in turn be liable to JCI. Chief Justice Moore pointed out that suretyship is a contractual relationship and that the Court had to review the terms of the surety contract itself. **Liberty Mutual agreed to be liable for Batson Cook's unpaid debts and only for Batson Cook's unpaid debts**. Therefore, Chief Justice Moore dissented in that the majority ignored the terms of the surety agreement at issue.

INSURANCE "DEFECTIVE CONSTRUCTION" CAN BE AN "OCCURRENCE" IF THE INSURED HAS COMPLETED OPERATIONS COVERAGE AND THE DAMAGE "OCCURS" AFTER THE WORK IS COMPLETED.

***Owners Ins. Co., v. Jim Carr Homebuilder, LLC,* 2014 Ala. LEXIS 44, March 28, 2014.**

HOLDINGS:

1. **Faulty workmanship itself is not an occurrence, but faulty workmanship can lead to an occurrence.**

2. **It was undisputed that the homebuilders "operations" on the house were completed at the time of the alleged occurrences; therefore, due to the presence of completed operations coverage, there would be coverage for the claims asserted.**

DISCUSSION:

1. In October, 2011, the Alabama Supreme Court issued *Town & Country Property, L.L.C. v. Amerisure Ins. Co.,* 2011 WL 5009777 (Ala.2011)(*Town & Country I*) in which it discussed the fact that negligent construction can be an "occurrence" under a general liability policy but only as to damages to property other than the work of the insured itself.

On appeal after remand, the Court in *Town & Country II* held:

> In *Town & Country I*, we held that the cost of repairing faulty or defective construction itself was not covered by the terms of the CGL policy. With one minor exception discussed below, our review of the materials submitted to the trial court in the present case indicates that **no evidence was introduced in the underlying trial as to the cost of repairing anything other than the defective**

construction itself. . . .

Town & Country Prop., L.L.C. v. Amerisure Ins. Co., 111 So. 3d 699, 710 (Ala. 2012)

2. The "Your Work" exclusion was not applicable to preclude coverage for the insured contractor's completed work in that the insured contractor had purchased completed operations coverage.

In March of 2014 the Alabama Supreme Court revisited the issue of whether defective construction is covered under a commercial general liability policy in *Owners Ins. Co. v. Jim Carr Homebuilder, LLC*, 2014 Ala. LEXIS 44 (Ala. Mar. 28, 2014). The *Carr* Court found that the "your work" exclusion was not applicable to preclude coverage for the insured contractor's completed work if the insured contractor had purchased completed operations coverage.

In *Jim Carr Homebuilder*, home owners (the Johnsons) who had used Jim Carr Homebuilder ("JCH") to build a new lake house sued him when the house suffered water intrusion problems. Their claims included breach of contract, fraud, and negligence and wantonness JCH made a claim on its commercial general liability policy with Owners Insurance Company. Owners defended JCH under a reservation of rights and ultimately filed a declaratory judgment action to determine whether Owners had a duty to defend and indemnify JCH with regard to the homeowners' claims. The homeowners' claims against JCH were ultimately arbitrated resulting in an award of $600,000.00 due to a variety of construction defects in the home.

3. The Trial Court held that the entire award was covered under the Owners policy and Owners appealed. Owners argued that there was no "occurrence" under the policy while the homeowners argued that the damage to the house was property damage resulting from an "occurrence."

The Court in *Carr* states:

> On appeal, Owners highlights the dichotomy between our holdings in *United States Fidelity & Guaranty Co. v. Warwick Development Co.*, 446 So. 2d 1021 (Ala. 1984), and *Moss v. Champion Insurance Co.*, 442 So. 2d 26

> (Ala. 1983), and emphasizes our statement in *Town & Country* that "faulty workmanship may lead to an occurrence if it subjects personal property or other parts of the structure to 'continuous or repeated exposure' to some other 'general harmful condition,'" 111 So. 3d at 706, to argue that faulty workmanship performed as part of a construction or repair project might result in an "occurrence" only to the extent that that workmanship results in property damage to real or personal property that is not part of that construction or repair project. However, in making that argument Owners asks the term "occurrence" to do too much. The term "occurrence" is defined in the Owners policy simply as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." If some portion of the Owners policy seeks to affect coverage by references to the nature or location of the property damaged, it is not the provision in the policy for coverage of occurrences. The policy simply does not define "occurrence" by reference to such criteria.

Owners Ins. Co. v. Jim Carr Homebuilder, LLC, 2014 Ala. LEXIS 44, 13-15 (Ala. Mar. 28, 2014)

After discussing several cases on the subject from other jurisdictions, the Court stated:

> Indeed, to read into the term "occurrence" the limitations urged by Owners would mean that, in a case like this one, where the insured contractor is engaged in constructing an entirely new building, or in a case where the insured contractor is completely renovating a building, coverage for accidents resulting from some generally harmful condition would be illusory. There would be no portion of the project that, if damaged as a result of exposure to such a condition arising out of faulty workmanship of the insured, would be covered under the policy.

Owners Ins. Co. v. Jim Carr Homebuilder, LLC, 2014 Ala. LEXIS 44, 16 (Ala. Mar. 28, 2014)

The Court then stated:

> Reading *Warwick* and *Moss* together, we stated in *Town & Country* that "we may conclude that **faulty workmanship itself is not an occurrence**." 111 So. 3d at 706. This is the essential holding of *Town & Country*. In light of the arguments framed in this case, however, we think it prudent to restate that principle in more precise terms -- faulty workmanship itself is not "property damage" "caused by" or "arising out of" an "occurrence." See also *Shane Traylor Cabinetmaker, LLC v. American Express Res. Ins. Co.*, 126 So. 3d 163, 172 (Ala. 2013) (Murdock, J., concurring specially) ("I would state the rule as follows: 'faulty workmanship itself' is not 'property damage' 'caused by' or 'arising out of' an 'occurrence.' **That is, the fact that the cost of repairing or replacing faulty workmanship itself is not the intended object of the insurance policy does not necessarily mean that, in an appropriate case, additional damage to a contractor's work resulting from faulty workmanship might not properly be considered 'property damage' 'caused by' or 'arising out of' an 'occurrence.'"). In sum, the cost of repairing or replacing faulty workmanship is not the intended object of a CGL policy issued to a builder or contractor.** Accordingly, we conclude that the definition of the term "occurrence" does not itself exclude from coverage the property damage alleged in this case.
>
> Our analysis, however, does not end with our discussion of the term "occurrence" because the Owners policy contains other provisions that bear on whether JCH and the Johnsons are entitled to coverage for their losses. The Owners policy, like other standard CGL policies, was intended to insure the builder, that is, JCH, from losses

resulting from its negligence while engaged in the process of performing the construction work for which it was hired. That is, once JCH's "ongoing operations" with regard to the Johnsons' house came to an end, it was not the intent of the Owners policy to insure JCH against claims for damage to the Johnsons' house arising from exposure to generally harmful conditions made possible by faulty workmanship previously performed by JCH. This risk is known as the "completed operations hazard" and, absent supplemental coverage purchased by the insured, is not insured against by the standard CGL policy. [1]

In manifestation of this latter fact, standard CGL policies -- including the Owners policy -- include an express "Your Work" exclusion that specifically addresses the completed-operations hazard. The parties acknowledge the applicability of the "Your Work" exclusion in this case, inasmuch as it is undisputed that JCH's "operations" on the Johnsons' house were completed at the time of the alleged occurrences. The "Your Work" exclusion specifically provides:
"This insurance does not apply to:
"....
"l. Damage To Your Work
"'Property damage' to 'your work' arising out of it or any part of it and included in the 'products-completed operations hazard.'"

[1] The Court noted in a footnote that "The standard CGL policy referred to in this opinion is the standardized form used in the construction industry and tracks the language of the 1986 revisions by Insurance Services Office, Inc." The Court also noted that unlike some policies, the policy issued to JCH did not contain the exception as to work performed "on your behalf" for work performed on behalf of the insured by subcontractors and stated, "Compare *Town & Country*, 111 So. 3d at 705."

(Emphasis added.) As the emphasized passage makes clear, in order for the "Your Work" exclusion to apply, the damage not only must be to "your work," but also must be "included" in the "products-completed operations hazard." We agree with the Johnsons' explanation of this exclusion in their brief filed with this Court:

"The [Owners] policy's 'your work' exclusion (Exclusion 'l') excludes coverage for, '"Property damage" to "your work" arising out of it or any part of it and included in the "products-completed operations hazard."' In order for the exclusion to apply, the damage must not only be to 'your work,' but it also must be 'included' in the 'products-completed operations hazard.'

"What is 'included' in the 'products-completed operations hazard?' Generally speaking, products that have left the insured's possession or work that has been completed are included in the hazard.[13] However, the 'products-completed operations hazard' specifically does not include bodily injury or property damage arising out of 'products or operations for which the classification, shown in the Declarations, states that products-completed operations are included.'

"So, one must look to the Policy's declarations to see if damage to the insured's completed work is covered by the Policy or is excluded. If the declarations show coverage for 'products-completed operations,' then the 'your work' exclusion does not apply. When one looks to the declarations here, one sees that [JCH] does indeed have coverage of up to $2,000,000 for both 'Bodily Injury Products/Completed Operations' and 'Property Damage Products/Completed [21] Operations' (a total of $4,000,000). ...

"....

"Simply put, the 'your work' exclusion applies if and only if the Policy's declarations fail to show any coverage for 'products-completed operations.' That is not the case here.

> Clearly, Owners' insured bargained and paid for up to a total of $4,000,000 in coverage for [its] 'products-completed operations,' which nullifies and renders inapplicable the 'your work' exclusion here.
> "....
> "According to Owners, the Johnsons' home and every component of the home is the 'work' of [JCH], and therefore the 'your work' exclusion bars coverage under every conceivable set of circumstances -- and despite the fact that the Policy's declarations provide $4,000,000 in coverage for bodily injury and property damage arising out of the insured's 'products' and 'completed operations.' If Owners' interpretation is correct, then Owners is guilty of issuing illusory coverage.
> "Completed operations" provisions refer to bodily injury and property damage which occur away from premises owned by or rented to the insured, and after the insured has completed work or relinquished custody of its product.' 9A Couch on Insurance 3d § 129:23. The completed operations 'hazard' basically means (as a default provision) that an insured is assuming the risk (or 'hazard') related to his completed operations unless the insured purchases coverage for his completed operations (as [JCH] clearly has done here up to the limit of $4,000,000)."
> Johnsons' brief, pp. 47-58.

In its reply brief, Owners essentially concedes that the Johnsons' argument on this issue is correct when it states:

> "Owners agrees with the statement in the Johnson's brief that:
>
> "'The completed operations "hazard" basically means (as a default provision) that an insured is assuming the risk ("hazard") related to his completed operations unless the insured purchases coverage for his completed operations ...' (Johnson[s'] brief at p. 48, [n.] 13) (emphasis

> supplied)."
>
> Owners' reply brief, p. 20 n.4. However, Owners fails to recognize that JCH did in fact purchase a total of $4 million in supplemental insurance coverage for its completed operations. Owners' argument that the "Your Work" exclusion should nevertheless apply even though this supplemental coverage was purchased is unavailing. Thus, because there is no dispute that JCH's "operations" on the Johnsons' house were completed at the time of the alleged occurrences, that coverage applies to the Johnsons' claims and, pursuant to the terms of the Owners policy, Owners must indemnify JCH for the judgment entered against it.

Owners Ins. Co. v. Jim Carr Homebuilder, LLC, 2014 Ala. LEXIS 44, 17-24 (Ala. Mar. 28, 2014). The Court then affirmed the trial court's ruling that Owners was required to pay the judgment against JCH.

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

Justice Murdock concurred specially.

Justice Shaw concurred in the result in part and dissented in part.

4. Special Concurrence by Justice Murdock:

Justice Murdock emphasized that the Trial Court found that the Arbitrator's award was supported by evidence relating to coverage damage: "That there was evidence of covered damage sufficient to account for the award made by the Arbitrator. Owners does not argue that the evidence was insufficient to support the trial court's assessment of the damages awarded."

5. Dissent by Justice Shaw:

Justice Shaw dissented and stated that Owners contended that JCH had the burden at trial of demonstrating which part of the arbitrator's award was attributable to the excluded faulty work and which part was attributable to the damage resulting

from the faulty work, and that JCH failed to meet that burden. He would remand the cause for the trial court to determine what portion of the damages award is attributable to covered "occurrences" and which portion is not.

INSURANCE - **ALFA WAS NOT BOUND BY AN ALLEGED ORAL CONTRACT BASED ON THE DECEDENT'S DISCUSSION WITH THE ALFA AGENT IN WHICH THE AGENT ALLEGEDLY SAID THAT COVERAGE WOULD BE PROVIDED IMMEDIATELY UPON RECEIPT OF THE CHECK.**

ALTHOUGH THE COURT INDICATED THAT IT HAD NEVER HELD PREVIOUSLY THAT CONTRIBUTORY NEGLIGENCE WAS A BAR TO A NEGLIGENT PROCUREMENT CLAIM, THE COURT ADOPTED THE OPINIONS OF OTHER JURISDICTIONS AND HELD THAT THE DEFENSE OF CONTRIBUTORY NEGLIGENCE WAS A BAR TO A CLAIM FOR NEGLIGENT PROCUREMENT.

Alfa Life Ins. Corp., v. Colza, **2014 Ala. LEXIS 64 (June 18, 2014)**

HOLDING:

Justice Stuart authored the opinion. Alfa and Alfa's agent appealed a judgment entered against them in favor of Colza. Justice Stuart found that the judgment was due to be reversed and rendered a judgment for Alfa and the agent.

DISCUSSION:

1. Colza completed an application for life insurance and applied for the preferred tobacco premium rate and indicated that he had not had a traffic violation, a driver's license suspended or an accident in the prior three years; however, that evidence was disputed.

The agent, Morris, met with Dante Colza to assist him in completing an application for life insurance. Two employees of Dante were also present at the

meeting. The process was that Dante had to complete an application agreement, Dante had to answer various health questions before a medical examiner and the medical examiner had to complete a report.

The evidence was disputed as to whether Morris asked Dante whether he had had a moving traffic violation, a driver's license suspended, or an accident in the prior three years; however, it was undisputed that Morris entered a check mark in the no box by that question. Further, Dante applied for the preferred tobacco premium rate.

2. The evidence was disputed regarding this but Alfa contended that Colza was provided a conditional receipt at the conclusion of the meeting that stated that all of the conditions had to be completed prior to there being any coverage which included verification of the accuracy of the information in the application and a medical examination.

At the close of the meeting, the agent provided Dante and his wife with a document entitled "Applicant's Copy of Notices – Authorization – Agreement – Receipt Signed Electronically." The Application Agreement was accompanied by a conditional receipt which stated in relevant part: "Conditions to Coverage: No insurance will become effective before the delivery in acceptance of a policy of insurance unless and until each and every one of the following conditions [is] fulfilled exactly." The conditions included paying the premium, medical examinations being completed and received, approval by the company's underwriting department, and that as of the effective date the state of health and all factors affecting the insurability of the proposed insured must be "as stated in the application."

3. Conflicting evidence was presented as to whether Morris provided Dante and Kimberly with a hard copy of the receipt; however, Kimberly acknowledged that she received an identical conditional receipt when she applied for her own life insurance policy. Kimberly paid the agent and testified that he informed them that Dante would be covered as soon as they gave Morris the check.

4. During a later examination by the medical examiner, Dante provided information that his family had a history of heart disease and that he had moving traffic violations within the past five years.

On the day after the medical examination, Dante was killed in an accident. Two days later, Alfa received the medical examiner's report which indicated that Dante's family had a history of heart disease, that Dante's cholesterol was above 255 and that Dante had moving traffic violations in the past five years.

5. Colza died two days after submitting the application and subsequently, Mrs. Colza was told that the underwriters had determined that her husband was not eligible for the preferred rate and the rate would have to be much higher and that no life insurance coverage was available because the conditions of the receipt were not met.

In light of the information provided by the medical examiner, the underwriters determined that Dante was not eligible for the preferred tobacco rate and that the rate paid would have to be much higher.

Subsequently, Alfa notified Kimberly that no life insurance coverage was available "because no policy was issued and the conditions of coverage under the Conditional Receipt were not met."

6. The jury returned a verdict against Alfa in the amount of $440,674.94 and against the agent in the amount of $100,000.00 for the breach of contract/bad faith claims asserted by Mrs. Colza.

Kimberly sued Alfa for breach of contract and bad faith. A verdict was awarded against Alfa in the amount of $440,674.94 and against the agent in the amount of $100,000.00. Alfa and the agent appealed.

On appeal Alfa maintained that because the conditions of the application agreement and the conditional receipt were not satisfied that there was no contract that existed between Alfa and Dante prior to his death. The Court found that Dante's failure to satisfy the conditions set forth in the plain, unambiguous language of the conditional receipt precluded coverage.

7. The Court found that Alfa did not breach an oral contract arising out of the agent's alleged statement that Mr. Colza would be "immediately covered."

The Court rejected Kimberly's argument that Alfa breached an oral contract in which they stated that he would be "immediately covered." The Court noted that the conditional receipt provided information to the contrary and negated any claims that Morris as the agent had actual or apparent authority to immediately bind Alfa.

8. The Court found that it was undisputed that the agent did not have the apparent authority to immediately bind Alfa.

The Court noted that even though there may have been an issue as to whether or not the conditional receipt was received by Dante, it was undisputed that he had received the Application Agreement which clearly provided that the agent did not have the apparent authority to immediately bind Alfa. As a result, the Court found that Alfa was due a Judgment as a Matter of Law.

9. Mrs. Colza failed to present an argument that the agent negligently failed to procure insurance until after the verdict and was therefore waived and even if he were negligent, the Colza's were contributorly negligent.

As to the agent, the agent contended that there was not sufficient evidence that he negligently failed to procure insurance and that even if he were that Dante and Kimberly were contributorly negligent as well.

The agent contended that no act by the agent was a proximate cause of the damaged alleged. The Court noted that regardless of any possible merit to this argument by the agent, it was not presented to the Trial Court until after a judgment was entered and therefore, was waived.

Morris did properly assert in Motions filed at the close of Kimberly's case and at the close of evidence that Dante's contributory negligence entitled him to Judgment as a Matter of Law. Relying on *Kanellis v. Pacific Indemnity Co.,* 917 So.2d 149, 155 (Ala. Civ. App. 2005), Morris argued that the documents clearly appraised the Colzas that Dante was not guaranteed immediate coverage and that by not reading the documents they took a risk and put themselves in danger's way.

10. Although the insured does not have an absolute duty to read his policy according to the Court, the Court found that the insured's failure to do so may amount to contributory negligence.

The Court citing to cases from other jurisdictions concluded "We are persuaded by the reasoning of this line of authority that an insured does not have an absolute duty to read their policy, but their failure to do so may amount to contributory negligence."

Justices Bolin, Parker, Main, Wise and Bryan concurred in Stuart's opinion.

Justice Murdock concurred in part and dissented in part.

Chief Justice Moore dissented.

11. The opinion of Justice Murdock in which he concurred in part and dissented in part.

a. Justice Murdock agreed that Alfa was entitled to a Judgment as a Matter of Law but stated that as for the agent, there was a genuine issue as to material facts regarding the contributory negligence defense.

Justice Murdock wrote that he agreed that Alfa was entitled to Judgment as a Matter of Law but reasoned that Morris did not challenge the premise that he owed a duty to the Plaintiff to complete Dante's Application for insurance in a reasonably prudent manner. Murdock found that genuine issues existed as to material facts relating to the contributory negligence defense asserted by Morris and he therefore dissented from the main opinion's reversal of the Trial Court's judgment against Morris.

b. Justice Murdock objected to the majority's reference to the reasonable reliance standard in fraud cases as to the contributory negligence defense.

He objected further to the majority's reference to the reasonable reliance standard in fraud cases in support of its contention that the claims against Morris were defeated by the affirmative defense of contributory negligence.

Chief Justice Moore dissented both as to the Judgment rendered in favor of Alfa and the Judgment rendered in favor of Morris.

LIMITATION OF ACTIONS

THE STATUTE OF LIMITATIONS AT ISSUE WHEN THE PLAINTIFFS FILED THEIR AMENDED COMPLAINT CONTROLLED; THEREFORE, THE APPLICABLE STATUTE OF LIMITATIONS WAS SIX YEARS BASED ON THE COURT'S DECISION IN *MCkENZIE v. KILLIAN*, 887 So.2d 861 (ALA. 2004).

***Ex parte Int'l Refining & Manufacturing Co.*, 2014 Ala. LEXIS 95 (June 20, 2014).**

HOLDINGS:

DISCUSSION:

1. In the first petition for Writ of Mandamus, the Court found that the claims stated against the "new Defendants" did not relate back because the first Amended Complaint was filed in May 2005, three years after the former employee's last possible exposure to the alleged toxic chemical.

This is the third time this case has come before the Alabama Supreme Court. The case arises out of the filing of two Petitions for Writ of Mandamus and are case numbers 1130110 and 1130111. The Court referenced the Petitioners in both cases as "the new Defendants." In *Ex parte Int'l Refining & Manufacturing Co.*, 972 So.2d 874 (Ala. 2007) ("International Refining"), the Court found that the claims the former employee stated against the new Defendants in the first Amended Complaint did not relate back to the claims they stated against the fictitiously named Defendant identified in their original Complaint because the first Amended Complaint was filed in May 2005, three years after the former employees' last possible exposure to the alleged toxic chemical.

As a result, the International Refining Court found that any new claims stated

in that Complaint which were subject to a two-year statutory limitations period under §6-2-38(1) were time barred and due to be dismissed.

2. The International Refining Court declined to reach the question of whether a six-year statute of limitations applied to any of the former employees' claims because the Petitioner asserted a statute of limitations defense only as to fictitious party practice.

Therefore, the Court reversed the Trial Court's Order denying the Motions to Dismiss or for a Summary Judgment and remanded the case for further proceedings including a determination of the extent to which any claims were timely without the availability of the relation back doctrine.

3. On remand, the former employees responded that their wantonness claims involved trespass to the person and under *McKenzie v. Killian,* 887 So.2d 861 (Ala. 2004) were subject to the six-year statute of limitations.

Stated in §6-2-34(1), Ala. Code 1975. On August 16, 2007, the former employees amended their Complaint a second time in which they stated that it was "intended to clarify the allegations contained in the Complaint and the First Amended Complaint in the wake of *International Refining.*" The second Amended Complaint asserted only a worker's compensation claim against Arvin, a wantonness claim against the new Defendants and a separate wantonness claim against five of the new Defendants.

4. The Trial Court determined that the second Amended Complaint stated no new cause of action and arose out of the same conduct and occurrences as did the original and first Amended Complaint; and in the second Amended Complaint, the Plaintiffs stated wantonness claims.

The new Defendants moved to strike the second Amended Complaint; however, the Trial Court did not rule on the Motion to Strike. Instead the Trial Court concluded that because the second Amended Complaint purported to state no new cause of action and to arise out of the same conduct and occurrences that the claim stated in the second Amended Complaint were subject to the same analysis as those in the first Amended Complaint. Relying on authority cited by the new Defendants as to their arguments that the claims were based on a products liability

theory, the Trial Court entered a February 4, 2008 Order dismissing all the former employees' claims against the new Defendants. The former employees' claims against Arvin remained pending; however, the Trial Court certified its February 4, 2008 as final pursuant to Rule 54(b) and the former employees appealed.

5. In the second appeal, *Carr v. International Refining & Manufacturing Co.*, 13 So.3d 947 (Ala. 2009) ("*Carr*"), the Court applied *McKenzie* and found that the wantonness claims against the new Defendant were subject to the six-year limitations period of §6-2-34(1).

At a case management conference in June of 2010, the new Defendants raised concerns that their former employees were trying to allege conspiracy based and non-bodily injury wantonness claims against them which they argued were not included in the second Amended Complaint and would be precluded by the Court's decision in *Carr*. The new Defendants raised those concerns in a Motion to "Dismiss all Conspiracy Based Claims or Claims for Non-Bodily Injury, or in the Alternative, To Preclude [the Former Employees] from Asserting Any Such Claims at Trial."

6. The new Defendants argued that among other things, that after *Carr*, the only surviving claims against the new Defendants were wantonness claims based on bodily injury.

7. While the case was pending on remand, the Court decided *Capstone* in which *McKenzie* was overruled; however, the Court noted that *Capstone* was to be applied only prospectively

However while the case was still pending on remand, the Court decided *Ex parte Capstone Building Corp.*, 96 So.3d 77, 86 (Ala. 2012), in which the Court overruled *McKenzie* and found that the two-year limitations period rather than the six-year limitations period applied as to wantonness claims. However *Capstone* was to be applied prospectively only. As a result of *Capstone*, in March 2012, the new Defendants moved the Trial Court for a Summary Judgment arguing that the wantonness claim of certain of the former employees were barred by the two-year statute of limitations applicable to wantonness.

8. After a hearing, the Trial Court denied both the new Defendants' Summary Judgment Motion based on *Capstone* and their Motion to

Dismiss a conspiracy based on non-bodily injury wantonness claims.

1. Case No. 1130110

9. The new Defendants argued that Mandamus was an appropriate remedy for seeking review of the Trial Court's denial of their Summary Judgment Motion because the claims did not relate back in that they were claims for wantonness.

The new Defendants argued that although denial of a dispositive motion was not generally considered appropriate for review, that it was appropriate in regard to the doctrine of relation back. The new Defendants argued that the Petition should be granted because the case fell within the narrow exception mentioned in *Ex parte Hodge*, Ms. 1121194, Feb. 7, 2014, 2014 Ala. LEXIS 13, 30-31 (Ala. 2014). In *Hodge*, the Court granted Mandamus relief based on the statute of limitations question that did not involve fictitiously named parties or the relation back doctrine but the Court noted in *Hodge* that

> "the defendants ... are faced with the extraordinary circumstance of having to further litigate this matter after having demonstrated from the face of the plaintiff's complaint a clear legal right to have the action against them dismissed based on the four-year period of repose found in §6-5-482(a). Having concluded that an appeal pursuant to Rule 5 A.R.A.P. or an appeal from a final judgment following further litigation is not an adequate remedy in this case, we conclude, based on the particular circumstances of this case, that mandamus is necessary in order to avoid the injustice that would result from the unavailability of any other adequate remedy."

The Alabama Supreme Court noted that:

> This Court has already resolved the question of whether the claims against the new defendants related back to the original Complaint. In *International Refining*, this Court determined that none of the claims raised in the first

> Amended Complaint, including the wantonness claims at issue in the Motion for Summary Judgment here related back to the original Complaint. The former employees did not argue in opposition to the Motion for Summary Judgment that the claims related back, nor did the trial court, in its Order denying the Motion for Summary Judgment, find that the claims related back. Moreover, such a finding was not necessary to the trial court's decision to deny the Summary Judgment Motion.

10. The new Defendants argued that the former employees could not have relied on *McKenzie* in filing their claims because their claims were time barred when *McKenzie* was released. However, the Court noted that that argument did not fall within the narrow exception in *Hodge* because *Hodge* did not address the issue of whether the claim related back via a fictitious party practice.

11. The Court found that the Trial Court complied with the mandate in *International Refining* by dismissing claims that were barred by the statute of limitations.

The new Defendants also argued that the Writ of Mandamus should issue because the Trial Court failed to comply with the Alabama Supreme Court's mandate to dismiss claims barred by the two-year statute of limitations. However, the Court noted that on remand from *International Refining*, the Trial Court determined that all the claims against the new Defendants were barred by the statute of limitations and dismissed those claims. The former employees appealed and the Court reversed the judgment as to wantonness applying *McKenzie*. As a result, the Court found that on remand the Trial Court complied with the mandate in *International Refining.* The Court found that:

> Although a two-year statute of limitations on wantonness claims may have been in place at the time the former employees' claims arose, the six-year statue of limitations adopted in *McKenzie* was in place at the time the former employees asserted those claims against the new defendants in the first amended complaint. Thus, the new defendants have not demonstrated that the trial court

> failed to comply with any prior mandate of this Court, nor have they demonstrated a clear legal right to the dismissal of the wantonness claims against them by way of a summary judgment. Therefore, the new defendants' petition for mandamus relief in case no. 1130110 is denied.[1]

11. The Court found that the Trial Court did not follow the Court's mandate in allowing the conspiracy based claims to proceed in that the conspiracy claim was not included in the remand order, and the Court rejected the Plaintiff's argument that the conspiracy claim should survive because they were wholly derivative and dependent on the wantonness claims.

2. Case No. 1130111

In 1130111 the new Defendants argued that a Writ of Mandamus should issue because the Trial Court failed to follow the Court's mandate in *Carr* by allowing the former employees to proceed with a conspiracy-based claim and claims for non-bodily injury. In *Carr*, the former employees appealed the Trial Court's February 4, 2008, Order dismissing all the former employees' claims against the new Defendants. That Order was certified as a Rule 54(b) appealable Order. The former employees appealed only the dismissal of the wantonness claims and did not appeal any of the other claims.

After the remand in *Carr*, the new Defendants moved the Trial Court to "enter an order dismissing any and all conspiracy-based claims or claims for non-bodily injury that the former employees may seek to assert or in the alternative precluding the former employees from asserting any such claims hereafter and from arguing any such claims at the trial of the case."

"The trial court denied that motion, and the new defendants argued that in doing so, it violated this Court's mandate in *Carr* by allowing the former employees to proceed with claims other than those included in the remand order in *Carr.* With

[1]"The general rule under Alabama law is that the statute of limitations in effect at the time an action is brought applies." *Jones v. Preuit & Mauldin*, 876 F.2d 1480, 1484 (11th Cir. 1989).

regard to the conspiracy claims, we agree." The former employees argued that the conspiracy claims should survive because they were wholly derivative and dependent on the wantonness claims arguing that "conspiracy is not an independent cause of action; therefore, when alleging conspiracy, a plaintiff must have a viable underlying cause of action." *Drill Parts & Serv. Co., v. Joy Mfg., Co.*, 619 So.2d 1280, 1290 (Ala. 1993). The Court reasoned that:

> Although these cases demonstrate that a conspiracy claim cannot exist independently of a viable cause of action, they do not indicate that conspiracy claims automatically 'travel with' or 'proceed in tandem' with other causes of action such that, where both the conspiracy claim and the claim in the underlying cause of action have been dismissed, an appeal challenging the claim in the underlying cause of action is, effectively or implicitly, an appeal of the conspiracy claim as well. The former employees have cited no authority supporting the latter proposition, and we know of none." (26-27).

12. In Petition 1130111, the new Defendants also argued that the trial court erred by failing to dismiss any wantonness claims for non-bodily injury. The Court disagreed noting that in *Carr* it did not distinguish between claims based on bodily injury and those based on non-bodily injury and instead simply held that "the trial court erred in dismissing the former employees' wantonness claims." 13 So.3d at 955.

Therefore, the Court granted the Petition for Writ of Mandamus in Case No. 1130111 in part as to the conspiracy claims and denied it as to the other remedies sought by the new Defendants. The Petition in Case No. 1130110 was denied.

TORTS – FRAUD **A GENUINE ISSUE OF MATERIAL FACT EXISTED AS TO WHEN A REASONABLE PERSON WOULD HAVE DISCOVERED THE FRAUD.**

THE VALUE OF THE PROPERTY AS STATED IN THE APPRAISAL COULD HAVE SERVED AS THE BASIS FOR THE NEGLIGENT MISREPRESENTATION CLAIM.

***Bryant Bank v. Talmage Kirkland & Co.*, 2014 Ala. LEXIS (May 23, 2014).**

HOLDINGS:

1. **In this case against real estate appraisers, Summary Judgment was not appropriate based an allegation that a negligent misrepresentation claim was barred by the two-year statute of limitations under Ala. Code §6-2-38(1) because the claim accrued when a reasonable person would have discovered the fraud and that was a question within the purview of the jury.**

2. **A general issue of material fact existed as to when a Bank discovered facts that would have caused a reasonable person to inquire and led to the discovery of fraud.**

3. **As to the merits of the claim, the value of the property as stated in the appraisal could have served as the basis for the negligent misrepresentation claim.**

4. **There was substantial evidence that the Bank relied on the appraisal of the property in approving a loan application.**

DISCUSSION:

Justice Murdock authored the opinion.

Bryant Bank appealed from a partial Summary Judgment in favor of an appraiser, Talmage Kirkland. Bryant Bank had an earlier appraisal of the property at issue in which the first appraiser had concluded that the property had a market value of $2.4 million and that the equipment in the building had a value of $1.25 million.

Bryant requested a second appraisal from Kirkland. Kirkland valued the property at $1.7 million.

1. Although the Bank employees believed that Kirkland had overstated the value, the Bank loaned the money to the borrower anyway feeling that even a deep discount would still justify the mortgage.

The Bank employees at issue believed that Kirkland had overstated the value of the property; however, the Bank loaned the money because even if the value had been deeply discounted, it would justify the amount of the loan.

2. After the borrower defaulted, the Bank obtained another appraisal that valued the property at $205,000.00.

Subsequently, the borrower defaulted on the loan. The Bank obtained another appraisal that valued the property at $205,000.00. The Bank sued the Defendants alleging breach of contract and negligent misrepresentation.

3. The Trial Court granted a partial Summary Judgment. Kirkland filed a Motion for partial Summary Judgment and argued (1) that the individual appraisers were entitled to a Summary Judgment because they were acting as agents of the Bank and (2) that the Defendants were due a Summary Judgment because:

1. An opinion of value could not serve as the basis for a misrepresentation claim;
2. The Bank had not relied upon the opinion; and
3. The claim was barred by the Statute of Limitations.

Kirkland and the individual appraisers filed a Motion for partial Summary Judgment contending that the individual Defendant appraisers were due a Summary Judgment because they were acting for a disclosed principal, the Bank.

As to the negligent misrepresentation claim, the Defendants contended that:

1. The opinion of value in the appraisal could not serve as the basis for a negligent misrepresentation claim;

2. That Bryant Bank had not relied upon the opinion; and,

3. That the claim was barred by the statute of limitations.

The Trial Court entered the partial Summary Judgment and a 54(b) Order. The appeal related only as to the Summary Judgment in regard to the negligent misrepresentation claim.

3. Whether a reasonable person would have discovered the alleged fraud is generally a question of fact for the jury.

The Court noted that whether a person of reasonable prudence would have discovered the alleged fraud is generally a question of fact within the purview of a jury citing to *Jim Walter Homes, Inc., v. Kendrick*, 810 So.2d 645, 650 (Ala. 2001). In *Jim Walter*, the Plaintiff testified that he knew for more than two years before filing the lawsuit that the home was not a "quality home." In that case, the Court found that the claim was barred by the statute of limitations.

4. The Court noted that Bryant Bank argues that its negligent misrepresentation claim accrued when it incurred damage as a result of the default.

The Bank contended that only after the default did it begin to investigate its mitigation options and discovered facts that led Bryant Bank to believe that Kirkland had negligently conducted the appraisal. As a result, the Court concluded that in that no evidence was presented indicating that Bryant Bank had actual knowledge for more than two years before commencing the action that the question had to be resolved by a jury.

The Bank relied on the case of *Fisher v. Comer Plantation, Inc.* 772 So.2d 455 (Ala. 2000), in which the Court held that a real estate appraiser could be held

liable for a negligently conducted appraisal under Restatement (2nd) of Tort §552.

5. If the recipient of the appraisal forebore an independent inquiry because the recipient was ignorant and the speaker understood that the recipient relied on the opinion as a result of a confidential relationship, the recipient could reasonably rely on the opinion.

The Defendants argued that the value of the property in the appraisal was merely a statement of opinion, not a statement of fact, and could, therefore, not serve as the basis of a negligent misrepresentation claim. Citing to *Brushwitz v. Ezell*, 757 So.2d 423, 432 (Ala. 2000).

The Court cited to *Brushwitz* in which that Court noted that:

> Even an opinion on value is actionable, however, if the recipient states his ignorance and invites the opinion and the speaker understands the recipient relies on the speaker's opinion as a fact so that the onus of a confidential relation results: if the recipient forebears independent inquiry because of an opinion elicited under these circumstances of confidence. Alabama courts will treat this statement as a fact reasonably relied upon.

680 F.2d at 1368.

6. The appraisers had a pecuniary interest in making the statements and had expertise and special knowledge to justify reliance and therefore had a duty of care with respect to the representations.

The Court cited to the case of *Private Mortgage Investment Services, Inc., v. Hotel & Club Associates, Inc.,* 296 F.3d 308, 314-315 (4th Cir. 2002), for the proposition that:

> If the defendant has a pecuniary interest in making the statement and he possess expertise or special knowledge that would ordinarily make it reasonable for another to rely on his judgment or ability to make careful inquiry, the law places on him a duty of care with respect to

representations when made to plaintiff.

The Court reversed and remanded the partial Summary Judgment as to the Bank's negligent misrepresentation claim and remanded the case for further proceedings.

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

TORT – WRONGFUL DEATH ACTION

IN RESPONSE TO THE PETITION FOR WRIT OF CERTIORARI, THE COURT FOUND THAT A PERSONAL REPRESENTATIVE COULD NOT BE COMPENSATED OUT OF THE PROCEEDS RECOVERED IN A WRONGFUL DEATH ACTION.

***Rodgers v. McElroy,* 2014 Ala. Civ. App. LEXIS 73 (April 18, 2014).**

SUMMARY:

The father of the Decedent objected to any monies being paid out of the wrongful death settlement to the Estate's personal representative.

HOLDING:

In answering the narrow question of whether a personal representative may be compensated out of the proceeds recovered in a wrongful death action, the Court found that the personal representative was due to recover no monies for her services.

DISCUSSION:

McElroy served as personal representative of the Estate of White who was killed in a motor vehicle accident. The wrongful death action resulted in a recovery for White's next of kin.

The issue of McElroy's fee was litigated and the Trial Court awarded her a fee to be paid from the proceeds of the wrongful death action for "**extraordinary services**" rendered as personal representative of the Estate, pursuant to §43-2-848(b), Ala. Code 1975.

Rodgers, the father of White, appealed and the Alabama Court of Civil Appeals affirmed.

Subsequently, the Alabama Supreme Court granted Rodgers' petition for

Writ of Certiorari "to determine the narrow question whether a personal representative may be compensated out of the proceeds recovered in a wrongful death action.

I. A wrongful death action must be brought by heirs of the Decedent and not by the Estate; therefore, the personal representative of the Estate was not entitled to any compensation.

The Supreme Court reversed the judgment of the Court of Appeals finding that:

> Section 43-20848(b) does not entitle McElroy, the personal representative, to any fee from the wrongful death proceeds because the recovery in the wrongful death action was not **for the Estate.** Alabama law mandates the payment of wrongful death proceeds to the heirs of the deceased. **The clear language of the wrongful death statute provides that proceeds from a wrongful death action 'are not subject to the payment of the debt for liability' of the decedent. §6-5-410(c) Ala. Code 1975.** There is no allowance in the wrongful death statute for payment of expenses of the administration of the decedent's Estate, which would include personal representative compensation. See §43-2-371, Ala. Code 1975 (setting out the order of preference of debts against the Estate). Under the combined effect of §§6-5-410 and 43-2-848(a) and (b) Ala. Code 1975, McElroy was not entitled to be paid from the proceeds of the wrongful death recovery either reasonable compensation for her services are extraordinary compensation for her services.

II. On remand, the Trial Court found that Trust law permitted the personal representative to receive compensation in a wrongful death action based on equitable principles, *quantum merit* and/or pursuant to Alabama Code §19-3(b)-708 (1975).

On remand, the Alabama Court of Civil Appeals reversed the judgment and

remanded the case to the Trial Court for further proceedings. On remand, the Trial Court had a hearing and entered a judgment finding that although the Alabama Supreme Court had determined that McElroy was not entitled to a fee pursuant to §43-2-848, "General rules of trust law permit a personal representative compensation in wrongful death actions." The Trial Court went on to state:

> Based upon general equitable principles, quantum meruit, and/or pursuant to Alabama Code §19-3(b)-708 (1975), Elizabeth McElroy should receive compensation for her services rendered relative to the non-probate creation and administration of the statutory trust. It would be unfair and inequitable for a personal representative and here, an attorney, to perform work for the benefit of others without compensation.

III. The Trial Court awarded McElroy a fee of $15,750.00 and Rodgers again appealed.

McElroy sought to have the appeal dismissed contending that White's Estate remained open and pending and therefore that the judgment was non-final.

IV. On March 4, 2014, the Court of Civil Appeals reinvested the Trial Court with jurisdiction to certify the 2013 judgment as final and the judgment was rendered final on March 18, 2014.

McElroy relied on Justice Bolin's special concurrence and stated "Although I concur with the main opinion, I posit that the unjust result obtained for the personal representative in this case may well be avoided prospectively on the basis of the finding of a statutory trust and successful wrongful death actions brought by the personal representative, with reasonable and just compensation being fixed as trustee fees and paid from the trust res in those actions."

V. The Alabama Court of Civil Appeals concluded that "if McElroy was to be awarded a fee from the wrongful death proceeds, the trust res from which such an award could have been paid should have been created by the Court in the wrongful death action against the driver of the vehicle. …"

In reversing and remanding the decision of the Trial Court, the Court of Civil Appeals concluded that:

> Nothing in *Ex parte Rodgers* allows the trial court to award McElroy a fee from the wrongful death proceeds for her work as the personal representative of White's Estate. If McElroy was to be awarded a fee from the wrongful death proceeds, the trust res from which such an award could have been paid should have been created by the Court in the wrongful death action against the driver of the vehicle involved in the accident in which White was killed. The trial court in this action which involves only issues arising out of the administration of White's Estate, did not have the authority to award McElroy a fee from the wrongful death proceeds … although the statutes applicable in this case require reversal of the trial court's judgment, this Court shares Justice Bolin's belief expressed in his special concurrence, that this outcome is "unfair and inequitable to the personal representative."

The opinion was authored by Justice Thompson and Judge Pittman, Thomas and Donaldson concurred. Judge Moore concurred in the result, without writing.