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

CIVIL LAW

WINTER CONFERENCE FOR CIRCUIT AND DISTRICT COURT JUDGES

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Ann McMahan, Esquire
SIMPSON, McMAHAN,
GLICK, & BURFORD, PLLC
2700 Highway 280 South
Suite 203, West Wing
Birmingham, Alabama 35223
(205) 876-1600

INDEX

ADMINISTRATIVE LAW - FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES

THE APSC HAS EXCLUSIVE JURISDICTION OVER THE CLAIMS RELATED TO THE PLAINTIFF CORPORATION'S CONTENTION THAT IT HAD BEEN CHARGED THE WRONG RATE AND WAS DUE A REFUND.

***Ex parte Alabama Power Co.*, 2011 WL 3633099 (Ala.) (August 19, 2011)**

SUMMARY:

Alabama Power Petitioned for a Writ of Mandamus directing the trial court to dismiss a customer's claims against it for lack of subject matter jurisdiction.

HOLDING:

Justice Main held that because a customer failed to exhaust its administrative remedies with the Alabama Public Service Commission before seeking redress from the Courts, the dismissal of the customer's claims was required.

DISCUSSION:

In the case, Alabama Power Company contended that an APSC rule provides that if a customer wants a different rate than the customer is assigned, it is the customer's responsibility to initiate the rate change rather than the utility's responsibility to bring the matter to the customer's attention. Capital contended that Alabama Power Company refused to refund monies to Capital resulting from its having paid a higher rate that it should have paid.

Capital Determined that it had been Charged the Wrong rate by retaining an expert to do and contended that it was Alabama Power Company's obligation to notify a customer when a rate had been changed.

Capital stated that it was forced to rely on an independent rate consultant to determine that it was being overcharged.

Capital relied on *Alabama Power Company v. Patterson*, 24 Ala. 558, 138 So.417 (1931), for the proposition that construing rates schedules and determining which schedule is applied to a given state of facts is the function of the Courts rather than the APSC. Capital also cited to *Holloway v. Alabama Power Company*, 568 So.2d 1245 (Ala.Civ.App. 1990).

In finding that Capital had to initiate its claim before the APSC, the Court cited to Section 37-1-31 referring to "rates and service regulations and equipment" as being under the exclusive jurisdiction of the APSC.

Justice Murdock's Concurred in the Result but Distinguished the Case from other types of Rate cases in which the rate is unlawfully charged to the customer.

Justice Murdock concurred in the result but wrote a distinguishing opinion. Murdock emphasized that in this case Alabama Power Company failed to advise a commercial customer that it should have been charged a lower rate due to its change in business operations.

If the case involved a rate charged by APCO that was illegal or otherwise impermissible, it would not be within the exclusive jurisdiction of the APSC.

The APSC would not have exclusive jurisdiction if Alabama Power Company applied the wrong rate to a customer's bill when only one rate was lawfully available, misread a meter, failed to properly apply a customer's payment to an account, made a computational error, or otherwise "overcharged" a customer in a manner that can and does occur in commercial transactions generally.

The APSC has exclusive jurisdiction of cases in which a "practice" of Alabama Power Company is Challenged.

An Expert Witness should not be permitted to offer Expert Testimony as to the Law.

Murdock further criticized the fact that Alabama Power Company offered the "expert testimony" of an Administrative Law Judge for the APSC. That testimony, in large part, addressed the legal issue of whether the trial court had original jurisdiction over the dispute presented that Murdock contended was for the trial court in its role as a finder of law and not an issue of law that presented itself as a "necessary operative fact."

ARBITRATION **THE DEFENDANT DID NOT WAIVE ITS RIGHT TO COMPEL ARBITRATION AS A RESULT OF ITS SUBSTANTIALLY INVOKING THE LITIGATION PROCESS AS A RESULT OF ITS PARTICIPATION IN MOTION PRACTICE RELATED TO VENUE AND DISCOVERY FOR 11 MONTHS AND ITS FAILURE TO ASSERT ITS RIGHT TO ARBITRATE IN ITS ANSWER**

Aurora Health Care, Inc., v. Ramsey, **2011 WL 5009781 (Ala.) (October 21, 2011)**

SUMMARY:

Administratrix of a nursing home resident's estate brought an action against the nursing's home owners and operators asserting statutory and common law claims arising from the residence's death. The trial court denied Aurora's Motion to Compel Arbitration.

HOLDING:

Justice Malone held that the Administratrix failed to show that she was prejudiced by the belated assertion of a right to arbitrate by the owners and operators of the nursing home; therefore, the nursing home did not waive its right to arbitration by participating in the litigation process.

DISCUSSION:

Aurora did not substantially invoke the litigation process by contesting venue.

The personal representative, Ramsey, originally sued Aurora in Wilcox County for wrongful death. The Defendants moved to transfer the case to Jefferson County and after significant litigation activity as to venue, the case was

transferred. After the case arrived in Jefferson County, the Defendants answered and served interrogatories and requests for production. Subsequently, the Defendants moved to compel arbitration pursuant to an arbitration agreement that the decedent or a representative of the decedent allegedly signed. Ramsey opposed the Motion based on waiver. The trial court denied arbitration and the Defendants appealed.

Justice Malone reversed finding both that the Defendants had not substantially invoked the litigation process sufficient to evidence an intent to abandon arbitration in favor of the judicial process and that the Plaintiff Ramsey would not be substantially prejudiced by an Order requiring it to submit to arbitration.

The Party Objecting to Arbitration has a "heavy burden" to establish substantial prejudice.

As to prejudice, the Court emphasized that Ramsey had a "heavy burden" of establishing substantial prejudice. As evidence of prejudice, Ramsey responded that she had incurred substantial attorney's fees and expenses as a result of the participation in the litigation process and as a result of court appearances in Wilcox and Jefferson County. Further, Ramsey argued that counsel had conducted legal research regarding venue responding to the Petition for Writ of Mandamus, filing Motions to Dismiss and other Motions, filing an Amended Complaint, preparing Discovery and participating in phone conferences. Justice Malone noted that these assertions were not supported by any factual evidence in the record.

The Costs related to Contesting Venue were not the Type of Litigation Expenses that Arbitration is Designed to Alleviate and the Arbitration Rules Permitted Discovery.

Justice Malone noted that Ramsey did not demonstrate that she had to undergo types of litigation expenses that arbitration was designed to alleviate nor did she demonstrate that the Defendants took advantage of judicial discovery procedures that were not available in arbitration.

As to venue, Malone noted that a party has a right to have the issue of arbitration litigated in the property venue. As to the discovery that was conducted, the Court found that little, if any, discovery had been conducted such that it could

be said that the Defendants had taken advantage of judicial discovery procedures not available in arbitration. The Court took judicial notice of the fact that the National Arbitration forum which was the selected arbitrator permitted document discovery.

The trial court should consider the claims related to the authenticity of the signature on the arbitration agreement.

The case was remanded for the trial court to consider whether arbitration was permitted in light of the claims of Ramsey that the signature on the arbitration agreement was not authentic or was forged and that the agreement was signed after the initial admission of the patient and whether non-signatories to the arbitration agreement (the individual Defendants) could enforce the agreement.

ARBITRATION- CASE OF FIRST IMPRESSION

AN AMENDED COMPLAINT REVIVES THE RIGHT TO SEEK ARBITRATION

***Krinsk v. SunTrust Bank,* (NO.10-11912 ___ F.3d ____)(11th Cir. 2011).**

HOLDING:

Even though SunTrust failed to assert its right to arbitrate for nine months, it did not sufficiently invoke the litigation process.

SUMMARY:

In the underlying case, SunTrust did not file a Motion to require arbitration until after the Plaintiff filed an Amended Complaint. The District Court found that SunTrust had "invoked the judicial process in litigating this case without any indication that it was contemplating arbitration for nine (9) months prior to filing its Motion to Compel Arbitration.

The Eleventh Circuit found that Krinsk did not demonstrate that it would suffer prejudice if the case were referred to Arbitration.

The District Court also decided that due to SunTrust's actions, Krinsk would suffer prejudice if SunTrust were permitted to assert its arbitration rights in such an untimely manner. The Court further held that the belated Motion to Arbitrate prejudiced Krinsk by inducing her to spend money on Class Action related Motion practice and discovery which are "the type of litigation expenses that arbitration was designed to alleviate." SunTrust Appealed. The Eleventh Circuit did not agree.

An Amended Complaint revived the Right to Seek Arbitration even though the Amendment only stated new claims based on the same operative facts.

The Eleventh Circuit noted that SunTrust's position that the Amended Complaint "revived" its right to compel Arbitration was an issue of first

impression. Under the Federal Rules of Civil Procedure generally the filing of an Amended Complaint does not automatically revive all defenses that the Defendant may have waived in response to the initial Complaint. However, the Court found that a Defendant will be permitted to plead anew in response to an Amended Complaint as if it were the initial Complaint when the Amended Complaint changes the theory or scope of the case. The Court found that "Courts will permit the Defendant to rescind his earlier waiver and revive his right to compel Arbitration only if it is shown that the Amended Complaint unexpectedly changes the scope or theory of the Plaintiff's claims." The Eleventh Circuit Court held that pursuant to the strong Federal policy supporting the enforcement of Arbitration Agreements, the Defendant's Motion to Compel Arbitration should be granted absent a new waiver by the Defendant based on the Defendant's lack of diligence in seeking Arbitration following the filing of the Amended Complaint.

The Court noted that the Amended Complaint merely asserted new claims based on the same operative facts but broadened the scope of the litigation by opening the door to thousands, if not tens of thousands of new class plaintiffs, not contemplated in the original class definition.

ARBITRATION **DOCTRINE OF MERGER BY DEED - THE MERGER DOCTRINE DID NOT EXTINGUISH THE RIGHT TO ARBITRATE THE CLAIMS.**

Thomas v. Sloan Homes, **2011 WL 4135742 (Ala.) (September 16, 2011)**

SUMMARY:

Home builder moved to compel arbitration of the home purchasers' claims alleging breach of contract and tortious conduct in regard to the construction of the home. The trial court granted the Motion and the purchasers appealed.

HOLDING:

Justice Murdock held that the Merger Doctrine did not extinguish the arbitration clause contained in the home purchase agreement.

DISCUSSION:

The Execution and Delivery of the Deed did not Nullify an Arbitration Clause included in the Residential Sales Agreement.

The question presented by this appeal is whether under the Doctrine of Merger, the execution and delivery of the deed in the case nullified an arbitration clause included in the prior residential sales agreement. The Court held that the arbitration agreement survived delivery of the deed because as the Court of Appeals recently held in *Brogden v. Durkee*, 16 So.3d 113, 115 (Ala.Civ.App. 2009), agreements contained in a real estate sales contract which are collateral to the conveyance can survive the conveyance. Justice Murdock cited also to the case of *Holmes v. Worthey,* 159 GA.App. 262, 266-267, 282 SE.2d 919, 923 (1981), in which the Court held, in part, that:

Where the antecedent contract or contracts clearly

provide for agreements or stipulations to build or construct as well as an agreement to convey, it is plain that the actual transfer of the deed, which is performance only of the agreement to convey, does not extinguish any duties and obligations arising out of the agreement to build.

CIVIL PROCEDURE **A JUROR'S FAILURE TO REVEAL DURING VOIR DIRE THAT THE JUROR HAD BEEN A DEFENDANT IN TWO COLLECTION CASES WAS NOT SUFFICIENT TO MERIT A NEW TRIAL DUE TO JUROR MISCONDUCT.**

***Hood v. McElroy,* 2011 WL 4507562 (Ala.)(Sept. 30, 2011).**

SUMMARY:

The Estate of a fourteen-month old child who died from brain injuries inflicted by his mother's boyfriend brought a wrongful death action against the boyfriend and the County Social Worker who determined it was safe to leave the child in the mother's care. After a jury returned a verdict in the Estate's favor and ordered only $25,000.00 in damages against the Defendants, the trial court granted the Estate's Motion for New Trial. The Social Worker appealed.

HOLDING:

The Supreme Court held that a juror's failure to reveal during voir dire that she had been sued for approximately $2,650.00 in two collection actions did not support a finding of probable prejudice to the Estate so as to warrant a new trial.

DISCUSSION:

At issue are the temporal remoteness of the matter inquired about, the ambiguity of the question, the prospective juror's inadvertence or willfulness, the failure of the juror to remember, and the materiality of the inquiry.

In determining whether a juror's silence resulted in probable prejudice to the Movant, the Alabama Supreme Court has said that a trial court should consider a broad range of factors. *Freeman v. Hall*, 286 Ala. 161 at 167, 238 So.2d 330 at 336. Some of the factors considered pertinent are:

1. Temporal remoteness of the matter inquired about;
2. The ambiguity of the question propounded;
3. The prospective juror's inadvertence or willfulness in failing to answer;
4. The failure of the juror to recollect; and
5. The materiality of the matter inquired about.

The Supreme Court held that its disagreement with the trial court's decision focused primarily on the factors of "ambiguity of the question propounded" and "the materiality of the matter inquired about."

Justice Main dissented finding that the Order was neither arbitrarily entered nor clearly erroneous.

Justice Main based his dissent, in large part, on *Union Mortgage Co., v. Barlow,* 595 So.2d 1335, 1342 (Ala. 1992):

> The determination of whether the complaining party was prejudiced by a juror's failure to answer voir dire questions is a matter within the discretion of the trial court and will not be reversed unless the Court has [exceeded] its discretion.

Justice Main discussed the same issues discussed in the majority opinion but emphasized most that it was within the discretion of the trial court and found "the trial court did not exceed its discretion" in granting the Estate's Motion for a New Trial. Its Order was neither arbitrarily entered nor clearly erroneous.

CIVIL PROCEDURE **RULE 54(B) CERTIFICATION IMPROPER BECAUSE IT WOULD HAVE PERMITTED PIECEMEAL REDEMPTION OF THE PROPERTY.**

***EB Investments v. Pavilion Development,* 2011 WL 3375657 (Ala.)(August 5, 2011)**

SUMMARY:

The assignee of a mortgagor's redemption rights brought an action against the foreclosure sale purchasers seeking to enforce the assignee's purported right of redemption. The trial court entered a Summary Judgment for the purchaser and the assignee appealed.

The Supreme Court reversed and remanded in 979 So.2d 24. On remand, the trial court found that the assignee had a right of redemption. The parties then cross-appealed.

HOLDING:

Justice Stuart found that the trial court exceeded its discretion in certifying its partial judgment as final for the purposes of appeal.

DISCUSSION:

The Court *ex mero motu* withdrew its opinion of June 17, 2011 and issued a new opinion holding that the Rule 54(b) Certification of the Judgment was improper because it left pending ancillary issues which had been severed from the redemption claims.

On January 23, 1999, the trial court entered an Order severing Pavilion's redemption claim from the other cross-claims, counterclaims, and third-party claims that had been filed in the action. The Defendant Companies contended that certification was proper because the trial court intended to address the claims and

issues raised by Pavilion's Complaint seeking to exercise the rights of redemption first before turning to the other claims filed later. They further contended that this was a wise decision in that the other claims were dependent upon whether or not Pavilion indeed had the right to redeem.

The Court found that the trial court's judgment failed to fully resolve the claim and all outstanding issues in that, first, the trial court failed to address the City of Huntsville's interest in the property and Pavilion could not elect to forego redemption of Huntsville's interest while redeeming the rest of the property. Second, the trial court failed to award any compensation to the Nelsons who purchased a lot from a company that had previously purchased the lot one of the Defendants. The trial court did not address that because the Nelsons and Pavilion had entered into an agreement not to redeem the Nelson's lot. The Court disagreed that a determination of the right of redemption disposed of that issue because "the law does not allow piecemeal redemption." *Costa and Head,* 569 So.2d at 363.

Finally, the trial court stated that the development mortgage, Gallup executed in favor of Pace as part of that April 1995, Settlement Agreement would be revived upon redemption and therefore remain a superior lien on the property and that the issues relating to that mortgage should be resolved prior to certification.

The Court reviewed recent decisions regarding its position that it looks with "some disfavor" upon certifications under Rule 54(b).

CLASS ACTION **CERTIFICATION OF THE CLASS WAS IMPROPER IN THAT THE REQUIREMENT OF ALA.R.CIV.P.23(B)(3) RE PREDOMINANCE OF COMMON ISSUES OVER INDIVIDUAL ISSUES AND SUPERIORITY WAS NOT MET.**

National Security Fire & Casualty Co., v. DeWitt, **2011 WL 5607802 (Ala.)(November 18, 2011)**

SUMMARY:

The owner of a mobile home that was damaged during a hurricane filed a complaint against insurer alleging that insurer breached the terms and conditions of his home owner's insurance policy when the insurer did not include in the payment to him 20% for general contractor overhead and profit in calculating the actual cash value of his loss. The owner also filed a Motion for Class Certification. The Class was certified and the insurer appealed.

HOLDING:

Justice Wise found that the owner failed to satisfy his burden of establishing the predominance and superiority requirements set forth in the Class Action rules.

DISCUSSION:

DeWitt argued that under industry standards, a general contractor was necessary when three or more trades are needed to make repairs. National Security contended that it makes the determination as to whether it will pay for a general contractor's services on a case by case basis.

In reversing as to the Certification issues, Justice Wise discussed at length several Federal District Court opinions regarding Class Certification issues as to predominance of common issues over individual issues and superiority.

The fact that an individual examination of the case files would be necessary would destroy predominance.

She concluded that individual examination of the case files would be necessary to determine whether a general contractor's services were reasonable which would destroy predominance. "The greater the number of individual issues, the less likely that the Court may properly find that a Class Action is the superior means of litigating the Plaintiff's claims." *Ex parte Greentree Financial Corp.*, 723 So.2d 6 at 9 (Ala. 1998). The Order granting Class Action Certification was vacated.

CONTRACTS **UNJUST ENRICHMENT - THIS CASE CONTAINS A GOOD DISCUSSION OF THE LAW REGARDING UNJUST ENRICHMENT**

***Matador Holdings v. Hopo Realty Investments,* 2011 WL 3375658 (Ala.)(Aug. 5, 2011).**

SUMMARY:

A building materials supplier brought an action against a commercial property owner and lessee of property seeking payment for materials and services provided to the lessee. The trial court entered judgment allowing the supplier to retrieve goods and materials from the property and granted the supplier a lien on the unexpired term of the lease and denied the supplier's unjust enrichment claim. Both parties appealed.

HOLDING:

Justice Main found:

1. **The evidence was sufficient to support the trial court's judgment that the commercial property owner was not unjustly enriched; and**

2. **The supplier's materialman's lien against the commercial property was not proper because the commercial lessee violated the terms of its lease.**

Affirmed in part, reversed in part and remanded with directions.

DISCUSSION:

The material at issue was provided to Stratford, the lessee, not to Hopo, the lessor. There was no evidence indicating that Matador made a mistake of fact in providing materials to the project nor was there any evidence indicating that Hopo

purported to accept any responsibility or liability for the materials such as would induce Matador to provide the materials to Stratford.

INSURANCE **THE COMMON FUND DOCTRINE REQUIRED THE DEDUCTION OF A PORTION OF THE FEES DUE THE INSURED'S ATTORNEY FROM STATE FARM'S SUBROGATION INTEREST.**

***Mitchell v. State Farm Mutual Automobile Ins. Co.*, 2011 WL 4790636 (Ala.Civ.App.)(October 7, 2011)**

SUMMARY:

After being injured in a traffic accident with another motorist, the insured (Mitchell) brought an action against her automobile insurer (State Farm) alleging various claims, including a claim of conversion, arising from State Farm's refusal to compensate the insured's attorney for time spent in obtaining the settlement and agree to a reduction of what was due State Farm pursuant to the Common Fund Doctrine. The trial court entered Summary Judgment in favor of the insurer and the insured appealed.

HOLDING:

Judge Pitman held that State Farm's interest in the settlement was subject to a reduction pursuant to the Common Fund Doctrine.

DISCUSSION:

State Farm was required to bear a proportionate share of the insured's attorney's fee.

The Common Fund exception to an insurer's subrogation rights is that the carrier "should bear a proportionate share of the burden of achieving that recovery - including a pro rata share of the insured's attorney fee." *Government Employees Insurance Co., v. Capulli*, 859 So.2d 1115, 1119 (Ala.Civ.App. 2002).

In this case, Mitchell had a one-third contingent contract with her attorney. State Farm paid medical payments and other payments to the insured in the total

amount of $12,992.50.

State Farm's notice to the insured's attorney that it intended to pursue a subrogation claim "without the need for you to represent State Farm" did not prevent the application of the Common Fund Doctrine.

State Farm sent two letters to the driver's insurer, Cotton States Mutual Insurance Company. Cotton States paid State Farm directly for part of its claim but would not pay for the $5,000.00 medical payment. State Farm then notified Mitchell's attorney that it "intended to pursue a subrogation claim, without the need for you to represent State Farm, for the" $5,000.00 medical payment and requested that the attorney "not take any action which may jeopardize [its] subrogation rights" and advised that if State Farm "retained an attorney to represent its interest" it would advise Mitchell's counsel.

Subsequently, Mitchell filed suit and entered into a settlement with Cotton States for a payment of $35,000.00. State Farm sought full reimbursement of its $5,000.00. The Defendant driver filed an unopposed Motion seeking to pay the disputed $5,000.00 into court pursuant to Rule 22 and thereafter to be dismissed. The trial court granted that Motion leaving State Farm as the only named Defendant.

Mitchell contended that State Farm's recovery of $5,000.00 was subject to a pro rata reduction for attorney's fees based on the Common Fund Doctrine. The trial court found that the Common Fund Doctrine did not apply and that State Farm took sufficient affirmative action on its own to avoid the application of the Common Fund Doctrine.

The Insured demonstrated that the two core requirements for the application for the common law fund doctrine applied.

Pitman noted that there are two core requirements for applying the Common Fund Doctrine:

(1) "there must be a 'fund' from which to compensate the attorneys; and

(2) the attorney's services must directly benefit the Fund."
859 So.2d at 1122.

The Insured's attorney created a "fund" from which he was to be compensated.

The Court disagreed with State Farm that no "Fund" came into being because the insured retained counsel, counsel diligently investigated the merits, counsel brought a civil action, and counsel ultimately secured a $35,000.00 settlement. The Court noted that prior to the insured hiring counsel, there was no indication in the record that Cotton States had agreed to pay anything to State Farm or to the insured.

The Court then considered the two theories advanced by State Farm to avoid the Common Fund Doctrine.

(1). The Court did not agree that policy language providing that State Farm was entitled to recovery its subrogation interest regardless of whether or not the insured is fully compensated does not abrogate the Common Fund Doctrine.

Judge Pitman did not agree that three opinions issued by various Alabama Circuit Court Judges controlled to negate the Common Fund Doctrine and cited to the case of *Blue Cross and Blue Shield of Alabama v. Freeman*, 447 So.2d 757, 759 (Ala.Civ.App. 1983), in which the Court stated that "in the case of an insured's recovery of damages in which the insurer has an interest as subrogee after payment to the insured" the equitable right of an insured to withhold a pro rata attorney fee under the Common Fund Doctrine may arise "aside from contract." The Court found that the mere presence of subrogation and reimbursement clauses in the State Farm policy did not support State Farm's claim that the language alone abrogated the Common Fund Doctrine.

(2). The Court found that State Farm did not actively participate in the litigation nor did it help "create or preserve" a fund sufficient to negate the Common Fund Doctrine.

Judge Pitman noted that the pertinent "Fund" was the gross recovery of $35,000.00 obtained by the insured through her counsel. As to that recovery, State Farm did nothing to aid the insured or its attorney. Based on the record, it also appeared that State Farm did not assist the insured's attorney in investigating the

claim or pursuing the lawsuit. To avoid the Common Fund Doctrine, State Farm had to prove that it had "helped create or preserve a subrogated fund." To the contrary, Judge Pitman found that as was the case in *Alston v. State Farm*, 660 So.2d 1314, 1316 (Ala.Civ.App. 1995), State Farm did nothing more of note than "rely on [an insured's] attorney to benefits that it received from the Common Fund."

The judgment was reversed and remanded.

INSURANCE - DIRECT ACTION AGAINST TORTFEASOR'S INSURER

Late Notice of the Claim Precluded Recovery by the Judgment Creditor

The Court Overruled *Haston v. TransAmerica Insurance Services*

The Judgment Creditor Does Not Have an Independent Right to Provide Notice to an Insurer After a Judgment Is Entered Against the Insured.

***The Travelers Indemnity Company of Connecticut v. Miller*, 2011WL6004619 (Ala.)** (December 2, 2011)

SUMMARY:

A judgment creditor brought a direct action against a commercial general liability and automobile insurer to apply the proceeds of the insured's policies to the default judgment the creditor had obtained against the insured.

HOLDINGS:

The Court overruled *Haston v. TransAmerica Insurance Services*, 662 So.2d 1138 (Ala. 1995). Justice Bolin found that failure to notify the insurer of the underlying claim until after a default judgment had been entered barred the creditor from recovering under the policies.

DISCUSSION:

The insured (Smith) was a house mover insured by Travelers. Smith contracted with Miller to move a house and place it on a foundation, but during transport, the house suffered damage. Further, the foundation itself was improper.

Miller sued Smith and Smith failed to answer or appear and eventually filed for bankruptcy. Miller obtained a default judgment against Smith; and within sixty (60) days thereafter, Miller's attorney began contacting Travelers and its agent concerning payment. Travelers refused to pay the judgment.

The bankruptcy court lifted the stay and allowed Miller to proceed directly against Travelers to the extent that coverage was available for the claim. Miller sued Travelers under the direct action statute. Travelers defended based on late notice. The trial court ruled in favor of Miller.

In a Direct Action Case, a Judgment Creditor Cannot Collect from the Insurer Unless the Prerequisites for the Insured's Coverage Have Been Met. If Late Notice Is the Defense to Coverage, the Judgment Creditor must Explain the Insured's Reasons for Delay.

The Supreme Court reversed citing to *Nationwide Mutual Fire Insurance Co. v. Estate of Files*, 10 So.3d 533 (Ala. 2008). The Court noted that *Files* stood for the proposition that under a direct action lawsuit the judgment creditor of an insured could not collect on a judgment unless the prerequisites for the insured's coverage are satisfied. Thus, the Court found that under any CGL policy requiring notice, any judgment creditor against the insured must explain the ***insured's*** reasons for the delay in giving the insurer notice of suit. Miller provided no such explanation.

The Court Overruled *Haston* Finding That *Files* Rather than *Haston* Controlled. The Judgment Creditor Does Not Have an Independent Right to Provide Notice to an Insurer After a Judgment Is Entered Against the Insured.

Miller countered that under *Haston v. TransAmerica* the judgment creditor has an interest in the proceeds of the policy and can notify the insurer directly after default is entered. In *Haston*, the Court found that the Hastons as injured parties acquired a hypothecated interest in any applicable insurance proceeds and it would be incumbent upon the Hastons at that point to provide prompt notice to Transamerica of the default judgment and of their claim to the proceeds. Justice Bolin noted on page 8 that:

> In short, what the *Haston* Court did was to conclude that the injured party's duty to protect his hypothecated interest by seeing that timely notice of the lawsuit is given to the insured's insurer was independent of the contractual duties of the insured in providing notice in that notice from the injured party after a default judgment was entered, if timely, would satisfy the notice requirement.

Although neither party requested the Court to do so, the Court concluded that *Haston* was an aberration and should be overruled and that *Files*, rather than *Haston*, controlled meaning that the judgment creditor could not recover absent some explanation for the late notice which was not provided by the insured. *Haston* was overruled to the extent that it purports to give a right to an injured party who gives notice after a default judgment has been entered, a right the insured would not have had nor have been successful in pursuing.

INSURANCE **EVEN THOUGH THE INSURER SOUGHT INTERVENTION UNDER BOTH *UNIVERSAL I* AND *UNIVERSAL II*, THE TRIAL COURT HAD BROAD DISCRETION IN DENYING A MOTION FOR PERMISSIVE INTERVENTION.**

***Employer's Mutual Cas. Co., v. Holman Building Co.*, 2011 WL 5110204 (Ala.)**

SUMMARY:

Land owners brought a putative class action against a contractor and supplier of drywall for negligence, fraudulent suppression, and breach of warranty among other claims. The contractor brought a cross-claim against the supplier for indemnity, negligence, breach of warranty, and breach of contract among other claims. The supplier brought a third-party claim against a manufacturer of drywall.

The contractor's commercial general liability insurer, Employer's, moved for permissive intervention to request special interrogatories and to participate in discovery or alternatively to request a bifurcated trial regarding coverage. The trial court denied the Motion and the insurer appealed.

HOLDING:

Justice Malone held that the Circuit Court did not exceed its discretion in denying the insurance company's Motion for Permissive Intervention. Justice Murdock dissented.

DISCUSSION:

At issue was the use of drywall manufactured in China that was alleged in part to make the homes uninhabitable.

Employer's moved to intervene outlining coverage issues that would implicate questions of fact for a jury's determination:

1. Resolution of the question regarding which policy is potentially implicated;

2. The question of whether some or all of the claims alleged against the contractor triggers any of the insuring agreements of the policies;

3. The question of whether some or all of the claims asserted alleged an "occurrence" as required by the insuring agreements;

4. The question of whether some or all of the claims asserted allege "bodily injury" as required by the insuring agreements;

5. The question regarding whether the claims asserted allege "property damage" as required by the insuring agreements;

6. The question regarding whether any alleged bodily injury or property damage commenced during any of the policy periods;

7. A question regarding whether the contractor's knowledge of "bodily injury" or "property damage" prior to the policy periods precludes the application of any of the insuring agreement;

8. A question regarding whether some of the Plaintiff's claims are barred by the substantive law of the State of Alabama and are due to be dismissed which means that Employer's would owe no duty to defend and/or indemnify the contractor as to those claims;

9. A question regarding whether the following exclusions contained in the policies apply to bar some or all of the claims as to (1) expected or intentional injury; (2) pollution exclusion; (3) damage to property; (4) damage to your product exclusion; (5) damage to your work exclusion; (6) damage to impaired property; (7) recall of product exclusion; (8) the continuous or progressive injury or damage exclusion; and (9) the absolute exclusion for fraud, misrepresentation, deceit or suppression or concealment of fact;

10. The question regarding whether some or all of the claims against Holman trigger the insuring agreements of one of the policies and

whether the exclusions bar the damages sought as to (1) property damage - general exclusion; (2) property damage to your product, work, impaired property; (3) product recall exclusion; (4) pollution exclusion; or (5) continuous or progressive injury or damage exclusion;

11. The question regarding the effect of a provision in the umbrella policy which provides that the coverage provided by the respective umbrella policies will not be broader than the underlying CGL policies.

Employer's sought permissive intervention for the limited purpose of participating in discovery and of moving either for a special verdict form or a general verdict form with general interrogatories pertaining to the numerous coverage issues and alternatively sought a bifurcated trial regarding the coverage issues.

The Court noted that the trial court has broad discretion in denying a Motion for Permissive Intervention. *Universal Underwriters Ins. Co., v. East Central Alabama Ford-Mercury, Inc., (Universal I)* 574 So.2d 716 (Ala. 1990), permitted, subject to the trial court's discretion, permissive intervention for the purpose of seeking a bifurcated trial in which insurance matters would be tried subsequent to the underlying tort claims.

Employer's sought to distinguish *Universal I* and *Universal II* by contending that the insurer in those cases that sought to intervene did not request different forms of relief in the alternative. Employer's contended it was entitled to intervene because it sought both a bifurcated trial under *Universal I* and a special verdict form or a general verdict form accompanied by interrogatories contemplated in *Universal II, Mutual Insurance v. Chancey,* 781 So.2d 172 (Ala. 2000). *Citing*, in part, to the language of Rule 24 that anyone "may be permitted to intervene" the trial court properly denied the intervention which was within the broad discretion of the trial court.

Justice Murdock's Dissent:

Justice Murdock found that no prior case has addressed a case in which a liability insurance carrier made a dual request for intervention under both *Universal I* and *Universal II.*

Justice Murdock contended that the trial court erred in not allowing one form of intervention or the other. **Justice Murdock found that Employer's would suffer prejudice in that there was not an adequate substitute for its intervention in the pending action.** Should there be a general verdict, the insurer would have no method for looking behind that general verdict to relieve it from the possible prejudice of *stare decisis* in subsequent litigation.

INSURANCE **THE INSURED'S FAULTY WORKMANSHIP IS NOT AN "OCCURRENCE."**

DAMAGE TO PERSONAL PROPERTY RESULTING FROM THE INSURED'S FAULTY WORKMANSHIP WAS THE RESULT OF A COVERED "OCCURRENCE."

THE TRIAL COURT WAS REQUIRED TO ESTABLISH THE AMOUNT OF DAMAGES ATTRIBUTABLE TO DAMAGE TO PERSONAL PROPERTY CAUSED BY THE WORK OF THE INSURED.

THE SUBCONTRACTOR EXCEPTION TO THE PRODUCTS COMPLETED OPERATIONS HAZARD RESULTS IN COVERAGE FOR THE WORK OF THE SUBCONTRACTORS.

***Town & Country Property v. Amerisure Ins. Co.*, 2011 WL 5009777 (Ala.)**

SUMMARY:

A judgment creditor (Town & Country) brought a direct action against the judgment debtors' commercial general liability company under the direct action statute for satisfaction of a judgment obtained in an underlying tort action for defective construction of the judgment creditor's automobile sales and service facility. Amerisure counterclaimed for a Declaration of Non-Coverage. The trial court entered Summary Judgment in favor of the insurer and the judgment creditor appealed.

HOLDING:

Justice Stuart held that claims of faulty workmanship were not "occurrences" under a CGL insurance policy precluding payment by the insurer unless the underlying award was also for damaged personal property.

DISCUSSION:

Town & Country hired JW (a general contractor), to perform work at its business. JW hired some subcontractors to assist. JW's work and the subcontractor's work was faulty and resulted in damage. Town & Country sued JW and obtained a judgment. Town & Country then sued Amerisure under the Direct Action Statute, Ala. Code Section 27-23-2.

The trial court entered judgment for Amerisure reasoning that the underlying judgment was not covered because the damage to Town & Country was not an "occurrence" within the meaning of a standard CGL policy because faulty construction is not an "occurrence."

Justice Stuart affirmed in part to the extent that "the awarded damages represented the costs of repairing or replacing the faulty work itself."

She remanded for a determination as to whether "any of the damages awarded represented compensation for damaged personal property - e.g. computers and furnishings - or otherwise non-defective portions of the facility."

Damage to personal property or otherwise non defective portions of the building were covered property damage resulting from an "occurrence."

Justice Stuart reviewed the law from other jurisdictions on these issues and discussed *Shehan Construction Co., v. Continental Cas. Co.,* 935 N.E.2d, 160, 162-163 (IND. 2010). The *Shehan* Court held that CGL coverage for "your work" or "property damage to your work arising out of it and included in the products completed operations hazard," does not apply "if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor." The Court also noted that its own precedent holds that coverage for faulty workmanship under a CGL policy depends on the nature of the damage at issue. Relying on these cases: *United States Fidelity Co., v. Warwick Development Co.,* 446 So.2d 1201 (Ala. 1984), and *Moss v. Champion Ins. Co.,* 442 So.2d 26 (Ala. 1983).

In *Warwick,* the Court found that Amerisure was not required to indemnify the contractor for the judgment entered against it in so far as the

damages represented a cost of repairing or replacing faulty work. In *Moss*, the Court held that there had been an "occurrence" for a CGL policy purposes when the contractor's poor workmanship resulted in not merely a poorly constructed roof but damage to the Plaintiff's attic, interior ceilings, and at least some furnishings. Therefore, 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." The Court also cited to *Alabama Plating Co., v. USF&G,* 690 So.2d 331 (Ala. 1996); *United States Fidelity & Guaranty Co., v. Armstrong,* 479 So.2d 1164 (Ala. 1995); and *United States Fidelity & Guaranty Co., v. Bonitz Insulation Co. of Alabama,* 424 So.2d 569 (Ala. 1982).

The Court affirmed in part and remanded with instructions for the trial court to consider arguments from the parties to determine if any of the damages awarded represented compensation for damaged personal property, for example, "computers and furnishings - or otherwise non-defective portions of the facility." Those damages would constitute "property damage" resulting from an "occurrence," and they would be covered under the terms of the Amerisure policy in light of the fact that all of the "construction work in this case was performed by a subcontractor and therefore, the damage suffered as a result of that construction work would fall within the subcontractor exception to the your work exclusion."

JUDGMENT-DEFAULT - -

The Default Judgment Entered Was Inconsistent With Due Process and Was Void because the Defendant's pro se Answer and included his telephone number was sufficient to Prevent the Entry of a default.

***Cornelius v. Browning*, 2011 WL 6004612 (Ala.)**(December 2, 2011)

SUMMARY:

Investors brought an action against various companies and the companies' principals alleging breach of contract, negligence, wantonness, fraudulent suppression, unjust enrichment, and breach of fiduciary duties. The investors obtained a default judgment and the principal moved to set aside the default.

HOLDINGS:

1. The Defendant's Answer which disputed the claims made against him and which included his telephone number was sufficient to constitute an appearance; and

2. The default judgment entered against the Defendant was inconsistent with due process and was void.

DISCUSSION:

Plaintiffs perfected service on the Defendant at his Home but failed to send notice of the Motion for a Default or the Deposition Notice to his home.

The Plaintiffs attempted to serve *Cornelius* on several occasions at his home address but were not successful. Eventually, the Plaintiffs served *Cornelius* through a Process Server at his home. A Pro Se Answer was filed by *Cornelius*. **The Pro Se Answer listed a post office box as his address and included a phone number with a return address on the envelope for a lawyer.**

The notice of the deposition at which Cornelius failed to appear was filed electronically and mailed to the post office box shown for Cornelius on the pro se answer.

Plaintiffs filed an electronic notice of a deposition of *Cornelius*. *Cornelius* was not a participant in the electronic filing system. The Plaintiffs also mailed a deposition notice to

Cornelius at the post office box shown on the pro se answer, but the notice was returned as "Not Deliverable as Addressed, Unable to Forward."

Even though no attorney had appeared on behalf of Cornelius, the Motion for a Default Judgment was not served on Cornelius but was instead served on the attorney shown on the envelope in which the pro se answer was mailed to Plaintiff's Counsel.

After *Cornelius* did not appear for his deposition, the Plaintiffs moved for a default judgment; however, Plaintiffs did not serve *Cornelius* with the motion and instead served the attorney shown on the envelope in which *Cornelius* mailed the Pro Se Answer.

After a default judgment was entered and garnishments began, *Cornelius* moved to set aside the default judgment under Rule 60(b)(4)&(6) for lack of due process. The trial court denied the motion.

The pro se answer constituted an appearance in the case and the Court found that the Plaintiffs served Cornelius at an address that they knew was not a valid address.

Justice Woodall held that the Pro Se Answer constituted an "appearance" in the case and, therefore, entitled *Cornelius* to receive notice before a default judgment was taken. *Cornelius* contended that the Plaintiffs knew that he would not receive mail sent to the post office box address and the Court agreed. Despite that knowledge, Plaintiffs relied on what they described as a "false" and "fraudulent" address as the only means of directly notifying *Cornelius* who had filed an Answer Pro Se.

The attorney who was served had never filed a Notice of Appearance on *Cornelius*' behalf. The Court noted that there was no indication that the Plaintiffs made any other attempt to notify *Cornelius* of the pending default judgment motion even though they had successfully served him with the Complaint at his home address only a few months before filing the motion and further had what appeared to be *Cornelius*' telephone number but made no effort to contact Cornelius via that number. The Court found that mailing the motion to an address at which they knew *Cornelius* would not receive it was "not reasonably calculated, under all the circumstances, to apprise [*Cornelius*] of the pendency of the [default-judgment motion] and [afford him] an opportunity to present [his] objections." *Mullane v. Central Hanover Bank & Trust Co*., 339 U.S. 306 at 314 (1911).

Plaintiffs relied on the case of *Piel v. Dillard*, 414 So.2d 87 (Ala.Civ.App. 1982) as "direct authority for the proposition that a party is entitled to rely upon addresses included within pleadings in order to determine service at the 'last known address.'" Justice Woodall agreed noting that the Court of Civil Appeals did not consider whether an address provided in a pleading could be relied on as the "last known address" when as was true in this case, the Plaintiffs knew that it was not a valid address for the Defendant and when the Plaintiffs were aware of another address for the Defendant at which service in the case had ultimately been successful. The Court

found the judgment void in that it was inconsistent with due process.

Justice Parker's Special Concurrence:

Justice Parker concurred as to the result but reached that conclusion on other grounds and believed that the case should be remanded for a consideration by the trial court of the *Kirtland* factors.

While Justice Parker agreed with the majority opinion that the default judgment was due to be reversed, he believed that the process followed by the Court in so determining was not consistent with prior law in that the Court did not address the *Kirtland* factors.

Parker urged that consistent with precedent, he believed that the trial court's judgment should be reversed and remanded to the trial court with directions for it to consider the *Kirtland* factors in resolving *Cornelius*' Motion to Set Aside the Default. Parker further believed that the trial court should consider as a part of its *Kirtland*'s analysis whether or not *Cornelius* intentionally or inadvertently provided a false address in his Answer and should consider Parker's actions in listing an attorney on the envelope containing the Answer when the lawyer had not been retained to represent him. Justice Parker believed that these facts would be important to determine "whether the default judgment was the result of the Defendant's on culpable conduct." *Kirtland*, 524 So.2d at 605.

JURISDICTION PERSONAL JURISDICTION

A complaint must include factual allegations that establish personal jurisdiction.

If Defendant disputes personal jurisdiction with sworn testimony, Plaintiff cannot rest on the bare allegations of the complaint.

Plaintiff must plead with particularity facts establishing personal jurisdiction via a conspiracy.

***Ex parte McNeese Title,* 2011 WL 4867614 (Ala.)**

SUMMARY:

The purchaser of two lots in a subdivision in Florida sued a non-resident escrow agent alleging that the escrow agent conspired with the developers and marketers associated with the development and sale of the subdivision and that the non-resident escrow agent misrepresented just prior to closing that all lots in the subdivision had sold and would close by the closing date for the purchaser's lots. The escrow agent filed a Motion to Dismiss for lack of *in personum* jurisdiction. The escrow agent filed a Petition for Writ of Mandamus as to the denial of its Motion to Dismiss.

HOLDING:

Justice Woodall held that the purchaser's Complaint failed to allege any jurisdictional basis over the escrow agent and, therefore, placed no burden on the escrow agent to controvert it by Affidavit.

DISCUSSION:

The Sales Contract contained a contingency provision which provided that the Atchison sale would not close prior to the successful closing "of all lots within the subdivision on or before the closing date."

Atchison agreed to buy two lots in Destin, Florida, from CD. McNeese was the Seller's Escrow Agent with which Atchison was required to deposit earnest money.

Atchison alleged that McNeese knowingly misrepresented to Atchison that the contingency was satisfied

Atchison alleged that McNeese knowingly misrepresented to Atchison that the contingency was satisfied and that despite that knowledge accepted Atchison's payments on the day of closing and paid that amount over to CD without insuring compliance with Section 26(b) of the Agreements.

The Complaint did not include any factual allegations that would establish personal jurisdiction.

In support of their Motion to Dismiss for want of personal jurisdiction, McNeese and the agent for McNeese contended that the Complaint, as amended, was completely "devoid of any factual allegations that would establish personal jurisdiction over" them. Justice Woodall agreed.

If the Defendant disputes jurisdiction with an evidentiary showing, Plaintiff has the burden of providing evidence establishing personal jurisdiction.

"The Plaintiff has the burden of proving that the trial court has personal jurisdiction over the Defendant." *Ex parte Covington Pike Dodge*, 904 So.2d 226 (Ala. 2004).

> If the Defendant makes a *prima facia* evidentiary showing that the Court has not personal jurisdiction, 'the Plaintiff is then required to substantiate the jurisdictional allegations in the Complaint by Affidavits or other competent proof, and he may not merely reiterate the factual allegations in the Complaint.

Mercantile Capital v. Federal Transtell, 193 F.Supp.2d 1243 (N.D. Ala. 2002). In response to the Motions of the Defendant to Dismiss and their accompanying

Affidavits outlining their limited contact with the State of Alabama, Atchison submitted no sworn testimony in opposition. To the contrary, Atchison did not direct the Court to any paragraphs of the Complaint but contended only that "the McNeese Defendants were agents, representatives and co-conspirators of the developers and marketers associated with the development and sale of [the subdivision]."

To establish personal jurisdiction via a conspiracy, Plaintiff must plead with particularity the overt acts establishing personal jurisdiction.

Justice Woodall noted that personal jurisdiction may in some instances may be obtained by imputing conduct to an alleged co-conspirator who has personally performed no overt acts in Alabama. *Ex parte Reindel,* 963 So.2d 614 (Ala. 2007). However, in Alabama "a Plaintiff cannot establish personal jurisdiction under a conspiracy theory unless the Plaintiff pleads with particularity the conspiracy as well as the overt acts within the forum taken in furtherance of the conspiracy." *Matthews v. Brookstone Stores,* 469 F.Supp.2d 1056 (S.D. Ala. 2007).

As to McNeese, Atchison alleged simply that CD engaged in a fraudulent scheme to sell the lots to Atchison and others and that this transfer was "done with knowledge and/or participation or by Defendants ... McNeese Title, McNeese and Owens, and with the actual intent to hinder, delay, or defraud Atchison."

Justice Woodall found that the reference to the terms "partners," "joint venturers," and "co-conspirators" were directed solely to the merits of the claims against CD and 331 Partners and do not purport to identify basis for jurisdictions nor were overt acts within the forum taken in furtherance of the conspiracy by the McNeese Defendants alleged. The fact that Atchison executed a Power of Attorney in favor of McNeese was not sufficient because "conspicuously absent are references to the situs of any relevant conduct of McNeese" which would be material for jurisdictional purposes.

Special Concurrence by Justice Murdock -

Murdock did not agree that a failure failed to establish personal jurisdiction in the complaint via specific facts entitled Defendant to a dismissal of all claims.

Justice Murdock concurred in the result but objected to the majority's position that the Plaintiff "labors under a pleading requirement as to personal jurisdiction that, if not satisfied, that necessitates the dismissal of the Plaintiff's Complaint from the Defendant's mere request." Murdock contended that Rule 12(b)(2) does not entitle a Defendant to dismissal upon a Plaintiff's mere failure to state personal jurisdiction in the Complaint but only if there is in fact a lack of personal jurisdiction. Essentially Murdock concurred in the result because the McNeese Defendants submitted Affidavits challenging jurisdiction which required the Plaintiff to put on contrary evidence via Affidavit which was not done.

JURISDICTION - - PERSONAL

THE FIDUCIARY SHIELD DOCTRINE DOES NOT INSULATE GENERAL PARTNERS FROM PERSONAL JURISDICTION IN ALABAMA.

***Ex parte Kolhberg Kravis Roberts & Co.*, 2011 WL 3633068 (Ala).**

<u>SUMMARY</u>:

Delaware Limited Partnerships and General Partners Petitioned for a Writ of Mandamus directing the trial court to vacate an Order denying the Motion to Dismiss the action against the investors under the Alabama Securities Act.

<u>HOLDINGS</u>:

Justice Murdock held that:

1. **The Alabama Court had personal jurisdiction over the Delaware Limited Partnerships and the General Partners under the Long-Arm Statute;**

2. **The Fiduciary Shield Doctrine did not insulate the General Partners in the Delaware Limited Partnerships from personal jurisdiction in Alabama in part because they personally traveled to Alabama; and**

3. **Mandamus review was not available for an alleged error in the Circuit Court's decision to deny Defendant Bruno's Motion to Dismiss the Investors' Claims for Failure to State a Claim.**

The Petition was denied.

DISCUSSION:

This old case concerning KKR's concerns, KKR's acquisition and divestiture of Bruno's, Inc. The individual Defendants, with one exception, were on the Board of Directors of Bruno's, an Alabama corporation for four years and had substantial involvement in the acquisition of Bruno's and the preparation of a prospectus for notes to be used in financing the acquisition.

As to the "Fiduciary Shield Doctrine," Justice Murdock relied on *Thames v. Gunter - Dunn*, 373 So.2d 640, 641-642 (Ala. 1979), in that the contacts of the Defendants were not merely based on the contact of KKR generally, but **the contact related to each individual Defendant's involvement in the leveraged financing of the acquisition and the alleged attendant fraud including a personal trip to Alabama by all but one Defendant.**

Plaintiffs allege that the Defendants misrepresented the financial condition of Bruno's in connection with the acquisition of that company and the financing of the acquisition. Although many of the activities at issue did not take place in Alabama and the purchasers of the notes do not reside in Alabama, the entire focus of the Defendants' actions was the leveraged recapitalization of Bruno's and the associated acquisition of Bruno's.

Bruno's was an Alabama corporation with substantial fiscal assets and business operations throughout Alabama.

In a second Petition for Writ of Mandamus, Ronald Bruno sought Mandamus relief to obtain dismissal of claims brought against him under the Alabama Securities Act claiming that the transactions at issue did not fall under specified sections of the Statute. The Court denied his Petition holding that the Petition sought relief for failure to state a claim upon which relief could be granted which was not the proper subject of a Mandamus Petition but would have to be remedied by appeal.

LIMITATION OF ACTIONS - -

An Amendment Changing Parties relates back if the claim asserted in the amended pleading arose out of the facts alleged in the original Complaint and (1) if the party has received notice and will not be prejudiced by the delay and (2) the party knew or should have known that it would be a party defendant but for a mistake concerning its identity.

***Ex parte Novus Utilit*ies*, Inc., 2011WL*6004618 (Ala.) (December 2, 2011).**

SUMMARY:

Novus, an alleged subsidiary of a participant in the operation in maintenance of a sewage treatment facility, petitioned for a writ of mandamus directing the trial court to dismiss the landowner's negligence and private nuisance claims against it.

HOLDINGS:

Justice Bolin held that:

1. Novus would not be prejudiced by maintaining a defense in the action so as to prevent the relation back of the original Complaint to Novus; and

2. Amended Complaint could relate back to the original Complaint.

DISCUSSION:

Rule 15 relates to both amendments changing parties on the one hand [Rule 15(c)(3)] and amendments substituting real parties for fictitious parties which requires that the provisions of Rule 9(h) be satisfied.

This case relates to the relation back of an amendment adding a party independent of fictitious party practice. Plaintiffs initially sued Southwest which was Novus' parent corporation. Novus and Southwest had many common personnel and shared the same address. The original Complaint was filed against Southwest, not Novus.

The original action was filed on **June 20, 2008.** The amendment adding Novus as a party defendant was filed on **February 24, 2011**. Novus sought dismissal based on the statute of limitations which the trial court denied.

Novus petitioned for mandamus although a denial of a Motion to Dismiss based on the statute of limitations is normally not reviewable by mandamus, it is reviewable when based on relation back.

The Court relied on the recent United States Supreme Court Decision in *Krupski v. Costa Crociere*, 130 S.Ct. 2485 (2010) which establishes that under Rule 15(c)(3), which is independent of fictitious party practice:

> (1) the amendment will relate back if within the latter period of the applicable period of limitations or 120 days after commencement of the action, the party to be added has received notice of the action and will not be prejudiced in maintaining a merits defense; and
>
> (2) the party knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against that party.

Justice Bolin emphasized as did *Krupski* that the focus of the rule is on the Defendant's knowledge, not the Plaintiff's knowledge as is at issue in regard to fictitious party practice. Under Rule 15(c)(3), the "mistake" made by the Plaintiff need not even be a reasonable mistake for the amendment to relate back to the date of the originally filed Complaint.

"[A]n amendment adding a new party does relate back when the old and new parties have such an identity of interest so that such relation back would not be prejudicial. . . ." *Bank of Red Bay v. King*, 482 So.2d 274, 280 (Ala. 1985). Novus and the original defendant, Southwest, shared the same address and telephone number and have the same employees and corporate representative.

MEDICAL LIABILITY - - MEDICAL LIABILITY

THE EXCEPTION REGARDING "HIGHLY QUALIFIED" EXPERTS DOES NOT ELIMINATE THE REQUIREMENT THAT THE EXPERT BE A SIMILARLY SITUATED HEALTH CARE PROVIDER.

***Springhill Hospitals, Inc., v. Critopoulos,* 2011 WL 5607816 (Ala.)**

SUMMARY:

A patient filed a medical malpractice action against hospital nurses alleging that they failed to take proper measures to prevent development of pressure ulcers while the patient was recovering in the hospital's cardiac recovery unit following cardiac-artery-bypass graph surgery (CABG). After a jury verdict for the Plaintiff, the nurses appealed.

HOLDINGS:

1. **THE PATIENT'S EXPERT DID NOT QUALIFY AS A "SIMILARLY SITUATED HEALTH CARE PROVIDER" AS IS REQUIRED TO TESTIFY AS AN EXPERT WITNESS; and**

2. **THE EXCEPTION ALLOWING HIGHLY QUALIFIED EXPERTS TO TESTIFY DID NOT APPLY.**

DISCUSSION:

The Plaintiff offered as an expert witness a wound care specialist nurse. The Defendants opposed the expert on qualification grounds and contended that the nurse was not a similarly situated health care provider under Alabama Code Section 6-5-548. The expert had provided wound management services to cardiac patients since the mid 1990s. She further testified that from the mid 1990s until the time of trial she had provided hands on wound management care to critical patients in an ICU setting and that she was providing that care as recently as the Friday

before the start of the trial.

The expert also testified that specific to wound care and preventing pressure ulcers, she had taught doctors, nurses, and other health care providers how to take care of cardiac patients in an intensive care setting. The expert admitted that she had never worked as a cardiac ICU nurse as were the Defendant nurses.

As to the "standard of care" Section 6-5-548, Ala. Code, provides, in part, as follows:

> The standard of care is that level of such reasonable care, skill, and diligence as others similarly situated health care providers in the same general line of practice, ordinarily have and exercise in like cases.

The Court emphasized the following testimony by the expert, she had never "practiced as an intensive care cardiac nurse," "provided direct, hands on care as a staff nurse to patients like Critopoulos who was in immediate post recovery in the cardiac recovery unit and she had never seen a CABG patient who had just had surgery to implement preventive measures. Further, the expert testified that she had not, as a staff nurse, determined the cardiac stability of a fresh post CABG patient for the purpose of providing hands on complete care, and had not worked in an ICU setting as a bedside nurse since 1992." The expert was questioned extensively about the task she had not performed that were required to be performed by the Defendant nurses. Particularly of interest was the fact that as a direct care provider, she had never had to weigh the competing risk of repositioning a post CABG patient in recovery. However, the expert had testified that based on her review of Mr. Critopoulos' vital signs, Nurse Jones would have had no problem in turning him. Despite that testimony, Defense counsel emphasized that the expert was not completely knowledgeable of all of the recorded indecencies of patient status included in the records. As to whether the measures taken by the nurses comported with the standard of care for a post CABG patient, the Court sited to *Dempsey v. Phelps*, 700 So.2d 1340 (Ala. 1997). In that case, Dr. Dempsey, an orthopedic surgeon performed surgery to correct a club foot on the Phelpses' son. After the surgery, portions of the child's foot had to be amputated. Dr. Phelps argued that the Plaintiff's expert witness was not a "similarly situated health care provider" in that Dempsey was an orthopedic surgeon and the expert testifying against him was a Board Certified Cardiovascular

Thoracic Surgeon. In *Dempsey,* the Court held that the trial court correctly found that the subject at issue was a vascular matter, not an orthopedic matter and that the standard of care allegedly breached was that of a health care provider treating a patient for post surgical problems and infections which are not specific to orthopedic surgery. In the present case, the Court found that the overriding question is "whether in light of Critopoulos' condition as a post CABG patient, that the nurses took proper measures to prevent the development of pressure ulcers. Therefore, the proper standard of care would be that of a cardiac recovery nurse treating post CABG patients to prevent pressure ulcers."

The second question to be answered was if the Defendant health care provider was a specialist in the school of practice, the Court had determined was alleged to have been breached. It was undisputed that the Defendant nurses were not Board Certified Specialists. In that the expert was licensed to practice as a nurse in North Carolina, the Court found that the expert satisfied the requirements of Section 6-5-548 (B) as a similarly situated health care provider because "the Medical Liability Act does not require that the Defendant health care provider and the expert witness have identical training, experience, or types of practice, or even the same specialties. To be similarly situated, an expert witness must be able to testify about the standard of care alleged to have been breached in a procedure that is involved in the case." The expert was, therefore, "licensed by the appropriate regularity Board or Agency of this or some other state."

As to the requirement of Section 6-5-548(B)(2) as to whether the expert is "trained and experienced in the same discipline or school of practice," the Court found that the expert's testimony clearly indicated that she was not trained and experienced with regard to the prevention of pressure ulcers for patients in a cardiac recovery unit particularly regarding the concerns or risks involving fresh post CABG patients. As a result, the Court found that the expert did not qualify as a "similarly situated health care provider."

The Plaintiff contended that even if the expert witness was not a similarly situated health care provider, she could offer testimony about the standard of care alleged to have been breached if she is highly qualified. *Dowdy v. Lewis,* 612 So.2d 1149 (Ala. 1992). The Court disagreed finding that the expert was highly qualified with regard to general wound care treatment and the prevention of pressure ulcers but was not highly qualified to the prevention of pressure ulcers in post CABG patients who are in a cardiac recovery unit. The Court reversed and remanded the case for the entry of a Judgment as a Matter of Law for the Defendant nurses.

MOTOR VEHICLE FRANCHISES — **TERMINATION UNDER THE MOTOR VEHICLE FRANCHISE ACT, SECTION 8-20-1 et seq.**

CASE OF FIRST IMPRESSION — **THE REQUIREMENT THAT THE BREACH MUST OCCUR WITHIN 180 DAYS PRIOR TO NOTICE OF TERMINATION DOES NOT APPLY TO CONTINUOUS AND EVOLVING BREACHES.**

***Smith's Sport Cycles v. American Suzuki Motor Corp.*, 2011 WL 4867651 (Ala.)**

SUMMARY:

Franchisee (American Suzuki) brought an action against the Franchisor (Smith's) asserting claims for breach of contract and violation of the Motion Vehicle Franchise Act. Judgment was rendered in favor of American Suzuki and Smith's appealed.

HOLDING:

Justice Bolin held as follows:

1. **As a Matter of First Impression, the Appearance Problems with the Dealership That Led to the Termination Were Both Evolving and Continuous; Therefore, American Suzuki Was Not Precluded from Terminating the Franchise Relationship Because it Had Knowledge of Those Problems More than 180 Days Before Giving Actual Notice of Termination;**

2. **The Franchise Agreement's Provision Requiring Smith's to Keep the Dealership in an Attractive, Neat, and Clean Condition Was Both Reasonable and Material to the Franchise Relationship; and**

3. **The Evidence Supported the Trial Court's Finding That American**

Suzuki Complied with the Acts' Good Faith Requirement.

DISCUSSION:

On **April 17, 2006,** Suzuki sent Smith's a notice of default and opportunity to cure and addressed six areas of default. Suzuki demanded that Smith's take certain actions to cure the default within 180 days.

On **June 27, 2006,** Suzuki sent another letter notifying Smith's that it remained in default. On **October 20, 2006,** Suzuki issued a Notice of Termination. As to Smith's breach of contract claim, the Court found in favor of Suzuki. As to Smith's claims that Suzuki was in breach of the Alabama Franchise Act, the Court also entered a judgment in favor of Suzuki.

1. The Franchise Act Is Designed to Protect the Citizens of the State from Abuses by Motor Vehicle Manufacturers and Dealers.

The Franchise Act clearly is designed "to protect the State's citizens from abuses by motor vehicle manufacturers and dealers and to regulate dealings between manufacturers and their dealers. *Sutherland Toyota v. Toyota Motor Sales*, 549 So.2d 460, 461 (1989).

Section 8-20-5 of the Franchise Act governs terminations and states, in part, as follows:

> (a) ... no manufacturer shall cancel, terminate, modify, fail to renew, or refuse to continue any franchise relationship with a licensed new motor vehicle dealer unless the manufacturer has: (1) satisfied the notice requirement of the section; (2) acted in good faith as defined in this chapter; (3) ... good cause for the cancellation, termination, modification, non-renewal, or non-continuance.

As to when "good cause" exists, the statute further provides in Section (b)(1):

> Good cause shall exist when, there is a failure by the new

> motor vehicle dealer to comply with the provision of the franchise which provision is both reasonable and of material significance to the franchise relationship, provided that the manufacturer first required actual or constructive knowledge of such failure not more than 180 days prior to the date on which notification is given by the manufacturer pursuant to the requirements of this section.

Although Suzuki relied on other portions of the Franchise Agreement as the basis for termination, Suzuki only prevailed as to the provisions that related to the appearance of the Smith's facility. As to the notice requirements, Smith's argued that their facility had been disorganized and had been in the same state relied on by Suzuki for a substantial period of time and far longer than 180 days prior to notice of the default. Therefore, Smith's contended that the franchise could not be terminated as a result of the status of Smith's facility.

Justice Bolin noted that the 180 day requirement was included in the statute to prevent a manufacturer from premising a termination on "old and long forgotten events" relying on the case of *Walters v. Chevron*, 476 F.Supp.353 (N.D. GA. 1979). As a matter of first impression, Justice Bolin in following *Walters* found that the 180 day limitation does not relate to continuous and evolving breaches like the ongoing problems with the appearance of Smith's. The *Walters* Court found and Justice Bolin agreed that to rule otherwise would result in awarding the Franchisee's carelessness or willful breach or Franchisors will be encouraged to terminate all breaches of the lease within the statutory period of its first occurrence without giving the Franchisee the opportunity and time to make reasonable efforts to remedy a breach. The *Walters* Court preferred to treat each instance of non-compliance as a separate violation and Justice Bolin concurred.

2. Suzuki Had Good Cause to Terminate the Franchise Agreement. Appearance of the Building Was Essential to the Development of the Company's Public Image and Marketing Strategy.

Suzuki relied on several provision of the Franchise Agreement as its basis for termination. The provisions on which Suzuki prevailed related to the maintenance of the facility which Suzuki contended would attract more customers and contribute more to the development of the business. The Court agreed that the

appearance of the facility was essential to the development and maintenance of Suzuki's public image and marketing strategy.

As to the good faith requirement of the Franchise Act, the Act provides that **good faith means "honesty in fact in the observation of reasonable commercial standards of fair dealing in the trade** is defined and interpreted in" the definition section of Alabama's Uniform Commercial Code. Even though Suzuki cited to six sections of the Franchise Agreement, that did not serve to offer proof of a lack of good faith simply because the trial court found that the termination was proper only as to the maintenance of the Smith's facility.

The trial court's judgment in favor of Suzuki was affirmed.

STATE AGENT IMMUNITY

A DEPUTY SHERIFF HAS ABSOLUTE IMMUNITY WHILE ACTING IN THE LINE AND COPE OF HIS EMPLOYMENT

THE *CRANMAN* ANALYSIS DOES NOT APPLY TO A DEPUTY SHERIFF

***Ex parte Donaldson*, 2011 WL 4135500 (Ala.)**

SUMMARY:

A motorist who allegedly sustained serious personal injuries in a collision with a vehicle operated by a Deputy Sheriff filed negligence claims against the Deputy Sheriff, the Sheriff, and other Defendants. The trial court denied the Motion to Dismiss brought by the Deputy Sheriff and the Sheriff and they Petitioned for a Writ of Mandamus.

HOLDING:

Justice Murdock found that the Deputy Sheriff had absolute State immunity on the motorist's claims and that a state agent analysis under *Cranman* would not apply.

DISCUSSION:

Justice Murdock reasoned that "because Sheriffs are constitutional officers and because Deputy Sheriffs act on behalf of Sheriffs as alter egos, a claim for monetary damages made against a Deputy Sheriff in his or her individual capacity is barred by the Doctrine of State Immunity whenever the acts that form the basis of the alleged liability were being performed within the line and scope of the Deputy Sheriff's employment." Plaintiff alleged that the accident occurred while

Deputy Donaldson "was operating a motor vehicle in the line and scope of his agency and/or employment with the Dallas County Sheriff's Department."

Jemison contended that the Deputy was not entitled to State Agent Immunity as is articulated in *Ex parte Cranman,* 792 So.2d 392 (Ala. 2000); and therefore, the cause of action could be maintained against the Deputy Sheriff. Specifically, Jemison argued that the Deputy **acted "beyond his authority" when he failed to "clear the intersection" because in doing so he "failed to discharge duties pursuant to detailed Rules and Regulations, such as those stated on a checklist."** Citing to *Ex parte Butts*, 775 So.2d 173, 178 (Ala. 2000). Justice Murdock reiterated that there is a distinction between the Doctrine of State Immunity and the Doctrine of State Agent Immunity under Section 14 of the Ala. Constitution for State Agents or Employees whose position exists by virtue of legislative pronouncement. Whether a Deputy Sheriff would be entitled to State Agent Immunity is immaterial to the question of whether a Deputy Sheriff is entitled to State Immunity.

Therefore, the Petition was granted and the Writ was issued.

TORTS - - FRAUD **APPELLANT WAS NOT VICARIOUSLY LIABLE FOR THE REPRESENTATIONS OF AN ALLEGED AGENT - SHE MADE NO MISREPRESENTATION OF A MATERIAL FACT AND WAS NOT AWARE OF ANY MATERIAL FACT TO CONCEAL.**

Lawson v. Harris Culinary Enterprises, **2011 WL 5009778 (Ala.) (October 21, 2011).**

SUMMARY:

Purchasers of a restaurant franchise ("Harris") brought fraud claims against the seller, its President, and the President's wife as lessor of the building in which the restaurant was located. The seller and President (Sims Lawson) failed to appear at trial. A verdict was rendered against the Defendants and the President's wife, Mitzi Lawson. Mitzi appealed. Sims was unavailable for trial because he was in the Federal Penitentiary for tax evasion.

HOLDINGS:

Justice Shaw held that:

1. **The evidence did not establish that Mitzi made a misrepresentation to the purchasers; and**

2. **Assuming that an unpled claim of fraudulent suppression was tried by implied consent of the parties, the evidence did not establish fraudulent suppression.**

DISCUSSION:

Sims, an accountant, formed a corporation to operate a pizza franchise (Fox Pizza Den) in a building owned by Sims. Sims' wife was not intimately involved in the business and her only significant involvement was that she handled payroll

from a remote computer. Several years after the business was started, Harris approached Sims about acquiring the franchise. Sims provided fraudulent financial information which induced Harris to acquire the franchise for a contract price. As a condition of the sale, Harris also entered into a one-year lease agreement to continue the operation of the franchise in a building owned by Mitzi.

Shortly after the acquisition, Harris and its principals sued Sims and Mitzi for fraud. At trial, Harris' principals admitted that Mitzi never made any representations to them concerning the business and that all of the representations were made by Sims. Further, Harris admitted that even though Sims was acting on behalf of Mitzi with respect to the one-year lease on the premises, no misrepresentations were made concerning the real estate lease.

Harris purchased two (2) franchises from Sims for Fox's Pizza Den. The initial location was successful. As a result, Harris sought the franchise located in the building owned by Mitzi. The initial discussions with Sims occurred at a funeral that a Harris representative and Sims were both attending. According to the principal of Harris (Clinton), Mitzi was present during his tour of the building but she was "quiet."

Harris initially did not buy the second franchise because of poor sales numbers. After relaying that to Sims, Sims provided better sales numbers. The Court pointed out that even though Mitzi was at times responsible for night deposits and payroll, that information alone would not have provided her with notice that the financial information provided to Harris was fraudulent. The claim for suppression failed because the evidence at trial failed to establish that Mitzi was aware of any material fact to conceal in regard to finances. The judgment of the trial court was reversed and judgment was rendered.

TORTS - - FRAUDULENT SUPPRESSION

WHETHER THE FUNERAL HOME KNEW THAT THE EMBALMING WOULD NOT BE DONE UNDER APPLICABLE LAW WAS AN ISSUE FOR THE JURY BOTH AS TO THE CONTRACT CLAIMS AND THE FRAUDULENT SUPPRESSION CLAIMS.

Crestview Memorial Funeral Home v. Gilmer, **2011 WL 3780099 (Ala.)(Aug. 26, 2011).**

SUMMARY:

A widow filed an action against the funeral home and individual Defendants alleging breach of contract, fraudulent suppression, tort of outrage negligence and/or wantonness, and negligent supervision in connection with funeral services for her husband. The trial court granted the Defendants' Motion to Dismiss for failure to state a claim and denied the wife's Motion to Alter, Amend or Vacate the Judgment. The wife appealed. The Supreme Court at 35 So.3d 585 affirmed in part and reversed in part and remanded.

At the close of Plaintiff's evidence at a jury trial, the trial court granted the Plaintiff widow a Judgment as a Matter of Law as to her breach of contract claim against the funeral home. The fraudulent suppression claims were decided by the jury.

The jury awarded the wife $350,000.00 in compensatory damages on the suppression and breach of contract claims and $3 million in punitive damages on the suppression claim. Later the trial court remitted the punitive damage award to $1,050,000.00. The funeral home appealed.

HOLDINGS:

Justice Woodall held that:

1. **Whether the funeral home knew that the embalming would not be done under applicable law was an issue for the jury; and**

2. **The issue of material breach of a contract was for a jury as well.**

DISCUSSION:

Gilmer retained Crestview Memorial Funeral Home (Crestview) to provide funeral services for her husband. She signed an "authorization to embalm and prepare" authorizing Crestview to use the services of independent embalmers, apprentices, or interns in connection with her husband's embalming so long as the person was allowed to perform such services under applicable law. At that time, Crestview's only licensed embalmer was on leave and not available. Gilmer later learned that Crestview had not had a licensed embalmer at the time and sued Crestview and several employees.

At trial, the trial court granted Gilmer's Motion for a Judgment as a Matter of Law as to her breach of contract claim against Crestview but let the suppression and tort of outrage claims go to the jury. The jury awarded $350,000.00 in compensatory damages jointly for the contract and suppression claims.

1. Crestview's contention that the trial court erred in denying its Motion for a Judgment as a Matter of Law on the Suppression Claim.

Crestview contended that it was entitled to a JML because Gilmer had failed to produce substantial evidence of a legal duty to disclose and reliance.

Mere silence as to a material fact does not constitute fraud unless that party is under a duty to disclose that fact. **A duty to disclose can arise either from a confidential relationship or from the particular circumstances of the case. *Keck v. Dryvit Systems,* 830 So.2d 1, 11 (Ala. 2002).**

In brief, Crestview made no argument regarding Gilmer's contention that a duty to disclose arose under the circumstances. Therefore, the Court found that Crestview had not demonstrated that as a matter of law it had no duty to disclose.

Crestview also cited facts to support its argument that Gilmer did not rely on the alleged suppression but cited to no law. As a result, Justice Woodall also found

that Crestview had not demonstrated that it was entitled to a JML on the suppression claim.

Crestview also argued that "an action for suppression will lie only if the Defendant actually knows of the fact alleged to be suppressed." Crestview contended that the evidence shows that the people who allegedly suppressed the information did not actually know the facts which were allegedly suppressed. Justice Woodall did not agree that was a proper characterization of the facts and found that Crestview had not demonstrated that it was entitled to a JML on the suppression claim.

Crestview argued that it was entitled to a new trial because the trial court erred by granting a JML to Gilmer on the breach of contract claim. **"A material breach is one that touches the fundamental purposes of the contract and defeats the object of the parties in making the contract.**" *Sokol v. Bruno's, Inc.*, 527 So.2d 1245 (Ala. 1988). Gilmer did not argue that the embalming of her husband was done improperly or that it did not serve its alleged purposes. She did say that her husband's body appeared to be swollen; however, Crestview offered testimony that swelling is common among eye donors and that sometimes bodies in a casket can appear to be swollen. **As a result, Crestview presented substantial evidence creating a question of fact as to whether the breach of contract was material such that the question that had to be resolved by the jury.**

As to the materiality in regard to the alleged claim of suppression and whether or not the fact that was suppressed was a "material fact," Justice Woodall pointed out that the Court could not determine if the granting of the JML on the contract claim had some effect on the jury's determination of the suppression claim and the damages awarded.

The case was reversed and remanded with directions.

TORTS - - PROMISSORY FRAUD

CIRCUMSTANTIAL EVIDENCE OF PRESENT INTENT TO DECEIVE IS NOT LIMITED TO EVENTS OCCURRING AFTER THE ALLEGED MISREPRESENTATION.

OVERRULING *ZIELKE v. AMSOUTH*

CORPORATIONS - - PIERCING THE CORPORATE VEIL

DOMINANT PARTY MUST HAVE COMPLETE CONTROL AND DOMINANCE AND THE DOMINANT PARTY MUST HAVE MISUSED THAT CONTROL.

***Heisz v. Galt Industries*, 2012 WL 29190 (Ala.)**

SUMMARY:

Galt, its President, and others sued AEGIS and its sole shareholder, Mark Heisz for breach of an asset purchase agreement, for fraud, and for Declaratory Judgment. Stratford, a company alleged to be controlled by Heisz and AEGIS purchased Galt and nine months later ceased manufacturing. A Judgment was entered against Heisz and AEGIS, and they appealed.

HOLDINGS:

Justice Stuart held that:

1. **Circumstantial evidence relating to events that occurred prior to the alleged misrepresentation is relevant to whether an individual had the present intent to deceive when making a misrepresentation. To the extent that *Zielke v. AmSouth Bank*, 703 So.2d 354 held otherwise and limited the evidence to events occurring after the alleged misrepresentation, it was overruled.**

2. **Heisz and AEGIS breached the asset purchase agreement for financial reasons, not as part of a fraudulent scheme; and**

3. **The evidence did not support the trial court's finding that the buyer's President, Heisz, misused his control over the buyer.**

4. **The Court reversed as to the judgment entered against Heisz and AEGIS for promissory fraud and as go the finding that the corporate veil could be pierced.**

DISCUSSION:

Nine Months after entering into an asset purchase agreement, Heisz-AEGIS ceased manufacturing operations and failed to fulfill the terms of the asset purchase agreement. Ultimately, the Galt parties sued Heisz, AEGIS and other related parties claiming breach of contract and fraud and seeking a judgment declaring (1) that the Heisz/AEGIS Defendants were obligated to indemnify Galt as set forth in the asset purchase agreement and (2) that the Galt Plaintiffs were entitled to pierce SPC-Alabama's Corporate Veil.

1. The Plaintiffs Could Not Establish Promissory Fraud Because They Could Not Proved That at the Time of the Misrepresentation the Defendants Had the Intention to Not Perform the Act as Promised.

The Galt parties alleged that Heisz and AEGIS promised that SPC-Alabama would fulfill its obligations under the asset purchase agreement when they knew that it had no intention of doing so. "A claim of promissory fraud is 'one based upon a promise to act or not to act in the future'" ... *Ex parte Michelin North America, Inc.,* 795 So.2d 674, 678 (Ala. 2001). In addition to the basic elements of fraud, to prevail on a promissory fraud claim, two additional elements must be satisfied:

1. Proof that at the time of the misrepresentation, the Defendant had the intention not to perform the act promised; and

2. Proof that the Defendant had an intent to deceive.

The Court agreed with Heisz and AEGIS that Galt could not demonstrate that

at the time of the misrepresentation, the Defendants had the intention not to perform the act promised.

The Court found agreed with the Plaintiffs that "circumstantial evidence relevant to whether an individual had the present intent to deceive when making a misrepresentation need not be limited to events occurring after the alleged misrepresentation" and found that "to the extent *Zielke v. AmSouth Bank*, 703 So.2d 354 (Ala.Civ.App. 1996) states otherwise, it is overruled."

> **The evidence presented by Plaintiffs did not demonstrate that Defendants had the present intent not to perform at the time of the asset purchase.**

Justice Stuart reviewed the circumstantial evidence presented by Galt and disagreed that the items constituted substantial evidence that Heisz intended for SPC-Alabama to breach the asset purchase agreement even as he was signing it. The fact that SPC was underfunded at the time of the purchase was not sufficient to establish the required intention not to perform the act promised.

"Failure to perform alone is not sufficient evidence to show a present intent not to perform." ***Gadsden Paper and Supply Co.*****, 554 So.2d at 987.**

2. The Corporate Veil of the Stratford Company should not be pierced.

> **"Whether the corporate veil of a business entity should be pierced is a matter of equity, properly decided by a Judge after a jury has resolved the accompanying legal issues,** ***Stevens v. Fines Recycling,*** **MS. 1091111, Nov. 10, 2011 (Ala. 2011).**

3. The failure of Heisz and AEGIS to file a post-judgment Motion did not preclude them from challenging the trial court's conclusion that the corporate veil of the Stratford Company should be pierced.

"Rule 52(b)[ARCP] provides an exemption from the requirement of invoking a ruling by the trial court on the issue of evidentiary insufficiency when written findings of fact are made. ... Thus, when written findings of fact are made, they serve the same useful purpose as does an objection to the trial court's findings, a Motion to Amend them, a Motion for A New Trial, and a Motion to Dismiss under

Rule 41(b)[ARCP] - - to permit the trial judge an opportunity to carefully review the evidence and to perfect the issues for review on appeal." *Ex parte Vaughn*, 495 So.2d 83, 87 (Ala. 1986). In *Messick v. Moring*, 514 So.2d 892, 894 (Ala. 1987), the Court set forth three theories under which the corporate veil could be pierced:

1. Inadequacy of capital;
2. Fraudulent purpose in conception or operation of the business; and
3. Operation of the business as an instrumentality or alter ego.

In a subsequent decision, the Court found the fact that a corporation is undercapitalized cannot alone be sufficient to establish personal liability. *Simmons v. Clark Equipment Credit Corp.*, 554 So.2d 398, 400 (Ala. 1989). The Court noted that it had previously held that there was insufficient evidence to establish that SPC -Alabama was conceived and operated as part of a fraudulent scheme. Therefore, the Court addressed the alter ego theory of liability.

To establish alter ego control, the parties must demonstrate:

1. The dominant party has complete control and domination;

2. The control must have been misused; and

3. The misuse of this control must proximately cause the harm.

514 So.2d at 894 - 95.

Justice Stuart found that there was sufficient evidence as to control but there was not sufficient evidence as to misuse or that misuse proximately caused the harm.

The Judgment of the trial court was reversed and remanded. Justice Murdock dissented but the dissent was not part of the opinion.

TORTS - - NEGLIGENCE

WALKING BEHIND A FORKLIFT WITH APPRECIATION OF THE DANGER WAS CONTRIBUTORY NEGLIGENCE AS A MATTER OF LAW.

***Lafarge North America v. Nord,* 2011 WL 4425557 (Ala.)(Sept. 23, 2011)**

SUMMARY:

A pedestrian whose foot was run over by a forklift in a loading zone at a cement pack house brought personal injury action against the forklift operator and packing house. The trial court entered a judgment on the jury verdict in favor of the pedestrian.

HOLDINGS:

Justice Parker held that:

1. **The evidence did not support a finding that the forklift operator acted wantonly when he ran over the pedestrian's foot while operating the forklift in reverse;**

2. **Punitive damages cannot be awarded on a negligence claim; and**

3. **A pedestrian who walked behind a forklift while appreciating the dangers of doing so was contributorily negligent.**

DISCUSSION:

The Plaintiff's Knowledge of the danger Established his Contributory Negligence.

The Plaintiff offered evidence that he knew the forklift was loading the truck in front of him, knew the procedures for use of a forklift and that it would back up

in order to turn around, knew what the forklift was about to do, knew that being around the forklift was dangerous, and knew that he had an easy route to follow that would have avoided the forklift.

As to the contentions of Defendant that Plaintiff was contributorily negligent as a matter of law, Justice Parker agreed finding that Plaintiff appreciated the danger posed by walking behind a forklift without the operator's being aware of his presence, that he knew that Looney upon placing the pallet of bag cement on the flatbed truck would place the forklift in reverse and back it away from the forklift truck and move in his direction. Despite his knowledge, Plaintiff placed himself in harms way.

Plaintiff Did Not Establish Wanton Conduct by the Defendant or a "Reckless or Conscious Disregard" of the Rights and Safety of Others.

As to the wantonness claim, Justice Parker noted that Plaintiff did not offer substantial evidence of wantonness as defined in Section 6-11-20(b)(3) Ala. Code (1975) as "conduct which is carried on with a reckless or conscious disregard of the rights or safety of others." Instead, Parker found that "Looney was aware of his duty to watch for pedestrians while he was operating the forklift, that he was conscious that pedestrians could be in the loading zone, and that he did keep a watch for pedestrians, though imperfectly."

The case was reversed and Judgment rendered.

Justice Woodall Concurred in Part and Dissented in Part.

Woodall agreed that the Defendant was entitled to a JML on the wantonness claim but did not agree that the Defendant was entitled to a JML on the Plaintiff's negligence claim because of Plaintiff being guilty of contributory negligence as a matter of law. He instead said that he would reverse the trial court's judgment as to the negligence claim and remand the case for a new trial on that claim.

VENUE **ENTERING INTO CONTRACTS IN A COUNTY SUFFICIENTLY ESTABLISHED DOING BUSINESS BY AGENT UNDER SECTION 6-3-7.**

***Ex parte Elliott,* 2011 WL 3633510 (Ala.)**

SUMMARY:

A worker's compensation claimant Petitioned for a Writ of Mandamus directing the Court of Civil Appeals to quash the Writs of Mandamus that the Court of Civil Appeals issued to the trial court in which the Court of Civil Appeals directed the trial court to transfer the underlying action to another county.

HOLDING:

Justice Main held that the employer was doing business in the county in which the lawsuit was filed for the purposes of the venue Statute; therefore, the case was not due to be transferred to another county. He specifically found that timber supply agreements gave IP the exclusive rights to timber in the Plaintiff's county of residence and the recording of those agreements in the county were sufficient to make venue proper.

DISCUSSION:

The Plaintiff was a resident of the county in which the lawsuit was filed and worked at an International Paper Plywood Plant in another county. International Paper maintained substantial acreage under a lease in the county in which the Plaintiff resided, but there was no evidence indicating that the lumber actually harvested from the county of residence had been used at the International Paper facility in the other county.

Plaintiff was injured on the job and sued in the county in which he resided. International Paper moved to transfer claiming that under Alabama Code Section 6-

3-7 it was not doing business by agent in the county of residence. The trial court would not transfer the action and the Defendants Petitioned for Writ of Mandamus.

The Court of Civil Appeals Found That Venue Was Improper in the Plaintiff's County of Residence Because None of the Timber That Was the Subject of the Agreement Came from the Plaintiff's County of Residence.

The Court of Civil Appeals heard the Petition and determined that "from all that appears in the record, all the timber supplied to Chapman pursuant to the log agreements came from" Butler County and Covington County and not from the county in which the Plaintiff resided "because neither IP nor Chapman was doing business there at the time Elliott filed his action.

Justice Pitman dissented from the Court of Civil Appeals opinion because the "log agreements" were recorded in many counties including the county in which the Plaintiff resided.

Venue was proper in the Plaintiff's County of Residence because timber supply agreements gave IP the exclusive rights to timber in the Plaintiff's county of residence and the recording of those agreements in the county.

Justice Main relied on the case of *Ex parte Scott Bridge Co.,* 834 So.2d 79 (Ala. 2002). In *Scott Bridge*, a former employee who lived in Chambers County filed a retaliatory discharge action in Chambers County against Scott Bridge that was headquartered in Lee County. Scott Bridge contended that it did no business in Chambers County and venue was improper. It further contended that it never constructed a bridge in Chambers County. **The evidence showed that Scott Bridge had purchased from vendors in Chambers County in an amount in excess of $50,000.00 which constituted doing business in Chambers County.** Based on that case, Main found that the trial court correctly denied the Motion to Transfer Venue of the Case to another county.

DISSENT BY JUSTICE MURDOCK

Justice Murdock dissented and he was joined in the dissent by Justice Bolin and Justice Shaw. Generally, Murdock reasoned in a manner consistent with his discussion of *Ex parte Scott Bridge* and in his dissenting opinion in *Ex parte*

Greentrack, 25 So.3d 449 (Ala. 2009). He questioned how if in *Greentrack* the Court held that a corporation that engaged in the active conduct of operating a bus on a regular basis in a neighboring county was not doing business in that neighboring county then how could the Court find that the passive conduct of merely entering into a timber supply contract, contracts that were actually executed outside the county of residence, constituted the doing of business by IP in Plaintiff's county of residence.