RECENT DECISIONS OF
THE ALABAMA SUPREME COURT
AND THE ALABAMA COURT OF CIVIL APPEALS
CIVIL LAW
WINTER CONFERENCE FOR CIRCUIT JUDGES AND DISTRICT COURT JUDGES

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settlements were ongoing with the correct defendant at the time of filing. The presumption must be in addressing a default judgment that a litigant has a paramount right to defend on the merits.

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Medical Liability:
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The Board of Education was immune from suit under Section 14. To recover under the construction contract with the Board , the Contractor had to sue a State Official re recover those monies but could not sue the Board.

Mandamus:
Because the Board was immune from suit, the Trial Court lacked subject matter jurisdiction and the Writ issued.

X. Torts

1. Torts – Defamation – Privileged Communications under Section 13A-11-161-**MATTER OF FIRST IMPRESSION**

a. Fair and impartial reports of Arrests or criminal proceedings are privileged and there is no private right of action for the failure to report the subsequent dismissal of the charges.

b. WAFF demonstrated that the report was not false at the time of the publication and that , therefore, the report was privileged under Alabama Code section 13A-11-161 which protects as privileged any "fair and impartial" report of criminal proceedings.

c. WAFF's failure to report the subsequent dismissal of all charges did not establish "actual malice."

d. **AS A MATTER OF FIRST IMPRESSION:** The Court for the first time construed this language is Section 13A-11-161: **"The publisher has refused on the written request of the Plaintiff to publish the subsequent determination of such suit, action, or investigation"** and found that the Station did not lose any privilege it had by failing to report the dismissal despite the fact that he sent a written request to WAFF asking it to report the dismissal.

e. Section 13A-11-161 did not create a private cause of action for "failure to retract."

f. Jackson failed to produce any case which supported his claim that a private cause of action was created as a result of WAFF's failure to retract its statements and that, therefore, the Court could affirm on the basis of Rule 28(10) as well.

ARBITRATION - **THE TRIAL COURT PROPERLY ORDERED THE CLERK TO ENTER THE SEPARATE ORDERS ENTERED BY THE ARBITRATOR BUT WAS REQUIRED TO TAKE SOME ADDITIONAL RESPONSIBILITIES FOR ENFORCING THE AWARD AND THE RESULT OF THE JUDGMENT.**

Southeast Construction, L.L.C., et al. v. WAR Construction, Inc.,
2012 WL 5458546 (Ala.) (Nov. 9, 2012).

SUMMARY:

A general contractor brought an action against an owner of a condominium project seeking damages for breach of contract, work and labor performed, and the enforcement of a Mechanics and Materialman's Lien.

Following arbitration, the trial court entered a judgment on the award. The owner appealed and the general contractor cross appealed.

HOLDINGS:

In a *Per Curiam* Opinion, the Court found that:

(1) The circuit court's Order constituted an enforceable Final Judgment; and

(2) The circuit court was required to take appropriate action to enforce its own Judgment.

DISCUSSION:

Southeast appealed from the entry by the trial court of a Judgment on an arbitration award. WAR filed a cross appeal which the Court treated as a Petition for Writ of Mandamus challenging the trial court's refusal to enforce the Judgment.

While WAR filed a Complaint in the trial court against SEC seeking damages for breach of contract for work and labor performed and enforcement of a Mechanics and Materialman's Lien. The trial court stayed the action pending the arbitration proceedings.

A. The Award at Issue was Entered in March, 2011 and Neither Party Appealed Pursuant to Rule 71(b), Alabama Rules of Civil Procedure.

In 2011, a three (3) arbitrator panel ruled in favor of both Southeast Construction and WAR on their respective claims resulting in a net award to WAR of Three Hundred Seventy-Three Thousand Nine Hundred Twenty-Nine Dollars ($373,929.00). A modified arbitration

award was entered on March 16, 2011 and neither party filed an appeal of the award pursuant to Rule 71(B), *Alabama Rules of Civil Procedure*, within thirty (30) days of service of the notice of the modified arbitration award.

B. In Response to WAR's Motion for the Entry of a Final Judgment, SEC Responded That WAR Had Not Provided the Required Releases Which Was a Condition Precedent to Its Obligation to Pay.

On April 22, 2011, WAR filed in the trial court a Motion for Clerk's Entry of Arbitration Award as Final Judgment pursuant to Rule 71(C), Alabama Rules of Civil Procedure. On April 25, 2011, SEC filed a response stating that WAR had not fulfilled its obligation of providing SEC with Releases of Liens and Claims held by WAR and by subcontractors on the project.

C. In Regard to the Timeline for Providing Releases, the Trial Court Found That It Was the Responsibility of the Arbitrator to Interpret What Was "Reasonably Adequate or Appropriate."

On April 27, 2011, the trial court entered an Order in which it declined to have the award entered as a Judgment at that time. The trial court explained that enforcement of a portion of the award was subject to a time frame that had not yet occurred, i.e., May 13, 2011, and that second and most importantly, that the arbitrator used language subject to interpretation and dispute e.g., "reasonably appropriate and adequate releases, adequate bond or other security." The trial court found that it was not clear whether there was even a Final Award that would support an appeal from the Arbitration Awards based on the language used. The trial court found that it was the responsibility of the arbitrators to rule on what is "reasonably adequate or appropriate as expressed in their Order."

D. WAR requested an Order From the Trial Court Modifying the Award Pursuant to 9 U.S.C. §11(c) of the Federal Arbitration Act to Require Payment Prior to Its Providing the Required Releases and SEC contended that the arbitration award was contingent, not final.

Subsequently, WAR filed a Motion for Emergency Hearing and contended that the award complied with the requirements to constitute a Final Award; and in its motion, WAR made a distinction between "the entry of judgment by the clerk and the subsequent enforcement of judgment." WAR acknowledged that it had not provided the Lien Releases and did not want to do so until it received payment. To that end, WAR requested that the circuit court, if necessary, "enter an Order to modify and correct the award so as to affect the intent thereof and promote justice between the parties." WAR cited to 9 U.S.C. §11(C) of the Federal Arbitration Act as authority for the trial court to modify the award.

SEC responded that only final arbitration awards could be enforced and that the arbitrator's award was contingent and therefore, not final. SEC contended that the trial court could not modify the arbitration award.

The trial court entered an Order directing the circuit clerk court to enter:

(1) The two documents from the arbitrators as a Judgment under Rule 71(C)(f);

(2) The trial court held that the court and the clerk could enforce the award if it was capable of enforcement through non-discretionary, perfunctory, ministerial acts such as garnishment, execution or other writ as provided in Alabama Code §6-6-13;

(3) Any issue regarding interpretation, modification, clarification or amendment of the award should be presented to the arbitrators; and

(4) If a Certificate of Judgment is requested under Alabama Code §6-9-210, the clerk would need to determine whether such a request complied with the language of the arbitrators' award. The Court specifically found that no Certificate of Judgment should be prepared unless it complied with the arbitrators' awards.

E. WAR Proposed That the Money Be Held in the Trust Account of WAR's Counsel Who Would Then File the Original Signed Release of the Lien.

On May 13, 2011, WAR filed a notice of its compliance in that it had supplied Releases of all Liens by subcontractors, but still did not want to jeopardize its security by providing a Release of the Liens filed by WAR. WAR offered that the money could be held in the Trust Account of WAR's counsel who would then file the original signed Release of the Lien in the Probate Court.

SEC responded noting that it had not been supplied with the Releases of Claims by two subcontractors and that WAR had admitted that it still had not provided Southeast Construction L.L.C. with the Release of its own Lien.

On June 7, 2011, SEC appealed from the circuit court's May 9, 2011 Order arguing that the circuit court erred in entering the judgment on the arbitration award before WAR had fulfilled its obligations under the award. WAR cross appealed complaining that the circuit court had failed to take any non-ministerial actions to enforce the judgment.

On July 21, 2011, WAR filed a Motion to Dismiss SEC's appeal because SEC did not file a timely notice of appeal within thirty (30) days of the entry of the Amended Order under Rule 71(B).

On November 18, 2011, the Alabama Supreme Court denied WAR's Motion to Dismiss the SEC appeal.

F. SEC Had Not Waived Its Right to Appeal Because It Instead Appealed the Manner in Which the Trial Court Sought to Implement and Enforce the Judgment.

The Court found that SEC had not waived its right to appeal in that SEC was not challenging the merits of the arbitration award; but instead appealed the manner in which the circuit court sought in its May 9, 2011 Order to implement and enforce the Judgment, which was not a procedure detailed in Rule 71(B).

In its Petition, WAR asked the Supreme Court to "instruct the circuit court that it has both the authority and obligation to enforce its Judgment and, if necessary, to construe the award to effectuate the intent thereof and promote justice between the parties."

G. The Court Found That the Order of the Trial Court Explicitly Provided for the Clerk to Enter the Two Documents as the Judgment but Further Concluded That the Trial Court Had to Take Some Additional Responsibility for Enforcing the Award and the Result of the Judgment.

The Court rejected SEC's argument that the circuit court's May 9, 2011 Order did not give effect to the arbitrator's Decision. To the contrary, the Court found that the Order of the trial court explicitly provides for the clerk of the court to enter the two documents as a Judgment, and as is the case with any Judgment, the trial court noted that "the Court and Clerk are available to enforce the award if it is capable of enforcement through non-discretionary, perfunctory ministerial acts such as garnishment, execution or other writ. The Court found that the fact that the Orders of the arbitrators contemplate further enforcement and perhaps interpretative acts by the trial court and did not make it non-final judgment. The Court concluded that:

> Given the nature of the award made by the arbitrators in this case and the nature of the resulting Judgment the circuit court properly ordered the clerk to enter, it is apparent that the circuit court must take some additional responsibility for enforcing that award and the result of Judgment. To the extent WAR complains in its Petition of the circuit court's reluctance to do so, we agree with WAR and accordingly order the circuit court to take appropriate action to enforce the Judgment it has entered based on the arbitrators' award.

Justices Woodall, Stuart, Bolin, Parker, Shaw, Main and Wise concurred and Justice Murdock concurred specially. Chief Justice Malone recused himself.

H. In His Special Concurrence, Justice Murdock Proposed by Way of Example That the Trial Court Might Enforce the Order by Requiring the Parties to Deposit Releases or Bonds and Pay the Monies Into the Court.

In his special concurrence, Murdock stated that "by way of example, the circuit court might well find it appropriate to coordinate the parties' fulfillment of the arbitration award and judgment entered on that award by requiring the parties to deposit Releases or Bonds and to make payment into the circuit court with the provision that such documents and payment will be held by the court pending performance by the other party of its obligation under the Judgment."

ARBITRATION - **THE AFFIDAVIT OF THE ALLEGED SIGNATORY TO AN ARBITRATION AGREEMENT IN WHICH SHE STATED SHE HAD NOT SIGNED THE AGREEMENT WAS SUFFICIENT TO CREATE A QUESTION FOR THE JURY SINCE THE ORIGINAL DOCUMENT WAS NOT AVAILABLE.**

APPEAL -

THE GRANT OF A MOTION IN LIMINE PROHIBITING DEFENDANTS FROM OFFERING AS EVIDENCE AT TRIAL A COPY OF THE ARBITRATION AGREEMENT WAS NOT A FINAL APPEALABLE ORDER.

SSC Selma Operating Co., LLC v. Gordon, 2012 WL 5693700 (Ala.) (November 16, 2012).

SUMMARY:

The administratrix of the estate of a deceased nursing home resident brought an action against the nursing home, its management company, and its administrator alleging wrongful death/medical malpractice and negligence. The defendants moved to compel arbitration.

The administratrix (the wife of the deceased) moved to strike an affidavit from a handwriting expert. The trial court granted the Motion to Strike and denied the Motions to Compel Arbitration.

The defendants appealed. As the appeal was pending, the defendants moved for a reconsideration of the trial court's ruling on the Motion to Strike and the Circuit Court denied the motion. The Supreme Court reversed and remanded (56 So.3d 598). On remand, the trial court again denied the defendants' Motion to Compel Arbitration and the defendants appealed.

HOLDINGS:

Justice Stuart held:

(1) The mandate of the Supreme Court in a prior appeal precluded the Circuit Court from granting a Motion to Compel Arbitration by the defendants, and

(2) Any attempt to appeal the trial court's decision granting the wife's Motion In Limine precluding the Defendant from offering a copy of the arbitration agreement at trial was premature before the entry of a final judgment following a jury trial on the issue of whether a valid arbitration agreement existed between the parties.

DISCUSSION:

A. The Plaintiff's Affidavit in which she stated that she did not sign the arbitration agreement created a fact question as to the existence of a valid arbitration agreement.

Justice Stuart noted that in the prior appeal the court held that it was inappropriate for the trial court either to grant or deny the Motion to Compel Arbitration finding that:

> "In order to satisfy their burden of proof, the defendants must present evidence that a contract calling for arbitration exists and that the contract evidences a transaction affecting interstate commerce… The arbitration agreement itself constituted substantial evidence that a contract calling for arbitration existed between SSC and Mrs. Gordon. Mrs. Gordon concedes in her appellate brief before this Court that SSC is engaged in interstate commerce… Thus, the defendants satisfy their burden of proof.
>
> Once the defendants satisfied their burden of producing substantial evidence that an arbitration agreement exists, the burden then shifted to Mrs. Gordon to produce sufficient evidence to create a genuine issue of material fact as to whether the arbitration agreement is valid. This Court stated in *Ex parte Meadows*, 782 So.2d 277, 280 (Ala.2000):
>
> To make a genuine issue entitling the [party seeking to avoid arbitration] to a trial by jury [on the arbitrability question], an unequivocal denial that the agreement had been made [is] needed, and some evidence should [be] produced to substantiate the denial."

2012 WL 5693700, pg. 1.

Justice Stuart noted that the widow responded to the Motion to Compel Arbitration with an affidavit in which she denied she had signed the arbitration agreement. Justice Stuart found that the affidavit was sufficient evidence to create a fact question as to the existence of a valid arbitration agreement and that, therefore, the issue had to be resolved by the trial court or by a jury if one were requested.

B. **The grant of a Motion In Limine prohibiting defendants from offering a copy of the arbitration agreement was not a final appealable order.**

On remand, the widow filed a Motion In Limine in which she sought an order excluding the introduction of a copy of the arbitration agreement since the original could not be produced. The defendants responded with an affidavit of the director of the home who stated that the copy was a true and correct copy of the original document. The trial court granted the Motion In Limine. The defendants then petitioned for a Writ of Mandamus directing the trial court to vacate its order granting the widow's Motion In Limine and filed a renewed Motion to Compel Arbitration in the trial court.

Stuart found that in denying the Motion to Compel Arbitration for the second time, the trial court complied with the mandate of the court and that the grant of the Motion In Limine was

not a final appealable order. The court noted that the proper procedure would be for the defendants to put forth substantial evidence at the trial that the copy of the document was authentic and to make the proper objections to preserve any error for appeal.

Chief Justice Malone and Justices Shaw and Wise concurred and Justice Parker concurred in the result.

ATTORNEYS – MALPRACTICE

Although §6-5-57 Provides that "All Legal Service Liability Actions…Must be Commenced Within Two Years After the Act or Omission…," the Court Held that §6-2-3 Applies if a Defendant Attorney Has Fraudulently Concealed a Claim.

The Court Rejected the Argument of Wooten That Jett was precluded from Relying on her Fraudulent Concealment Claim Because the Statute of Limitations on Jett's Legal Malpractice Claim Had Not Run When She Made Her Discovery in March, 2009

Jett v. Wooten, 2012 WL 4040422 (September 14, 2012).

SUMMARY:

A former client brought a legal malpractice action against her attorney and law firm. The trial court granted the defendant's motion for summary judgment.

HOLDINGS:

Justice Stuart held that:

(1) The former client preserved for appellate review her claim that the two year statute of limitations did not apply in a legal malpractice action when the defendant attorney had fraudulently concealed the cause of action; and

(2) The tolling statute tolled the statute of limitations until the former client discovered that her attorney had not filed actions on her behalf even though the former client still had approximately one (1) year left under the statute of limitations to file the legal malpractice action at the time that she discovered the attorney's failure to file.

The decision of the trial court was reversed and remanded.

DISCUSSION:

A. Jett Was Injured in 2006 and the Attorney Decided Not to Pursue the Actions in 2009.

Appellant ("Jett") fell down some stairs at the YMCA on March 13, 2006. She was injured two (2) months later at the Brookwood Medical Center. She sought medical treatment for medical injuries suffered in both incidents. Jett contacted Wooten who had represented her in approximately 10 other legal matters over a twelve (12) year period to discuss possible claims.

Jett executed two substantially identical Contracts for legal services:

(1) For the claim against the YMCA; and

(2) The claim against Brookwood.

Wooten sent a demand letter to Brookwood on October 25, 2007 and sent a demand letter to the YMCA on February 26, 2009.

In March, 2009, Wooten contended that he decided to not pursue an action against the YMCA based on the weakness of the case as to the tort claims and so informed Jett, but told her that she had six (6) years to pursue her breach of contract claim if she chose to do so. Jett denied this conversation. Jett also asserted that she was not a member of the YMCA.

B. Jett Learned That the Actions Had Not Been Filed When She Was at the Courthouse on Another Matter in March, 2009.

In March, 2009, Jett, who was at the courthouse on an unrelated case, learned for the first time that Wooten had not filed actions against either the YMCA or Brookwood. By this time, any tort claims were barred by the statute of limitations. Jett testified that Wooten had assured her repeatedly that the lawsuits had been filed.

On June 4, 2009, Jett wrote Wooten to notify him that she was terminating their attorney/client relationship.

In 2010, Jett sued Wooten asserting claims for breach of contract, negligence, and negligent infliction of emotional distress based on his failure to file the lawsuits.

Wooten responded that under §6-5-57, Ala. Code (1975), the Alabama Legal Services Liability Act, that the claims were barred pursuant to the applicable statute of limitations. Wooten contended that Jett's claim was time barred because under §6-5-574 "all legal service liability actions against a legal service provider must be commenced within 2 years after the act or omission or failure giving rise to the claim, and not afterwards…." The trial court granted the summary judgment based on the preclusive effect of the statute of limitations.

C. Although §6-5-57 Provides that "All Legal Service Liability Actions…Must be Commenced Within Two Years After the Act or Omission…, The Court Held that §6-2-3 applies if a Defendant Attorney Has Fraudulently Concealed a Claim.

The Court agreed with Jett that §6-2-3, Ala. Code (1975) applied and found that if a defendant attorney has acted fraudulently to conceal a claim, the statute of limitations applying to that claim will not begin to run until the plaintiff discovers or should have discovered the claim. The Court of Civil Appeals had previously held that §6-2-3 applied to legal malpractice claims. *Rutledge v. Freeman*, 914 So.2d 364, 368-69 (Ala.Civ.App.) 2004).

Wooten contended that she presented evidence that she did not discover that the actions had not been initiated until she was at the courthouse in March of 2009.

D. The Court Rejected the Attorney's Argument That Jett Waived the Right to Invoke §6-2-3 by Failing to Cite to It in Her First Response to the First Motion for Summary Judgment Because Wooten Failed to Cite to Any Authority Supporting That Contention.

Wooten argued that §6-2-3 should not be applied because Jett failed to raise this argument or produce any evidence of fraudulent concealment in the trial court and that, therefore, the issue is outside the scope of the appeal. The Court noted that Wooten's own counsel and Brief acknowledged that Jett responded to the second summary judgment alleging fraud in this statement: "the words 'frauds' appears nowhere in the record until [Jett] realized in responding to [our] second motion for summary judgment of the fatal flaw." (p. 4)

The Court did not agree with Wooten's position that because Jett first included in her response to the second motion for summary judgment that fraud was an exception to the statute of limitations and emphasized that Wooten cited to no authority supporting his contention that Jett waived the right to invoke §6-2-3 by failing to cite it in her first response to the first motion for summary judgment.

E. The Court Rejected the Argument of Wooten That He Should Prevail Because the Statute of Limitations Had Not Run on Jett's Legal Malpractice Claim When She Made Her Discovery in March, 2009; and She Was, Therefore, Precluded From Relying on Her Fraudulent Concealment Defense.

To the contrary, the Court found that the statute of limitations was two (2) years from the date of discovery and the fact that the plaintiff discovered the cause of action for legal malpractice less than two (2) years before the expiration did not preclude her from maintaining the action. Citing to *Van Antwerp and Ryan v. Charles Townsend Ford, Inc.*, 409 So.2d 784 (Ala. 1981), the Court found that "The Wooten defendant's argument that §6-2-3 should not apply in this case because the limitations had not run when Jett discovered a cause of action" was without merit.

The Court reversed and remanded. Chief Justice Malone and Justices Parker, Shaw and Wise concurred.

CONSTITUTIONAL LAW - RIGHTS UNDER THE FIRST AND FOURTEENTH AMENDMENTS - CASE OF FIRST IMPRESSION

THE STATEMENTS WERE PRIVILEGED UNDER THE FIRST AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION BECAUSE THEY DEALT WITH SPIRITUAL AND ECCLESIASTICAL AFFAIRS

TORTS –

DEFAMATION – INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS – INVASION OF PRIVACY

JURISDICTION AND MANDAMUS-

DUE TO THE CONSTITUTIONAL PROTECTIONS FOR SPIRITUAL AND ECCLESIASTICAL AFFAIRS THE TRIAL COURT LACKED SUBJECT MATTER JURISDICTION OVER THE CLAIMS ASSERTED BY THE PASTORS AND THE WRIT ISSUED

DISCOVERY -

THE RECORDS OF THE CHURCH CONFERENCE WERE NOT DISCOVERABLE AND WERE PRIVILEGED UNDER THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BECAUSE THEY RELATED TO SPIRITUAL OR ECCLESIASTICAL AFFAIRS.

Ex Parte Tom Bole, 2012 WL 3764721 (Ala.) (August 31, 2012).

SUMMARY:

Former pastors of a church brought an action against a lay member of the church alleging defamation, invasion of privacy, and intentional infliction of emotional distress.

The trial court granted in part and denied in part the pastors' motion to quash the member's civil subpoena requesting production of certain documents from the District Supervisor of Local Conference of National Church.

The pastors and the member both petitioned for a Writ of Mandamus.

HOLDINGS:

On an issue of first impression, Justice Wise held:

(1) That the trial court lacked subject matter jurisdiction over the pastors' defamation claims against the lay member because the statements were privileged under the

First and Fourteenth Amendments to the United States Constitution because they dealt with spiritual and ecclesiastical affairs;

(2) The Court found that the records of the South Central District of the North Alabama Conference of the United Methodist Church were not discoverable, and they too were privileged under the First and Fourteenth Amendments to the United States Constitution because they related to spiritual or ecclesiastical affairs.

The Court granted the member's petition and dismissed the pastors' petition.

DISCUSSION:

Higgs, a former pastor at a Methodist church, and his son who was also a Pastor brought an action against Bole, a lay member of the church. The action alleged defamation, invasion of privacy and intentional infliction of emotional distress.

Higgs through subpoena sought records from the District Supervisor of the South Central District of the North Alabama Conference of the United Methodist Church. The Conference filed a motion to quash based on First and Fourteenth Amendment concerns. Bole filed a motion to dismiss alleging that the trial court did not have subject matter jurisdiction over the claims based on the First and Fourteenth Amendments to the United States Constitution.

The trial court entered an Order in which it granted in part and denied in part the conference's motion to quash. In one case before the Court, Bole petitioned for a Writ of Mandamus requesting that the Alabama Supreme Court dismiss the Pastors' claims him. In a separate case, the conference petitioned for a Writ of Mandamus asking the Alabama Supreme Court to quash the subpoena on the basis that the records subpoenaed by the Pastors were privileged, ecclesiastical records of the church.

The Court granted Bole's petition directing the trial court to dismiss the Pastors' claims against Bole based on lack of subject matter jurisdiction.

In that the claims against Boles were dismissed, the Court dismissed the petition by the conference seeking an Order quashing the subpoena.

A. In Regard to Bole's Petition Seeking a Dismissal of the Claims Against Him Based on Subject Matter Jurisdiction Pursuant to the First and Fourteenth Amendments to the United States Constitution, the Court Found That the Trial Court Did Not Have Subject Matter Jurisdiction to Determine Disputes Related to the Ecclesiastical Affairs of the Church and Issued the Writ.

Boles contended that he was asked by the current pastor of the church and the Board to "undertake to organize its financial records" which he did. Also, Bole's contended that the

conference asked him "to report to it on matters concerning the financial affairs and governance" of the church.

In a letter authored by Bole to the conference, Bole reported accounting irregularities and a resistance to transparency. Higgs wrote a letter of gratitude to Ratliff at Collateral Mortgage for a $50,000.00 pledge and Bole could not determine if the money was received, and if so, what happened to it. Bole also reported that cash had been missing from the offering before it could be counted and deposited. He also referenced three (3) other checks that were unaccounted for.

Bole also reported complaints about "political rhetoric" during sermons. Bole also cited to many instances of sexual acts and selling of drugs on church grounds and inside the building. Boles also stated that homeless veterans and other veterans who served the church are offended by Higgs' comments that he sees "our government and our military as imperialist…warmongers."

Higgs was notified by letter from the conference that the allegations were being investigated and that he was to remove himself from church activities until the investigation had been completed. As to the resolution of the Complaint, the conference found that the Complaint against Reverends Kevin Higgs and Lawton Higgs was to be dismissed. The conference also informed several recipients with the church that the Complaint was being dismissed and that both Kevin and Lawton Higgs remained in good standing. Kevin was moved to another church and Lawton was to be no longer connected to the church at issue.

The correspondence at issue was forwarded to two other recipients.

A dispute developed between members who believed that the conference should not have severed the ties of Kevin and Lawton to the church. Other members contended to the contrary and contended that the conference instead found that there was sufficient evidence of behavior that warranted the Higgs' removal from the church. In an email authored by Bole, he referenced acts of "sabotage, disruption, theft, destruction of church property and withholding of support funds" by individuals committed to both of the Higgs. A series of other emails both in support of and against the Higgs ensued.

In July, 2011, Higgs sued Bole and other fictitious parties. Higgs then filed a civil subpoena for production of documents under Rule 45 requesting documents from the conference. The conference filed an objection based on the matter being internal and ecclesiastical and therefore, free from judicial interference by secular courts pursuant to protections provided by the United States Constitution.

Bole then filed a motion to dismiss on the grounds the court lacked jurisdiction under the First and Fourteenth Amendments. Bole contended, in part, that the Court's inquiry constituted an inquiry to things were ecclesiastical matters. Higgs contended that religious doctrine, practiced, or any other matter of an ecclesiastical nature was not involved.

The trial court entered an Order granting the conference's objection to the extent it requested documents not provided to the conference by Bole and denied it to the extent that it requested documents provided by the conference by Bole.

In response to Bole's petition seeking a dismissal of the claims against him based on subject matter jurisdiction pursuant to the First and Fourteenth Amendments to the Constitution, Higgs responded that the First Amendment did not bar his action because the alleged defamatory statements were not subject to the First Amendment preclusion.

1. The Court had previously held in *Abyssinia* that it had no jurisdiction to resolve disputes regarding spiritual or ecclesiastical affairs but could resolve questions of civil or property rights.

With regard to a state court's jurisdiction over a church in face of a First Amendment challenge, the Court had previously stated in *Abyssinia Missionary Baptist Church v. Nixon*, 340 So.2d 746, 748 (Ala. 1976) that:

> As is the case with all churches, the Courts will not assume jurisdiction, in fact, has none, to resolve disputes regarding their spiritual or ecclesiastical affairs. However, there is jurisdiction to resolve questions of civil or property rights.

Lott v. Eastern Shore Christian Center, 908 So.2d 922 (Ala. 2005).

B. Although the Court Noted That There Was Jurisdiction To Decide When a Church Member Challenged Her "Expulsion" As Not Being Within the Authority of the Church, Such Was Not the Case in Regard to Jurisdiction Over Claims of Defamation, Invasion of Privacy, or Intentional Infliction of Emotional Distress Based on Statements Leading to an Investigation and the Ultimate Removal of a Pastor.

The Court noted that it had reviewed the actions of churches in expelling members and that the action was reviewable, for example, "when a church member challenges whether her 'expulsion' was the act of the authority within the church having the power to order it."

Abyssinia Missionary Baptist Church v. Nixon, 340 So.2d 746, 748 (Ala. 1976).

Justice Wise noted that none of the parties had cited to any Alabama case in which the Court had specifically addressed whether it had jurisdiction over claims of defamation, invasion of privacy, or intentional infliction of emotional distress based on statements that led to an investigation and the ultimate removal of a pastor from a church, as well as statements made after the investigation and discussions about the results of the investigation and about the actions taken, but that other jurisdictions had addressed similar situations.

The Court cited to *Watson v. Jones*, ADUS 679 (1872) and *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976), in that both cases the Court declined to interfere with the "relevant [hierarchical] church governing body has power under religious law [to decide such disputes] …to permit civil courts to probe deeply enough into the allocation of power within a [hierarchical] church so as to decide … religious law [governing church polity] … would violate the First Amendment in much the same manner as civil determination of religious doctrine."

Id. at 708-709.

C. The Court Relying on the Opinions of the United States Supreme Court Noted That the General Rule is That "Courts Should Be Loath to Assert Jurisdiction Over Internal Church Disputes; its Exceptions are Rare." *Serbian*, 426 U.S. at 709-710.

Two Courts have addressed the question of whether to exercise federal jurisdiction over a defamation action and both declined to do so. *Farley v. Wisconsin Evangelical Lutheran Synod*, 821 F.Supp. 1286 (D. Minn. 1993) and *Hutchison v. Thomas*, 789 F.2d 392 (6th Cir. 1986). In *Trice v. Burress*, 137 P.3d 1253 (Okla.Civ.App. 2006), Trice was terminated as a youth director and Burress, a member, questioned Trice's sexuality, but only communicated this to one member. The Oklahoma Court noted that "only where the imposition of ecclesiastical discipline poses an immediate threat to single 'the public safety, peace, or order' is the mantle of absolute constitutional privilege shed. (p.7). Trice contended that the defamatory statement occurred months after he was terminated, however, the Oklahoma court found that examination of that statement required an impermissible inquiry into church disciplinary matters which was barred by the First Amendment.

D. In Reviewing the Evidence Submitted, Justice Wise Found That the Higgs' Claims Were Not Limited Solely to the Statements Made After the Investigation and Were Based on in Large Part on the Letter Made the Basis of the Investigation. As a result, Justice Wise Found That "A Determination Into Whether Bole's Statements Were False Would Require an Inquiry Into Details of the Conference's Investigations, Findings, and Reasoning." (p. 31).

The Court found that all of the Higgs' claims were intertwined with the underlying investigation and that, therefore, the trial court did not have subject matter jurisdiction over the claims against Bole by virtue of the First and Fourteenth Amendments to the United States Constitution. The Court concluded that Bole had a clear right to have the claims against him dismissed for lack of subject matter jurisdiction and to have the subpoena issued to the conference quashed. The Court also found that the conference's mandamus petition was moot.

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

DAMAGES - DAMAGES FOR THE TOTAL LOSS OF THE VEHICLE PLUS LOSS OF USE DAMAGES ARE AVAILABLE IN REGARD TO THE DESTRUCTION OF A COMMERCIAL VEHICLE.

THE COURT OVERRULED *HUNT V. WARD,* 79 SO.2D 20; *FULLER V. MARTIN,* 125 SO. 4; *LARY V. VALIANT INSURANCE CO.,* 864 SO.2D 1105.

Ex parte S & M, LLC, d/b/a Huntsville Cab Company, 2012 WL 6062565 (Ala.) (December 7, 2012).

SUMMARY:

A taxi cab company sued the estate of the motorist with whom the cab collided and sought damages for loss of use of the cab during the time the company was required to purchase and repair a replacement vehicle.

Judgment was entered in favor of the motorist's estate in the trial court. The Court of Civil Appeals affirmed. The cab company filed a petition for certiorari.

HOLDINGS:

Justice Woodall found that in regard to a damaged commercial vehicle that is not repairable, the recovery of reasonable loss of use damages is allowed during the time reasonably required to procure a suitable replacement vehicle.

Justice Woodall overruled *Hunt v. Ward,* 79 So.2d 20; *Fuller v. Martin,* 125 So. 4; *Lary v. Valiant Insurance Co.,* 864 So.2d 1105.

DISCUSSION:

The Court of Civil Appeals and the trial court relied on the cases of *Hunt v. Ward,* 262 Ala. 379, 79 So.2d 20 (1955); *Fuller v. Martin,* 41 Ala.App.160, 125 So.2d 4 (1960); and *Lary v. Valiant Insurance Co.,* 864 So.2d 1105 (Ala.Civ.App.2002) in finding that Huntsville Cab could not recover damages both for the total loss of its vehicle as well as loss of use of the same vehicle.

A. Huntsville Cab would not be made "whole" unless it received loss of use damages as well as damages for the total loss of the vehicle.

Huntsville Cab contended that because it could not recover for loss of use of the cab that it had been prevented from receiving full compensation for its losses which was contrary to the purpose of compensatory damages, i.e. "to make the plaintiff whole by reimbursing him or her for the loss or harm suffered." *Ex parte Goldsen,* 783 So.2d 53,56 (Alabama 2000). Huntsville Cab in part relied on a case decided by the Oklahoma Supreme Court and the Iowa Supreme Court.

Justice Woodall relied on the case decided by the Iowa Supreme Court which found, in part, that:

> "The rule denying loss of use damages in these situations has not been specifically discussed in the cases. Because the rule has been challenged in the present case, we must determine its continued viability. ***We do so against the background 'that the principle underlying allowance of damages is that of compensation, the ultimate purpose being to place the injured party in as favorable a position as though no wrong had been committed.'"***

Long v. McAllister, 319 N.W.2d 256,258(Iowa 1982).

B. The Court found that if loss of use damages were recoverable if the automobile could be repaired that the same should be true if the automobile could not be repaired.

Justice Woodall noted that under *Hunt* and its progeny, loss of use damages would have been recoverable if Huntsville Cab's vehicle had been repairable rather than a total loss. Justice Woodall further stated that:

> **"Therefore, we modify our existing vehicle-damage rule with regard to a damaged commercial vehicle that is not repairable to allow the recovery of reasonable loss-of-use damages during the time reasonably required to procure a suitable replacement vehicle."**

2012 WL 6062565 at 6. Justice Woodall found that *Hunt*, *Fuller* and *Lary* were overruled to the extent that they conflicted with this modified vehicle damage rule.

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

INSURANCE – ASSAULT AND BATTERY EXCLUSION

THE EXCLUSION FOR ANY ACT OF ASSAULT AND/OR BATTERY DID NOT PRECLUDE COVERAGE FOR A NEGLIGENT/WANTON BREACH OF THE DUTY TO IMPLEMENT A RISK MANAGEMENT SYSTEM.

Admiral Insurance Company v. Ryan Price-Williams, 2013 Ala. LEXIS 4 (January 11, 2013)

SUMMARY:

Price-Williams sued Admiral, Gabriel Dean and Charles Baber pursuant to Alabama's Direct Action Statute, §27-23-2, Ala. Code (1975). Price-Williams alleged that Dean and Baber were covered under a commercial general liability insurance policy issued by Admiral to the National Kappa Sigma Fraternity to which Dean and Baber belonged.

Following a bench trial, the trial court found that the Admiral policy provided coverage to Dean and Baber for the negligent and/or wanton acts that formed the basis of the underlying action.

HOLDINGS:

In an Opinion authored by Justice Stuart, the Court found that the trial court properly found that the Admiral policy provided coverage to Dean and Baber for their negligent and/or wanton acts relating to their failure to implement a risk management program which was a claim independent from the claims for assault and battery. The Court affirmed the ruling of the trial court.

DISCUSSION:

A. Dean and Baber Were Proper Defendants Under the Direct Action Statute and Were Indispensible Parties to the Direct Action.

The Direct Action Statute provides, in part, "The judgment creditor may proceed against the defendant and the insurer to reach and apply the insurance money to the satisfaction of the judgment."

B. The Trial Court Properly Found that the Negligent-Wanton Claims Against Baber and Dean Were Covered Under the Admiral Policy Because They Were Officers of the Fraternity and Failed to Implement the Risk Management Program Required by Kappa Sigma and Failed to Have a "Sober Monitor" at the Party.

Kappa Nu was the local chapter of Kappa Sigma. Price-Williams sustained substantial injuries when he attended a party at the fraternity house for which he sued Kappa Sigma, Kappa Nu, and the individuals who were alleged to have assaulted him, which included Baber and Dean. Price-Williams asserted claims of negligence and/or wantonness against Baber and Dean arising out of their failure as officers of Kappa Nu to implement the risk management program that Kappa Sigma required of local chapters.

Kappa Sigma notified Admiral of a possible "occurrence" under its commercial general liability policy; however, the Admiral policy contained a self-insured retention clause. Kappa Sigma retained counsel which also represented Kappa Nu. However, counsel for Kappa Sigma-Kappa Nu did not represent either Dean or Baber. Neither Dean nor Baber made a claim for coverage under Admiral's policy.

Dean and Baber did not respond to the claims against them and a default judgment was entered against them. Kappa Sigma was granted a summary judgment, and by the time that the jury trial began, Kappa Nu was the only remaining defendant for trial.

C. A Default Judgment Was Entered Against Dean and Baber.

After closing arguments, Kappa Nu reached a settlement with Price-Williams. Price-Williams then moved the trial court to withdraw his jury demand and to enter a Final Judgment against Dean and Baber.[1]

D. The Trial Court Found that Dean and Baber Had Coverage Because:

(1) as Officers They Assumed a Duty to Implement and Enforce a Risk Management Program;

(2) they were Officers and Were Also Drinking;

(3) One or Both of Them Knew That an Assault Was Probably Going to Occur;

(4) Their Negligence/Wantonness Was Committed While They Were Acting Within the Scope of Their Duties, as Officers;

(5)They Were Additional Insureds Under the Policy; and

(6) There Was a Presumption of Correctness Under the *Ore tenus* Rule.

In the Order finding in favor of Price-Williams, the trial court issued an Order which included a comprehensive discussion of the Findings of Fact, which included:

[1] There are references in the Opinion to "Haber" and "Baber"; therefore, in this analysis, we will refer to only "Baber" who was clearly an Officer of the local fraternity.

(1) Dean and Baber were Officers and had assumed and/or were under a duty to implement, supervise, or enforce a risk management program;

(2) Dean as President was considered the Chief Executive Officer of the Chapter. Baber was the Vice-President and was second in command, and both Baber and Dean had been drinking, and that one or both of them knew that an assault was probably going to occur;

(3) The trial court found that the negligence and wantonness of Dean and Baber were committed while acting in the scope of their duties on behalf of the fraternity;

(4) The Court agreed with Price-Williams that by virtue of their status as Officers of Kappa Nu, Dean and Baber were additional insureds under the Commercial General Liability Insurance Policy. **The trial court conducted a bench trial in the direct action case and Admiral did not attend despite notice from the trial court that the trial would proceed.** Admiral contended that it believed that the case would be decided through Briefs and not via a trial; and

(5) Under the *Ore Tenus* Rule there was a presumption of correctness as to the Findings of Fact and the Verdict. *Travelers Indemnity of Connecticut v. Miller*, 86 So.3d 338 (Ala. 2011).

E. The Fraternity's Settlement Did Not Include the Claims Against Dean and Baber.

The trial court entered a judgment for $1,250,000.00 with a set-off of the amount paid to Price-Williams by the fraternity. Subsequently, there was a dispute between Price-Williams and Kappa Nu because Kappa Nu contended that the Release also released all claims against the individual defendants.

On appeal, the Court affirmed the decision of the trial court finding that the Release did not release Dean and Baber, in part, noting that the attorney for Kappa Sigma-Kappa Nu did not represent Dean and Baber. *Kappa Sigma Fraternity v. Price-Williams*, 40 So.3d 683, 693 (Ala. 2009).

F. The Court Rejected All of the Arguments Asserted by Admiral.

1. Admiral contended that the exclusion for assault and battery precluded coverage for Baber and Dean because the gravamen of the claim was that Price-Williams sustained bodily injury as an illegal assault and battery. The Court rejected this argument.

The Court noted that in addition to his assault claim, Price-Williams alleged claims of negligence and/or wantonness based on the failure of Dean and Baber to implement the risk management program.

The Court agreed with the trial court finding that the claims for assault and the claims for negligence and/or wantonness were separate and distinct claims.

2. Admiral contended that there was only one injury and the acts combining to cause that injury are not severable. The Court rejected this claim as well finding that *Auto Owners* did not apply because the claims against Dean and Baber were based on two separate and distinct acts and *Gregory* did not apply because the Admiral exclusion was much narrower than the exclusion in *Gregory*.

Admiral relied primarily on the case of *Auto Owners Insurance Company v. American Central Insurance Company*, 739 So.2d 1078 (Ala. 1999). In *Auto Owners*, the Court agreed with the trial court that it was not possible to distinguish between the plaintiff's intentional tort claims and the plaintiff's unintentional tort claims "so as to obligate [the insurer] to provide a defense and indemnity as to some of the claims but not as to others." 739 So.2d at 1082. The Court distinguished *Auto Owners* by finding that unlike the facts in *Auto Owners*, the claims against Dean and Baber were based on two separate and distinct acts.

The Court also distinguished the case of *Gregory v. Western World Insurance Company*, 481 So.2d 878 (Ala. 1985), that was relied upon by Admiral finding that the exclusion in *Gregory* excluded "bodily injury or property damage arising out of assault and battery…whether caused by or the instigation or direction of the insured, its employees, patrons or any other person."[2]

The Court distinguished *Gregory* by finding that the Kappa Sigma policy had a much narrower exclusion that excluded only injuries or damage "arising out of any act of assault and/or battery by any insured or additional insured." The Court therefore, agreed with trial court that the assault and battery exclusion did not bar Price-Williams from recovering from Admiral.

3. Admiral contended that Baber and Dean were not acting within the line and scope of their duties at the time of the assault. The Court disagreed finding that their failure to implement a risk management program was a separate act than an assault.

On appeal, Admiral alleged in part that "This is nonsensical as a person can't be both within and outside the scope of his duties when committing in the same act resulting in the same injury." (p. 20).

[2] 481 So.2d at 878.

The Court noted that the trial court did not find Dean and Baber to be within and outside of the scope of their duties with regard to the same act, but correctly assumed that although the assault was not covered, the claims related to the failure to implement a risk management program were.

4. Admiral contended that the failure to implement a risk management program was not an "occurrence" or "accident" under the terms of the policy. The Court rejected this argument because there was no evidence that Kappa Sigma "expected or intended" its local officers to ignore the requirement that they implement a risk management program.

In regard to this argument, the Court emphasized that two separate acts occurred and that there was no evidence indicating Kappa Sigma, the named insured, 'expected or intended' its local officers to ignore the requirement that they implement a risk management program.

5. Admiral contended that the failure to implement a risk management program was not the proximate cause of the injuries to Price-Williams. The Court disagreed because the risk management program which included a "sober monitor" would have prevented and/or stopped the assault after it began.

The trial court found that a risk management program would either have prevented the assault from starting, or at a minimum, would have stopped it shortly after it began. In regard to Admiral's contention that there was no evidence to support that finding, the Court noted that "questions of negligence and proximate cause involved Findings of Fact that are within the province of the jury." *Union Bank and Trust Company v. Elmore County National Bank*, 592 So.2d 560, 563 (Ala. 1991).

The risk management program generated by Kappa Sigma required that a "sober monitor" be responsible for any decision made at a party. It was undisputed that no person was at the party who was designated as a "sober monitor" to "generally maintain order." (p. 28).

The Court affirmed the decision of the trial court and Chief Justice Malone, and Justices Parker, Shaw and Wise concurred.

INSURANCE – SUBROGATION – CASE OF FIRST IMPRESSION

THE PROVISION IN THE STATE FARM POLICY REQUIRING SUBROGATION "TO THE EXTENT OF OUR PAYMENT" DID NOT ABROGATE THE COMMON FUND DOCTRINE.

THE LIMITED APPEARANCE OF STATE FARM TO PROTECT ITS SUBROGATION INTEREST DID NOT CONSTITUTE "ACTIVE PARTICIPATION" SUCH THAT IT WOULD ABROGATE THE COMMON FUND DOCTRINE.

Ex Parte State Farm Mutual Automobile Insurance Company,
2012 WL 4238631 (Ala.) (September 21, 2012).

SUMMARY:

A State Farm insured brought an action against State Farm alleging various claims, including a claim for conversion, because the insurance company refused to agree to a reduction in what it was to receive via its subrogation interests pursuant to the Common Fund Doctrine. The trial court entered judgment in favor of State Farm and the insured appealed.

The Court of Civil Appeals held that State Farm's interest in the settlement was subject to a reduction pursuant to the Common Fund Doctrine and reversed and remanded. State Farm sought a review by the Alabama Supreme Court.

HOLDINGS:

Justice Main held that:

(a) In a matter of first impression, the application of the Common Fund Doctrine was warranted despite the language of the policy requiring reimbursement "to the extent of our payment"; and State Farm was required to pay a pro rata share of the insured's attorney fees;

(b) The limited appearance of counsel for State Farm to protect its subrogation interest did not constitute **active participation** such to avoid application of the Common Fund Doctrine; and

(c) The fact that the policy provided that State Farm had a subrogation interest "to the extent of our payment" did not abrogate the Common Fund Doctrine.

DISCUSSION:

State Farm paid the medical expenses of its insured incurred as a result of an automobile accident and State Farm then sought reimbursement from Cotton State's Mutual Insurance Company. The insured filed a personal injury action against the Cotton State's insured, State Farm, and certain fictitious parties contending that any monies received by State Farm's insured ("Mitchell") was subject to the reduction pursuant to the Common Fund Doctrine for the attorney's fees incurred by Mitchell.

A. The Alabama Court of Civil Appeals Found That the Insurance Contract Did Not Abrogate the Common Fund Doctrine and That State Farm's Participation was not the "Active Participation" Required to Avoid Application of the Common Fund Doctrine.

B. As a Matter of First Impression, the Court Found That the Common Fund Doctrine Applied in an Insurance Subrogation Case in Which the Insurer Had Paid the Insured's Medical Expenses and the Insured Sought Payment From the Insurer of a Pro rata Share of the Insurer's Attorney's Fees.

The Court noted that a Common Fund arises in the medical payments coverage context where:

(1) There is a fund from which to compensate the attorney; and

(2) The services of the insured's attorney actually benefited the fund.

C. The Court Found That There Was Clearly a Fund As a Result of a $35,000.00 Settlement From Cotton States on Behalf of the Tortfeasor, a Cotton States' Insured.

D. The Court Also Noted That the Fund Was Created by Mitchell's Attorney and That There Was No Question That State Farm Benefited From Those Efforts.

As a result, the Court concluded that State Farm was required to pay a pro rata share of the insured's attorney's fees based on the $5,000.00 medical expenses payment.

E. The Court Found That the Participation of State Farm Was Not Sufficient to Establish "Active Participation" Sufficient to Avoid the Application of the Common Fund Doctrine."

The Court noted that:

> An insurance company must actively assist its insured in creation, discovery, increase, or preservation of the Common Fund.

(p.8).

The Court noted that although State Farm had demanded the $5,000.00 from Cotton States prior to the lawsuit's being filed and had notified the insured's counsel that State Farm intended to represent itself in regard to the recovery of those monies, the Court found that those efforts were not sufficient to establish the requisite "active participation."

F. The Policy Language Relied on by State Farm ("To the Extent of Our Payment") Did Not Abrogate the Common Fund Doctrine.

The Court noted that the policy provision at issue did not expressly reference potential attorney fee claims in any way via the provisions "to the extent of our payment." The Court acknowledged that in prior decisions it had held that "equitable principles apply to all instances of subrogation except when the Contract expressly provides otherwise." *Liao*, 548 So.2d at 165. The Court agreed with the Court of Civil Appeals that the language at issue did not abrogate the Common Fund Doctrine.

The Decision of the Alabama Court of Civil Appeals was affirmed. Chief Justice Malone and Justices Woodall, Bolin, Parker, Murdock, Shaw and Wise concurred.

INSURANCE –

THE TERM "SUIT" IN A COMMERCIAL GENERAL LIABILITY POLICY IS AMBIGUOUS

A POTENTIALLY RESPONSIBLE PARTY ("PRP") LETTER FROM THE EPA SATISFIES THE "SUIT" REQUIREMENT UNDER THE TERMS OF A COMMERCIAL GENERAL LIABILITY POLICY

Travelers Casualty and Surety Company et al. v. Alabama Gas Corporation, 2012 Ala. LEXIS 174 (Ala.)(December 28, 2012)

SUMMARY:

The United States District Court for the Northern District of Alabama, Southern Division certified to the Alabama Supreme Court the following question pursuant to Rule 18, Alabama Rules of Appellate Procedure:

> Under Alabama law, is a 'Potentially Responsible Party' ('PRP') letter from the Environmental Protection Agency ('EPA'), in accordance with the Comprehensive Environmental Response Compensation and Liability Act ('CERCLA') provisions, sufficient to satisfy the 'suit' requirement under a liability policy of insurance?

HOLDING:

The Alabama Supreme Court answered this question in the affirmative.

DISCUSSION:

A. Facts presented by the District Court.

The defendants were St. Paul Fire and Marine Insurance Company, St. Paul Surplus Lines Insurance Company, and St. Paul Mercury Insurance Company (hereinafter referred to collectively as "Travelers." In this Per Curiam opinion, the Court noted that the District Court's question related to this provision of the policies at issue:

> **(a) Defend in the name and on behalf of the insured any suit against the insured alleging such injury, death, damage, or destruction and seeking damages on account thereof, even if such suit is groundless, false or fraudulent; but [Travelers] shall have the right to make such investigation, negotiation, and settlement of any claim or suit as may be deemed expedient by [Travelers].**

The District Court noted that the policy applied only to "occurrences" that occurred during the policy period and that "occurrence" was defined in the policy to include “a continuous or repeated exposure during the policy period to conditions which unexpectedly and unintentionally cause … injury to or destruction of tangible property, including the loss of use thereof.” (p. 2).

1. Events in 1967 and 1970.

In November 1967, the City of Huntsville conveyed the former Huntsville Gas Company site to HUD and the Huntsville Housing Authority. Huntsville Gas Company was the predecessor to Alagasco. Between November 1967 and May 1970, HUD and the Housing Authority demolished the remains of the former Huntsville MGP and built the Searcy Homes Public Housing Project.

2. Events in 1998.

The potential claim was reported to the insurers in June 1998. In June 1998 the parent company to Alagasco alerted the defendant insurance companies that there were actual or potential claims arising from the historical manufactured gas plant operations which included the Huntsville MGP.

3. Energen and St. Paul entered into a confidentiality agreement for settlement negotiations in 1999.

Alagasco's parent company, "Energen," as the policyholder and one of the St. Paul entities entered into a **confidentiality agreement for settlement negotiations** in February 1999.

In that agreement Energen indicated that it expected to receive one or more claims and/or lawsuits with respect to the alleged environmental contamination. In that agreement Energen contended that claims and potential claims were covered under certain policies issued to Energen and its predecessors by various insurers.

The agreement provided that Energen and the various insurers wished to enter into good-faith negotiation toward the possible resolution of the claims. The agreement defined **"negotiation period"** until from the period beginning on the date of execution and ending when the agreement was terminated by either party.

4. Under the provisions of CERCLA, in 2008 the EPA requested certain information from Alagasco/Energen and Alagasco/Energen tendered the defense of the claim to Travelers; and in November of 2008, Travelers responded that the EPA's assertions did not rise to the level of a formal "claim" and that, therefore, Travelers could not state a coverage position until a claim or lawsuit was received.

In October 2008, the EPA requested certain information from the plaintiff under CERCLA. Alagasco forwarded the information request to the defendants contending that the information request and pollution report constituted a claim and Alagasco tendered the defense and made a demand for coverage. On November 10, 2008, the defendants responded that the EPA's assertions did not rise to the level of a "formal claim" and that the defendants were unable to state a coverage position until "such a claim or lawsuit is received." From October 2008 to June 2009, the EPA and Alagasco communicated regarding the site. All of this information was provided to the defendants.

5. In 2009, Alagasco received a "Potentially Responsible Party" ("PRP") letter and again demanded a defense, and in February of 2010, the insurers responded that the PRP letter was not a "suit" creating defense obligations.

On June 24, 2009, Alagasco received a formal notice of potential liability and offer to negotiate from the EPA. (The "PRP letter"). Alagasco forwarded this letter to the defendant insurers and again reiterated a demand for a defense. The defendants twice responded saying that they were still reviewing the file and that Alagasco should act in its best interest. On February 3, 2010, the defendant insurers notified Alagasco that they did not believe any of the communications from the EPA constituted a "suit" such that the defendant insurers did not believe they had any potential defense obligations at that time.

B. The Alabama Supreme Court Found that the Issue of whether the Facts in the Case gave Rise to an "Occurrence within the Meaning of the Policy was not before the Court.

C. The Court refused to answer a question posed by Alagasco that was not posed by the District Court and stuck that portion of Alagasco's brief.

Travelers filed a motion to strike substantial portions of Alagasco's brief because Alagasco requested that the court answer a second question not asked by the federal district court:

> Whether an insurer can always claim to have a reasonably legitimate or arguable reason within the test for normal bad faith when it refuses to provide a defense under a liability

policy based on a position not previously addressed by Alabama courts, even if that position is contrary to the clear and substantial majority rule outside Alabama and even if the insurer fails to offer to defend under a reservation of rights?

Finding that it was required only to answer the question posed by the district court, the court granted the defendant's motion to strike the portions of Alagasco's brief that discussed Alagasco's proposed certified question.

D. The Court found that the term "suit" was not defined in the policy and was ambiguous; therefore, the Court relied on precedent from other states in which those courts found that a PRP letter was a "suit" that required an insurer to at a minimum defend.

The court noted Alabama precedent regarding the interpretation of an insurance policy finding that terms were to be interpreted according to their everyday meaning and if the terms under that standard are reasonably certain in their meaning, they are not ambiguous as a matter of law. Further, the court found that in cases of genuine ambiguity or inconsistency it is proper to resort to rules of construction and that, however, a policy is not made ambiguous because the parties to the agreement interpret the policy differently. Further the court noted that it must not rewrite a policy so as to include or exclude coverage.

In regard to the interpretation of "suit" the court quoted from Mark S. Dennison, annotation, what constitutes "suit" triggering insurer's duty to defend environmental claims found at 48 ALR 5th 355, 365-66 (1997). The court noted by referring to *Professional Rental, Inc. v. Shelby Insurance Company*, 75 Ohio App. 3d 365, 372-74, 599 NE 2d 423, 428-29 (1991) that the enforcement process for shifting cleanup responsibility to PRP's included two primary methods:

1. The CERCLA statutory claim providing for injunctive relief permitting the EPA to issue an administrative order compelling cleanup or to obtain a court order compelling the same and

2. CERCLA also allowed for restitutional relief by authorizing the EPA to expend funds from the federal superfund to clean up toxic waste sites and to subsequently institute cost recovery actions against the responsible party.

The court noted that a significant number of Supreme Courts in other states in other states had addressed the issue of whether a PRP letter issued by the EPA constituted a "suit" for purposed of a CDL policy. The court noted that most of those courts had determined that a PRP letter did in fact constitute a "suit" for purposes of the CGL policy. See *Michigan Millers Mutual Insurance Company v. Bronson Plating Company*, 445 Mich. 558, 519 NW 2d 864 (1994).

The court noted that even outside the environmental arena courts have defined the term "suit" broadly and found it to encompass arbitration and administrative proceedings and cited, in part, to *Madawick Contracting Company v. Travelers Insurance Company*, 307 NY 111, 117-119, 120 NE 2d 520 (1954) as well as cases from other jurisdictions including the United States Supreme Court. In *Solo Cup Company v. Federal Insurance Company*, 619 Fed. 2d 1178, 1188 7th Cir. 1980), cert. den., 449 U.S. 1033 (1980).

The Court concluded that it found the term "suit" as used in the insurance policy at issue to be ambiguous and capable of application to legal proceedings initiated in other than a traditional court setting as was the finding in the many cases cited. The Court also referenced jurisdictions in which the courts found that there was no duty to defend absent a more definitive and direct EPA action. The Court quoted extensively from *Bronson*, 455 Mich. at 567-75, 519 NW 2d at 869-72. The Court also cited to *Hazen Paper Company v. United Stated Fidelity and Guaranty Company*, 407 Mass. 689, 555 NE 2d 576 (1990) as a "helpful discussion."

The Court cited also to a recent Nebraska opinion in which that court concluded that a PRP notice differs from a "garden variety demand letter" in that it carried "immediate and severe implications." The Alabama Supreme Court noted that "the authority given the EPA in regard to determining liability on the part of PRPs, while not absolute, is very nearly so." (p. 37).

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

C. Dissent by Murdock, Shaw and Wise.

Justices Murdock, Shaw and Wise dissented.

Murdock stated that pursuant to the views expressed in *Nationwide Mutual Insurance Company v. Thomas*, 2012 Ala. LEXIS 105 (Ala. 2012), he would decline to answer the certified question.

Justice Shaw wrote in part that "I would adhere to the holding of Stewart Title (*Stewart Title Guaranty Company v. Shelby Realty Holding, LLC*, 83 So. 3d 469, 472 (Ala. 2011) that this court should decline to answer certified questions seeking simply the meaning of language in contracts. Justice Wise concurred in the dissents.

INSURANCE - EXCLUSIONS MUST BE CONSTRUED NARROWLY

1. **The carry for a fee exclusion was unambiguous even if the compensation was based on the number of newspapers delivered.**

2. **By construing the exclusion narrowly as was required, Justice Main found that the carry-for-a-fee exclusion did not apply after delivery was completed.**

CASE OF FIRST IMPRESSION

Nationwide Mutual Insurance Company vs. Thomas et al., 2012 WL 3631158 (Ala.) (August 24, 2012)

SUMMARY:

An injured driver obtained a judgment against an insured driver in a personal injury action arising from an automobile accident. The insured driver's automobile insurer brought a federal action against the injured drivers and the insured seeking a determination of whether a "carry-for-a-fee" exclusion in the Nationwide precluded coverage for the insured's liability.

The United States District Court for the Northern District of Alabama, Eastern Division, certified two questions.

HOLDINGS:

As a matter of first impression, Justice Main held that:

1. The "carry-for-a-fee" exclusion was unambiguous;

2. The exclusion could be enforced as to the insured if the insured was using the covered vehicle to delivery newspapers for a fee at the time of the accident with the injured drivers; and

3. The exclusion could not be enforced as to the insured after the insured's delivery of papers was complete.

DISCUSSION:

A. Questions Certified.

(1) Is the carry for fee exclusion applicable to an insured who delivers newspapers and is paid based on the number of newspapers delivered?

(2) Does the exclusion apply after the last newspaper is delivered?

The following two questions were certified:

1. Whether a coverage exclusion clause in an automobile liability [insurance policy] which provides: **"this coverage does not apply to: use of any motor vehicle to carry persons or property for a fee"** is enforceable as to an insured who delivers newspapers for an employer and is compensated by the employer based on the number of newspapers delivered, regardless of the location of customers.
2. A secondary issue is whether said exclusion applies when the subject accident takes place after the delivery of the last paper, but while the insured is driving back to his point of origin or some other location.

The District Court specifically did not certify issues as to:

1. Waiver and estoppel,

2. The enforceability of the 'duty to notify' clauses or

3. The relevance of Alabama's mandatory insurance or uninsured motorist statutes because it did not view any of these issues as controlling.

B. Facts Presented by the District Court.

The Thomas defendants were injured as a result of an automobile accident which occurred at approximately 5:30 a.m. Lori Thomas was the driver of the one of the vehicles. The Thomas defendants recovered a judgment in state court against defendant Gooden, the driver of the other vehicle. At issue is whether the Thomas defendants can recover from Nationwide in a direct action lawsuit.

The policy provides in part an exclusion for coverage for "use of any motor vehicle to carry persons or property for a fee."

1. **The Insured had a duty to notify Nationwide as soon as possible of any "change which may affect the premium or the risk . . . this includes . . . (3) use of the insured vehicles."**

One of the duties of the insured is to notify Nationwide "as soon as possible of any change which may affect the premium or the risk under this policy … this includes, but is not limited to, changes in … (3) use of the insured vehicles."

2. **There were no misrepresentations in the December 2007 application submitted by the Insured.**

On the application for insurance coverage is the following statement:

> **'I certify that the vehicles listed for coverage on this policy are not used for commercial use, the pickup and delivery of goods or people, which includes but is not limited to pizza, mail, newspapers, a taxi, debris/snow removal, for hire or fee.'**

At the time of the December 21, 2007 application, the insured was not delivering newspapers nor was he engaging in any other commercial activity; therefore, the December 2007 application made no misrepresentations.

3. **The insured did not notify Nationwide that he began a part-time job delivering newspapers in 2009 and no other application or any other information was requested by Nationwide at the time that the policy was renewed in July of 2009.**

In 2009, the insured ("Gooden") began a part time job delivering newspapers. He did not notify Nationwide of this change.

The policy was renewed in July 2009, Gooden offered no further application or any other information nor was it requested at this time and he was still working for his full time employer as well as he was delivering newspapers.

4. **The insured did not recall what he was doing at the time of the accident; however, there were 15 newspapers in his car after the accident. The insured testified that he could not think of any reason for his being on the road at 5:30 a.m. other than delivering newspapers. A newspaper representative testified that based on the location of the accident that the insured had completed all deliveries.**

In August 2009 Gooden's only job was delivering newspapers. At the time of the accident, Gooden's wife was in the hospital; therefore he carried his child with him while he was delivering newspapers. At the time that the accident occurred Gooden was on the wrong side of the road and after the accident, he had no explanation as to how he was in the area where the accident occurred. Therefore, any determination as to whether deliveries had been completed would be speculative.

An employee of Nationwide took photograph of approximately 15 newspapers that remained in Gooden's car after the accident. Gooden ordinarily delivered approximately 129 newspapers but always took some additional newspapers to cover unexpected circumstances. Gooden testified that he could not think of any reason he would have been out at 5:30 a.m. on October 12, 2009 other than in connection with delivering newspapers.

The Birmingham News supervisor testified that if Gooden was in the area of the accident he would have already completed his delivery route. Gooden testified that he normally would have been to Houston Road by 1:00 to 1:30 a.m. and he had no idea why he was there at 5:30 a.m. The supervisor testified that they had received no notice from any customer about missed deliveries.

5. Nationwide contended that there was no coverage and that the vehicle was carrying property for a fee and contended that the exclusion applied even if actual delivery had been concluded and Gooden was returning home or going elsewhere.

Nationwide also contended that Gooden failed to notify Nationwide "as soon as possible" of any change in the use of his vehicle.

Nationwide relied on cases involving misrepresentations made by the insureds. The district court found that no such misrepresentations were made by Gooden. The district judge also found that the other cases cited by Nationwide were not dispositive of the issues at hand.

6. **The injured drivers contended that the exclusion was ambiguous, that the delivery had been completed rendering the exclusion inapplicable, that Nationwide waived the exclusion by paying medical expenses, and that a commercial policy's premium would be no higher than the premium for a personal policy.**

The Thomases contended that the "carrying property for a fee exclusion is ambiguous." They further contended that delivery had been completed and that the exclusion as a result did not apply. The Thomases also argued that Nationwide waived the exclusion by paying medical expenses and that a commercial policy would not require a hirer premium than the personal policy at issue. The district court disagreed as to the issue regarding the premium. The district court did not find the cases that were submitted by the Thomas' as addressing controlling Alabama law on the certified issues.

C. Responses to the Questions by the Alabama Supreme Court.

1. The Court found that the carry-for-a-fee exclusion applied to newspaper delivery.

a. **The exclusion does not apply to a common enterprise or a joint adventure for pleasure.**

In *United States Fidelity and Guarantee Company v. Hearn*, 233 Ala. 31, 170 So. 59 (1936), the insurance policy excluded coverage if the vehicle was being used "for carrying passengers for a consideration." Hearn used his automobile to travel with several passengers from Alabama to the Rose Bowl in California. The Court found that the parties agreed and

intended that Hearn's contribution to the trip was to be his automobile and his services in driving and concluded that the payment of his expenses was not consideration paid by the passengers in exchange for the trip.

The *Hearn* court found that the carry-for-a-fee exclusion did not apply because "all the parties who went were engaged in a common enterprise or a joint adventure for pleasure." 233 Ala. at 34.

b. The exclusion does not apply if at the time of the accident the insured was not carrying persons "for a charge."

In *Imperial Assurance Company v. Perry*, 252 Ala. 424, 41 So. 2d 394 (1949), the insured had obtained a taxi license but at the time of the accident he was not using the automobile "to carry persons for a charge."

c. The exclusion was unambiguous and it precluded coverage for transporting children to and from a day care for a fee.

In *Johnson v. Allstate Insurance Company*, 505 So. 2d 362 (Ala. 1987), the court recognized that as to the transporting of children to and from a daycare center, a similar carry-for-a-fee exclusion was clear and that the insurance company was entitled to limit coverage under the exclusion. In *Johnson*, the court found the exclusion to be clear and unambiguous precluding coverage for the accident at issue.

D. Conclusions by the Court.

1. The carry for a fee exclusion was unambiguous even if the compensation was based on the number of newspapers delivered.

Justice Main held that in the present case the question was whether a carry-for-a-fee exclusion may be in force in the case of an insured who delivers newspapers and is compensated based on the number of newspapers delivered. Main wrote that the answer to that question depended on a determination of whether the exclusion is ambiguous. Maine noted that although the policy did not define the terms used in the carry-for-a-fee exclusion, the terms were not unusual, technical, or otherwise unclear.

2. By construing the exclusion narrowly as was required, Justice Main found that the carry-for-a-fee exclusion did not apply after delivery was completed.

The Court noted that Alabama required that an exclusion be construed as narrowly as possible to provide the maximum coverage for the insured and that the Court should enforce the

exclusion as written. In *Hearn*, *Perry*, and *Johnson*, the court found that the enforceability of a carry-for-a-fee exclusion was based on the use of the covered vehicle at the time of the accident. Therefore, the court found that the exclusion applied beginning with the point when the newspapers are loaded and would not apply after the last newspaper was delivered.

Therefore, the court answered the first certified question in the affirmative and answered the second certified question in the negative.

Chief Justice Malone and Justices Woodall, Stewart, Bolin, and Parker concurred.

E. Dissent by Murdock, Shaw and Wise.

1. Justice Murdock.

Justice Murdock dissented concluding that Rule 18 of the Alabama Rules of Appellate Procedure provides that the court may answer determinative **"questions or propositions of law of this state"** which are certified to it by the federal court as to which **"there are no clear controlling precedents in the decisions of the Supreme Court of this state."**

Justice Murdock did not believe that the questions certified were within the contemplation of Rule 18. Murdock did agree, however, that the policy language did not provide an unambiguous answer to the second question – whether the exclusion applied after the insured completed his deliveries.

Murdock objected to the majority's opinion as to when the exclusion **"begins to apply."** Murdock stated that he would likely find that the use of the motor vehicle to carry persons or property for a fee included the dedicated use of the vehicle while on the way to pick the person or property and on the way back from delivering the person or property.

However, he contended that the fact that he would interpret the contract language differently than did the other members of the court still did not make the inquiry suitable for certified question treatment.

2. Justice Shaw.

Justice Shaw expressed no opinion as to the proper interpretation of the policy language but also contended that the question was not properly answered or certified under the provisions of Rule 18, Alabama Rules of Appellate Procedure.

Wise concurred in the dissent.

JUDGMENTS – DEFAULT

DEFENDANTS SUBMITTED SUFFICIENT EVIDENCE TO DEMONSTRATE THAT IT WAS NOT THE PROPER DEFENDANT AND HAD A MERITORIOUS DEFENSE

THE PRESUMPTION MUST BE THAT A LITIGANT HAS A PARAMOUNT RIGHT TO DEFEND ON THE MERITS

Camping World, Inc. v. McCurdy, 2012 WL 5697714 (Ala.Civ.App.) (November 16, 2012).

SUMMARY:

The owner of a recreational vehicle brought an action against the company which was repairing his vehicle and alleged that the company had negligently handled and damaged his vehicle.

The trial court entered a default judgment and the company moved to set aside the default.

The trial court denied the motion and the company appealed.

HOLDINGS:

Judge Pittman held that the trial court acted outside its discretion by denying the company's motion to set aside the default judgment.

DISCUSSION:

The lawsuit was filed on April 26, 2011. The defendant was served on May 13, 2011. On June 21, 2011, McCurdy filed a motion under Rule 55(a) seeking the entry of a default. On June 27, 2011, the trial court granted McCurdy's motion and entered a default judgment. On July 8, 2011, the attorneys for the defendant appeared and they filed a motion to set aside the default judgment pursuant to Rule 55(c) on July 20, 2011. McCurdy did not file anything in opposition to or otherwise respond to the defendant's motion to set aside the default.

The trial court denied the motion to set aside the default finding that the motion was not supported by sufficient proof that the defendant had a meritorious defense to the action.

A. The Defendant submitted evidence in support of its Motion to Set Aside The Default Judgment that it was not the proper defendant to have been named in the complaint.

The defendant contended that the affidavits submitted demonstrated that the defendant was not the proper party defendant and was sufficient evidence that established a meritorious

defense and showed that McCurdy would not be prejudiced if the Court granted the motion to set aside the default. Evidence was also submitted that McCurdy's attorney and the attorney for Emerald Coast Recreational Vehicle Centers – an affiliate of the named defendant Camping World – had been discussing a settlement since before March 25, 2011.

B. In ruling on a Rule 55(c) motion a trial court must begin with a presumption that a litigant has a paramount right to defend on merits and that, therefore, cases should be resolved on the merits whenever practicable. *Jones v. Hydro-Wave of Alabama, Inc.*, 524 So.2d 610, 613 (Ala.1988).

C. The evidence proffered by the defendant, Camping World, was sufficient to establish a meritorious defense in that it demonstrated that ECRVC, not Camping World, was the proper defendant.

The only evidence offered in opposition to the motion were the statements that McCurdy had directed payment for the repairs to Camping World but no evidence was offered in that regard. McCurdy also contended that Gallagher Bassett had engaged in settlement negotiations on behalf of Camping World which was disputed by the correspondence offered at trial offered in support of the motion.

D. The Court found that all *Kirtland* factors had been met.

The Court found that Camping World had not submitted sufficient evidence of a meritorious defense. The Court also found that the remaining two *Kirtland* factors weighed in support of granting Camping World's motion to set aside default judgment. The Court noted that McCurdy would not be prejudiced by setting aside the default judgment and that McCurdy further did not argue that he would be prejudiced.

E. As to the third *Kirtland* factor relating to culpability, the Court found that Camping World had demonstrated that he had neither acted willfully or in bad faith.

The Court also found that any culpability on the part of Camping World relating to its failure to answer the complaint was not sufficient to support the trial court's denial of the Rule 55(c) Motion. In finding that the actions of Camping World were neither willfully nor did it act in bad faith, the Court cited to *Sanders v. Weaver*, 583 So.2d 1326 (Alabama 1991).

Camping World relied on a claims rep for Gallagher Bassett to inform McCurdy that ECRVC was the proper defendant and to either negotiate a settlement or if necessary proceed with the litigation on behalf of ECRVC. The Court found that Clifton's actions at worse were negligent citing to the fact that in a June 15, 2011 letter to McCurdy's attorney Clifton made a settlement offer which was evidence of Clifton's good faith belief that he would reach a

settlement on behalf of ECRVC. Relying on *Sanders*, the Court noted that negligence by itself is insufficient for refusing to grant a Rule 55(c) motion.

Thompson, Bryan, Thomas, and Moore concurred in the opinion authored by Pittman.

LIMITATION OF ACTIONS

THE CLAIMS FOR SECONDARY EXPOSURE FOR ASBESTOS WERE BARRED BECAUSE THE PLAINTIFF DID NOT EXERCISE DUE DILIGENCE AND THE SUBSTITUTION OCCURRED AFTER THE LIMITATIONS PERIOD HAD RUN

Patterson v. Consolidated Aluminum Corporation, 2012 Wl.353 8213(Ala.)(August 17, 2012)

SUMMARY:

An alleged victim of secondary asbestos exposure brought an action against the employers of her father and grandfather and various manufacturers of asbestos-containing products that her father and grandfather were alleged to have been exposed to in the course of their employment.

The trial court dismissed the claims as being barred by the applicable statute of limitations.

HOLDINGS:

Justice Stuart held that the relation back doctrine did not apply to justify substitution of defendants for fictitiously named party after the limitations period had run.

DISCUSSION:

Dawn Patterson was diagnosed with malignant mesothelioma in September 2008. Dawn and her husband (the Pattersons) instituted this lawsuit in August 2009 claiming that Dawn was a victim of secondary exposure as a result of her contacts with her father and grandfather. The lawsuit asserted claims against the employers of the father and grandfather but also against certain manufacturers of asbestos-containing products. The complaint also asserted claims against fictitious parties.

The appeal dealt only with the Pattersons' claims against the employers of Dawn's father. One of the named defendants was "Phelps-Dodge Corporation aka Phelps-Dodge Industries aka Phelps-Dodge Wire and Cable Group ("Phelps-Dodge) and Nichols Wire. Dawn's father was employed by Phelps-Dodge from 1965 to 1971 by Consolidated Aluminum Corporation from 1971 to 1993, by Nichols-Home Shield, Inc., from 1983 to 1990; and by Nichols Wire from 1991 to 2004. Dawn testified in deposition that prior to being Nichols Wire, her father's employer was Consolidated Aluminum and it was also called Phelps-Dodge. This testimony was confirmed by Dawn's father.

In February 2010, the Pattersons filed an amended complaint adding Quanex as a successor and interest to Nichols-Home Shield and they added Ormet Corporation as successor in interest to Consolidated Aluminum. The Pattersons alleged that they had no knowledge of

possible claims against Consolidated Aluminum and Lonza until they received discovery responses from Quanex in January 2011.

With the court's permission, the Pattersons filed a second amended complaint identifying Consolidated Aluminum and Lonza as defendants in May 2011. Consolidated Aluminum and Lonza moved to dismiss the Pattersons' claims against them because the Pattersons had not acted with due diligence in identifying the fictitiously named defendants. Because matters outside the pleadings were relied on by the parties, the trial court entered an order finding that the summary judgment of Consolidated Aluminum and Lonza was due to be granted.

A. The Pattersons did not act with due diligence because : (1) the illness was discovered in September 2008; (2) the lawsuit was filed in August of 2009; (3) the Pattersons received the Social Security records of Ms. Patterson's father in December 2009 which identified Consolidated Aluminum as one of his employers; (4) in February 2010 the Pattersons added as a party defendant "Ormet Corporation, individually and as successor in interest to Consolidated Aluminum; and (5) the amendment substituting Consolidated Aluminum was not filed until May of 2011.

The Pattersons contended that the claims asserted in the second amended complaint were timely in light of the relation that principals of Rule 9(h) and 15(c) of the Alabama Rules of Civil Procedure.

The due diligence standard "is whether the plaintiff knew, or should have known or was on notice, that the substituted defendants were in fact the parties described fictitiously. *Davis v. Mims*, 510 So.2d.227, 229(Ala.1987). In order for the relation-back doctrine to apply and justify the substitution of a defendant for a fictitiously-named party after the limitations period has run, the plaintiff must establish:

(1) That it stated cause of action against the defendant in the body of the original complaint albeit identifying the party only as a fictitiously-named party;

(2) That it was ignorant of the defendant's identity at the time the original complaint was filed;

(3) That it exercised due diligence to identify the fictitiously-named party; and

(4) That it promptly amended its complaint once it knew the identity of the fictitiously-named party.

Consolidated Aluminum conceded that the plaintiffs did not know their identity that the lawsuit was filed but contended also that the Pattersons could not meet the three remaining items that must be established.

The Pattersons contended that even though they were aware of Consolidated Aluminum's existence before January 2011 when they received discovery responses from Quanex, they did not become aware of its potential liability until January 2011; therefore, the Pattersons contended that they exercised due diligence at all times and the substitutions should be permitted under Rules 9(h) and Rule 15(c).

B. Conclusions.

The Court concluded:

(1) that at least by December 2009 the Pattersons were on notice that Consolidated Aluminum and/or its corporate parent Lonza had employed Dawn's father when they received the father's Social Security records;

(2) that in February 2010 when the Pattersons added Quanex as a defendant they also asserted a new claim against Ormet Corporation stating "Ormet Corporation, individually and as successor and interest to Consolidated Aluminum…" The court reasoned that if the Pattersons had knowledge of a potential claim against Ormet based on its status as successor to Consolidated Aluminum; and

(3) that "no 'fair-minded person in the exercise of impartial judgment' could reasonably conclude that the Pattersons did not have any knowledge of" the potential liability of Consolidated Aluminum in February 2010. *West v. Founders Life Assurance Company of Florida*, 547 So.2d 870, 871(Ala. 1989). Despite that, the Pattersons waited an additional 15 months before they substituted Consolidated Aluminum and Lonza.

The court affirmed the order of the trial court. Chief Justice Malone and Justices Parker, Shaw, and Wise concurred.

MEDICAL LIABILITY -

STANDARD OF CARE: ALTHOUGH A PHYSICAL THERAPIST SPECIFIED THE PROCEDURES FOR MOVING THE PATIENT, THE APPLICABLE STANDARD OF CARE WAS THE STANDARD OF CARE APPLICABLE TO NURSES, NOT PHYSICAL THERAPISTS

CORPORATIONS –

PIERCING THE CORPORATE VEIL – THE PLAINTIFF DEMONSTRATED THAT THE DEFENDANTS WERE SO INTERTWINED THAT THE PLAINTIFF COULD MAINTAIN HER ACTIONS AGAINST ALL OF THE DEFENDANTS

Hill v. Fairfield Nursing and Rehabilitation Center, 2012 WL 5077166 (Ala.) (October 19, 2012).

SUMMARY:

A patient brought an action against the owner of a nursing home and various other defendants based on the Alabama Medical Liability Act arising out of a broken leg suffered while being helped out of bed by a nursing assistant.

The trial court entered a summary judgment in favor of the defendants. The patient appealed.

HOLDINGS:

Justice Murdock held that:

(1) the nurses' standard of care was applicable rather than a physical therapists' standard of care;

(2) the patient presented sufficient evidence regarding causation; and

(3) genuine issues of material fact precluded summary judgment on the piercing of corporate veil claim.

DISCUSSION:

Hill sued the Fairfield Nursing and Rehabilitation Center as well as other entities and individuals. The trial court entered a summary judgment as to all of the claims asserted by all of the defendants except the Fairfield Nursing and Rehabilitation Center. Hill's claims were based on the Alabama Medical Liability Act § 6-5-540 et seq. Hill's lawsuit arose out of the fact that she suffered a broken leg while being helped out of bed by a nursing assistant that was owned and operated by Fairfield.

Hill was being helped out of bed by a certified nursing assistant, Smith, when Hill lost strength in her legs and either fell to the ground or was lowered to the ground by Smith. Hill's left leg was bent backward and hit the bed and she sustained a broken leg. Hill's claims were based on the alleged failure of Fairfield employees to use proper safety measures when transferring her from her bed. The claims against the other defendants were based among other things upon Hill's claim that Fairfield served as the alter ego of the other defendants and that the "corporate veil" between the other defendants and Fairfield should be "pierced."

At the trial of the claims against Fairfield, the jury heard testimony from Hill, Hill's son, Fred Hill, the director of nursing at Fairfield, Dawson, Dr. Volgas, who treated Hill after the accident, and Toya Nelson, a registered nurse who testified as an expert regarding the applicable standard of care.

Fairfield moved for a judgment as a matter of law and argued among other things that Hill had failed to establish by way of expert testimony from a similarly situated health care provider that the applicable standard of care had been breached. Fairfield further argued that Hill had failed to establish that the transfer from her bed probably caused her injury.

A. Hill's expert testimony concerning the standard of care was met in that Nelson, a nurse, was a proper expert witness to testify as to the standard of care applicable to Smith, a certified nursing assistant.

At trial, Nelson testified that Smith breached the standard of care because she did not use a mechanical lift, she failed to use a "gait belt" and she transferred Mrs. Hill alone. Further, Nelson testified that these breaches of the standard of care by Smith combined with the breaches of the standard of care by the Fairfield nurses who failed to put the proper information in the care plan and daily care guides.

Defendants argued that the standard of care had to be established by a physical therapist expert, not a nursing expert. The evidence was that the physical therapy department in its assessment of Hill had not mandated a mechanical lift, a gait belt, or multiple staff members for transfers.

B. Summary judgment was not due to be granted as to all of the defendants except Fairfield in that there was a question of fact as to whether Fairfield acted as the alter ego of the other defendants.

Citing to *McKissick v. Auto Owners Insurance Company*, 429 So. 2d 1030, 1033 (Ala. 1983), the court noted in part as follows:

> A court may 'pierce the corporate veil' and declare stockholder or officer of the corporation's alter ego, when evidence is presented that the stockholder or officer used the corporate form to escape personal liability. . . . the law will not recognize the legal entity of a corporation in equity when the controlling shareholder or officer creates the corporation 'to promote injustice and to protect the owner from payment of just obligations.'

In *Ex parte, AmSouth Bank of Alabama,* 669 So. 2d, 154, 156 (Ala. 1995), the court found:

> A separate legal existence will not be recognized when a corporation is 'so organized and controlled and its business conducted in such a manner as to make it merely an instrumentality of another, . . . or when it is the 'alter ego' of the person owning and controlling it. **Whether the separate legal entity of a corporation may be 'pierced' and personal liability imposed, is a 'question of fact treated as an evidentiary matter to be determined on a case by case basis.**

C. The Following Standards established in *Duff* are the Standards to be considered by the Trial Court in regard to whether the corporate veil should be pierced.

In *Duff v. Southern Railway,* 496 So. 2d, 760, 762-63 (Ala. 1996), the court recognized the following indicia of control:

> '(a) the parent corporation owns all or most of the capital stock of the subsidiary.
>
> '(b) the parent and subsidiary corporations have common directors or officers.
>
> '(c) the parent corporation finances the subsidiary.
>
> '(d) the parent corporation subscribes to all the capital stock of the subsidiary or otherwise causes its incorporation.
>
> '(e) the subsidiary has grossly inadequate capital.
>
> '(f) the parent corporation pays the salaries and other expenses or losses of the subsidiary.

‘(g) the subsidiary has substantially no business except with the parent corporation or no assets except those conveyed to it by the parent corporation.

‘(h) in the papers of the parent corporation or in the statements of its officers, the subsidiary is described as a department or division of the parent corporation, or its business or financial responsibility is referred to as the parent corporation’s own

‘(i) the parent corporation uses the property of the subsidiary as its own.

‘(j) the directors or executives of the subsidiary do not act independently in the interest of the subsidiary but take their orders from the parent corporation.

‘(k) the formal legal requirements of the subsidiary are not observed.

All of the factors cited to in Duff are not required to pierce the corporate veil. To the contrary, the *Duff* court noted that only four or five of the factors were present in *Duff* and was combined with other evidence of control but noted that the court had found in one case that the corporate veil could be pierced when only 2 of the 11 were present.

In finding that there was evidence from which the trial court reasonably could have found the following facts, the court concluded that whether or not the plaintiff could maintain a claim based on veil piercing was a question of fact to be decided by the jury and concluded that “we cannot help but conclude that there exists a genuine of material fact as to whether the defendants operated as a single business enterprise as to which Fairfield was an alter ego.” (p. 12).

The facts at issue relied on by the court was that:

a. Fairfield, a 190 bed skilled nursing facility, owned no real property and no significant personal property.

b. Fairfield had only $25,000 in liability insurance and its balance sheet for the most recent year showed a loss of $579,851.

c. Defendants Denz and Bennett were the sole members respectively of DTD, LLC, and D&N, LLC and neither DTD nor D&N had any employees or an operating agreement.

d. DTD and D&N are the sole owners and members of Fairfield, each having a 50% interest.

e. Denz originally served as President and Chief Financial Officer of Fairfield

and Bennett originally served as Chairman of the Board and Chief Executive Officer of Fairfield.

f. Defendants Fairfield, DTD, and D&N were created as LLC's within a few days of one another in May 2003 and defendant Tara Cares also was created in May 2003.

g. DTD and D&N are the sole owners and members of Tara Cares, each with a 50% interest and Tara Cares has no operating agreement, no employees, and owns no real or personal property.

h. Denz and Bennett were the current co-chief executive officers of Tara Cares.

i. Tara Cares had entered into a long term "administrative services agreement" with Fairfield and at least 30 other affiliated nursing homes.

j. In addition to Fairfield, DTD and D&N also owned at least 30 other LLC's operating nursing homes in Alabama, Missouri, Illinois, Tennessee, Louisiana, Mississippi, and Georgia. DTD and D&N were the sole owners and members of each of the other nursing homes and held a 50% interest in each of them and, like Fairfield, none of the above described nursing homes owned any real property or significant personal property.

k. The real property and most of the personal property at the nursing homes are owned by another entity called Health Care REIT. In 2003, Denz and Bennett arranged for Healthcare REIT to purchase all of the real and personal property from Beverly Healthcare for the purpose of leasing it to Aurora Healthcare. Aurora Healthcare acted as the "middle man" in the leasing of the real and personal property used in the nursing homes operated by the various LLCs.

D. Justice Stuart's Dissent in which she found that the standard of care at issue was the standard of care applicable to physical therapists, not nurses.

Justice Stuart dissented. Justice Stuart pointed to testimony that the physical therapist department at the nursing home made the decisions as to what transfer assistance should be given to its residents and that Nelson did not testify that the standard of care for nurses and certified nurse assistants required them to dispute or to override the recommendations made by the physical therapy department if they disagreed with those decisions. Stuart found that because the lawsuit was premised on the allegation that Fairfield committed malpractice by not mandating that Hill be given additional assistance when being transferred and because it was the physical therapist department at the

nursing home facility not the nursing department that made that decision, she concluded that the relevant standard of care was the standard applicable to a physical therapist.

Stuart noted that Nelson explicitly acknowledged that she was not qualified to render a professional opinion as to whether a physical therapist had breached the standard of care applicable to physical therapists. Stuart also noted that no other expert testified that there had been a breach of the standard of care and that Dr. Volgas' testimony was limited to proving causation and in any event he was not trained as a physical therapist. Based on these reasons, Justice Stuart dissented.

MEDICAL LIABILITY -

HOLDING THE CORPORATION VICARIOUSLY LIABLE FOR THE MEDICAL MALPRACTICE OF ITS EMPLOYEES DID NOT VIOLATE THE CORPORATION'S DUE PROCESS RIGHTS.

INSURANCE -

IN A *HAMMOND* HEARING REGARDING THE AMOUNT OF PUNITIVE DAMAGES THAT COULD BE RECOVERED IN THIS WRONGFUL DEATH ACTION, A TRIAL COURT COULD CONSIDER THE VALUE OF THE INSURED'S BAD FAITH ACTION AGAINST ITS INSURER BASED ON THE INSURER'S NEGLIGENT FAILURE TO SETTLE.

NEW TRIAL –

THE COURT HELD THAT THE TRIAL COURT DID NOT EXCEED ITS DISCRETION IN DENYING A NEW TRIAL BASED ON ALLEGED JUROR MISCONDUCT DUE TO THE PHRASING OF THE VOIR DIRE QUESTION, THE ABSENCE OF WILLFULNESS, THE LACK OF MATERIALITY OF THE UNDISCLOSED MATTERS, AND THE LIMITED SCOPE OF REVIEW.

Boudreaux v. Pettaway, 2012 WL 4473254 (Ala.) (September 28, 2012).

SUMMARY:

The Administratrix of a deceased patient's estate brought a wrongful death action for medical malpractice against an anesthesiologist, a nurse, and a professional corporation for medical malpractice.

The trial court entered judgment in favor of the Administratrix in the amount of $4,000,000.00 following remittitur. The defendants appealed.

HOLDING:

Justice Shaw held that:

(1) the trial court did not abuse its discretion in denying the motion for new trial based on allegations that several jurors failed to accurately respond to voir dire question;

(2) holding a corporation vicariously liable for punitive damages stemming from employees' medical malpractice did not violate the corporation's due process rights;

(3) the remitted award of $4,000,000.00 was not disproportionate and was not financially devastating; and

(4) the trial court could consider the defendants' potential bad faith claim against its liability insurer as an asset in calculating the damage award.

DISCUSSION:

The original verdict was $20,000,000.00 and it was remitted to $4,000,000.00. Boudreaux is a licensed, board certified anesthesiologist and a principal of Coastal Anesthesia. Ortego is a certified registered nurse anesthetist and an employee of Coastal. Coastal is the exclusive provider of anesthesia at Spring Hill Memorial Hospital in Mobile. The decedent underwent an exploratory laporotomy during which Boudreaux and Ortego administered anesthesia. She died during the procedure.

It was established at trial that the decedent (Hall) had numerous risk factors placing her in the category of patients with a high risk of pulmonary aspiration during the administration of anesthesia via routine intubation. Boudreaux and Ortego failed to physically examine Hall for the presence of aspiration risk or to review her medical records and instead employed a routine anesthetic induction as part of the intubation process instead of the rapid sequence induction required for patients at risk for aspiration. Hall died as a result of aspirating bile into her lungs.

A. Juror Misconduct – the trial judge did not exceed his discretion in failing to grant a new trial on the ground of alleged juror misconduct – the jurors alleged failure to respond to questions posed by Defendants during voir dire.

Defendants allege that 9 of the 12 jurors suppressed material information about their personal litigation histories. The defendants argued that the jurors suppressed information including the fact that six of them were plaintiffs in prior undisclosed litigation. Defendants also contended that jurors failed to reveal past disputes with healthcare providers and past billing disputes including two jurors who either had been discharged in bankruptcy or had disputed debts owed to Spring Hill.

The trial court expressly found that there was no evidence that any of the jurors willfully, recklessly, negligently or even innocently failed to properly respond to any of the questions posed by defense counsel. The trial court noted that "the questions as posed were not clear cut and could quite reasonably have been construed by one or more of the jurors as asking about a very specific and very narrow field of prior types of legal proceedings." The trial court noted that much of the information was a matter of public record that could have been discovered either prior to or during the trial and that the issues regarding monies owed to healthcare providers were not timely raised.

The court agreed with the trial court that the question posed by defense counsel could have easily been misunderstood by the jurors and that in regard to the several members of the venire who did disclose prior cases, defense counsel posed no follow-up questions.

In regard to the defendants' claim that the alleged non-disclosures resulted in the seating of a "plaintiff oriented" jury, the Court noted that only four of the allegedly non-responsive jurors had been a plaintiff in a prior action. The Court further noted that defense counsel at no time asked if the jurors had billing disputes or bad debts owed to Spring Hill and that there was no factual similarity between the case at issue and the litigation in which jurors were allegedly involved. The Court found that due to the phrasing of the questions, the absence of any demonstration of willfulness, the lack of materiality of the alleged undisclosed matters and the limited scope of the court's review, the court would not hold that the trial court exceeded its discretion in concluding that the answers resulted from a misunderstanding and that no probable prejudice resulted.

B. Finding the Corporate Defendant, Coastal, vicariously liable its employees acts of medical malpractice did not deprive the corporation of due process.

The defendants argued that the trial court erred in denying their motion for a new trial because the administration of the wrongful death statute and imposition of punitive damages in the case were unconstitutional particularly in regard to holding Coastal vicariously liable for the actions of Boudreaux and Ortego.

In *Ex Parte Henry*, 770 So.2d 76, 85 (Ala. 2000), Justice Johnstone noted that for a plaintiff to recover punitive damages against a principal for vicarious liability for the wrongful act of the agent, Section 6-11-27(a) requires proof of at least one of four kinds of culpability in addition to the essential elements of the tort and agency traditionally recognized by common law for vicarious liability. However, the Court neither Section 6-11-27(a) nor the distinctions included in that section apply in wrongful death cases in which only punitive damages are awarded.

> In a wrongful death case there is no need for different evidentiary standards depending on the type of damages that are sought. Instead of subjecting all punitive damages to the heightened evidentiary standard of Section 6-11-27(a), the legislature specifically exempted punitive damages sought in wrongful death actions from the operation of the heightened evidentiary standard. Alabama Code 1975 § 6-11-29 (providing that Section 6-11-27(a)'s heightened evidentiary standard 'shall not pertain to or affect any civil actions for wrongful death pursuant to Sections 6-5-391 and 6-5-410).

Cain v. Mortgage Realty Company, 723 So.2d 631, 633 (Ala. 1998). Coastal contended that the exception of wrongful death actions from Alabama Code 1975 §§ 6-5-410 and 6-5-411 violated its equal protection rights under the 14th Amendment. The court noted that in *Alabama Power Company v. Turner*, 575 So.2d 551 (Ala. 1991), the Court rejected the same argument finding, in part, that: **"the exception of wrongful death actions from legislation imposing caps on the amount of punitive damages that can be awarded in civil actions bears a rational**

relationship to a legitimate state interest that is not prohibited by the constitution. Therefore that exception does not violate the guarantee of equal protection."

The court also noted that the United States Supreme Court found in *Louis Pizitz Dry Goods Company v. Yeldell*, 274 US 112 at 115 (1927) that **"a legislature may impose an extraordinary liability. . . not only upon those at fault but upon those who, although not directly culpable, or able nevertheless in the management of their affairs, to guard substantially against the evil to be prevented."**

C. The Court found that due process was not denied Coastal as a result of the Trial Court failure to address the ratio of the punitive damages to the compensatory damages in the *Hammond* hearing – a requirement established by the United States Supreme Court in *Gore v. BMW*.

The defendants contended that they were deprived of due process because of the alleged inability of the trial court to apply one of the three factors established by the United States Supreme Court in *BMW v. Gore* for addressing the alleged excessiveness of a punitive damages award. Specifically, Gore required a comparison of the ratio punitive damages to compensatory damages and the Alabama wrongful death statute "leaves a defendant's right to due process unprotected."

As the court found in *Tillis Trucking Company v. Moses*, 748 So.2d 874, 890 (Ala. 1999), the court found in this case that "as Tillis Trucking makes clear, however, a punitive damages award in a wrongful death case may nonetheless be compared and evaluated, though perhaps not in a strictly mathematical sense, by means of a **'proportional evaluation'** of the awarded amount, the conduct of the defendant, and the resulting harm from that conduct . . . Thus, because the award of punitive damages in a wrongful death is subject to a proportionality review, we are not inclined to revisit *Tillis Trucking*." (p. 12)

D. Coastal contended that the Jury had unbridled discretion in the amount of punitive damages awarded.

The court quoted extensively from *Central Alabama Electric Cooperative v. Tapley*, 546 So.2d 371 (Ala. 1989).

> Punitive damages should not exceed an amount necessary to accomplish society's goals of punishment and deterrence. But the degree of punishment necessary to achieve those goals changes with each case. In the rarest cases, involving the most egregious conduct, juries should be entitled to punish defendants so severely as to destroy them; justice demands that. But in a typical punitive damages case, the award should punish without destroying. That, in a nutshell, is the way punitive damages in the civil justice system coexist. . . .Due to the safeguards now in place in Alabama, we find no merit to [the defendant's] allegation that its rights to substantive due process have been denied, or

based on the issues preserved for our review, that our wrongful death statute is unconstitutional. We have confidence in our system of civil justice and faith that the system will accommodate change as it is required."

Turner, 575 So.2d at 553-556.

E. Defendants Were Not Entitled to a Further Remittitur of the Jury's Punitive Damages Award Based on Its Alleged Excessiveness.

The court reviewed the trial court's application of the Guideposts set forth in *Gore* and *Hammond v. City of Gadsden*, 493 So.2d 1374 (Ala. 1986) and *Green Oil Company v. Hornsby*, 539 So.2d 218 (Ala. 1989). In regard to the reprehensibility of the defendants' conduct, the court found:

(1) that the duration of the conduct was short,

(2) that there was no evidence that the defendants were aware of the hazard,

(3) that there was no evidence that the defendants attempted to conceal or cover up the events and

(4) that there was no evidence of any similar claims or allegations made against the defendants.

In regard to similar criminal and civil sanctions, the trial court referenced prior wrongful death verdicts ranging from $6.875 million in a medical malpractice wrongful death case to $2 million in a medical-negligence/wrongful death case.

As to the *Hammond/Green Oil* factors, the trial court found that while there is no adequate measure for the value of human life, the punitive damages award of $20 million in the case was excessive given the evidence. The court found there was no evidence that any of the defendants profited from the acts or omissions.

F. In assessing the impact of the punitive damage award on the Defendants' financial position, the value of the potential bad faith action could be a part of the analysis of the wealth of the Defendants.

In regard to the impact on the defendants' financial position, the court found that Ortego had a negative net worth. Coastal had a net worth of $284,136.00. Boudreaux had a net worth of $151,419.00 when his retirement account was subtracted from his assets. The trial court found that the defendants had $1 million in liability insurance coverage.

The trial court reviewed *in camera* the claim file documents produced by the insurer and noted that plaintiff's counsel made substantial pretrial efforts to settle the case within policy limits which were rejected by the insurance company. Further, the trial court noted that in the

course of the trial, the insurer made efforts to settle for less than the policy limits as well. The trial court found that the insurance company's actions did put the insureds at risk for an excess verdict when during the course of the trial after hearing all the evidence from all the expert witnesses establishing breaches of the standard of care, "[the adjuster] elected instead to try to save his employer money while exposing its insureds to the likelihood of an explosive verdict that would far exceed the $1 million coverage limits."

The trial court found that the insurer's conduct could be found by a jury to reflect a failure to exercise "ordinary diligence" in ascertaining the explosive facts of liability and “in failing to make a settlement for policy limits before the verdict was returned."

In regard to the defendants' contention that they would be "destroyed financially," if the award were not further remitted to an amount equivalent to totaling less than 10 percent of their combined net worth, the court noted that "further, given the possibility that the defendants may, by means of their potential bad faith and/or negligent failure to settle claim – discussed below, avoid any impact of the remitted award, we cannot agree that the remitted amount is disproportionate." (p.18). The court found that the amount was not financially devastating because the amount of the insurance and the potential of a bad faith award.

G. The trial court properly considered the Plaintiff’s costs in prosecuting a medical negligence case for wrongful death.

In regard to cost of the plaintiff in pursuing the litigation, Pettaway submitted evidence that his out-of-pocket expenses were $126,301.09. The trial court noted that "a fair and reasonable inference is that medical negligence wrongful death verdicts must be left relatively sizeable if competent and qualified attorneys are to remain motivated." Finally the trial court found that there were no criminal and/or sanctions or civil actions for similar conduct as was the conduct of the defendants.

H. Defendants did not demonstrate sufficiently that they would be “destroyed financially” as a result of the award.

In regard to the defendants' contention that they would be "destroyed financially," if the award were not further remitted to an amount equivalent to totaling less than 10 percent of their combined net worth, the court noted that "further, given the possibility that the defendants may, by means of their potential bad faith and/or negligent failure to settle claim – discussed below, avoid any impact of the remitted award, we cannot agree that the remitted amount is disproportionate." (Page 18). The court found that the amount was not financially devastating because the amount of the insurance and the individual net worth combined total of $1,435,555.00. The court also noted that Coastal was a profitable business that from 2006 to 2009 generated annual billings in excess of $8 million and netted annual revenues in excess of $5 million. The court found that "given the defendants' income and the strength of their bad faith

claim, as evaluated by the trial court, there is no evidence demonstrating that the current award will financially devastate the defendants." (p. 19).

I. No impermissible conduct of Plaintiff's Counsel supported a new trial.

The Court further rejected the defendants' contention that "the descriptive labels allegedly implied to Hall as 'a wife, mother, daughter, family member, and breadwinner' did not rise to the level of impermissible comment which the court considered and found in *Lance v. Ramanauskas*, 731 So.2d 1204 (Ala. 1999). The court found that "we do not conclude that the labels Pettaway's counsel used to describe Hall were a plea for compensatory damages, were a plea for compensation based on characteristics unique to Hall, or were otherwise so inflammatory that they prejudiced the outcome of the case involving, as the trial court noted, such 'explosive facts.'" (p. 20)

J. The Trial Court properly considered the insurance company's claim file in assessing the amount of the punitive damage award.

As to the defendants' final challenge to the trial court's remittitur based on the court's consideration of the claim file, the court noted that in *Mutual Assurance v. Madden*, 627 So.2d 865 (Ala. 1993), a majority of the court concluded that "it is within the trial court's discretion to ascribe a reasonable present value to [a defendants' bad faith or negligent failure to settle claim], and to consider such an asset on the remittitur issue." 627 So.2d at 866. In regard to the review of the claim file, defendants contended that it was attorney-client privilege pursuant to Rule 502 of the Alabama Rules of Evidence and that it contained attorney work product. The court noted that the trial court granted Pettaway's motion to compel *in camera* production but specifically ordered that any specific attorney-client communications could be either redacted or removed before the trial court's review of the file.

The specific issue of the production of the claim file was addressed in a petition for writ of mandamus which this Court denied in an unpublished Order entered on September 21, 2010. The Court found that it appeared that the defendants and their insurer apparently opted neither to withhold nor to redact any of the information in the claim file and could not then demonstrate how they were actually prejudiced by the trial court's *in camera* review of the claim file.

The court rejected defendants' argument that the trial court assigned a dollar value "hypothetical or otherwise to the defendants' potential bad faith claim, despite *Madden's* express authorization for it to do so." *Mutual Assurance, Inc. v. Madden* 627 So.2d 865, 866 (Ala. 1993).

The decision of the trial court was affirmed. Chief Justice Malone and Justices Woodall, Stewart, Bolin, Parker, Maine and Wise concurred in Shaw's opinion.

K. Justice Murdock dissented on the basis of the inappropriateness of the consideration of a hypothetical third-party recovery in a bad faith action in setting the proper amount of a punitive damages award."

Murdock contended that it was impermissible for the trial court to consider a potential bad faith and/or negligent failure to settle claim against the defendants' liability insurance carrier in assessing whether the punitive damage award was beyond the defendants' ability to pay. Murdock contended that the passage in *Madden* relied upon by the court was dictum. Murdock contended that the decision in *Madden* related to the appellants in *Madden*, "the doctor in a medical malpractice action and his liability insurance carrier, challenged the trial court's authority to order the insurance carrier to 'show cause' as to why the court should not consider, in determining the financial impact of the punitive damages award, a potential bad faith claim the doctor might have had against his liability insurance carrier. This Court concluded that the trial court did not have the authority to order the liability insurance carrier, a non-party to the malpractice action, 'to assume a burden of proof on the remittitur question.'" 627 So.2d at 866. Murdock went on to say that the *Madden* court went further and addressed whether in a remittitur proceeding, it was proper for a trial court to consider a physician's potential for recovering from his liability insurer the amount of the judgment against him that exceeds the amount of the insurance coverage. Murdock contended that the conclusion relied upon was dictum and therefore not binding in the present case. Murdock further noted that the *Madden* Court's statement that a trial court could consider a potential claim as an asset was criticized by both Justice Houston and Justice Maddox. Murdock pointed out that there was simply no way to know how much worth if any could be placed on a potential bad faith claim. Stating that "as any plaintiff's lawyer can attest, the road from the accrual of a potential cause of action to the entry of a judgment and, eventually, collection of that judgment, can be a long one full of pitfalls and potential 'exits.'" (p. 25).

Murdock pointed out that aside from the speculative nature of such a claim, the punitive damage award was due as soon as the judgment became final. If that judgment is not paid, the plaintiff can immediately execute upon the defendants' assets. To the contrary, any recovery in a potential bad faith claim would be years after the judgment is enforceable which clearly would financially destroy the defendants.

Murdock also pointed out that no bad faith claim would exist until the judgment was entered and a bad faith claim or negligent bad faith failure to pay claim does not accrue unless and until a final judgment is awarded in excess of the policy limits. Murdock cited to the case of *Wransky v. Dalfo*, 801 So.2d 239, 242 (Fla. Dist. Ct. App. 2001) in which that court found that because the potential claim "was not in existence before the jury entered its verdict, it could not be considered as part of [the defendants'] net worth in determining the amount of the award. Otherwise, the size of the punitive award could be unlimited. . ." Murdock concluded that for all of the foregoing reasons trial courts should not be asked to divine the likelihood of the tortfeasor

obtaining a judgment against a third party and the chances of actually collecting on that judgment.

MEDICAL MALPRACTICE -

THE NURSE DEFENDANTS DID NOT DEMONSTRATE THAT THE PLAINTIFFS DID NOT KNOW THEIR TRUE IDENTITY NOR DID THEY DEMONSTRATE THAT PLAINTIFF FAILED TO EXERCISE DUE DILIGENCE IN AMENDING THE COMPLAINT

MANDAMUS -

TRIAL COURT PROPERLY DENIED A MOTION FOR SUMMARY JUDGMENT BASED ON A STATUTE OF LIMITATIONS DEFENSE DUE TO THE DUE DILIGENCE EXERCISED BY PLAINTIFFS

LIMITATION OF ACTIONS -

AMENDMENT SUBSTITUTING THE NAMES OF THE NURSES FOR FICTITIOUS PARTIES RELATED BACK TO THE DATE OF FILING BASED ON THE DUE DILIGENCE EXERCISED BY PLAINTIFFS

Ex parte Alanna Nail, 2012 WL 3538212 (Ala. (August 17, 2012)

SUMMARY:

The defendant nurses petition for a writ mandamus directing the trial court to vacate its order denying their summary judgment motion raising a statute of limitations defense in a medical malpractice action.

HOLDING:

Justice Woodall held that the plaintiffs used due diligence in attempting to find the true identities of the fictitiously named nurses and that the amended complaint substituting the true names related back to the original complaint filing.

DISCUSSION:

A. The date of injury was in May of 2005 and the fact that the Dulins obtained a chart on which the nurses' names were illegible in June of 2005 did not preclude the amendment adding the correct names of the nurses from relating back to the date that the original complaint was filed in May of 2007.

George Dulin ("Dulin") was admitted to the hospital in **May 2005** for treatment of crush injuries to his chest. Subsequently, Dulin's tracheostomy allegedly became dislodged during a bath administered by the nursing staff which resulted in the loss of oxygen for an undetermined period. As a result, Dulin suffered brain damage.

In **June of 2005**, Dulin's wife obtained the hospital records which purported to identify eight members of a "code team." Four of the members were designated by an initial followed by a last name which was in turn followed by the designation RN. The other four members were generally listed only by first name which was followed by "RT" (respiratory therapist). The names on the flow sheet were not clear. The medical records also included nurses' notes (the chart) and each entry on the chart was followed by a signature which possibly began with the letter "A."

B. The Dulins demonstrated their due diligence because in discovery served with the May 2007 complaint, the Dulins sought the true names of the nurses at issue. After the responses were received in September of 2007, the Dulins amended their complaint in October 2007.

The medical malpractice action was filed on May 2, 2007. The nurses were described as fictitious parties with a description of them as well. The client complaint was accompanied with a set of interrogatories that requested among other things "the names of all individuals who were assisting or attending to [Mr. Dulin] at the time [his] tracheostomy tube became dislodged."

In responses in September of 2007, the Alabama Regional Medical Center ("Center") identified only three individuals, Alanna Nail, Paul Watson, Jennie Farragher. On October 26, 2007 the Dulins amended their Complaint to Substitute pursuant to Rule 9(h), Alabama Rules of Civil Procedure, Nail, Watson, and Farragher for the fictitiously named Defendants 6, 7, 8, 9, 10, and 11. The amended complaint averred that Nail, Watson, and Farragher were the individuals who had negligently or wantonly undertaken "to provide medical services and/or care and/or assistance to plaintiff George Dulin on the occasion made the basis of [d] law suit."

C. In support of their contention that the Dulins did not exercise due diligence, the Nurses relied on

(1) the receipt of the illegible records shortly after the injury,

(2) Ms. Dulin's recollection that she met a nurse named "Alanna" in her husband's room on the date of the injury and

(3) the nurse in charge of the intensive care unit was an acquaintance of the Dulins and they failed to seek the correct names from her.

Nail, Watson, and Farragher moved for a summary judgment on the ground that the amended complaint was filed more than two years after the alleged incident and that it did not relate back because the Dulins failed to exercise "due diligence" in ascertaining the nurses' identities. As a result, they claimed that the claims against them were barred by the two-year statute of limitations under Section 6-5-482, Alabama Code (1975).

In support of the motion, the nurses presented the testimony of Vivian Dulin and excerpts from hospital records. Mrs. Dulin received a telephone call from the Center on the morning of the incident. When she arrived at the hospital room, she found the nurse named "Alanna" working in the room. Susan Green was the nurse in charge of the intensive care unit at the Center. Mrs. Dulin testified that she and Green have at times encountered one another in the neighborhood. In regard to the motion, the Dulins primarily contended that the documents relating to the treatment and issue were illegible.

D. The Dulins satisfied the requirements of Rule 9(a) because they demonstrated that they were ignorant of the true identity of the fictitiously named nurses at the time that the complaint was filed and that they exercised due diligence in finding the true names.

For Rule 9(a) to apply such that the claims will relate back the plaintiff must establish:

1. That the plaintiff was ignorant of the identity of the fictitiously named party at the time that the complaint was filed and;

2. That the plaintiff used due diligence to discover the true identity before filing the original complaint.

Rule 9(a) tolls the applicable statute of limitations when the plaintiff has diligently pursued the identity of but could not identify certain defendants and Rule 15(c) allows the claim against the substituted defendant to relate back to the date of the original complaint. See *Weber v. Freeman*, 3 So. 3d 825, 831-32 (Ala. 2008).

The due diligence standard is "whether the plaintiff knew, or should have known or was on notice that the submitted substituted defendants were in fact the parties described fictitiously." *Davis v. Mims*, 510 So. 2d 227, 229 (Ala. 1987). Due diligence is determined by the circumstances of each case. *Brown and Flowers v. Central of Georgia Railway,* 197 Ala. 71, 75, 72 So. 366, 367(1916).

E. A Writ of Mandamus will issue only if the Defendants demonstrate that the Plaintiffs failed to act with due diligence.

The court noted that although a petition for writ of mandamus is the proper vehicle by which to seek review of the trial court's denial of the motion for summary judgment on the statute of limitations ground in the context of fictitious party practice, the writ will issue "only if undisputed evidence shows that the plaintiffs had failed to act with due diligence in identifying [the fictitiously named defendants] as the parties intended to be sued." *Ex parte Stover*, 663 So. 2d 948, 952 (Ala. 1995).

F*. The Defendants contended that the Plaintiffs could not wait to receive discovery responses and had to instead seek the names of the proper parties by other methods as well relying on *Ex Parte Mobile Infirmary Association, Ex Parte Ismail, and Ex Parte Klemawesch.

The Court noted that Farragher was apparently spelled without the "h." "Watson" appeared as "Watkins" and the name "Nail" could not be reasonably determined from the flow sheet. The nurses contended that the Dulins were dilatory as a matter of law in relying on formal discovery to gain the identities of the attending nurses. The Court disagreed.

1. In *Mobile Infirmary*, the name of the hospital was in records obtained shortly after the injury, interrogatories served with the complaint did not seek the correct identity of the Defendants, supplemental interrogatories seeking the name were filed after the statute ran, and there is no comparison with discovering the names of nurses versus the discovery of a very visible hospital.

The nurses relied specifically on *Ex Parte Mobile Infirmary Association*, 74 So. 3d 424 (Ala. 2011). In the Mobile Infirmary case at issue was the proper legal name of the entity doing business as Mobile Infirmary Medical Center. Plaintiff Shaw was admitted to the Mobile Infirmary Medical Center in January 2008 and she was transferred for treatment of pressure sores to a facility owned by Infirmary Health Hospital, Inc., d/b/a Infirmary Long Term Acute Care Hospital and then was transferred to a facility operated by Infirmary Health Hospital, Inc., d/b/a Infirmary West where she died in March 2008.

Although the words "Mobile Infirmary Medical Center" were found throughout the hospital records obtained on April 7, 2008, Shaw as administrator in his December 2009 complaint sued Infirmary Health Systems, Inc., doing business as Mobile Infirmary West and as Infirmary West Long Term Acute Care Center. Shaw alleged fictitious parties; however Mobile Infirmary Medical Center was never mentioned by name and the "hospital" was referred to as "the Mobile Infirmary Emergency Room."

With the complaint were interrogatories however none of the questions sought information regarding the "correct legal name" of the Mobile Infirmary Medical Center. After the statutory limitations period expired, Shaw supplemented the interrogatories with a request for information regarding the proper legal entity for the hospital known as the Mobile Infirmary Medical Center. Shaw then amended the complaint on April 2, 2010 over two years after the date of the death on March 23, 2008.

The court distinguished *Ex Parte Mobile Infirmary* from the present case because in that case the plaintiff neither informally nor formally inquired about the legal name of the entity until after the limitations period had expired. In contrast, the Court noted that the nurses' identities were unknown at the time the complaint was filed and that there was little comparison between

the notoriety and visibility of a large hospital and three members of a nursing staff. Further, the Dulins propounded interrogatories before the expiration of the limitations period.

2. In *Ismail*, the Plaintiff had medical records before the complaint was filed in which Ismail was identified as one of the two treating physicians and Ismail was not substituted as a defendant until more than two years after the statute ran.

The nurses relied on *Ex Parte Ismail*, 78 So. 3d 399 (Ala. 2011) which the court also distinguished. In *Ismail* there were medical records in the possession of the plaintiffs before the complaint was filed showing that Dr. Ismail was one of the two treating physicians. Despite that, Ismail was not substituted for a fictitious party until more than two years after the expiration of the limitations period.

3. In Kemawesch, the Plaintiff was on notice of an unidentified physician and filed no discovery until 27 months after the complaint was filed and filed the substitution 40 months after the expiration of the limitations period.

In regard to *Ex Parte Klemawesch*, 549 So. 2d 62, 63 (Ala. 1989), the Court also distinguished the facts from the facts at issue in Dulin. In *Klemawesch,* the plaintiff was on notice of an unidentified physician's signature below a progress note on medical records in her possession since before she filed the complaint. Despite that, she never filed a single interrogatory and indeed waited 27 months after the complaint was filed to initiate any discovery at all. The substitution was filed some 40 months after the expiration of the limitations period and it was disallowed.

G. The Dulins were not required to do detective work to discover the names.

The nurses contended that the Dulins should have pursued some avenue of inquiry aside from formal discovery, e.g., talking with Susan Green with whom Mrs. Dulin allegedly had a "friendly relationship." The court disagreed finding that short of "detective work" the nurses' contentions were unrealistic.

H. Conclusion

The Court denied the petition finding:

(1) that the Dulins promptly acquired the medical records, (2) that the names of the nurses in the room were illegible in the medical records and

(3)that the Dulins promptly issued discovery.

Therefore, the Court could not say as a matter of law that the Dulins failed to exercise due diligence. Chief Justice Malone and Justices Bolin and Main concurred. Justice Murdock concurred in the result.

STATE - IMMUNITY

STATE AGENCIES ARE IMMUNE FROM SUIT UNDER ARTICLE I, SECTION 14 OF THE ALABAMA CONSTITUTION (1901).

STATE OFFICIALS ARE NOT IMMUNE FROM SUIT IN SPECIFIC INSTANCES BUT ARE IMMUNE FROM SUIT AS TO A REQUEST FOR MONEY DAMAGES.

MANDAMUS

THE STATE OFFICIAL WAS LIABLE FOR HIS FAILURE TO COMPLY WITH THE PROVISIONS OF THE EMPLOYEE HANDBOOK; THEREFORE, THE TRIAL COURT PROPERLY GRANTED MANDAMUS AND DECLARATORY RELIEF.

Harris v. Owens, 2012 WL 4238274 (Ala.) (September 21, 2012).

SUMMARY:

A former state university employee brought an action against the university president and the Board of Trustees seeking declaratory and injunctive relief and a Writ of Mandamus alleging that her employment had been wrongfully terminated. The trial court ordered the defendants to reinstate the employee with full back pay and benefits. Defendants appealed.

HOLDINGS:

Justice Wise held that:

(1) The trial court lacked subject matter jurisdiction to order the defendants to provide the employee with back pay and benefits; but

(2) The defendants failed to support their argument on appeal that their failure to comply with any employee handbook procedures had been harmless.

DISCUSSION:

Douglas received a notice of termination. Subsequently, she requested a hearing. The hearing officer recommended that Owens be suspended for thirty (30) days without pay. Subsequently, the Vice President of Human Resources ("Douglas"), notified Owens that Harris (the President of ASU), had rejected the hearing officer's findings and that the termination of Owens was upheld.

Subsequently, Owens filed a Petition for Writ of Mandamus and Petition for Declaratory and Injunctive Relief. Harris was named as a Respondent in his official capacity and the individual Board members were also named as Respondents. Harris contended that the

Respondents failed to follow the rules of the applicable handbook which required certain due process procedures prior to termination.

The trial court entered an Order finding that the Respondents did not comply with the handbook and granted the request for mandamus and declaratory relief and Ordered that Owens be reinstated with full back pay and benefits.

A. The Court Agreed with the Respondents that Owens was Not Entitled to Back Pay and Benefits Because the Respondents Were Immune From Liability For Monetary Damages Pursuant to Article I Section 14, Alabama Constitution 1901.

B. The Following Actions are not Actions Against the State and They Apply Only as to Actions by a State Official:

(1) Enjoin state officials from enforcing an unconstitutional law;

(2) Compelling the official to perform ministerial acts;

(3) To perform their legal duties;

(4) Seeking construction of a statute and its application;

(5) Valid inverse condemnation actions; and

(6) When the official acted fraudulently, in bad faith, beyond their authority or in a mistaken interpretation of law.

Wallace v. Board of Education of Montgomery County, 280 Ala. 635 at 639, 197 So.2d 428 (1967).

The Court noted that the six actions delineated were in essence not actions "against the state" for Section 14 purposes. Further, the exceptions apply only to actions against state officials, not actions against state agencies. As a result, the Court found that the defendant Boards of Trustees are corporate bodies and that the claims against them were due to be dismissed relying on *Alabama Agriculture and Mechanical University v. Jones*, 895 So.2d 867 (Ala. 2004) and *Alabama Department of Transportation v. Harbert International, Inc*., 990 So.2d 831 (Ala. 2008).

C. The Court Found That Although Injunctive and Declaratory Relief Could Be Maintained As to the Administrators, That Section 14 Still Immunizes Those Officials From Any Claim for Money Damages. *Harbert,* 990 So.2d at 839-41.

D. The Court Found That the Trial Court Properly Granted Owens' Petition for Writ of Mandamus and Declaratory Relief Based on the Failure of the Remaining Respondent to Comply with the ASU Handbook.

1. The Respondents Cited to No Case Law Supporting Their Argument That Deviation From the Handbook Was "Harmless Error."

The Court noted that the respondent cited to no specific authority in support of their argument that any deviation from the handbook was "harmless error" and that, to the contrary, Rule 28(a)(10) of the *Alabama Rules of Appellate Procedure* specifically requires that the Brief of the Appellant should set out "the contentions of the Appellant/Petitioner with respect to the issues presented, and the reasons therefore, with citations to the cases, statutes, other authorities and parts of the record relied on." *Butler v. Town of Argo*, 871 So.2d 1, 20 (Ala. 2003). The respondents cited only to law for the general proposition that "the doctrine that error, in order to furnish a ground for reversal, must be prejudicial is generally applied to review of the decision by an administrative board." That law did not satisfy the requirement of authority that supported their specific contention that the harmless error rule would apply.

2. The Court Vacated the Portion of the Trial Court's Order Awarding Back Pay and Benefits but Affirmed the Portion of the Trial Court's Order Granting Mandamus and Declaratory Relief.

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

STATE - IMMUNITY

THE COUNTY BOARD OF HEALTH WAS ENTITLED TO ELEVENTH AMENDMENT IMMUNITY AS AN ARM OF THE STATE.

PLAINTIFF FAILED TO NAME A STATE OFFICIAL AS A DEFENDANT IN THE LAWSUIT TO AVOID THE IMMUNITY AVAILABLE TO THE BOARD.

Ross v. Jefferson County Dept. of Health, 2012 WL 5519095 (11th Circuit) (November 15, 2012).

SUMMARY:

A former employee of the county's Health Department brought an action against the Health Department alleging discrimination under the Americans With Disabilities Act, Title VII, and § 1983. The trial court entered Summary Judgment in favor of the Health Department. The employee appealed.

HOLDINGS:

Upon *sua sponte* reconsideration, the Court of Appeals held that:

1. The Health Department was a state agency and entitled to Eleventh Amendment immunity against the ADA claim, and
2. The employee waived her Title VII race discrimination claim.

DISCUSSION:

The plaintiff alleged that she was disabled as a result of having fibromyalgia. She alleged further that the Health Department refused to provide her a reasonable accommodation when it denied her light duty and fired her.

The Health Department in its summary judgment moved alternatively stating that it had immunity under the Eleventh Amendment as the result of the disability. In regard to the disability discrimination claim, that the employee failed to request an accommodation for her fibromyalgia, that she had withdrawn her complaint of racial discrimination by admitting during her deposition that race was not related to her termination and that alternatively the department had proffered legitimate, non-discriminatory reasons for the employee's termination.

The case was before Circuit Judges Hull, Pryor and Fay. In *a per curiam* opinion, the Court noted that it *sua sponte* vacated and reconsidered its original opinion and substituted this opinion for the original opinion.

F. The Health Department Is a State Agency Immune From the Employee's Complaint of Disability Discrimination.

The Court noted that "in conducting our analysis [as to whether the agency is an 'arm of the state,'] this Court 'has stated the most important factor in how the entity has been treated by the State Courts." *Versiglio v. Board of Dental Examiners of Alabama*, 686 F.3d 1290, 1291 (11th Cir.2012). The Court noted that the Alabama Supreme Court had recently found that the Board of Dental Examiners is an "arm of the State" entitled to immunity.

The Court cited to Alabama cases in which the Alabama Supreme Court or the Court of Appeals held that:

1. County Boards of Health are state agencies;
2. An employee of the Morgan County Health Department is a state employee; and
3. The Madison County Board of Health is a state agency entitled to sovereign immunity.

The employee (Ross) argued that the Health Department was not immune from a complaint for monetary damages because the department served as an agent of the county, not the state, in its performance of personnel functions. The Court noted that the "function" at issue is the termination of employees and that state law establishes that the state controls that function.

See Pack v. Blankenship, 612 S.2d 399, 400 (Alabama 1992) in which the Alabama Supreme Court held that an employee of the Morgan County Health Department was a state employee. The Court noted that State Statutory Law provided that Health Departments were subject to the control of the State Board of Health, that the Health Officer by statute is a State Officer and that due to the size of Jefferson County, its employees were subject to the State's merit system.

The Court noted that the State controls the personnel decisions within the Health Department, including terminations, based on Alabama Statutory Law and that the source of funding for the Health Department did not "tip the balance" against immunity simply because State law required the county to supply the necessary funds.

Further, the Court noted that liability by the State Treasury is not determinative of whether a governmental entity should enjoy Eleventh Amendment immunity.

G. In regard to the employee's claim for injunctive relief, the Court found that because the employee failed to file a complaint against a State Officer, she could not maintain an action for injunctive relief.

H. The District Court correctly granted summary judgment as to the claim of racial discrimination.

The Court noted that the Plaintiff had the burden of proof of establishing that the Defendant intentionally discriminated against her and that her deposition testimony to the contrary was that her termination was not the result of racial discrimination.

The decision of the District Court was affirmed.

STATE IMMUNITY-

THE BOARD OF EDUCATION WAS IMMUNE FROM SUIT UNDER SECTION 14, ALABAMA CONST. 1901. TO RECOVER UNDER THE CONSTRUCTION CONTRACT WITH THE BOARD, THE CONTRACTOR HAD TO SUE A STATE OFFICIAL AND COULD NOT SUE THE BOARD.

MANDAMUS –

BECAUSE THE BOARD WAS IMMUNE FROM SUIT, THE TRIAL COURT LACKED SUBJECT MATTER JURISDICTION AND THE WRIT ISSUED.

Ex Parte Phenix City Board of Education, 2012 WL 5077227 (Ala.) (October 19, 2012)

SUMMARY:

The trial court denied the City Board of Education's motion to dismiss or for summary judgment in an underlying action based on state agent immunity. In the lawsuit a construction contractor asserted claims against the Board for breach of contract and quantum meruit related to construction of a school facility. The Board petitioned for a mandamus relief.

HOLDING:

Justice Woodall held that the Board of Education was an agency of the state and thus was absolutely immune from the contractor's suit.

DISCUSSION.

In 2007, the contractor ("Lisle") contracted with the Board to construct a school facility. A dispute arose and the Board contended that Lisle refused to cure the alleged defects. In June 2010 (three years after the contract was executed), the Board notified Lisle that the contract was being terminated and made a demand on Lisle's surety. The Board argued that negotiations were continuing for the completion of the work and no agreement had been reached as to whether the Board owed Lisle money or whether Lisle owed the Board.

In *Ex Parte Montgomery County Board of Education*, 88 So.3d 837, 841 (Alabama 2012) the court stated that:

> Section 14, Ala. Const. 1901, provides 'that the State of Alabama shall never be made a defendant in any court of law or equity.' It is well settled in Alabama that 'local school boards are agencies of the state, not of the local government unit they serve, and they are entitled to the same absolutely immunity as other agencies of the state.'

Lisle contended that Section 14 immunity does not and should not apply to the express contractual obligations voluntarily undertaken by the Board. The court noted that Alabama case law supports no such distinction.

The petition for writ of mandamus was granted and the writ issued. Chief Justice Malone and Justices Murdock and Main concurred.

Justice Bolin concurred specially. Bolin noted that:

> To defeat the prohibition of § 14, the state official, and not the state agency…must be the named defendant and the facts of the litigation must fit into one of the recognized 'exceptions.' If those requirements are not met, the trial court has no subject matter jurisdiction. Because it does not have subject matter jurisdiction, the trial court cannot allow amendments to add the state official as a named defendant. *Ex Parte Alabama Department of Transportation*, 6 So.3d 1126 (Ala.2008).

TORTS – DEFAMATION - PRIVILEGED COMMUNICATIONS UNDER 13A-11-161

FAIR AND IMPARTIAL REPORTS OF ARRESTS OR CRIMINAL PROCEEDINGS ARE PRIVILEGED AND THERE IS NO PRIVATE RIGHT OF ACTION FOR THE FAILURE TO REPORT THE SUBSEQUENT DISMISSAL OF ALL CHARGES.

WAFF Demonstrated That the Report was not False at the Time of the Publication and that, Therefore, the Report was Privileged Under Alabama Code Section 13A-11-161 Which Protects as Privileged Any "Fair and Impartial Report" of Criminal Proceedings.

WAFF's Failure to Report the Subsequent Dismissal of All Charges Did Not Establish "Actual Malice."

As a Matter of First Impression, the Court for the First Time Construed This Language in Section 13A-11-161, "The Publisher Has Refused on the Written Request of the Plaintiff to Publish the Subsequent Determination of Such Suit, Action, or Investigation" and Found That the Station Did Not Lose Any Privilege It Had By Failing to Report The Dismissal Despite the Fact He Had Sent a Written Request that WAFF Do So.

Section 13A-11-161 Did Not Create a Private Cause of Action for "Failure to Retract."

Jackson Failed to Produce Any Case Which Supported His Claim That a Private Cause of Action Was Created As a Result of WAFF's Failure to Retract Its Statements and That, Therefore, the Court Could Affirm On the Basis of Rule 28(10) As Well.

Jackson v. WAFF, LLC, et al., 2012 WL 5278378 (Ala.Civ.App.) (Oct. 26, 2012).

SUMMARY:

Jackson brought an action against television stations alleging that the stations had defamed him by broadcasting reports that he had been involved in a crime, by reporting that he was believed to be armed and dangerous, and by failing to report on the subsequent dismissal of the charges against him. The trial court dismissed the Complaint and the plaintiff appealed.

HOLDINGS:

Judge Thomas held that:

(1) statements and broadcasts were privileged under statute governing privilege for a publication of a fair and impartial reports of arrests or filing of documents in criminal proceedings; and

(2) statute governing privilege do not provide a private cause of action for failure to report dismissal of charges.

DISCUSSION:

The Court had previously issued a No Opinion Order of Averments, but withdrew that Order and substituted this Opinion instead. The television stations stated on the air that local police authorities had named Jackson as a suspect in a shooting and requested the public's assistance in locating him and warning the public that the authorities considered Jackson to be armed and dangerous. The television segment was rebroadcast on several occasions and the television stations also broadcasted a segment reporting that Jackson had been arrested.

Subsequently, the charges against Jackson were dismissed because he was not in the area at the time at issue; however, the television stations failed to broadcast a report on the dismissal of the charges despite Jackson's written request that they do so.

A. WAFF Demonstrated That the Report was not False at the Time of the Publication and that, Therefore, the Report was Privileged Under Alabama Code Section 13A-11-161 Which Protects as Privileged Any "Fair and Impartial Report" of Criminal Proceedings.

The television stations filed a Rule 12(b)(6) Motion to Dismiss arguing that Jackson had not alleged that they had published any false statements about him. Further, the stations argued that their broadcasts were privileged under Alabama Code 1975 §13A-11-161 which protects as privileged any "fair and impartial report" of among other things "the issuance of any warrant [or] the arrest of any person for any cause…"

B. WAFF's Failure to Report the Subsequent Dismissal of All Charges Did Not Establish "Actual Malice."

Jackson amended his Complaint to assert that although the initial reporting may be privileged under §13A-11-161, the stations were no longer entitled to the privilege because either they failed to report on the dismissal proving actual malice or the fact that they failed to report on the dismissal removed the privilege. Jackson pointed out that with his letter he had submitted police records demonstrating that all charges against him had been dismissed.

C. As a Matter of First Impression, the Court for the First Time Construed This Language in Section 13A-11-161, "The Publisher Has Refused on the Written Request of the Plaintiff to Publish the Subsequent Determination of Such Suit, Action, or Investigation" and Found That the Station Did Not Lose Any Privilege It Had By Failing to Report The Dismissal Despite the Fact Jackson Sent a Written Request that WAFF Do So.

The Court agreed with Jackson that no Alabama case gas ever construed the last portion of §13A-11-161 which "at first read, does appear to support Jackson's argument to appoint." (Page 3). The statute provides as follows:

> The publication of a fair and impartial report of the return of any indictment, the issuance of any warrant, the arrest of any person for any cause or the filing of any Affidavit, pleading or other document in any criminal or civil proceeding in any court or of a fair and impartial report of the contents thereof, or any charge of crime made to any judicial officer or body, or of any report of any grand jury, or of any investigation made by any legislative committee, or other public body or officer, shall be privileged, unless it be proved that the same was published with actual malice, or that the defendant has refused or neglected to publish in the same manner in which the publication complained of appeared a reasonable explanation or contradiction thereof by the plaintiff or that **the publisher has refused on the written request of the plaintiff to publish the subsequent determination of such suit, action or investigation**."

Judge Thomas noted that although the stations had refused upon the written request of the plaintiff to publish the subsequent determination "we agree with the television stations that we need not delve into the parameters of the Fair Report Statute to decide this case."

D. Section 13A-11-161 Did Not Create a Private Cause of Action for "Failure to Retract."

The Court noted that Jackson conceded that what was broadcast was accurate or truthful at the time. As to Jackson's second contention that §13A-11-161 created a private cause of action for "failure to retract" or "failure to report the subsequent determination of investigation," the Court noted that no case relied on by Jackson involved the creation of a private cause of action in an Alabama statutory scheme.

E. Jackson Failed to Produce Any Case Which Supported His Claim That a Private Cause of Action Was Created As a Result of WAFF's Failure to Retract Its Statements and, Therefore, the Court Could Affirm On the Basis of Rule 28(10) As Well.

The Court stated that "Because of that failure, Jackson's argument on this issue fails to comply with Rule 28(A)(10), *Alabama Rules of Civil Procedure*. We could affirm on this ground alone." In so holding, Judge Thomas relied on the case of *White Sands Group v. PRS II*, 998 So.2d 1042, 1058 (Ala. 2008).

Thomas agreed with the television stations that "One claiming a private right of action within a statutory scheme must show clear evidence of a legislative intent to impose civil liability for a violation of the statute." *American Auto Insurance Company v. McDonald*, 812 So.2d 309, 311 (Ala. 2001). The Court found that Jackson had presented no evidence of a legislative intent to impose civil liability on media outlets to fail the report on the subsequent determination of a police investigation. The trial court's Order was affirmed.

Judges Thompson, Pittman, Bryan and Moore concurred.

TORTS – NEGLIGENCE **THE DEFENDANT PRESENTED *PRIMA FACIE* EVIDENCE THAT IT HAD NO KNOWLEDGE OF THE ALLEGED DEFECT. THE BURDEN THEN SHIFTED TO PLAINTIFF TO PRESENT SUBSTANTIAL EVIDENCE CREATING AN ISSUE AS TO SUCH NOTICE, AND PLAINTIFF DID NOT MEET THAT BURDEN.**

APPEAL **PLAINTIFF COULD NOT ARGUE ON APPEAL THE DOCTRICE OF RES IPSA LOQUITUR WHICH WAS NOT ARGUED IN THE TRIAL COURT.**

Black Warrior Electric Membership Corporation v. McCarter, 2012 WL 5077179 (Ala.) (Oct. 19, 2012).

SUMMARY:

A highway worker brought an action against an electric utility seeking damages for injuries he sustained when he came in contact with an allegedly low hanging electric utility line while paving a highway.

After a jury trial, the trial court denied the company's Motion for Judgment as a matter of law and entered Judgment on the jury verdict in favor of the worker. The company appealed.

HOLDINGS:

Justice Woodall held that:

(1) the evidence was insufficient to show that the utility had noticed that the line was hanging low; and

(2) the worker failed to argue in trial, and thus, was precluded from arguing on appeal that the principle of *res ipsa loquitur* applied to relieve him of the burden of proving notice.

DISCUSSION:

The electrical wires at issue were a "service tap" across the highway to provide electrical service for a residence on the other side of the highway being paved. There were two lines: The lower line was the "neutral" line; and above that line was the "primary" line that carried 7,600 volts. The height requirements were specified by the National Electric Safety Code ("NESC"),

which required a height of 15 feet 6 inches for the neutral line and 18 feet 6 inches for the primary line. The equipment being operated by the plaintiff measured 14 feet 8 inches at its highest point.

As he passed under the power lines, McCarter attempted to raise one of the lines using an 8 foot metal pole. During that process, he was electrocuted and received serious injuries to his arm and hand.

A. The Court Found That Even Assuming That McCarter Established That The Lines Were Too Low to Meet NESC Standards At the Time of the Accident, McCarter Failed to Establish that Black Warrior Had Either Actual or Constructive Notice of Any Problems with the Height of the Lines.

McCarter contended in opening statement and throughout the trial that the placements of the line did not conform with the requirements of the NESC.

In support of its JML Motion, as well as on Appeal, Black Warrior contended that there was neither any evidence and certainly not substantial evidence that Black Warrior had actual or constructive notice that the height of the power line was defectively low so as to give Black Warrior reason to anticipate that a person such as McCarter might come in contact with the power lines. The Court noted that whether or not the lines were "defectively low" was disputed at trial.

Black Warrior offered testimony that the lowest line was 16 feet 2 inches above the roadway.

McCarter offered testimony that the neutral line would not have cleared the equipment he was operating at 14 feet 8 inches.

Black Warrior argued that even assuming that McCarter's witnesses were correct, McCarter failed to present substantial evidence that Black Warrior had constructive notice of the defect so as to fix liability on Black Warrior for McCarter's injuries.

B. The Jury Could Not Conclude That When the Black Warrior Representative Traveled Under the Lines at 6:30 A.M. on the Day of the Accident That Black Warrior Had Constructive Knowledge That the Lines Were the Proper Height. The Court Agreed With Black Warrior That the Jury Could Have Only Reached That Conclusion by Improperly Stacking Inferences.

A representative of Black Warrior testified that he had traveled underneath the lines at issue at 6:30 a.m. on the day of the accident and that the lines were at that point at the proper height. McCarter relied on this testimony to support his claim that Black Warrior had constructive knowledge that the lines were not at the proper height because the jury was free to ignore Bryant's testimony to the extent it tended to establish that the lines complied with the NESC, and could nevertheless conclude that Bryant saw or that he should have seen that the lines were not in compliance with NESC Standards.

Black Warrior contended that such a conclusion could only be reached by improperly stacking inferences and the Court agreed. The Court noted that McCarter's inference that Bryant failed to notice the defect depended on whether the lines were, in fact, below NESC Standards at 6:30 a.m.

C. Black Warrior Presented Evidence That the Pole Had Recently Been Forced Over Resulting in a Lowering of the Lines Which Was Confirmed by Two Black Warrior Witnesses, Including the Witness Who Traveled Through the Area at 6:30 A.M.

Black Warrior presented testimony of its safety and fleet maintenance director, Tutt, who investigated the scene immediately after the accident. Tutt testified that he discovered a gap of 5 inches to 8 inches at the base of the pole bearing the lines indicating that the pole had recently been forced over in the direction of the highway which caused the pole to lean toward the highway by 12 inches or more resulting in a lowering of the lines over the roadway. In his opinion, the pole had been "freshly moved" likely by a "large piece of equipment" getting into the lines. Bryant, the employee, who came through the area at 6:30 a.m. testified that he went to the scene after the accident and found the lines to be noticeably lower than they had been at 6:30 a.m.

D. As to foreseeability and notice, the Court Distinguished *Central Alabama* in Which it Was Established That at the Time of the Installation of the Line, the Cooperative Knew That it Could Not Install its Line Where "Dumping Was Obviously Taking Place" and Ultimately, Installed the Lines Well Below the Height to Which Truck Beds Were Raised Despite Knowledge That it Would Occur on Many Locations on the Premises. Unlike the Present

Case, in *Central Alabama*, a Jury Question was Presented as to Foreseeability and Notice.

The Court distinguished the cases relied on by McCarter. In *Central Alabama Electric Cooperative v. Tapley*, 546 So.2d 371 (Ala. 1989), a truck driver was killed when he raised the "trailer dump" of his tractor trailer rig into an un-insulated electric distribution line owned by the Central Alabama Electric Cooperative. The line had been installed less than a week prior to the accident, and at the time of installation, the cooperative knew that it could not install its line across the areas of the plant where "dumping was obviously taking place" because of the height of unloading dump trucks. Therefore, the cooperative strung the line across the roadway well below the height to which truck beds were raised despite knowing that truck beds were raised in several locations on the premises. In that case, the Court held that a jury question was presented as to foreseeability and notice.

E. The Court Distinguished *Capps* because in *Capps* a Large Piece of Equipment Had Torn Down the Lines About 200 Yards from the Site of the Accident Only Two Months Prior to the Accident at Issue.

In *Alabama Power Company v. Capps*, 519 So.2d 1328 (Ala. 1988), a similar accident occurred and Alabama Power was found liable because it "undisputedly knew that the large items of equipment were present in the vicinity of the lines. These lines were installed specifically to serve this mining operation. Indeed, a large piece of equipment had torn down the lines about 200 yards from the site of this particular occurrence less than two (2) months earlier." 519 So.2d at 1329.

F. The Court Distinguished *Brooks* because in That Case, Alabama Power Had Raised Some of the Lines but Had Not Raised the Lines on Which the Plaintiff Was Insured.

In *Alabama Power Company v. Brooks*, 479 So.2d 1169 (Ala. 1985), Alabama Power had raised an adjacent span of lines to allow adequate clearance for large trucks, but the lines on which Brooks was injured had not been raised. The Court found that reasonable men could differ as to whether Alabama Power had sufficient notice so as to have anticipated that the incident could occur.

In *Alabama Power Company v. Cantrell*, 507 So.2d 1295 (Ala. 1986), a power line was within 9 feet of the roof of an apartment building. Applying the "Scintilla Rule," the Court held that there was a jury question as to Alabama Power's duty to insulate the line.

G. None of the Cases Cited by the Plaintiff Dealt With the Displacement of a Power Line by an Unknown Agency Independent of the Power Company Before the Accident in Question. Plaintiff did not meet his burden of presenting substantial evidence of notice to Black Warrior.

The Court distinguished all of the cases cited by the plaintiff stating that "none of these cases involved an issue, as does this one, of displacement of a power line by an unknown agency independent of the power company before the accident in question." (p.7). The Court noted that after Black Warrior presented *prima facie* evidence that it had no knowledge of the alleged defect, the burden then shifted to McCarter to present substantial evidence creating an issue as to such notice. The Court found that McCarter did not meet that burden.

H. On appeal, McCarter Could Not Invoke the Doctrine of *Res Ipsa Loquitur* By Argument that the Neutral Line That He Touched Had Become Charged With Electricity. McCarter at All Times at Trial Argued That the Lines Did Not Comply With the NESC and Never Argued at Trial the Doctrine of *Res Ipsa Loquitur*.

On Appeal McCarter proposed that it was the neutral line that he touched which for unknown reasons had become charged with electricity. He, therefore, asserted that he was not required to prove notice because the jury could properly have concluded that the facts of the case gave rise to a presumption of negligence.

For this proposition, McCarter relied on *George v. Alabama Power Company*, 13 So.3d 360 (Ala. 2008) in which the Court held that the Doctrine of *Res Ipsa Loquitur* was applicable in an electrocution accident involving the apparent energization of a neutral line through some agency unknown to the plaintiff. The Court distinguished *George* because in *George*, the plaintiff's theory of the case was that he touched a neutral line and was injured because the electrical system was not functioning properly for a reason or reasons upon which there had been no proof. To the contrary, McCarter's theory of the case, as well illustrated in his opening argument, was merely that he touched a primary line because the lines were lower than the NESC required. In *George*, it was undisputed that in a properly functioning electrical distribution system in which the neutral wire is properly grounded, the neutral wire cannot become energized, and thus, one who touches it will not be injured. McCarter did not argue or try the case based on that theory.

I. McCarter Failed to Object to the Jury Instructions Which Did Not Include a Jury Charge on the Theory of Res Ipsa Loquitur.

Finally, the jury was not charged on the Doctrine of *Res Ipsa Loquitur* and McCarter made no challenges to the jury instructions. Unchallenged jury instructions become the law of the case and the jury is bound to follow such instructions even if they are erroneous. *Clark v. Black*, 630 So.2d 1012, 1017 (Ala. 1993).

The case was reversed and remanded.

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

TORTS - PROXIMATE CAUSE

ALTHOUGH PROXIMATE CAUSATION IS ORDINARILY ONE FOR THE JURY, THAT IS THE CASE ONLY IF REASONABLE INFERENCES FROM EVIDENCE SUPPORTS THE PLAINTIFF'S THEORY WHICH WAS NOT THE CASE UNDER THE FACTS PRESENTED.

Wilbanks v. United Refractories, Inc., 2012 WL 5693002 (Ala.) (November 16, 2012).

SUMMARY:

A welder who was injured in an explosion of a welding machine brought an action against the supplier of the machine alleging that the supplier's negligence in inspection and repairing a valve cause the explosion. The trial court granted summary judgment to the supplier and the welder appealed.

HOLDING:

Justice Woodall held the welder failed to produce evidence of any causal relationship between his injuries and the alleged negligence of the supplier.

DISCUSSION:

The welding machine was manufactured and owned by Coal Products Limited ("CPL") and Drummond Company for whom Wilbanks was working pursuant to a license between CPL and United through which United supplied welding equipment to Drummond under which it agreed "to maintain the [welders] in good working order." The mixing chamber for the welder mixes oxygen and ceramic powder. The employee performing the welding operation handed the welder to Wilbanks stating that he was not getting sufficient ceramic powder. Wilbanks attempted to remove the powder hose from the mixing chamber and an explosion occurred causing him very serious injury.

Wilbanks sued United, the supplier of the welding equipment, claiming that United had negligently and/or wantonly failed to properly inspect and maintain the subject equipment. The trial court granted summary judgment finding there was no evidence of causation sufficient to withstand the summary judgment motion.

A. **Wilbanks did not establish his claim that the explosion occurred as a result of an oxygen leak at the valve.**

Wilbanks continued that the valve was leaking either because it was excessively worn or because debris had entered the valve; however, Wilbanks testified that he "couldn't even begin to speculate what caused the accident."

United testified that it had a duty to examine the welder and its components at the coke plant, at a minimum, at annual intervals and perhaps even quarterly under certain circumstances. Wilbanks produced some evidence that United had never visited the plant to examine the welder.

United established an intervening cause of the accident in that Wilbanks testified that the valve was routinely changed and replaced with a new oxygen valve by Drummond personnel and could have been replaced as often as weekly. The court found that the evidence offered by Wilbanks was nothing more than speculation, conjecture or a guess and fell short of the level of substantial evidence to overcome a properly supported summary judgment motion.

Justice Woodall affirmed the ruling of the trial court and Chief Justice Malone and Justices Bolin, Murdock and Main concurred.