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

# CIRCUIT AND DISTRICT JUDGES MID-WINTER CONFERENCE

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**ARBITRATION – POST ARBITRAL REVIEW –**

**IN A UNANIMOUS DECISION AUTHORED BY MURDOCK, THE COURT REASONED THAT THE ARBITRATOR EXCEEDED HIS POWERS UNDER SECTION 10 OF THE FEDERAL ARBITRATION ACT BY ADJUDICATING A STATUTE OF LIMITATIONS ISSUE WHICH HAS NOT BEEN RAISED BY THE DEVELOPER AND WHICH WAS IN FACT INCORRECT LEGALLY.**

***Gower v. Turquoise Properties Gulf, Inc., et al.*, 2013 Ala. LEXIS 184 (December 20, 2013).**

**SUMMARY:**

The Court noted that the developer expressly argued a bar of the claims based on a specific statute of limitations but never argued that claim to the arbitrator and effectively withdrew it.

**HOLDINGS:**

**(1) Because the issue of the applicability of a statute of limitations was not submitted to the arbitrator for a decision, the arbitrator exceeded his powers in applying a statute of limitations to the Gower's claim.**

**(2) Under 9 USC § 10(b), this action by the arbitrator constitutes a legitimate reason to vacate the arbitration award.**

**(3) Given the facts that Gower had no indication as argument unfolded before the arbitrator that a statute of limitations could be an issue, the Court deemed vacation of the award appropriate in the case.**

**(4) Gower's right to recovery must be reexamined absent consideration of any statute of limitations to his claim.**

The Court reversed the judgment entered on the arbitrator's award and remanded the case to the trial court for proceedings "consistent with this opinion."

**ARBITRATION – POST ARBITRAL REVIEW**

**TERMINIX CONTENDED THAT THE ARBITRATOR FAILED TO DISCLOSE THAT HIS LAW FIRM HAD SUED TERMINIX. THE COURT FOUND THAT THE EVIDENCE SUBMITTED BY TERMINIX TO THE TRIAL COURT CONCERNING AN UNDISCLOSED POTENTIAL CONFLICT CREATED A TRIABLE ISSUE SUFFICIENT TO REQUIRE THE TRIAL COURT TO HOLD A HEARING ON THE RULE 59 MOTION.**

*Terminix International Company et al. v. Walter F. Scott, III et al.*, 2013 Ala. LEXIS 135 (September 27, 2013).

**SUMMARY:**

An arbitrator entered a substantial award against Terminix. Terminix filed a motion to reconsider which was denied by the arbitrator. The trial court entered a judgment consistent with the arbitrator's award. Shortly thereafter Terminix moved the trial court pursuant Rule 59 of the Alabama Rules of Civil Procedure to vacate the judgment.

**HOLDINGS:**

**(1) An arbitration judgment entered by trial court in favor of homeowners arising from allegedly fraudulent actions by termite service company was properly appealed because the company filed a timely motion under Alabama Rules of Civil Procedure 59 to vacate the arbitration judgment and it then filed a timely notice of appeal under Rule 71(b) of the Alabama Rules of Civil Procedure.**

**(2) The trial court committed error that was not harmless under the Alabama Rules of Appellate Procedure Rule 45 in failing to hold a hearing on the company's motion under Rule 59(g) alleging possible bias by the arbitrator, because the company raised a threshold inference of bias;**

**(3) The trial court lacked jurisdiction to adjudicate the owner's claim under the Alabama Codes § 12-19-272(a) of the Alabama Litigation Accountability Act, because the trial court had already entered a final judgment and it failed to reserve jurisdiction to hear it.**

The judgment was reversed and remanded with instructions. The appeal from the sanctioned order was dismissed.

**DISCUSSION:**

The facts that are at issue are what occurred in the trial court and then subsequently the matter was appealed to the Alabama Supreme Court. On March 26, 2012, the trial court entered a judgment consistent with the arbitrator's decision. That final judgment was entered as the final

judgment of the trial court on April 26, 2012. The plaintiffs immediately sought writs of execution which the trial court issued on May 1 and May 23, 2012. On May 24, 2012, Terminix moved the trial court pursuant to Rule 59 of the Alabama Rules of Civil Procedure to vacate the judgment entered on the arbitration decision and award. Terminix raised as issues in the Rule 59 motion the same issues addressed in the motion for reconsideration presented to the arbitrator. Terminix also on May 24, 2012 moved to stay the execution of the judgment pending ruling on the post judgment motions.

On May 25, 2012, the trial court set a hearing for June 14, 2012 as to both the motion to stay execution of judgment and the motion to vacate the arbitration judgment filed by Terminix. Five days thereafter the Scotts served the writs of execution on Terminix and Terminix requested an emergency hearing on its pending motion to stay the execution.

During the May 31, 2012 hearing the Scotts attempted to file in open court a number of pleadings which included an opposition to the post judgment motion of Terminix. The trial court did not accept these pleadings in open court.

On June 1, 2012, the Scotts filed these pleadings in the trial court:

(1) a "motion to require filing and notice of appearance in Pro Hac Vice application by defendants' counsel in compliance in the rule for service requirements";

(2) "motion for relief pursuant to the Alabama Litigation Accountability Act …";

(3) "petition to appoint arbitrator to hear ALAA, malicious prosecution, and abuse of process claims";

(4) "opposition to defendants' motion to stay execution and posting of post-trial bond"; and

(5) "motion to strike defendants' corrective motion to stay execution and posting of post-trial bond."

**The court noted that it does not appear from the record that the Scotts ever filed their opposition to Terminix's post judgment motion to vacate the arbitration award.**

On June 5, 2012, the trial court entered separate orders that:

(1) granted Terminix's motion to vacate or quash the writs of execution entered in violation of the automatic 30 day stay pursuant to Rule 62(a), Alabama Rules of Civil Procedures;

(2) denied Terminix's post judgment motion to vacate the arbitration judgment;

(3) granted the motion to refer the Scotts' ALAA claim to arbitration while expressly reserving jurisdiction to depose of post arbitration pleadings; and

(4) granted the Scotts' motion to appoint Simon, the original arbitrator, as the arbitrator of their ALAA claim.

Terminix appealed.

At issue in regard to the appeal was whether the trial court committed harmless error in ruling on the Rule 59 motion without allowing Terminix a hearing on that motion. In support of its post judgment motion to vacate arbitration award, Terminix presented evidence that at the initial arbitration conference in November 2010, the arbitrator revealed that he had no potential conflict of interest other than Terminix provided service to his home. Terminix contended that it discovered on January 18, 2012, that the arbitrator's law firm had prosecuted a termite damage claim on behalf of a plaintiff against Terminix from 2003 to 2005. Terminix contended via affidavit from counsel that it would have not chosen the arbitrator had this conflict been revealed.

**A. The Arbitrator did not have jurisdiction to hear the claim of his alleged partiality; however, the trial court was required to conduct a hearing on the Rule 59 Motion because Terminix raised a "threshold inference of possible bias that should be considered by the trial court."**

The Scotts contended that since Terminix presented to the arbitrator the issue of his partiality that even though the arbitrator himself questioned his ability to decide that matter he did decide it at the request of Terminix which precluded Terminix from raising the issue in state court. The court disagreed finding that the arbitrator was correct and that he had no jurisdiction to hear the claim of his alleged partiality. The court found that the evidence submitted by Terminix regarding partiality raised "a threshold inference of possible bias" that should be considered by the trial court.

The arbitrator found in his arbitration decision in *Ward* that Terminix fraudulently induced the Scotts to enter into the termite service contract in 2001 and 2007 and that as a result of the fraudulent inducement by Terminix, neither the "contract nor the limitations of remedy and damages contained in these contracts were enforceable." The court noted that given the lack of the record of the arbitration proceedings that it was impossible to determine whether the arbitrator's finding of fraudulent inducement was supported by the evidence.

**The court agreed that the trial court erred in denying its post-judgment motion to vacate the arbitration award without conducting a hearing but that the trial court did not err in denying the post-judgment motion to vacate the arbitration award without first conducting a hearing as to the issue of whether the arbitrator had exceeded his authority under the termite service contract by not enforcing the damages provisions.**

As to Terminix's appeal from the trial court's order referring the Scotts' ALAA motion for sanctions to arbitration, the trial court noted that the ALAA does not create a new or separate cause of action that can be brought after a case is litigated and given a final adjudication on the merits. Therefore, the court found that the trial court did not have jurisdiction to rule upon an

ALAA claim after it entered a final judgment on the underlying claim unless it had specifically reserved jurisdiction to hear the ALAA claim.

In this instance, having not reserved jurisdiction over the ALAA claim, the court found that the trial court's order referring the ALAA claim to arbitration was void and would therefore not support an appeal.

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

**ARBITRATION**

**DESPITE THE FACT THAT THE ARBITRATION AGREEMENT REQUIRED THE TRIAL COURT TO CONDUCT A *DE NOVO* REVIEW OF THE ARBITRAL AWARD AND THE CASE WAS REMANDED TO THE CIRCUIT COURT BY THE ALABAMA SUPREME COURT FOR THAT PURPOSE, THE COURT HELD THAT THE CIRCUIT COURT'S ORDER ENTERING A JUDGMENT IN FAVOR OF HONEA WAS VOID AND WOULD NOT SUPPORT AN APPEAL BECAUSE THE ARBITRATION AWARD HAD NEVER BEEN ENTERED AS A JUDGMENT BY THE TRIAL COURT AS REQUIRED BY ALABAMA CODE §6-6-15.**

***Raymond James Financial Services, Inc., et al., v. Honea***
**2013 Ala. LEXIS 124 (September 20, 2013)**

**HOLDING:**

The trial court's judgment purporting to vacate an arbitration award and enter judgment in favor of Honea was void because the arbitration award had never been entered as a judgment by the trial court as required by Alabama Code §6-6-15.

**SUMMARY & DISCUSSION:**

Honea had multiple investment accounts with Raymond James. Honea sued Raymond James for breach of contract, breach of fiduciary duty, negligence, wantonness, and fraud. The trial court granted the Motion to compel arbitration of the claims.

An Arbitration panel ruled in favor of Raymond James. Honea then filed a Motion in the Circuit Court seeking to vacate the arbitration award. The trial court ultimately vacated the award and Raymond James appealed.

**1. First Appeal:**

On appeal, the Alabama Supreme Court reversed the trial court's judgment vacating the arbitration award and held that a provision in the Arbitration Agreement required the trial court to conduct a *de novo* review of the arbitration award. The Alabama Supreme Court remanded the case to the Circuit Court for it to conduct such a review. *Raymond James v. Honea,* 55 So.3d 1161, 1162-64 (Ala. 2010).

On remand, the Circuit Court conducted a *de novo* review and vacated the award for Raymond James and entered judgment for Honea for over $1.1 million.

**2. Second Appeal:**

The Court held *ex mero motu* that because the judgment was not entered by the Clerk in accordance with §6-6-15, the trial court never acquired jurisdiction and the Order entered by the Circuit Judge was void and no appeal would lie.

Justice Shaw authored the opinion.

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

**ARBITRATION - -**

**BECAUSE THE RESIDENT OF A NURSING HOME WAS MENTALLY INCOMPETENT, ONLY AN ATTORNEY IN FACT AS THE HOLDER OF A DURABLE POWER OF ATTORNEY COULD BIND THE INCOMPETENT PATIENT TO THE ARBITRATION PROVISION IN THE NURSING HOME CONTRACT.**

***SSC Montgomery Cedar Crest Operating Company, LLC v. Linda Bolding*, 2013 Alabama LEXIS 25 (March 22, 2013)**

**SUMMARY:**

The nursing home operator challenged the judgment of the Montgomery County Circuit Court denying its motion to compel arbitration of a medical malpractice claim asserted against it by the appellee attorney in fact and next friend of her father a resident in the nursing home.

**HOLDINGS:**

**(1) The judgment of the trial court was affirmed in that the daughter who signed the agreement signed it as a family member or next friend and not as the holder of a durable power of attorney granted by the father.**

Justice Stuart authored the opinion.

Chief Justice Moore, Justices Parker and Wise concurred.

Justice Murdock concurred in the result.

**CIVIL PROCEDURE - RULE 54(b) CERTIFICATION**

**THE COURT DISMISSED A RULE 54(b) APPEAL IN A REDEMPTION ACTION HOLDING THAT THE REMAINING CLAIMS WERE INTERTWINED WITH THE CLAIMS THAT WERE THE SUBJECT OF THE APPEAL.**

***Pavilion Development, LLC v. J.B.J. Partnership, et al.,***
**2013 Ala. LEXIS 147 (October 11, 2013).**

**SUMMARY & HOLDINGS:**

After a developer was granted the right to redeem certain foreclosed real property upon payment of certain "lawful charges" allegedly due to various parties under Ala. Code §6-5-252 and 6-5-253(a)(5), the developers appealed challenging the trial court's judgment assessing the "lawful charges." The developers contended that the trial court had exceeded its discretion in certifying the judgment as final under Rule 54(b) of the Alabama Rules of Civil Procedure because the judgment did not address all outstanding issues of the lawful charges and revived liens.

The Court agreed that the judgment at issue did not address all outstanding issues of the lawful charges and revived liens and dismissed the appeal.

**DISCUSSION:**

This is the third appeal in this case. In *Pavilion Development, LLC v. J.B.J. Partnership*, 979 So.2d 24 (Ala. 2007) ("*Pavilion I"*), the Court reversed a Summary Judgment entered by the trial court in favor of J.B.J. and against Pavilion holding that the trial court had erred when it concluded that Tracey lacked the authority to transfer Gallop's right of redemption to Pavilion in holding that Pavilion did in fact hold the right to redeem the 19 acres at issue.

On remand following the decision in *Pavilion I*, the trial court conducted a four-day bench trial aimed solely at deciding the merits of Pavilion's redemption claim. After the trial, the trial court entered an amended final Judgment. In the amended order, the trial court found that Pavilion was entitled to redeem the property and was required to deposit in the office of the Clerk of the Court three plus million dollars. After the monies were paid into court, the trial court found that the current title holders should then deliver to the Clerk a deed conveying all of their right, title and interest in each lot or parcel of property. The trial court then entered a Rule 54(b) Order.

On appeal, the Court in *E.B. Investments, LLC v. Pavilion Development, LLC*,77 So.3d 133 (Ala. 2011) (*"Pavilion II"*), the Court found that the trial court failed to address all of the necessary issues prior to entering the amended Order. The Court noted in this case (*Pavilion III*) that it had identified "'at least' three deficiencies with regard to the trial court's first attempt at a

final adjudication of that claim. … That qualified identification was clearly not intended to be exhaustive. Although the trial court in attempting to rectify the non-final status of its original Order, dutifully addressed the three deficiencies specifically identified by the Court in *Pavilion II*, it did not address the interests of all Defendants to the redemption action with regard to all parcels affected thereby." p. 19-20. The Court in *Pavilion III* also noted that "redemption may not be accomplished in a piecemeal fashion … Thus, as we explained in *Pavilion II*, all the outstanding potential 'interests' should be addressed by the trial court before we consider an appeal of a judgment deciding the redemption claim." 77 So.3d at 137. p. 21.

In dismissing the appeal, the Court noted that it was "clearly aware of the long and tortured history of the underlying litigation, we are similarly aware of the general disfavor with which both piecemeal appellate review and Rule 54(b) Certifications are viewed. … We can reach no other conclusion but that the trial court exceeded its discretion in certifying its judgment as final for purposes of an immediate appeal."

The opinion was authored by Justice Shaw and Chief Justice Moore and Justices Stuart, Parker, and Wise concurred.

**CIVIL PROCEDURE – RULE 54(b) CERTIFICATION IMPROPER**

**CERTIFICATION OF A PARTIAL DISPOSITION UNDER RULE 54(B) WAS IMPROPER UNDER THE MULTI-FACTOR TEST FOR DETERMINING THE PROPRIETY OF RULE 54(B) CERTIFICATION.**

***Meeks v. Morrow et al*, 2013 Ala. LEXIS 189 (December 20, 2013).**

**SUMMARY:**

Although the parties did not dispute the validity of the trial court's Rule 54(b) certification, the court took note of the jurisdictional matter ex mero motu. *Nunn v. Baker*, 518 So.2d 711, 712 (Ala. 1987). The Meekses appealed the 54(b) Order of the trial court finding that the deed conveying the property to them was void.

**HOLDING:**

**The appeal was dismissed.** The claims remaining before the trial court and the claims before the Supreme Court on appeal were so intertwined that they could not be adjudicated without the unreasonable risk of inconsistent results.

**DISCUSSION:**

In 2004, the Bank recorded a judgment against Lewis. The bank initiated proceedings to conduct a Sheriff's sale on the Meeks' property on December 13, 2006. The Meekses learned of the sale on Friday, January 9, 2009. The Sheriff held a sale on Monday, January 12, 2009, after which he deeded the property to Roderick Morrow. Morrow was the highest bidder. On January 29, 2009, the Meekses sued Morrow seeking redemption and a temporary restraining order preserving their position in the house.

The Meekses later amended the complaint to add the bank. The Meekses held title to the property via a deed from Lewis to Lard which was an unrecorded deed. Therefore, the trial court found that the deed conveying the property from Lard to the Meekses was void on its face.

In finding that the Rule 54(b) certification was improper the court addressed the five factors outlined in *Lighting Fair, Inc. v. Rosenberg*, 63 So.3d 1256, 1264 (Ala. 2010). Those factors are:

**1. The relationship between the adjudicated and unadjudicated claims;**

**2. The possibility that the need for a review might or might not be needed by future developments in the trial court.**

**3. The possibility that the reviewing court might be obliged to consider the same issue a second time;**

**4. The presence or absence of a claim or counterclaim which could result in a set off against the judgment sought to be made final;**

**5. Miscellaneous factors such as delay, economic insolvency, considerations, shortening the time of trial, frivolity of contending claims, expense, and the like.**

The claims that remain pending were Morrow's claims against the Meekses, Morrow's cross-claims against the bank and Option 1, another party, and the possibility of claims against the Estates of Lewis and Lard. The appeal was dismissed as being from a non-final order.

Chief Justice Moore authored the opinion. Justices Bolin, Murdock, Main and Bryan concurred.

**CIVIL PROCEDURE – 54(B) CERTIFICATIONS**

**If the claims that are the subject of the Rule 54(b) Certification and the claims remaining are intertwined, a Rule 54(b) certification is improper.**

***Fuller v. Birmingham Jefferson County Transit Authority,* 2013 Ala. LEXIS 186 (December 20, 2013).**

**SUMMARY:**

The appeal and cross-appeal follow the entry of Summary Judgment in favor of the Transit Authority and the Union, the Transit Authority Retirement Allowance Committee, and individual members of the Committee. The trial court certified its judgment as a 54(b) final order.

**HOLDING:**

The court dismissed an appeal as being from an improper Rule 54(b) certification because of the intertwined nature of the claims and counterclaims (the employees sued the defendants on claims arising out of the defendants' recovery of retirement benefits and the defendants' counterclaimed for repayment of the benefits and attorney's fees.)

**DISCUSSION:**

In this case the employees sued the defendants the Birmingham Jefferson County Transit Authority and Amalgamated Transit Union Local 725 Employees' Contributory Retirement Plan, et al. for a breach of contract, conversion, breach of fiduciary duty, and bad faith arising out of the defendants' recoupment of early retirement benefits they claimed the employees were not entitled to under the plan.

The defendants filed a counterclaim seeking immediate repayment from the employees of the benefits, interests, and attorney's fees arising out of the payment of the early retirement benefits based on their fiduciary duty to the plan.

The Court found that "the trial court's resolution of the employees' claims does not moot the defendants' counterclaims because the trial court must decide whether immediate recoupment (less any amounts they already received through the actuarially reduced monthly benefits), interest, and attorney's fees are owed the defendants for the early retirement benefits received by the employees."

Justice Bolin authored the opinion.

Chief Justice Moore and Justices Stuart, Parker, Main and Wise concurred.

Justice Shaw wrote a special concurrence and Justice Bryan concurred with Justice Shaw's special concurrence.

**SPECIAL CONCURRENCE BY JUSTICE MURDOCK.**

Murdock wrote specifically in part to disagree with the special concurrence of Justice Shaw. In his special concurrence Justice Shaw addressed what he believes is an anomaly under current case law regarding appeals of judgments certified as final under Rule 54(b). Shaw wrote that to comply with the prior decision of the court in *Wallace v. Belleview*, 127 3d 485 (Ala. 2012), the Court should have found in this case that if a party failed to appeal the improper certification in a 54(b) order then the parties should also forego the challenge by failing to raise the issue. Essentially, Shaw was that the decision in *Wallace* was not consistent with the decision in this case and that his dissent in *Wallace* should be adopted by the court or at a minimum calls into question the rationale of *Wallace*. Murdock reasoned that if there is no appeal then the Appellate Court has no way to address it until it becomes final.

**CIVIL PROCEDURE – RULE 54(B) CERTIFICATIONS –**

**PENDING CLAIMS AGAINST ONE OF THE DEFENDANTS RAISED THE SAME LEGAL ISSUES PRESENT IN THE CLAIMS THAT WERE THE SUBJECT OF THE RULE 54(B) ORDER WHICH CREATED AN UNREASONABLE RISK OF INCONSISTENT ADJUDICATIONS.**

***Barrett v. Carlos Roman d/b/a Carlos Roman Roofing, et al.*, 2013 ALA. LEXIS 167 (November 22, 2013).**

**SUMMARY:**

The trial court's judgment disposed of all claims asserted by two homeowners against two subcontractors but it did not dispose of the homeowners' claims against the third subcontractor. Appellate consideration of the homeowners' appeal while the same claims were pending against the third contractor would mean that the intertwined claims against the subcontractors would be litigated in piece-meal fashion.

**HOLDING:**

At issue as to the defendants who received a 54(b) certification was their contentions that the assigned contract claims were not legal, the timeliness of the direct tort claims and substantive viability of the tort claims. Because those same issues were apparent as to the remaining subcontractor defendant, the court found that the piece-meal adjudication of the claims against the subcontractors posed an unreasonable risk of inconsistent results.

Therefore, the appeal was dismissed. Justice Murdock authored the opinion and Chief Justice Moore and Justices Bolin, Main, and Bryan concurred.

**CIVIL PROCEDURE - SUBJECT MATTER JURISDICTION - STANDING**

**THERE WAS A CAUSE OF ACTION PROBLEM IN THIS CASE, NOT A PROBLEM OF EITHER STANDING OR SUBJECT MATTER JURISDICTION.**

**THE COURT OVERRULED *CADLE CO., v. SHABANI,* 950 S.2d 277 (Ala. 2006) AND OTHER CASES IN WHICH THE COURT HELD THAT A LACK OF STANDING TO SUE DEPRIVED THE COURT OF SUBJECT MATTER JURISDICTION.**

***Ex parte Bac Home Loans Servicing, LP***
**2013 Ala. LEXIS 105 (Ala.)(Sept. 13, 2013).**

**SUMMARY:**

BAC contended that it was the "holder of [Sturdivant's] mortgage … which contained a power of sale." BAC initiated foreclosure proceedings and purchased the property at the auction. The sale occurred on December 1, 2009. Also on December 1, 2009, MERS (the mortgage holder) assigned Sturdivant's mortgage to BAC.

BAC then filed a Complaint in ejectment against Sturdivant contending that Sturdivant had failed to surrender possession of the property. BAC moved for a Summary Judgment and the trial court granted a Summary Judgment in favor of BAC.

The Court of Civil Appeals found "that the Summary Judgment in favor of BAC was improper because [Sturdivant] says, BAC failed to make a prima facie showing that it had the authority to and did validly foreclose on the property," 2011 Ala. Civ. App. LEXIS 361 at 10.

The Court of Civil Appeals agreed with Sturdivant finding that at the time the foreclosure proceedings began, the assignment of the mortgage to BAC had not yet occurred and therefore BAC "had no valid right to sell the property at foreclosure." Therefore, according to the Court of Civil Appeals, the deed BAC purported to receive as a result of that foreclosure was not valid; and without a valid foreclosure sale to BAC, BAC would not have had the legal title or right of possession required by Section 6-6-280(b) for an ejectment action.

BAC petitioned for a writ of mandamus to the Alabama Supreme Court.

**HOLDING:**

(1) It was error for the Alabama Court of Civil Appeals to hold that the relevant issues were a lack of **standing** which thereby deprived the trial courts of **subject matter jurisdiction.**

(2) Each purchaser of property at a foreclosure auction and who received a foreclosure deed and brought an action under Alabama Code §6-6-280(b) could come to court claiming good title to the property at issue and the right to eject the mortgagors.

(3) The Circuit Courts had subject matter jurisdiction to hear any cause of action problem and the actions in which the cause of action problems arose. The trial court had subject matter jurisdiction over these causes which included any issue as to the validity in fact of the purchasers' title to the property which was an element of proof in an ejectment action.

(4) The purchaser may have a "cause of action" or "a failure to prove one's cause of action" problem; however, the issue was not one of standing.

In this case, the issue was not one of standing but was one of whether BAC could prove its causes of action.

**DISCUSSION:**

In *Sturdivant v. BAC Home Loan Servicing, LP*, 2013 Ala. Civ. App. LEXIS 263 (December 16, 2011), the Court of Civil Appeals cited to *Cadle v. Shabani*, 950 So.2d 277 (Ala. 2006), for the proposition that the issue presented was one of "standing" on the part of BAC to have brought the ejectment action that in turn deprived the trial court of subject matter jurisdiction.

*Cadle Co., v. Shabani*, 950 So.2d 277 (Ala. 2006) was a case in which a judgment assignee brought an ejectment action against the mortgagor and mortgagee after the judgment creditor purchased the property at a Sheriff's sale. In that case, Justice Lyons held that the assignee lacked standing to bring an ejectment action while the judgment creditor had held record title based on a Sheriff's deed.

Justice Murdock who authored the *BAC* opinion noted that:

> The holding in *Cadle* has not gone unquestioned by commentators and by members of the Bench and Bar, as well as by members of this Court and the Court of Civil Appeals. Indeed, four years after the opinion in *Cadle* was released, its author [Justice Lyons] expressed concern that this Court had in fact been too 'loose' in its use of the term 'standing.' ... In more than one case, however, this Court has declined to revisit its holding in *Cadle* because it has not been expressly invited to do so. ... In the present cases, however, we have been expressly invited to revisit *Cadle*. Because of substantial concerns that have arisen regarding *Cadle* since it was decided and because of the integral nature of the 'standing' questions and issues presented here, and in order to provide needed guidance to the Bench and Bar as to a complex and confusing area of the law relating to the fundamental jurisdiction of our courts. We accept the invitation extended in these cases.

2013 Ala. LEXIS 105, p. 24.

In *Wyeth, Inc., v. Blue Cross and Blue Shield of Alabama*, 42 So.3d 1216 (Ala. 2010), the Court cited to *Wright and Miller* and Justice Murdock included that discussion in this case:

> Wright and Miller explain standing as follows:
>
> Standing goes to the existence of sufficient adversariness to satisfy both Article III case-or-controversy requirements and prudential concerns. In determining standing, the nature of the **injury asserted** is relevant to determine the existence of the required **personal stake and concrete adverseness**….
>
> 13A *Federal Practice & Procedure* §3531.6 … 13B *Federal Practice & Procedure* § 3531.10 (discussing citizen and taxpayer standing and explaining that 'a plaintiff cannot rest on a showing that a statute is invalid, but must show 'some direct injury as a result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally').
>
> In the present case, Wyeth appears to argue that the plaintiff, [Blue Cross] lacks standing because, Wyeth says, [Blue Cross'] allegations, even if true, would not entitle it to a recovery…
>
> The question whether the right asserted by [Blue Cross] is an enforceable one in the first place, i.e., whether [Blue Cross] has seized upon a legal theory our law accepts, is a cause-of-action issue, not a standing issue.

Justice Murdock noted that as the Court explained in *Steele v. Federal National Mortgage Assoc.*, 69 So.3d 89 (Ala. 2010):

> Although Jeffery has framed this argument in standing terms, Fannie Mae's standing to bring this action has not actually been implicated. ... **'[the appellee] appears to argue that plaintiffs lack standing because they have no legal right to the relief they seek.' The appellee has confused standing with failure to state a claim.** The two are conceptually distinct: when standing is an issue, the court asks whether the **plaintiffs are the proper parties to bring the action**, whereas failure to state a claim focuses not on the parties but on the existence of a cause of action (i.e. on the merits).

69 So.3d at 91.

Murdock noted that:

> The problem identified by Judge Pittman [in his dissent] and others is a function of the fact that **the concept of standing was developed by the United States Supreme Court for 'public law' cases, See e.g., *Lugan v. Defenders of Wildlife,* 504 U.S. 555 ... (1992), not 'private law' cases.** In the absence of defined elements as exists in established private causes of action, the concept of standing is used to differentiate between those complaints regarding governmental action that are shared generally by the citizenry and that therefore must be addressed politically and those complaints that reflect the sufficient injury and consequence adversiness to make it for a 'case' that is within the purview of the judicial branch.'

Murdock concluded that:

> Each of the plaintiffs before us attended a foreclosure auction, was the successful bidder at that auction, paid money for the auctioned property, and received a foreclosure deed to the property. With deed in hand, each plaintiff now brings an action under Alabama law, specifically Section 6-6-280(b), Ala. Code 1975, claiming good title to the property at issue and the right to eject the original debtor. We are clear to the conclusion that the trial courts had subject matter and jurisdiction over these cases, including any issue as to the validity in fact of the plaintiffs' title to the property, this being one of the elements of proof required in an ejectment action.
>
> If in the end the facts do not support the plaintiffs, or the law does not do so, so be it - - but this does not mean the plaintiffs cannot come into court and allege, and attempt to prove, otherwise. If they fail in this endeavor, it is not that they have a 'standing' problem, it is, as Judge Pittman recognized in *Sturdivant*, that they have a "cause of action" problem, or more precisely in these cases, a '**failure to prove one's cause of action**' problem. The trial court has subject matter jurisdiction to 'hear' such 'problems' - - in the cases in which they arise. To the extent *Cadle* holds otherwise, i.e., that a plaintiff in an ejectment action lacks 'standing' if it cannot prove one of the elements of its claim (namely, legal title or the right to possession of the property) and that the trial court in turn lacks subject matter jurisdiction over that claim - - it and other cases so holding are hereby overruled.

Justices Stuart, Parker, Shaw, and Wise concurred.

Chief Justice Moore and Justices Bolin and Main concurred in the result.

Judge Bryan recused himself because he was on the Alabama Court of Civil Appeals at the time the underlying opinion was issued.

Justice Main objected to the discussion of "public law" and "private law" as it relates to standing which was addressed by Justice Murdock in a subsequent opinion, *Ex parte Alabama Educational Television Commission et al.*, 2013 Ala. LEXIS 134 (September 27, 2013).

In *Alabama Educational Television* (the "Agency"), two former employees sued the Agency under Alabama's Open Meetings Act and asked for the production of certain documents and for compensatory and punitive damages. The plaintiffs claimed that were terminated and their "termination resulted directly from a violation of the Open Meetings Act. As such, [they have] every right to demand the civil fines specified in Section 36-25A-9(g) . . . in addition to whatever other relief the Circuit Court deems appropriate." p. 13.

The Court found that they lacked standing to raise their Alabama Open Meetings Act claim because even though it allowed for enforcement by any Alabama citizen the employees did not satisfy the *Lujan* test where they failed to show a likelihood that their alleged injury would be redressed by a favorable decision since only civil fines are available.

The Alabama Supreme Court has adopted the standing test outlined in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992):

> . . . [T]he irreducible constitutional minimum of standing contain three elements. First, the plaintiff must have suffered an 'injury in fact' – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not 'conjectural' or hypothetical.' Second there must be a causal connection between the injury and the conduct complained of – the injury has to be 'fairly . . . traceable to the challenged action of the defendant and not the result of the independent action of some third party not before the court. . . . Third, it must be 'likely,' as opposed to merely 'speculative' that the injury will be redressed by a favorable decision.'

504 U.S. at 560-61. Justice Murdock noted that the United States Supreme Court held similarly in *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998). He also noted that while *Steel* did not involve a governmental defendant "it does however, involve a suit to require a third party to fulfill an obligation that, whatever else may be said of it, clearly was intended by Congress as an obligation to disclose information for the benefit of the public at large." Murdock reasoned that "[a]s the author of this Court's recent opinion in *Ex parte BAC Home Loans Servicing, LP, ….*, I must confess that the statements in *BAC* suggesting a limitation of standing to public law cases involving governmental defendants would be better understood as statements of a general rule that admits of the aforesaid exception [Steel] but only in rare cases involving inadequately formed statutory causes of action as in Steel."

**CIVIL PROCEDURE - SUBJECT MATTER JURISDICTION - STANDING v. CAUSE OF ACTION PROBLEM**

**THE COURT FOUND THAT NEITHER STANDING NOR SUBJECT MATTER JURISDICTION WAS AT ISSUE AND THAT INSTEAD THE ONLY THING AT ISSUE WAS THE VIABILITY OF THE CLAIM.**

**THE PETITION FOR WRIT OF MANDAMUS WAS DENIED.**

***Ex parte MERSCORP, Inc.*, 2013 Ala. LEXIS 121 (September 20, 2013)**

**SUMMARY:**

A Mortgagee petitioned for a writ of mandamus requiring the trial court to dismiss an action filed by the county on behalf of a putative class of all Alabama counties alleging unjust enrichment based on the Mortgagee's use of private electronic data base to track transfers of home loans. In a separate action, a data base operator petitioned for a writ of mandamus requiring the Barbour County Circuit Court to dismiss an action filed by a Probate Judge in her official capacity on behalf of the putative class of all Probate Judges in Alabama alleging that the operator obstructed Alabama law regarding the recording of mortgages.

The Petitions sought "**review of orders denying motions to dismiss the actions based on the alleged lack of standing of the Plaintiffs and, in turn, the alleged lack of subject matter jurisdiction of the trial court and seeking an order requiring the trial courts to grant the motions to dismiss**." p. 1.

**HOLDING:**

Justice Murdock held that neither standing nor subject matter jurisdiction was at issue and that instead at issue was a cause of action problem to be resolved via a 12(b)(6) motion, a Motion for Summary Judgment or trial. Justice Murdock found, therefore, that Mandamus review was not available for any alleged error in the decisions of the Circuit Courts to deny the Defendants' Motion to Dismiss for failure to state a claim.

**DISCUSSION:**

As to the action pending in Barbour County and the claims of the Probate Judge, MERSCORP contended that the Plaintiff lacked standing because she "does not and cannot alleged an injury in fact causally connected to a failure to record conveyances and grants of interest in real estate with a probate court. ..." MERSCORP contended that "the law imposes no duty to record conveyances and grants of interest in real estate in the public land records" and that "Judge Robertson is not (and is not alleged in the Complaint to be) a purchaser of or encumbrance of land whom Alabama's recording statutes are solely designed to protect." 2013

Ala. LEXIS 121, at 15.

The *MERSCORP* Court emphasized its reasoning in *Wyeth v. Blue Cross,* 42 So.3d 1216, 1220 (Ala. 2010). **In *Wyeth*, the Court found that 'the question whether the right asserted by [the plaintiff] is an enforceable one in the first place, i.e., whether [the plaintiff] has seized upon a legal theory our law accepts, is a cause of action issue, not a standing issue.**' *Wyeth,* p. 19.

The *MERSCORP* Court further stated that in *Ex parte BAC Home Loan Servicing, LP*, [Ms. 1110373, September 13, 2013] _ So.3d , 2013 Ala. LEXIS 105 (Ala. 2013), "this Court recently rejected the notion that questions, not unlike those raised here regarding the cognizability of the Plaintiffs' legal theories or claims, are 'standing' issues rather than 'cause of auction' issues. We again reject that notion. According, the efforts to frame the questions before us is questions of standing and to thereby implicate the subject matter jurisdiction of the trial courts must fail." *MERSCORP*, pp. 21-22.

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

**CIVIL PROCEDURE – STANDING – SUBJECT MATTER JURISDICTION**

> **THE PLAINTIFF IN THE EJECTMENT ACTION WHO WAS DEEDED THE PROPERTY VIA A FORECLOSURE DEED DID NOT LACK STANDING TO SUE DUE TO THE INVALIDITY OF THE FORECLOSURE SALE.**
>
> **THE ISSUE WAS NOT ONE OF STANDING BUT INSTEAD WENT TO THE MERITS OF THE EJECTMENT CLAIM.**
>
> **THE COURT RELIED ON ITS SEPTEMBER 2013 RULING IN *EX PARTE BAC HOME LOANS SERVICING, LP,* 2013 ALA LEXIS (ALA.) (SEPT. 13, 2013). IN *EX PARTE BAC HOME LOANS,* THE COURT OVERRULED *CADLE v. SHABANI* AND ALL OTHER CASES DECIDED SIMILARLY.**

***Ex parte Rhodes,* 2013 Alabama LEXIS 164 (November 22, 2013).**

**SUMMARY:**

Fannie Mae instituted an ejectment action based on its foreclosure deed. The mortgagors contended that Fannie Mae lacked standing to sue because both the foreclosure sale and the deed itself were invalid. The trial court denied the mortgagors' motion to dismiss. The mortgagors petitioned for a Writ of Mandamus.

**HOLDING:**

The mortgagors were not entitled to a writ of mandamus directing the trial court to dismiss an ejectment action filed against them by Fannie Mae based on their claim that the foreclosure sale and foreclosure deed were invalid.

**At issue were the merits of the ejectment claim ("a cause of action problem"), not an issue of Fannie Mae's standing to bring the ejectment claim**.

The petition for a writ of mandamus was denied.

**DISCUSSION:**

In this opinion authored by Justice Murdock he relied on recent decisions of the court regarding standing. In the Court's recent opinion in *Ex Parte BAC Home Loans Servicing*, the Court expressly rejected the reasoning in *Cadle Company v. Shabani*, 950 So.2d 277 (Ala. 2006); *Byrd v. MorEquity, Inc.*, 94 So. 3d 378 (Ala. Civ. App. 2012); and *Sturdivant v. BAC Home Loans Servicing, LP*, 2011 Ala. Civ. App. LEXIS 361 (Ala. Civ. App. 2011).

In reversing *Cadle* in regard to the standing issue the Court relied on the dissent of Judge Pittman in *Cadle* in which he stated that "*Cadle* actually presented a question of the

plaintiff's inability to prove the allegations of its complaint rather than a question of standing." 2013 Ala. LEXIS 164 at 4.

The Rhodes contended that Fannie Mae lacked standing to bring the claim in ejectment because the foreclosure deed from Bank of America to Fannie Mae was void. Rather than an issue of standing, the Court found that whether the foreclosure sale and the foreclosure deed were invalid went to the merits of an ejectment claim i.e. "The ability or inability of a plaintiff in an ejectment action to prove the elements of such of a claim, not to the plaintiff's standing to bring that action."

The petition for writ of mandamus was denied.

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

**CIVIL PROCEDURE – DISCOVERY OF POST ACCIDENT INVESTIGATION REPORTS**

**ALTHOUTH THE SOLE FACTOR FOR PREPARING THE REPORT WAS NOT IN ANTICIPATION OF LITIGATION, IT WAS PROTECTED BECAUSE IT WAS THE PRIMARY PURPOSE FOR PREPARING THE REPORT.**

***Ex parte Schnitzer Steel Industries, Inc.*, 2013 Ala. LEXIS 131 (September 27, 2013).**

**SUMMARY:**

The trial court compelled the production by Schnitzer of a post-accident report relating to an accident occurring at subsidiary work site. Schnitzer petitioned for a writ of mandamus.

**HOLDING:**

**The Court granted the petition finding that it was attorney work product in that it was prepared in anticipation. The Court did so because:**

**(1) the primary purpose of preparing the report was in anticipation of litigation;**

**(2) The report was reviewed and revised by in-house counsel; and**

**(3) a review of an accident report by in-house counsel was not done in the ordinary course of business.**

**DISCUSSION:**

The writ of mandamus was issued in regard to an investigative report prepared by an employer after an employee's leg was amputated in an accident at work. The employer contended that the report was protected work product under Alabama Rules of Civil Procedure Rule 26(b)(3).

Although anticipation of litigation might not have been the sole factor for preparing a report, it was a significant factor since the workers' compensation manager testified that anticipated litigation was the primary purpose for the report and that such reports were prepared only when litigation was anticipated.

The safety director acknowledged that the report was reviewed and revised by in-house counsel before it was finalized and that a review of an accident report by in-house counsel did not occur in the ordinary course of business and that there were concerns about potential litigation when the safety director did the investigation into the accident.

**A. The Only Review of Discovery Matters via a Mandamus is Available if there is:**

**(1) Disregard of the Privilege;**

**(2) Required Production of Irrelevant and Duplicative Materials;**

**(3) Orders Eviscerating a Party's Action or Defense; and**

**(4) Orders Denying a Party the Right to Make a Record for Appellate Review of the Discovery Order.**

The Court noted that it would review by mandamus only discovery matters involving "(a) the disregard of the privilege, (b) the ordered production of patently irrelevant or duplicative materials, (c) orders effectively eviscerating a party's entire action or defense and (d) orders denying a party the opportunity to make a record sufficient for appellate review of a discovery issue. *Ex Parte Meadowbrook Insurance Group, Inc.*, 987 So.2d 540, 547 (Ala. 2007).

**B. Elements of the Work Product Exception:**

**(1) Documents or Tangible Things;**

**(2) Prepared in Anticipation of Litigation;**

**(3) Prepared by or for a Party or Representative of a Party.**

The work product exception to the general discovery rule includes these elements: (1) the materials sought to be protected are documents or tangible things; (2) they were prepared in anticipation of litigation or for trial; and (3) they were prepared by or for a party or a representative of that party." *Ex Parte Flowers*, 991 So.2d 218, 221 (Ala. 2008).

The Court noted that it was undisputed that the report at issue contained materials sought to be protected qualified as documents or tangible things and that the report at issue was prepared by or for a party or representative of that party.

The only issue to be decided by the trial court was whether the documents were prepared in anticipation of litigation or for trial. **The plaintiff conceded that the report could lead to the assumption that litigation could be expected**. Therefore, the Court found that the trial court should only address whether the report was, in fact, prepared in anticipation of litigation. The court noted that an *Ex Parte Flowers* it stated that:

It is not necessary that statements be made solely in anticipation of litigation to be treated as privileged work product. In *Ex Parte Alabama Department of Youth Services*, 927 So.2d 805, 808 (Ala. 2005), this court held that the question as to whether the investigative reports are work product when there are several motivating causes, other than anticipated litigation, for preparing them turns on whether it was reasonable … to assume in light of circumstances, that litigation could be expected.

991 So.2d at 225-26.

**C. The Court Rejected Plaintiff's Contention that the Report was Prepared for Operational Safety Concerns.**

Plaintiff countered with testimony of the person who prepared the initial draft contending that her testimony established that the report was prepared for operational safety concerns. However the Court noted that she also testified that counsel who worked closely with Schnitzer revised the draft and included language that it was privileged as well.

The Court concluded that in the present case as was the case in *Ex Parte Alabama Department of Youth Services*, and *Ex Parte Flowers*, there may have been "several motivating factors, other than anticipated litigation, for preparing the report, but "it was reasonable for [Schnitzer Steel] to assume in light of circumstances that litigation could be expected." *Ex Parte Alabama Department of Youth Services*, 927 So.2d at 808, *Ex Parte Flowers*, 991 So.2d at 226.

The opinion was authored by Justice Bryan and Justices Stuart, Bolin, Main and Wise concurred.

Chief Justice Moore and Justices Parker and Murdock dissented without opinion.

**CIVIL PROCEDURE - DISCOVERY - WORK PRODUCT DOCTRINE**

**THE POST INCIDENT REPORT WAS PRIVILEGED UNDER THE WORK PRODUCT DOCTRINE BECAUSE IT WAS PREPARED IN ANTICIPATION OF LITIGATION AGAINST THE PETITIONER.**

***Ex parte USA Water Ski, Inc.*,**
**2013 Ala. LEXIS 67 (June 21, 2013).**

**SUMMARY:**

Petitioner, the national governing body for organized waterskiing in the United States, petitioned for a writ of mandamus directing the Montgomery County Circuit Court to vacate its discovery Order compelling the production of a report that Petitioner claims is privileged under the Work Product Doctrine.

**HOLDING:**

The Court concluded that the trial court exceeded its discretion in ordering the production of post-incident report because the report was privileged under the Work Product Doctrine.

**DISCUSSION:**

**A. A FAIR INFERENCE FROM THE AFFIDAVIT SUBMITTED BY USA WATER SKI WAS THAT HE ANTICIPATED LITIGATION.**

The Court found that the report was protected under the Work Product Doctrine because an Affidavit adequately established that the report was prepared in anticipation of litigation against the Petitioner. None of the evidence before the Court indicated that the report was prepared for any reason other than in preparation for eventual litigation. The Affiant believed litigation was likely and that the report would be helpful to the defense.

**The Court noted that although the Affiant did not specifically state that he anticipated litigation to be initiated against the Petitioner that was a fair inference from the reading of his Affidavit.**

**B. THE COURT DISTINGUISHED *STATE FARM* IN WHICH THE AFFIANT STATED THAT HE WAS UNDER THE IMPRESSION THAT LITIGATION WOULD RESULT.**

The Plaintiff responded to the evidence offered by the Defendant Petitioner that the evidence did not establish that the report was prepared in anticipation of litigation because the Affidavit did not state specifically that the report was prepared in anticipation of litigation to be brought against USA Water Ski. Citing to *Ex parte State Farm Mutual Automobile Ins. Co.*, 761

So.2d 1000, 1002 (Ala. 2000), the Affiant stated that State Farm "**was under the impression and took the position that [the plaintiff] had planned to be involved in litigation regarding this accident**." 761 So.2d at 1003. The Court in that case found that State Farm did not present evidence indicating that the documents sought were prepared specifically in anticipation of litigation against State Farm and that, therefore, the documents were not protected by the Work Product privilege.

The Court distinguished *State Farm* by noting that the Affiant testified that although "he did not believe USA Water Ski, the National Show Ski Association or Colonel Biggs Water Ski Show Team had done anything improper," **he believed litigation was likely and that the report would be helpful to the defense**. Therefore, the Court found that although the Affiant did not specifically state in his Affidavit that he anticipated litigation to be initiated against USA Water Ski, that was a "fair inference from the reading of his Affidavit."

### C. THE COURT FOUND THAT THESE REPORTS WERE NOT CREATED IN THE ORDINARY COURSE OF EVENTS.

Plaintiff contended next that the post-incident report was not prepared in anticipation of litigation because the correspondence constituting the report was (1) between non-attorney members of USA Water Ski, (2) was not drafted at the direction of an attorney or in response to any notice that the Plaintiff had retained an attorney and (3) was written two years before a lawsuit was filed.

While the Court noted that the evidence that the report was not prepared at the request of an attorney and that the report was prepared two years before a lawsuit was filed were factors to consider, the determinative question to be resolved is whether the post-incident report "**can fairly been said to have been prepared or obtained because of the prospect of litigation**." *Sims v. Knollwood Park Hospital,* 511 So.2d 154, 158 (Ala. 1987). The Court held that the report was not discoverable because the Affidavit established that at the time Wilson requested the report he recognized that the incident had resulted in the death of a skier while that skier was preparing for a USA Water Ski show and believed that litigation would ensue. Further, the Affidavit also established that the report was not created in the ordinary course of business.

The opinion was authored by Justice Stuart. Justices Bolin, Parker, Murdock, Wise and Bryan, concurred. Justice Shaw concurred specially and Chief Justice Moore dissented.

## JUSTICE SHAW'S SPECIAL CONCURRENCE

Justice Shaw wrote specially to distinguish cases relied on by the Plaintiffs, *Ex parte Cummings,* 776 So.2d 771 (Ala. 2000) and *Ex parte Cryer*, 814 So.2d 239 (Ala. 2001). Shaw noted that the document in question was in a worker's compensation file and in *Cryer* at issue was a document prepared by a doctor relating to a birth where injury to a baby occurred. Shaw stated that the evidence indicated that neither report was prepared in anticipation of litigation.

**CIVIL PROCEDURE - DISCOVERY - WORK PRODUCT DOCTRINE –**

**DOCUMENTS GENERATED FOR REPORT TO ADEM WERE DISCOVERABLE; HOWEVER, DOCUMENTS GENERATED FOR ATTORNEYS IN REGARD TO CIVIL LITIGATION WERE NOT DISCOVERABLE.**

***Ex Parte Mobile Gas Service Corporation,*123 So.3d 499 (Ala. 2013) (Released for Publication November 6, 2013).**

**SUMMARY:**

Plaintiff residents sued defendant Natural Gas Company alleging nuisance and other claims arising from the release of mercaptan, an odorant injected into natural gas.

The trial court ordered an engineering firm to produce documents plaintiff requested in their Rule 45, Alabama Rules of Civil Procedure, non-party subpoena.

The trial court denied defendant's objection to the subpoena and its request for a motion for a protective order.

The defendant gas company petitioned for a Writ of Mandamus.

**HOLDINGS:**

**The discovery sought was protected by the work product doctrine in that it was prepared in anticipation of litigation.**

(1) **The Information Was Available From Another Source.**

Plaintiffs had copies of the reports the firm submitted to ADEM and, therefore, they did not satisfy their burden to show that they had substantial need of the documents as to which the defendant claimed privilege.

(2) **The Engineer Was Not Designated As An Expert.**

Defendant did not designate the engineering firm as its expert under Rule 26(b)(5)(B); therefore, plaintiffs could not discover the firm's facts or opinions because they **failed to show exceptional circumstances** i.e. that it was impracticable to obtain the information by other means.

(3) **Defendant Did Not Waive Privilege.**

Defendant did not treat the allegedly privileged documents in a manner inconsistent with keeping them from an adversary and, therefore, did not waive the privilege.

**DISCUSSION:**

**1. The Defendant contended that it retained the engineering firm as a consultant in anticipation of litigation and therefore claimed work-product privilege.**

The defendant gas company contended that it retained the engineering firm as a consultant in anticipation of litigation and that the requested discovery was thereby protected by the work product privilege under Alabama Rules of Civil Procedure, Rule 26(b)(4) and (5).

The Court found that the defendant's affidavits established that it retained the firm to assist in an investigation of odor complaints as ordered by state agency. Defendant established that the documents it claimed were privileged were prepared or obtained in anticipation of litigation.

ADEM was notified of an odor complaint in the Eight Mile Creek area in Mobile County. ADEM advised Mobile Gas that it wanted Mobile Gas to conduct an investigation to either confirm or deny the presence of mercaptan in the subsurface soil or ground water in the area. Plaintiffs contended that:

(1) the documents sought were not protected by the work product privilege,

(2) the defendant did not view the engineer as a trial expert,

(3) to the extent the engineer was a trial expert the defendant had waved any privilege or work product restriction on the engineer's records,

(4) the work product doctrine does not apply to a party who was not "specially employed for a case,"

(5) there was no evidence that the law firm representing the defendant retained the engineer that the defendant had directly retained the engineer,

(6) the engineer was not retained in connection with rendering legal advice to the defendant and that the services rendered by the engineer had been "business" in nature and that based on the dissemination of the engineer's work product no confidentiality attached.

**The Court noted that for the work product privilege to apply:**

**(1) the material sought to be protected are documents or tangible things;**

**(2) they were prepared in anticipation of litigation or for trial; and**

**(3) they were prepared by or for a party or a representative of that party. p. 506. The fact that a document was produced after the lawsuit was filed does not automatically create the work product privilege. *Ex parte State Farm Mutual Auto Insurance Company*, 761 So.2d 1000, 1004 (Ala. 2000).**

"The purpose for which a party created a document is the fundamental requirement of the rule and [regardless of whether] litigation is reasonably anticipated, certain, or even underway, a court must still undertake an examination of **why a document was produced**." *Harper v. Auto Owners Insurance Company*, 138 F.R.D. 655, 661 (S.D.Ind. 1991). *Ex parte Meadowbrook Insurance Group, Inc.*, 987 So2d 540, 547 (Ala. 2007).

As the court in *Meadowbrook* emphasized a party claiming work product privilege must:

> **(1) expressly make the claim; and**
>
> **(2) adequately describe the documents without revealing information itself that is privileged or protected**.

The *Meadowbrook* court noted that a similar provision is found in Rule 45(d)(2), Alabama Rules of Civil Procedure, dealing with production by third parties of documents that were prepared in anticipation of litigation.

**2. Plaintiffs contend in this case that the defendant did not meet its burden of demonstrating that the documents were prepared in anticipation of litigation because the affidavit submitted did not contain any facts specific enough in support of its motion for protective order.**

Plaintiff contended that "the evidence is clear that McFadden was retained 'in the regular course of business, rather than for purposes of litigation.'" p. 508. The court cited to *Atlantic Richfield Company v. Current Controls, Inc.*, 1997 U.S. Dist. LEXIS 82, August 21, 1997, (S.D.N.Y. 1997), in which the court found that "**even if they were prepared in anticipation of litigation involving only governmental agencies and were not prepared in anticipation of litigation involving private parties…because a party in one action may assert work product protection as to documents prepared in anticipation of another action, particularly where the two actions are related." p. 509**.

The court concluded that based on the affidavit testimony submitted by the defendant that the defendant had established that the documents as to which it was claiming a privilege were prepared or obtained in anticipation of litigation.

**3. Waiver of the Privilege – Mobile Gas Did Not Waive The Privilege By Producing Documents:**

Plaintiff contended that the privilege had been waived in that the defendant had previously produced voluminous documents prepared by the engineer to ADEM.

The court found that Mobile Gas satisfied its burden of demonstrating that the requested documents constituted work product thereby shifting the burden to plaintiffs to demonstrate a substantial need for the undisclosed documents and to show that they were "**unable without undue hardship to obtain the substantial equivalent of the materials by other means**."

**4. Plaintiff Did Not Meet Its Burden of Proving Exceptional Circumstances.**

The defendant via affidavit proved that the engineer's "communications with ADEM, [the engineer's] report submitted to ADEM, and the underlying data submitted to ADEM" had been produced. p. 514. Citing to *Spearman Industries, Inc. v. St. Paul's Fire and Marine Insurance Company*, 128 F. Supp. 2nd 1148, 1151-52 (N.D. Ill. 2011), the court stated that "under Rule 26(b)(4)(B), the party seeking discovery from the non-testifying expert consulted in anticipation of litigation **'carries a heavy burden in demonstrating the existence of exceptional circumstances**.'" The court noted that the plaintiffs had not met their burden of establishing exceptional circumstances and that, therefore, the information sought was not discoverable the writ issued.

Justices Stuart, Bolin, Murdock, Main and Bryan concurred in the opinion of Justice Wise.

**DISSENT BY CHIEF JUSTICE MOORE**

Chief Justice Moore dissented. Chief Justice Moore wrote that in *Ex Parte Ocwen Federal Bank, FFSB*, 872 So2d 810 (Ala. 2003), the Court found that "mandamus will issue to compel the discovery only in those cases where a **clear abuse of discretion is shown**."

**CIVIL PROCEDURE - FICTITIOUS PARTIES - TIMELINESS**

**A PARTY COULD NOT BE SUBSTITUTED FOR A FICTITIOUS PARTY AFTER THE STATUTE OF LIMITATIONS HAD RUN DUE TO THE FAILURE OF THE PLAINTIFF TO EXERCISE DUE DILIGENCE.**

***Ex parte General Motors of Canada, Ltd.,***
**2013 Ala. LEXIS 109 (September 13, 2013)**

**SUMMARY & HOLDING:**

In a products liability claim, a driver was not entitled to substitute a car manufacturer for a fictitiously named defendant after the statute of limitations in Alabama Code §6-2-38(l) had run because the driver did not act with due diligence in discovering the vehicle's legally required manufacturer's identification label which was conspicuous, legible, and in the driver's possession. The Court found that the manufacturer was entitled to a writ of mandamus and the writ issued.

**DISCUSSION:**

The Plaintiff was injured on **April 11, 2007**, and filed his complaint on **April 6, 2009**. The statute of limitations had run when Plaintiff sought leave to add GM Canada on **June 10, 2009**. The Court emphasized that for a claim to relate back to the date of filing of the complaint if the complaint alleges fictitious parties depends on if the Plaintiff is "**ignorant of the name of an opposing party**." Rule 9(h); *Harmon v. Blackwood,* 623 So.2d 726, 727 (Ala. 1993).

"If the plaintiff knows the identity of the fictitiously named parties or possesses sufficient facts that will lead to the discovery of their identity at the time of the filing of the complaint, relation back under fictitious party practice is not permitted and the running of the limitations period is not tolled. " *Ex parte Mobile Infirmary Assoc.,* 74 So.3d 424 at 427-428 (Ala. 2011). In an Affidavit, the attorney testified that he only began representing the Plaintiff one month prior to the date that he filed the Complaint and that prior counsel had the vehicle at all times prior to that.

In finding that the Plaintiff's claims were barred by the statute of limitations, the Court emphasized that the Plaintiff had a source of information that would have led him to the identity of the manufacturer of the Impala - - "that vehicle's legally required manufacturer's identification label." p. 10. The Plaintiff's attorney contended that "it was his '**interpretation' of the answer filed by Motors Liquidation Company that 'led' him 'to believe' that MLC had manufactured the vehicle**." p. 11.

The Court in finding that ample evidence was available to discover the manufacturer cited to *Jones v. Resorcon, Inc.*, 604 So.2d 370 (Ala. 1992) in which the Court found that the Plaintiff failed to exercise due diligence in discovering Resorcon's identity because Plaintiff's attorney had requested that USX give him the opportunity to inspect the fan to determine the

manufacturer. USX refused and the Plaintiff's attorney did nothing else.

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

Chief Justice Moore dissented.

**DISSENT:**

Chief Justice Moore reasoned that GM Canada had not established all four grounds for securing a writ of mandamus.

**1. Chief Justice Moore wrote that the Defendant had not established a "clear legal right to the Order sought."**

**Chief Justice Moore pointed out that there was uncertainty in regard to an important fact i.e., whether the Plaintiff had sufficient and readily available facts to lead to the discovery because there was a question as to who possessed the car, either the Plaintiff or his family.** In fact, evidence was submitted that when the lawsuit was filed, the attorney did not know where the vehicle was and first learned after the June 10, 2009, Motion to the Amended Complaint that a prior attorney for the Plaintiff had the car.

**2. Chief Justice Moore said that there was no imperative duty on the Respondent to perform accompanied by a refusal to do so necessary for the Court to act.**

**If there is no clear legal right, there can be no imperative duty for the trial court to act.**

**3. Chief Justice Moore also wrote that GM Canada had not demonstrated that it lacked another adequate legal remedy a Rule 5(a) Permissive Appeal.** Chief Justice Moore stated that because GM Canada should have sought permission to appeal the trial court's order under Rule 5 of the Alabama Rules of Appellate Procedure when the trial court allowed the substitution, the Defendant could not now receive a writ of mandamus due to its failure to seek a Rule 5(a) interlocutory appeal.

**4. As to item 4, "the properly invoked jurisdiction of the Court," Chief Justice Moore found no abuse of discretion by the trial court.**

**CIVIL PROCEDURE – DECLARATORY JUDGMENT ACTION**

**A DECLARATORY JUDGMENT ACTION IS NOT INTENDED TO BE A VEHICLE FOR A POTENTIAL TORT DEFENDANT TO OBTAIN A DECLARATION OF NON-LIABILITY.**

*Ex Parte John Valloze et al.*, 2013 Ala. LEXIS 127 (September 27, 2013).

**SUMMARY:**

Tiffin filed a declaratory judgment action seeking an order finding that he had no liability to two purchasers of custom made motor homes manufactured and sold by Tiffin.

The purchasers filed motions to dismiss the manufacturer's declaratory judgment actions. The purchasers contended that a bona fide judicial controversy did not exist and an action under the declaratory judgment act, Alabama Code §§ 6-6-223, 6-6-232 was not intended to permit a potential tort defendant to obtain a declaration of non-liability. The trial court denied the Motions.

The purchasers filed a Petition for Writ of Mandamus.

**HOLDINGS:**

(1) **A Potential Tort Defendant Cannot Obtain a Declaration of Non- Liability.** The trial court erred in denying the motion to dismiss in that the declaratory judgment act did not permit a potential tort defendant to obtain a declaration of non-liability.

(2) **No obligations or Rights of the Manufacturer would be affected.** The manufacturer did not highlight how any of its obligations would be impaired or any of its rights invaded if it could not obtain declaratory relief.

(3) **Apprehension of Legal Action Cannot be a Basis for a Declaratory Judgment Action.** Relieving a party of the apprehension of legal action and potential liability was not the purpose of a declaratory judgment action; and

(4) **Plaintiffs can choose the Time and Forum for filing an Action.** A plaintiff had a right to choose a forum and using the declaratory judgment action in the manner employed by the manufacturer deprived tort plaintiffs of that right and of the ability to elect the timing for bringing an action.

The court granted the petition for writ of mandamus.

**DISCUSSION:**

**A. A Potential Claim Cannot be the Basis of a Declaratory Judgment Action.**

The petitioners argued that Tiffin had admitted that no bona fide judicial controversy existed because it admitted in its complaints that the insurance companies had notified Tiffin of "a potential claim." The petitioners contended that Tiffin's rights had not been thwarted or affected in any way because there was no right to be free from the mere possibility of a lawsuit. Tiffin countered in part that State Farm's letter explicitly stated that State Farm would commence litigation unless Tiffin agreed to settle the claim under terms offered by State Farm.

The Court agreed with Tiffin that a declaratory judgment action is designed to be preemptive, because they **"set controversies to rest before they lead to repudiation of obligation, invasion of rights, and the commission of wrongs,"** *Carey v. Howard*, 950 So.2d 1131, 1134 (Ala. 2006). However, the Court reasoned that Tiffin had not highlighted how any of its obligations would be impaired or any of its rights invaded if it could not obtain declaratory relief.

### B. No Alabama Case Had Addressed this Issue; therefore, the Court Relied on Cases from Other Jurisdictions.

The Court stated that it could find no Alabama case on this issue but found that the majority of courts with which the Alabama Supreme Court agreed had determined that declaratory relief was not intended to be used for a determination of potential tort liability.

Justice Murdock authored the opinion and Justices Bolin, Main, Wise and Bryan concurred.

**CIVIL PROCEDURE – FRAUDULENT MISREPRESENTATION AND PROMISORRY FRAUD CLAIMS RELATED TO A CONTRACT BETWEEN THE PARTIES**

***Target Media Partners Operating Company, LLC, et al. v. Specialty Marketing Corporation d/b/a Truck Market News,* 2013 Ala. LEXIS 103 (September 6, 2013).**

**SUMMARY:**

Target and Specialty published magazines directed to the trucking industry. They have litigated a commercial contract dispute since 2007. Further Specialty also alleged fraud claims against Target and others. At trial the jury found in favor of Specialty awarding compensatory damages and substantial punitive damages.

In the first opinion issued in this case the Court essentially reversed the judgment entered on the fraud claims contending that the fraud claims arose out of contract.

On the first application for rehearing the Court withdrew its opinion and in its April 19, 2013 Order affirmed the judgment without opinion.

On the second application for rehearing decided on September 6, 2013, the Court issued this Opinion.

**HOLDINGS:**

**(1) The trial court's Order denying the publishing company's motion as to the marketer's breach of contract claim was proper as counsel failed to object to the verdict form after the trial court instructed the jury.**

**(2) The notice of appeal was timely filed.**

**(3) The trial court's Order denying Target's motion for a judgment as a matter of law as to Specialty's fraudulent misrepresentation claim was proper as the jury could have found that Specialty relied upon Target's continual misrepresentations throughout the term of the distribution contract.**

**(4) There was evidence that Target engaged in promissory fraud;**

**(5) Sufficient evidence supported the jury's damages award for breach of contract.**

**(7) The trial court had to conduct a hearing concerning the jury's punitive damages award against the company.**

The judgment was affirmed in part and remanded in part.

**DISCUSSION:**

**A. SPECIALTY ARGUED THAT THE TRIAL COURT'S ORDER DENYING TARGET'S POST-JUDGMENT MOTION WAS NOT A FINAL ORDER BECAUSE THE ORDER DID NOT COMPLETELY ADJUDICATE ALL MATTERS AND CONTROVERSIES BETWEEN THE PARTIES AND THE ALABAMA SUPREME COURT DISAGREED FINDING THAT THE APPEAL WAS FROM A FINAL JUDGMENT AND WAS THEREFORE TIMELY.**

**B. TARGET CONTENDED THAT THE DAMAGES AWARDED BY THE JURY ON THE BREACH OF CONTRACT CLAIM WERE EXCESSIVE AND THAT THE UNDISPUTED EVIDENCE DEMONSTRATED THAT TARGET HAD NOT BREACHED THE CONTRACT.**

**HOWEVER, TARGET ARGUED THAT DUE TO A PROBLEM WITH THE VERDICT FORM THE JURY'S VERDICT IN FAVOR OF SPECIALTY ON SPECIALTY'S BREACH OF CONTRACT CLAIM COULD NOT BE SUSTAINED BECAUSE THE VERDICT IN FAVOR OF SPECIALTY WAS INCONSISTENT WITH THE JURY'S VERDICT IN FAVOR OF TARGET ON ITS COUNTERCLAIM ALLEGING BREACH OF CONTRACT.**

The Court agreed that the verdict form on its face was inconsistent. However, counsel for Target did not object to the verdict form now being challenged. Therefore, the trial court's order denying Target's post-judgment motion as to Specialty's breach of contract claims is due to be affirmed.

**C. SPECIALITY'S FRAUDULENT MISPRESENTATION CLAIM WAS NOT BARRED BY ALABAMA'S TWO-YEAR STATUTE OF LIMITATIONS FOR FRAUD CLAIMS DUE TO THE DISPUTE AS TO THE DAY OF DISCOVERY.**

Target contended that Specialty's fraudulent misrepresentation claim was barred by the Alabama two-year statute of limitations for fraud claims. However, the Court disagreed in that there was a dispute of fact as to when Specialty was put on notice of the alleged fraud that was decided by the jury in favor of Specialty.

**D. SUBSTANTIAL EVIDENCE WAS PRESENTED REGARDING THE ALLEGED REPRESENTATIONS BEING FALSE THAT THE JURORS REASONABLY COULD HAVE FOUND THAT TARGET MADE FRAUDULENT MISREPRESENTATIONS.**

Target contended that Specialty did not meet its burden of proof as to the fraudulent misrepresentation claims and that, therefore, the trial court should have awarded the requested judgment as a matter of law.

The Court noted that substantial evidence was presented that the alleged representations were false and that the jurors reasonably found that Target made fraudulent misrepresentations. The only remaining issue was whether the jurors could have inferred that Specialty relied on those representations and whether the reliance was reasonable. The jury determined that Specialty in fact relied on the representations. The trial court properly denied the Motion.

**E. AS TO THE PROMISSORY FRAUD CLAIMS, TARGET CONTENDED THAT IN THAT THE JURY FOUND IN FAVOR OF TARGET'S AGENT, LEADER, ON THE PROMISSORY FRAUD CLAIM THAT FINDING PRECLUDED THE JUDGMENT AGAINST TARGET FOR PROMISSORY FRAUD.**

Target relied on *Alfa Life Insurance Corporation v. Jackson,* 906 So.2d 143, 154 (Ala. 2005) and *Stevenson v. Precision Standard, Inc.*, 762 So.2d 820, 827 (Ala. 1999) for the contention that to find in favor of the employee but then to find against the employer was inconsistent.

**The Court found that the verdicts were not necessarily inconsistent because two other agents for Target made similar representations**.

As to Target's contention that there was no evidence that Target intended not to perform under the 2002 distribution contract, the Court found that the jury could have disregarded the testimony of the Target representatives as to the intent not to perform under the contract and found that the circumstantial evidence presented warranted submission of the promissory fraud claim to the jury upon which the jury reasonably could have inferred an intent on target's part.

**F. THE COURT FOUND THAT THE TRIAL COURT DID NOT ERR IN DENYING THE JUDGMENT AS A MATTER OF LAW FILED BY TARGET AND THAT THE CLAIMS OF BREACH OF CONTRACT AND CLAIMS FOR FRAUD WERE PROPERLY SUBMITTED TO THE JURY.**

**G. THE COURT FOUND THAT THE TRIAL COURT PROPERLY DENIED TARGET'S MOTION FOR A NEW TRIAL AS TO THE BREACH OF CONTRACT CLAIM.**

**H. AS TO TARGET'S MOTION FOR A REMITTITUR, THE COURT REMANDED THE CASE TO THE TRIAL COURT TO CONDUCT A *Hammond/Green Oil* HEARING.**

JUSTICES PARKER AND WISE CONCURRED IN THE PER CURIAM OPINION.

Chief Justice Moore and Justices Shaw and Bryan concurred in the result.

Justice Murdock concurred in the rationale in part and concurred in the result.

Justices Stuart, Bolin and Main concurred in part and dissented in part.

**JUSTICE MAIN'S DISSENT.**

Justice Main dissented as to the fraudulent misrepresentation claim and the promissory fraud claim. He found instead that the judgment as a matter of law filed by Target as to those claims asserted by Specialty should have been granted by the trial court. Justice Main found Specialty's reliance upon the representations to be unreasonable as a matter of law. As to promissory fraud, intent not to perform was not proved by Specialty. Justices Stuart and Bolin concurred in Main's dissent.

**CIVIL PROCEDURE: - CORPORATION NOT QUALIFIED TO DO BUSINESS IN ALABAMA.**

**CAPACITY AND LEGAL EXISTENCE OF DEFENDANT AND COUNTERCLAIM PLAINTIFF CORPORATION WAS NOT PROPERLY RAISED BY NEGATIVE AVERMENT IN THE ANSWER TO THE COUNTERCLAIM CONSISTENT WITH RULE 9(a) OF THE ALABAMA RULES OF CIVIL PROCEDURE.**

***Wausau Development Corporation v. Natural Gas et al., Inc.*, 2013 Ala. LEXIS 168 (November 22, 2013).**

**SUMMARY:**

An Alabama corporation (Natural Gas) sued a non-registered foreign corporation. (Wausau). Wausau asserted counterclaims. The fact that Natural Gas contended that Wausau was not qualified to do business in Alabama was insufficient in that a specific negative averment as to capacity under Alabama Rule of Civil Procedure 9(a) was required.

**HOLDING:**

**The circuit court by raising the issue of capacity sua sponte improperly denied the foreign corporation an opportunity to raise the interstate commerce exception to the door closing statute.**

**The Court reversed the decision of the circuit court**.

**DISCUSSION:**

Natural gas sought to invalidate certain oil and gas leases on the basis that Wausau was not qualified to do business in Alabama and that the leases had expired. Wausau counterclaimed for breach of contract.

Natural Gas moved for a judgment on the pleadings which was granted.

The Court noted that although Natural Gas alleged in its complaint and its motion for a judgment on the pleadings that Wausau was not authorized to conduct business in Alabama, Natural Gas never made "a specific negative averment" regarding capacity to bring the counterclaims as was required by Rule 9(a).

Although Natural Gas noted that Wausau was not admitted, at the hearing, **Natural Gas did not argue that Wausau lacked capacity nor did it mention that Wausau was not licensed to conduct business in Alabama**. The only arguments made by Natural Gas at the hearing related to the merits of Wausau's claims.

The court noted that because Natural Gas did not raise as a defense Wausau's capacity under the door-closing statute the court did not discuss the applicability of the interstate commerce exception.

As the circuit court noted, Natural Gas alleged in its complaint that Wausau was not authorized to do business in Alabama and Wausau admitted that it was not qualified to do business in Alabama. Despite that, the court required that it be asserted affirmatively as a defense and in the motion for judgment on the pleadings and that the allegation in the complaint and the admission by Wausau was insufficient.

**CIVIL PROCEDURE – VENUE FOR CORPORATIONS –**

**VENUE WAS NOT PROPER IN THE COUNTY WHERE THE LAWSUIT WAS FILED FOR EITHER THE INSURANCE COMPANY OR ITS BROKER AGENTS.**

***Ex Parte Guarantee Insurance Company, et al.,* 2013 Ala. LEXIS 64 (June 14, 2013).**

**SUMMARY**:

After a dispute over insurance premiums, the insured sued the insurance companies and individual agents for breach of contract, fraudulent misrepresentation, fraud in the inducement, fraudulent suppression, negligence and wantonness, negligent procurement of insurance coverage, and conversion.

The trial court denied the petitioners' motion for a change in venue and they petitioned for a writ of mandamus.

**HOLDINGS:**

**A. As to the agents, the Supreme Court held that venue was improper under Alabama Code § 6-3-2(a)(2) and (3) because:**

**1. As to breach of contract claims, venue was improper because they resided in other counties.**

**2. As to the personal injury claims, the alleged act or omission might only have occurred in a county other than the county in which the lawsuit was filed.**

**B. As to the insurance companies under Alabama Code § 6-3-7, venue was improper because:**

**(1) As to the personal injury claims, a substantial part of the underlying events or omissions occurred in another county or State.**

**(2) As to the breach of contract claims, venue was improper because**

**(a) An alleged unperformed audit was insufficient to show a substantial part of underlying events or omissions occurred in the trial court's county**

**(b) The insurance company's affidavit shifted the burden to the insured to show proper venue under Alabama Code § 6-3-7(a)(3) and**

**(c) The insured did not meet that burden because the insurance company's regularly performed corporate functions as to the subject policies were taken in another county or State and <u>any past isolated transaction in</u>**

**the trial court's county did not show that the insurance company did business there for the purposes of venue**.

**DISCUSSION:**

Justice Main authored the opinion.

The plaintiff company is an Alabama limited liability company. The insurance company is a Florida corporation with its principal place of business in Fort Lauderdale and its registered agent in Jefferson County. It is a wholly owned subsidiary of Patriot, a Delaware corporation, with its principal place of business in Fort Lauderdale. The two individual defendants are insurance agents with an insurance brokerage and risk management firm in Montgomery. One of the individual agents resides in Montgomery County and the second resides in Lee County.

After a dispute over premiums arose, the plaintiff sued the insurance company parties in Dallas County alleging breach of contract, fraudulent misrepresentation, fraud in the inducement, fraudulent suppression, negligence and wantonness, negligent procurement of insurance coverage, and conversion stemming from the plaintiff's purchase of the subject insurance policies.

The defendants filed a joint motion requesting the transfer of the case to Lee County Circuit Court.

Evidence submitted indicated that the plaintiff corporation was formed in 2001, and it had a registered office address in Montgomery Alabama. The plaintiff offered testimony by affidavit that the company's principal office in the State of Alabama was located in Dallas County, Alabama.

In response to the evidence submitted by the insurance company defendants, the plaintiff company countered that venue was proper in Dallas County because the Plaintiff's principal place of business was located in Dallas County and the insurance company parties did business by agent in Dallas County.

An affidavit submitted on behalf of the insurance company stated that it did not do business by agent in Dallas County and did not do business in Dallas County at the time that the lawsuit was filed. Further, the insurance company defendants submitted testimony that they did not insure any locations in Dallas County either at the time of filing suit or at the present time. Further, they had no employees or agents physically present in Dallas County at any time at issue.

**D. AS TO THE VENUE OF ACTIONS AGAINST THE INDIVIDUAL DEFENDANTS, SECTION 6-3-2, ALABAMA CODE (1975) CONTROLS, AND THE COURT FOUND THAT VENUE WAS ONLY PROPER IN EITHER LEE COUNTY OR MONTGOMERY COUNTY.**

Section 6-2-2 provides in part as follows:

(2) All actions on contracts, except as may be otherwise provided, must be commenced in the county in which the defendants or one of the defendants resides if such defendant has within the State a permanent residence.

(3) All other personal actions, if the defendant or one of the defendants has within the State a permanent residence, may be commenced in the County of such residence **or in the County in which the act or omission complained of may have been done or may have occurred**.

The plaintiff submitted no evidence to contradict affidavit testimony that Thomas was a resident of Montgomery and Harper was a resident of Lee County.

**B. THE ACT OR OMISSION DID NOT OCCUR IN DALLAS COUNTY.**

As to the issue of where the act or omission complained of occurred in regard to personal actions other than actions on contract one of the individual defendant's testified that he met with someone from the plaintiff company in Montgomery County before the policies were issued. The other individual defendant sent any emails directed to the plaintiff company from Montgomery County. All documents regarding the policies including applications, policies etc. were either issued from Montgomery or from the insurance company's office in Florida.

**C. THE FACT THAT THE COMMUNICATIONS WERE DIRECTED TO DALLAS COUNTY DID NOT AFFECT VENUE.**

Plaintiff's contended that because the communications were directed to Dallas County and the subject policies were to be delivered in Dallas County and because the insurance company collected premiums from Dallas County that then, therefore, venue was proper in Dallas County.

The Court disagreed. The Supreme Court determined that the only Alabama County in which the "act or omission complained of…may have occurred" was Montgomery County. The court found, therefore, that venue in Dallas County was improper as to the individual defendants.

**D. AS TO PROPER VENUE FOR THE CORPORATE DEFENDANTS, SECTION 6-3-7, ALABAMA CODE (1975) CONTROLS, THE COURT FOUND THAT VENUE WAS ONLY PROPER IN MONTGOMERY COUNTY. SECTION 6-3-7 PROVIDES, IN PART, AS FOLLOWS:**

Section 6-3-7 provides, in part, as follows:

(a) All civil actions against corporations may be brought in any of the following counties:

(1) in the County in which a **substantial part of the events or omissions giving rise to the claims occurred** or a substantial part of the real property that is the subject of the action is situated or…

(3) in the County in which the plaintiff resided or if the plaintiff is an entity other than an individual where the plaintiff had its principal office in this State at the time of the accrual of the cause of action, if **such corporation does business by agent in the County of the plaintiff's residence**.

**E. FOR PERSONAL CLAIMS, VENUE AS TO THE CORPORATIONS IS PROPER WHERE THE WRONG WAS COMMITTED, NOT WHERE ITS EFFECT WAS FELT.**

As to the personal claims for fraud, negligence, wantonness, and conversion, the venue of a personal injury claim is proper where the defendant committed the alleged wrongful act, not where its effect was felt by the plaintiff. *Ex parte Pikeville County Club*, 844 So. 2d 1186 (Ala. 2002).

**F. AS TO THE BREACH OF CONTRACT CLAIMS, THE DECISION AT ISSUE WERE MADE IN EITHER MONTGOMERY OR FLORIDA.**

As to the plaintiff's breach of contract claim safety net relied on *Vulcan Material Company v. Alabama Insurance Guarantee Association*, 985 So. 2d 376, 382 (Ala. 2007) for the principal that the events or omissions giving rise to the breach of contract claim occurred in Dallas County. In *Vulcan*, the court noted that "under the law of Alabama, a breach of contract claim, like the claim between [the plaintiff] and its insurance companies, arises **where the contract was breached**." The court disagreed with plaintiff's contention that the breach of contract occurred in Dallas County. The court found that all of the decisions concerning the subject policies that formed the basis of the plaintiff's claim were made in either Florida or Montgomery.

**G. FAILURE OF THE INSURANCE COMPANY TO DO AN AUDIT IN THE COUNTY IN WHICH THE LAWSUIT WAS PENDING WAS NOT SUFFICIENT TO CONCLUDE THAT "A SUBSTANTIAL PART OF THE EVENTS OR OMISSIONS GIVING RISE TO THE CLAIM OCCURRED IN DALLAS COUNTY**."

Nothing in connection with the performance under the subject policies by any of the defendants was performed in Dallas County. Plaintiff referenced the failure of the defendant insurance company to conduct an audit in Dallas County and the court noted this "inaction" alone was not sufficient to conclude that "a substantial part of the events or omissions given rise to the claim occurred in Dallas County."

H. **THE TWO PRONG ANALYSIS ESTABLISHED THAT VENUE WAS NOT PROPER IN DALLAS COUNTY.**

As to venue under Section 6-3-7(a)(3), that section requires a two-prong analysis if a plaintiff other than an individual has filed a complaint. Therefore, venue in Dallas County would be proper against a corporate defendant only if

1) plaintiff's **principal place of business** was in Dallas County at the time the action accrued and

2) if the corporation sued **did business by agent** in Dallas County which is the county in which plaintiff claimed it resides or has its principal place of business.

The court found that plaintiff had not met the second prong of the test because the insurance company did not do business by agent in Dallas County.

## I. SENDING DOCUMENTS TO DALLAS COUNTY WERE ISOLATED TRANSACTIONS THAT DID NOT ESTABLISH VENUE IN DALLAS COUNTY.

In regard to sending documents and things to Dallas County to the insured the Court found that did not demonstrate that the insurance companies did business by agent in Dallas County because those were isolated transactions that would not establish venue in Dallas County.

The petition for writ of mandamus was granted. Justices Stuart, Bolin and Wise concurred in the opinion authored by Justice Main. Justice Bryan concurred in the result.

**DISSENT BY CHIEF JUSTICE MOORE AND JUSTICE MURDOCK:**

Chief Justice Moore and Justice Murdock dissented. Murdock contended that venue was proper for the contract claims against the corporate defendants because under 6-3-7(a)(1) all civil actions against corporations may be brought in any one of the following counties in the county in which a substantial part of the events or omissions given rise to the event occurred.

Murdock agreed with the following argument by plaintiff:

> [Plaintiff's] breach of contract claim is based upon defendants' failure to tender the performance required by the insurance contract. **This failed performance included not performing a proper retroactive audit of [plaintiff's] business records which are located in Dallas County, and failing to tender the contractually required refund of premiums to [plaintiff's] Dallas County corporate office**.

**"A breach of contract occurs where the contract is to be performed."** ***Vulcan Materials v. Alabama Insurance Guarantee Association,*** **985 So. 2d [376] at 382[(Ala. 2007)].**

**CIVIL PROCEDURE – VENUE FOR CORPORATIONS**

**VENUE WAS NOT PROPER IN WASHINGTON COUNTY UNDER ALABAMA CODE § 6-3-7 AND THE RESPONDENT FAILED TO REBUT THE EVIDENCE WHICH PROVED:**

**(1) THAT PETITIONERS DO NOT HAVE A PRINCIPAL OFFICE IN WASHINGTON COUNTY; AND**

**(2) THAT THEIR WORK WAS EXCLUSIVELY DONE IN MOBILE COUNTY. FURTHER, PETITIONERS PROVED THAT THE ACCIDENT OCCURRED IN MOBILE COUNTY.**

***Sullivan v. H&M Industrial Services,* 2012 Ala.Civ.App. LEXIS 306 (Nov. 16, 2012).**

**DISCUSSION:**

In this opinion decided by Judge Moore, the petitioners relied on the provisions of Section 6-3-7(a), Alabama Code 1975 which provides, in part, as follows:

> All civil actions against corporations may be brought in any of the following counties:
>
> (1) In the county in which a substantial part of the **events or omissions giving rise to the claim occurred**, are a substantial part of real property that is the subject of the action is situated; or
>
> (2) In the county of the **corporation's principal office** in the state; or
>
> (3) In the county in which the plaintiff resided or if the plaintiff is an entity other than an individual, where the plaintiff had its principal office in the state, at the time of the accrual of the cause of action, **if such corporation does business by agents in the county of the plaintiff's residence**; or
>
> (4) If Subdivisions (1), (2), or (3) do not apply, in any county in which the corporation was **doing business by agent** at the time of the accrual of the cause of action.

**1. Defendants Contended That a Substantial Part of the Events or Omissions Did Not Occur in Washington County and Contended That They Did No business in Washington County.**

The petitioners argued that Sullivan's accident did not occur in Washington County and

that neither H & M nor ThyssenKrupp did business in Washington County. Further they contended that the plaintiff failed to rebut their evidence. The Court disregarded evidence that may have been submitted after the trial court ruled – that was submitted after the trial court ruled.

**2. The court rejected the evidence submitted by the plaintiff to establish that ThyssenKrupp did do business in Washington County for the purposes of venue as "past isolated transaction" that were "inconclusive."**

As to whether either H & M or ThyssenKrupp did business in Washington County the court noted that "a corporation does business in a county for purposes of Section 6-3-7 … if it performs with some regularity in that county some of the business functions for which the corporation was created." *Ex parte* Elliott, 80 So.3d 908, 912 (Ala. 2011).

**3. In Support of Its Motion for Change of Venue, Defendants Offered An Affidavit of Casey, a Technical Specialist and Project Manager For ThyssenKrupp and Dennis, a Project Manager For H&M.**

Dennis testified that H&M only performed work in Mobile and did not regularly do business in any other location in Alabama. Although an accident report showed that the accident occurred in Washington County, Dennis testified that he "**had been made to understand** that the hot-dip galvanizing lines are located in Mobile County, Alabama, by employees of ThyssenKrupp who have access to maps and satellite imagery of the ThyssenKrupp site." Casey testified that he was the project manager at the hot-dip galvanizing lines and that he was "**familiar with and has knowledge of where the boundaries of both Mobile County and Washington** County fall with respect to the ThyssenKrupp site… based on the extensive experience [he has] on this site, and [his] knowledge of the boundaries of Mobile and Washington County are based upon [his] frequent and **extensive use and knowledge of the Master Overlay Plans which depict the Washington County boundaries** upon it as compared to the layout of the [ThyssenKrupp] site." He stated that, based on his "review of the maps [his] professional and personal experience and [his] knowledge of the [ThyssenKrupp] site, [ThyssenKrupp] has erected no structure or other improvement on its site that falls within the borders of Washington County." Casey testified that based on his "review of the maps, [his] professional and personal experience and [his] knowledge of the [ThyssenKrupp] site, all worked performed by H&M was located well within the Mobile County boundary line."

The Plaintiff submitted a website page for ThyssenKrupp Steel & Stainless USA stating that the Company's site would be located in northern Mobile County and southern Washington County. Plaintiff also attached tax maps and a deed indicating that the "ThyssenKrupp Steel & Stainless USA, LLC" was located both in Mobile County and Washington County. He also attached a resolution of the Washington County Commission indicating that certain land in Washington County had been designated as an industrial park by "ThyssenKrupp Steel & Stainless USA, LLC." Further, he attached their Certificate of Merger between "ThyssenKrupp Steel USA, LLC" and ThyssenKrupp Steel & Stainless USA, LLC." Finally, he provided proof of registration of several vehicles in the name of ThyssenKrupp Stainless USA, LLC.

The trial court struck portions of Casey's Affidavit relying on documents that were not attached and portions of the Dennis Affidavit relying on hearsay.

**4. The Court Held That All of Casey's Testimony Was Admissible.**

The Court emphasized that Casey's testimony was based on his familiarity with the boundaries of Mobile County and Washington County and the site based on his "extensive experience [he has] on the site." He testified that his knowledge is based upon "his frequent and extensive use and knowledge of the Master Overlay Plans." Further, the Court noted that he testified that his testimony was based on his "review of the maps, his professional and personal experience, and his knowledge of the ThyssenKrupp site.

As to Casey's testimony as regarding where H&M's work was performed, Casey testified that it was based on his "review of the maps, his professional and personal experience and his knowledge of the ThyssenKrupp site." The Court found that Casey's testimony was based on personal knowledge and that it was not required for him to attach the maps on which he was relying.

**5. The Court Agreed That The Petitioners Demonstrated That The Accident Did Not Occur in Washington County and That The Evidence Was Not Rebutted By The Plaintiff.**

The Court disregarded the first report of injury showing that the accident occurred in Washington County because it was not presented to the trial court prior to that Court's ruling.

**6. The Court Found Unpersuasive Evidence Of The Industrial Park Being In Washington County and The Registration Of The Vehicles.**

The Court noted that the vehicles were registered to ThyssenKrupp Stainless USA but that the Plaintiff "did not submit any evidence indicating any relationship between ThyssenKrupp and "ThyssenKrupp Stainless USA." Although the opinion is not clear in this regard, it appears that the evidence was not presented to the trial court; however, in response to the Petition, Plaintiff offered a Certificate of Merger between ThyssenKrupp Steel USA and ThyssenKrupp Steel & Stainless USA dated September 26, 2011. However, the accident occurred on June 22, 2010.

**7. The Court found that evidence that ThyssenKrupp had twice used barges from a company located in Washington County "to collect some of its steel coils to ship out in response to a purchase order" indicated only a past isolated transaction particularly in that the barges had to come to Mobile County to load the coils.**

The Court found that none of this evidence established that the corporation did business in Washington County. The petition was granted and a writ issued.

**DAMAGES – EXPERT TESTIMONY IN A COMMERCIAL CONSTRUCTION CASE**

**AS TO COMMERCIAL CONSTRUCTION, OWNER COULD NOT TESTIFY AS TO THE COST OF REPAIRS AS HE COULD IN A RESIDENTIAL CASE BUT INSTEAD WAS REQUIRED TO OFFER EXPERT TESTIMONY AS TO OTHER FACTORS AFFECTING COMMERCIAL REAL ESTATE SUCH AS OCCUPANCY RATES AND OTHER FACTORS DEMONSTRATING A LOSS IN VALUE.**

***Bella Investments, Inc. v. Multi Family Services, Inc.*, 2013 Ala. Civ. App. LEXIS 256 (November 22, 2013).**

**SUMMARY:**

In this opinion authored by Judge Thomas, the builder argued that the correct measure of damages under Alabama law would be the difference between the fair market value of the property before the injury and the fair market value after the injury citing to *Nelson Brothers v. Busby*, 513 So. 2d. 1015, 1017 (Ala. 1987). The owner plaintiff contended that the cost of the repairs was sufficient.

**HOLDING:**

**(1) The trial court properly granted a contractor a judgment as a matter of law on the property owner's negligent construction claim because the owner did not present evidence of the fair market value of the property before and after the alleged injury. Evidence of repair cost was insufficient evidence of damages.**

**(2) The trial court properly granted the contractor a judgment as a matter of law on the owner's fraudulent suppression claim as there was no evidence that the contractor concealed or failed to disclose any material fact. Instead, the facts that the owner alleged the contractor should have known and disclosed were equally discoverable by the owner through the owner's employment of independent architects on the construction site.**

**DISCUSSION:**

1. **The Court distinguished its ruling in *Qore, Inc. v. Bradford Building*, 25 So. 3d. 1116 (Ala. 2009) reasoning that in *Qore* Bradford had asserted a breach of contract claim regarding construction of a Walgreens store and that no breach of contract claim was asserted in this case.**

In *Qore* the Court found that the evidence that the damage would not have occurred had the contract not been breached coupled with the evidence of repair costs was sufficient. **The Court emphasized *Qore* was not controlling because the plaintiffs in this case did not assert**

**a breach of contract claim.**

2. **The Court in finding for the contractor noted that the "proper measure of compensatory damages in a tort action based on damage to real property is the difference between the fair market value of the real property immediately before the damage and the fair market value immediately after the damage."**

Bella offered testimony of a real estate appraiser, Key, but Key testified only as to his "methodology" based on "presumed" numbers and did not do an independent valuation. The only evidence concerning the value of the hotel was the contract price as opposed to the fair market value of the hotel upon completion which took into account none of the myriad factors required to perform a valuation of a commercial property like a hotel. "Although mathematical certainty is not required, a jury cannot be left to speculate as to the amount of damages but 'this does not mean that the plaintiff must prove damages to a mathematical certainty or measure than by money standard rather he must produce evidence tending to show the extent of damages as a matter of just and reasonable inference." *IMAC Energy,* 590 So. 2d at 168.

The opinion was authored by Judge Thomas. Judges Pittman and Donaldson concurred. Judge Thompson concurred in the result.

**JUDGE MOORE DISSENTED.**

Moore contended that the decision was inconsistent with prior decisions of the Alabama Supreme Court in *IMAC Energy, Inc. v. Tittle,* 590 So. 2d 163 (Ala. 1991) and *Dooley v. Ard Oil Company*, 444 So. 2d 847, 848 (Ala. 1983). Judge Moore found that value of the property before and after the damage could be inferred from the evidence presented including the contract price for building the hotel, the testimony of Dennis Key a real estate appraiser who testified that the present day value of the hotel would be reduced by at least the repair cost and the evidence regarding the repair cost.

**INSURANCE – DIRECT ACTION AGAINST INSURANCE COMPANY**

**THE CLAIMS MADE BY THE PLAINTIFF IN THE UNDERLYING ACTION WERE NOT COVERED UNDER THE TERMS OF THE ADMIRAL POLICY DUE TO AN EXCLUSION IN THE POLICY FOR COVERAGE FOR INJURIES ARISING FROM AN ASSAULT AND BATTERY IN WHICH ANY INSURED WAS INVOLVED.**

***Admiral Insurance Company v. Ryan Price-Williams*, 2013 Ala. LEXIS 49 (May 17, 2013).**

**SUMMARY:**

An assault victim sued officers of a fraternity and the fraternity's general liability insurer, Admiral, seeking damages for injuries she received in an assault at the fraternity house. She alleged that the officers were "additional insureds" under a policy the insurance company issued to the fraternity.

The trial court entered a judgment in favor of the victim and against Admiral. Admiral appealed.

**1. First Submission:**

On original submission, the Supreme Court affirmed rejecting Admiral's argument that the covered claims (negligence) and the non-covered claims (assault and battery) were so intertwined as to destroy coverage. The court reasoned that the wrongful acts under the two theories were separate and distinct.

**2. Second Submission:**

On rehearing, the Court reversed, holding that an exclusion in the Admiral policy precluded coverage due to the terms of the assault and battery exclusion.

**HOLDINGS:**

(1) The Court held that the victim was attempting to use the direct action statute, Section 27-23-2, to require the insurance company to fulfill a judgment entered against the officers for injuries she received as the result of an assault in which they participated.

(2) As Price-Williams stood in the shoes of the officers as to the coverage issues and as the policy did not cover assault and battery, Price-Williams could not recover damages from Admiral.

(3) Further, the court held that it was impossible to allocate some portion of his injuries to the officers' failure to implement a risk management program and some other portions to the assault.

The judgment was reversed and the case remained.

**DISCUSSION:**

The Admiral policy was issued to the Kappa Sigma Fraternity to which the individual defendants Dean and Baber belonged. Price-Williams alleged that Admiral was obligated to pay a judgment that had been entered in favor of Price-Williams and against Dean and Baber in a previous action. (The national fraternity is Kappa Sigma and the local chapter is Kappa Nu.)

**1. The Underlying Lawsuit.**

The attorney for Kappa Sigma settled the claims against it in the underlying lawsuit. The individual defendants, Dean, Baber and Howard never retained counsel, never answered the complaint and never appeared in the action and a default judgment was entered against them in the underlying lawsuit.

Subsequently there was a dispute between Price-Williams and Kappa Nu regarding the settlement agreement. Kappa Nu contended that Price-Williams had agreed to release Kappa Sigma, Kappa Nu and Dean and Baber in their capacities as agents of Kappa Nu. The trial court found in favor of Price-Williams. Kappa Nu appealed and the Alabama Supreme Court affirmed that decision.

**2. The Direct Action Lawsuit.**

In October 6, 2009 Price-Williams filed the present lawsuit as a direct action against Admiral alleging that by virtue of their status as officers, Dean and Baber were additional insureds under the commercial liability policy that Kappa Sigma held with Admiral on the date of the assault.

A bench trial was conducted but Admiral did not attend the trial having been under the mistaken belief that the case would be decided through the submission of briefs. **Ultimately the trial court held that although the assault and battery exclusion applied to those claims that the exclusion did not apply to bodily injury attributable to negligence and wantonness which "actually facilitated Howard's conduct of assaulting Price-Williams**."

**Price-Williams contended that Howard's involvement in the assault avoided the application of the assault and battery exclusion in the Admiral policy because the policy itself applied only to any damage due to the assault and battery by Dean and Baber, not any injuries caused by Howard since Howard was not an insured under the policy.**

**3. The Court disagreed because the lawsuit against Admiral was specifically pled to seek payment of a judgment previously entered against Admiral insureds, Dean and Baber – in the underlying action.**

The Court concluded, therefore, that Price-Williams could have no greater right to recover from Admiral than Dean and Baber's coverage for the claims asserted against them.

What Howard did or did not do was not at issue because Price-Williams was not asking Admiral to fulfill a judgment entered against its insured Kappa Nu for injuries received in an assault committed solely by a non-insured member of the fraternity such as Howard.

**4. The Court pointed to the language of the trial court's order in which it stated that the negligent or wanton acts of Dean and Baber in failing to implement a risk management program combined with the assault resulted in "<u>one indivisible injury</u>" to Price-Williams.**

Therefore the Court concluded it was impossible to allocate some portion of the injury an award of damages based on those injuries to the claims of failure to implement a risk management program and to allocate other amounts to the assault.

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

Justice Murdock concurred specially.

Chief Justice Moore and Justice Shaw concurred in the result.

**INSURANCE – BAD FAITH CLAIM – UNINSURED MOTORIST COVERAGE**

**IN THIS CASE, THE COURT FOUND THAT THE PLAINTIFF COULD PROVE STATE CLAIMS FOR BREACH OF CONTRACT AND BAD FAITH BECAUSE A "PHANTOM" VEHICLE CAUSED THE INJURIES AT ISSUE.**

**CIVIL PROCEDURE – SUBJECT MATTER JURISDICTION**

**SAFEWAY'S 12(B)(1) AND 12(H)(3) MOTIONS WERE DUE TO BE DENIED IN THAT THE COURT CLEARLY DID NOT LACK SUBJECT MATTER JURISDICTION.**

**CIVIL PROCEDURE – RIPENESS**

**SAFEWAY DID NOT DEMONSTRATE THAT THE BAD FAITH CLAIM WAS NOT RIPE FOR CONSIDERATION BY THE TRIAL COURT.**

***Ex parte Safeway Insurance,* 2013 Ala. LEXIS 181 (October 4, 2013).**

**SUMMARY:**

The insured claimed that he was due uninsured motorist coverage for an accident involving a phantom vehicle. Safeway denied the insured's claim for the full amount of the UM coverage. The insured sued Safeway for both breach of contract and bad faith. Safeway filed a 12(b)(1) Motion to Dismiss under Rule 12(h)(3) which provides that "whenever it appears by suggestion of the parties or otherwise that the Court lacks jurisdiction of the subject matter, the Court shall dismiss the action."

Safeway argued that the bad faith claim was not ripe for consideration until liability and damages had been established. The trial court denied the Motion to Dismiss and Safeway petitioned for a Writ of Mandamus.

**HOLDING:**

The Court denied the petition finding that Safeway had neither demonstrated a lack of subject matter jurisdiction nor had Safeway demonstrated that the claim was not ripe for the Court's consideration.

**DISCUSSION:**

The petition for writ of mandamus addressed only the trial court's refusal to dismiss the claims for bad faith. The insured was hit by an unknown driver who left the scene. The insured alleged that the driver of the "phantom vehicle" was an uninsured motorist and sought his full

coverage of $50,000.00. There was a dispute in the case as to whether or not Safeway denied the claim; however, the insured sued for both breach of contract and bad faith.

**A. THE TRIAL COURT DID NOT LACK SUBJECT MATTER JURISDICTION; THEREFORE, THE RULE 12(B)(1) MOTION WAS DUE TO BE DENIED.**

The insured sued Safeway asserting claims of breach of contract and bad faith alleging that Safeway without lawful justification had intentionally refused to pay Kimbrough's claim.

Safeway moved to dismissed for lack of subject matter jurisdiction and alleged that a claim for uninsured motorist benefits was not ripe for adjudication until liability and damages had been established.

Safeway further contended that its Motion was due to be granted pursuant to Rule 12(h)(3), Alabama Rules of Civil Procedure which provides:

> "Whenever it appears by suggestion of the parties or otherwise that the Court lacks jurisdiction of the subject matter, the Court shall dismiss the action."

The *Safeway* court noted that "subject-matter jurisdiction is a simple concept":

> **Jurisdiction of the subject matter is the power to hear and determine cases of the general class to which the proceedings in question belong**. The principal of subject-matter jurisdiction relates to a court's inherent authority to deal with a case or matter before it. The term means not simply jurisdiction of the particular case then occupying the attention of the court but jurisdiction of the class of cases to which the particular case belongs.

21 C.J.S. Courts Section 11 (2006).

The court noted that:

> **In determining a trial court's subject-matter jurisdiction, this court asks 'only whether the trial court had the constitutional and statutory authority to hear the case**.' *Russell v. State*, 51 S.3d (26), 1028 (Ala. 2010) ("Ex parte Seymour, 946 S.2d 536,538 (Alabama 2006)). Problems with subject-matter jurisdiction arise if, for example, a party files a probate action in a juvenile court, a divorce action in a probate court, a lay bankruptcy petition in the circuit court, because the nature or class of those actions is limited to a particular forum with the authority to handle them. There are, however, no problems with subject-matter jurisdiction merely because a party files an action that ostensibly lacks a probability of merit.

The Court concluded that while the issue of bad faith could be decided in a 12(b)(6) Motion or a Rule 56 Motion for Summary Judgment, that it would not be disposed of on the basis of lack of subject matter jurisdiction under 12(b)(1).

**B. SAFEWAY ARGUED THAT THE CLAIM WAS NOT RIPE FOR CONSIDERATION BASED ON THE CASE OF *PONTIUS v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,* 915 SO.2D 557 (ALA. 2005); HOWEVER, THE COURT DISTINGUISHED *PONTIUS* AND NOTED THAT IN *PONTIUS* THE UNINSURED DRIVERS WERE THE DEFENDANTS IN THE LAWSUIT BUT THAT IN THE PRESENT CASE A PHANTOM VEHICLE WAS AT ISSUE.**

The insurance company based its contention that the claim was not ripe for consideration on *Pontius.* In *Pontius*, the insureds were in a car accident with a vehicle driven by an uninsured driver. The insured sued the driver and the driver's parents and then filed a claim with State Farm for uninsured motorists benefits. State Farm denied the claim and intervened in the lawsuit.

The insureds then amended their Complaint and added State Farm and asserted both breach of contract and a bad faith claim.

The trial court granted State Farm's 12(b)(6) Motion to Dismiss pursuant to Rule 12(c).

The *Pontius* court noted that "to be legally entitled to recover its damages 'the insured must establish fault on the part of the uninsured motorist, which gives rise to damages and must then prove the extent of those damages.'" *Pontius,* 915 So.2nd at 506.

Safeway contended that *Pontius* controlled because liability had not been established and that damages were questionable and that Safeway was entitled to litigate liability and damages without being subjected to bad faith discovery and the threat of an extra contractual judgment at the end of what is a simple automobile accident case.

The Court concluded that it did not agree that the trial court lacked subject matter jurisdiction. Further, the Court held that the trial court did have the authority to hear the case and it could dismiss it on the merits but that the outcome of the case ought to be decided by a Rule 12(b)(6) Motion to Dismiss not a 12(d)(1) Motion to Dismiss. **Proving fault and damages ought to be an evidentiary or elemental prerequisite for showing an insured's insurance company's bad faith failure to pay benefits, not a jurisdictional prerequisite**.

The Court cited to Justice Murdock's special concurrence regarding ripeness and subject matter jurisdiction in *Ex parte Safeway Insurance Co., of Alabama,* 990 So.2d 344, 353 (Ala. 2008) in which Justice Murdock stated:

> I am not persuaded … that the concept of 'ripeness' is the appropriate concept by which to describe the problem with the plaintiff's claim. And I especially am not persuaded that the problem here is of a jurisdictional nature. For all that appears, this is a case in which the plaintiff is unable to demonstrate that the wrongful conduct she alleges to have occurred, actually has occurred. Addressing such circumstances is one of the purposes for which Summary Judgment is made available under Rule 56, Ala.R.Civ.P.

**JUSTICE SHAW'S DISSENT:**

Justice Shaw contended that there was no distinction between the facts in the present case and the Court's prior ruling in *Pontius* and *Ex parte Safeway Ins. Co. of Alabama*, 990 So.2d 344 (Ala. 2008). Justice Shaw stated that "as in both *Safeway* and *Pontius*, Safeway has presented unrefuted evidence establishing that both damages and liability are in dispute. Thus, in accordance with both of those decisions, Kimbrough's bad faith claim is, as a matter of law, not ripe." p. 11.

Finding *Pontius* and the prior *Safeway* decision controlling, Shaw concluded that Safeway's petition should be granted and that the trial court should be directed to dismiss the bad faith count without prejudice. Justice Bolin concurred in Justice Shaw's dissent.

**INSURANCE - "ABNORMAL" BAD FAITH – BAD FAITH REFUSAL TO INVESTIGATE**

**THERE IS ONLY ONE TORT OF BAD FAITH AND A KEY REQUIREMENT IS THE ABSENCE OF A LIGITIMATE REASON FOR DENIAL.**

***State Farm Fire and Casualty Company v. Brechbill*, 2013 Ala. LEXIS 126 (September 27, 2013).**

**SUMMARY:**

State Farm appealed from an adverse judgment entered on a jury verdict in favor of a homeowner on his claim of "abnormal" bad faith failure to investigate an insurance claim. State Farm appealed.

**HOLDING:**

The judgment was reversed and remanded.

(1) The trial court's ruling eliminated the third element of a tort of bad faith refusal to pay an insurance claim as the insurer had a reasonably legitimate and arguably reason for refusing to pay the claim; therefore, the insured's claim that the insurance company intentionally failed to adequately investigate the claim had to fail.

(2) Even if the insurance company improperly omitted some aspects of a complete investigate, more than bad judgment or negligence was required in a bad faith action.

The Supreme Court found that (1) there is only one tort of bad faith of which a refusal to investigate can serve as a basis **but** (2) whether the claim is a bad faith refusal to pay or a bad faith refusal to investigate, the tort of bad faith requires proof of the third element, absence of legitimate reason for denial.

**DISCUSSION:**

**A. The first appeal of the case - - a Rule 5 Permissive Appeal.**

The trial court granted State Farm's motion for summary judgment as to the "normal" bad faith claim but refused to grant its motion for summary judgment as to the "abnormal" bad faith failure to investigate.

**The trial court denied State Farm's Motion for Summary Judgment on the "abnormal" bad faith claim and State Farm petitioned for Permissive Appeal which the Court denied holding that there is "no controlling question of law of which there is a substantial ground for a difference of opinion."**

Relying on the case of *Jones v. Alfa Mutual Insurance Company*, 1 So.3d 23 (2008) the trial court found in denying the motion for summary judgment that it could not find as a matter of law that State Farm had carried its burden to make a prima facie showing that it made a good faith coverage determination, that it adequately investigated all areas of damage, that it properly and adequately investigated the condition of the home and that it properly subjected the claim to reasonable cognitive review or evaluation before denying the claim on August 7, 2008.

Subsequent to the denial of the motion for summary judgment as to the abnormal bad faith claim, State Farm requested a permissive appeal pursuant to Rule 5 of the Alabama Rules of Appellate Procedure.

In denying that petition the Alabama Supreme Court noted that "in abnormal bad faith cases, however, the predicate of a pre-verdict judgment as a matter of law on the plaintiff's breach of contract claim is not required. …**given this distinction between the predicates for getting a 'normal' versus an 'abnormal' bad faith claim to a jury, the court finds no controlling question of law of which there is substantial ground for a difference of opinion**."

The jury returned a verdict against State Farm on the abnormal bad faith claim and State Farm appealed.

**B. The second appeal of the jury verdict.**

**1. The Court rejected Plaintiff's contention that even if a bad faith failure to pay claim could not survive that a bad faith refusal to investigate claim could survive finding that there is only one tort of bad faith.**

In reversing the decision of the trial court the Alabama Supreme Court noted that:

"When this court in 1981 adopted the tort of bad faith in regard to the failure to pay an insurance claim, it held, 'an actionable tort arises for an insurer's intentional refusal to settle a direct claim where there is either' (1) no lawful basis for the refusal coupled with actual knowledge of that fact or (2) intentional failure to determine whether or not there was any lawful basis for such refusal.'" *Chavers v. National Security Fire and Casualty Company*, 405 So. 2d 1, 7 (Ala. 1981).

Rather than using the "confusing terms," "normal" or "abnormal" bad faith, the court instead used the terms "bad faith refusal to pay" and "bad faith refusal to investigate." The plaintiff in this case argued that even if a bad faith failure to pay claim could not survive that a bad faith refusal to investigate claim could survive.

The Court noted that "we have repeatedly held that the tort of bad faith refusal to pay a claim has four elements:

(a) a breach of insurance contract,

(b) the refusal to pay claim,

(c) the absence of arguable reason,

(d) the insurer's knowledge of such absence - with a conditional fifth element:'

(e) if the intentional failure to determine the existence of a lawful basis is relied upon, the plaintiff must prove the insurer's intentional failure to determine where there is a legitimate or arguable reason to refuse to pay the claim.'" Quoting from *Bowen*, 417 So. 2d at 183.

"Requirements (a) through (d) represent the normal case. Requirement (e) represents the 'abnormal' case." *Grissett*, 732 So. 2d at 976. However, the tort is only one tort.

**2. The Court distinguished the *Jones* case (a plurality opinion) finding that in *Jones* evidence for the insurer's denial was gathered after the denial was made, whereas in the present case a debatable reason for State Farm's denials existed at the time of the denials**.

That being the case as the Court held P*yun vs. Paul Revere Life Insurance Company*, 768 Fed. Supp. 2d 1157, 1171-72 (N.D. Ala. 2011) (holding that because "MetLife had a reasonably debatable reason for denying plaintiff's claim at the time of its denial of plaintiff's claim … [It] is entitled to summary judgment on plaintiff's extraordinary bad faith claim."

In *Jones v. Alfa Mutual Ins. Co.*, 1So.3d 23 (Ala. 2008), the Court affirmed a Summary Judgment for Alfa on the "normal" bad faith refusal to pay claim and found that Alfa's structural engineer's "report creates a question of material fact that would preclude the Joneses from receiving a pre-verdict judgment as a matter of law on the underlying breach of contract claim." *Jones*, 1So.3d at 34. The Court concluded in *Jones* in a plurality opinion that there was a jury question on the bad faith refusal to investigate a claim. The Plaintiff contended that State Farm, like Alfa, never considered "before and after" evidence from its own insurance agent, from real estate agents, from the prior owner and did not speak to the engineer or anyone else who may have seen the house before the windstorm.

**The Court distinguished *Jones* because "evidence for the insurer's denial was gathered after the denial was made, whereas here a debatable reason for State Farm's denials existed at the time of the denial**."

**3. Perfection is not the standard for a good faith investigation.**

As to the necessary investigation, the Court noted that "perfection is not the standard." **The court concluded that "a bad faith failure to investigate claim cannot survive where the trial court has expressly found as a matter of law that insurer had a reasonably legitimate or arguable reason for refusing to pay the claim at the time the claim was denied**. Because State Farm repeatedly reviewed and reevaluated its own investigative facts as well as those provided by *Brechbill*, it is not liable for a tortious failure to investigate."

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

Chief Justice Moore wrote a special concurrence as did Justice Murdock.

**CHIEF JUSTICE MOORE'S SPECIAL CONCURRENCE**

In his concurrence, Chief Justice Moore urged the Court to reexamine *Chavers* and to overrule it in an appropriate case and to abolish the judicially legislated tort of bad faith leaving to the legislative branch the right to determine policy questions such as the intentional breach of an insurance contract by an insurance company.

**INSURANCE - COMMERCIAL GENERAL LIABILITY POLICIES –**

**EXCLUSION FOR "YOUR WORK" PRECLUDED COVERAGE FOR THE HOMEOWNER'S CLAIMS AGAINST THE BUILDER.**

***Owners Insurance Co., v. Jim Carr Homebuilder, LLC***
**2013 Ala. LEXIS 122; 2013 WL 5298575 (September 20, 2013)**

**SUMMARY:**

A homeowner claimed property damage and bodily injury due to the faulty workmanship of an insured homebuilder in its construction of their home. The insurance company contended that the claims were not the result of an "occurrence" under the terms of the insured's commercial general liability policy. The trial court found that the insurance company had an obligation to indemnify the insured for the underlying award against it.

**HOLDING:**

The Court found that the insurance company did not have an obligation under the policy to defend and indemnify the insured primarily by applying the "your work" exclusion. The Court reversed and remanded the decision of the trial court.

**DISCUSSION:**

Owners appealed a judgment entered by the trial court declaring that Owners was obligated to pay an arbitration award entered against Carr under the terms of a commercial general liability policy.

The Plaintiff homeowners contended in the arbitration proceeding that they suffered bodily injury and property damage in the amount of $600,000.00 based on problems with flashing, leaks, moisture, water intrusion and damage, improper installation of brick, insufficient weep holes, windows and doors not properly installed or caulked, inadequate waterproofing, problems with the roof and improper installation of a bathtub.

As a result of these leaks and construction defects, generally the Plaintiffs contended that the construction defects caused leaks and water damage to the interior to their home thereby causing them property damage and mental anguish. The Arbitrator entered an Order finding that the Plaintiffs had suffered mental anguish and property damage.

**1. Owners' claimed that the damages were not the result of an "occurrence" as "occurrence" was defined in the policy as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."**

The Court cited to its decision in *Town & Country Property, LLC v. AmeriSure Insurance*

*Company*, 111 So.3d 699, 705 (Ala. 2011), in which it found that whether or not poor workmanship constitutes an occurrence "depends on the nature of the damage caused by the faulty workmanship." The Court cited to its decision in *United States Fidelity & Guaranty Co., v. Warwick*, 446 So.2d 1021 (Ala. 1984), in which that Court found that there was no "occurrence" within the definition of "occurrence" found in the pertinent policy provisions. A contrary result was issued in *Moss v. Champion Ins. Co.*, 442 So.2d 26 (Ala. 1983), in which the plaintiff sued a roofer and alleged that the roof leaked causing damage to her attic and ceilings. The Court in that case found that there was an occurrence because the "**contractor's poor workmanship resulted in not merely a poorly constructed roof, but damage to the plaintiff's attic, interior ceilings and at least some furnishings**." *Town & Country*, 111 So.3d at 705-06.

The Plaintiffs relied on one sentence in *Town & Country* for the proposition that there was an occurrence: "faulty workmanship may lead to an occurrence if it subjects personal property or other parts of the structure to 'continuous or repeated exposure' to some other 'general harmful conditions.'" 113 So.3d at 706.

**2. The Court stated that *Town & Country* clearly provided no coverage unless "faulty workmanship subjects personal property or other parts of the structure outside the scope of that construction or repair project to continuous or repeated exposure to some other general harmful condition or other unrelated parts of the structure are damaged." 2013 Ala. LEXIS 122, p. 15.**

The Court cited also to *United States Fidelity & Guaranty Co., v. Bonitz Installation Co., of Ala.*, 424 So.2d 569, 573 (Ala. 1982) in which that Court found that Bonitz, a roofing contractor, had coverage because the roof it installed leaked and caused damage to something other than the roof. The Court noted in a footnote that the AmeriSure policy in *Town & Country* contained a subcontractor exception and the Owners' policy did not.

Justice Stuart authored the opinion. Chief Justice Moore and Justices Parker, Shaw, and Wise concurred.

**MEDICAL MALPRACTICE - EVIDENCE OF THE STANDARD OF CARE AS TO CAUSATION**

**TESTIMONY OF A NURSING EXPERT WAS SUFFICIENT TO ESTABLISH CAUSATION.**

***Tammie L. Boyles et al. v. Denise Dougherty*, 2013 Ala. LEXIS 133 (September 27, 2013).**

**SUMMARY:**

The plaintiff's infant son was born prematurely. A nurse pricked one of the child's fingertips for blood and the child's finger later auto-amputated or fell off.

The plaintiff's mother appealed from the trial court's entry of a summary judgment.

**HOLDING:**

The mother sufficiently established causation to defeat a nurse's summary judgment motion.

The evidence supported a reasonable inference:

(1) that the nurse's negligent conducted caused auto-amputation of an infant's fingertip,

(2) that the nurse breached the appropriate standard of care in her arterial stick to the infant's hand in applying a warm compress to that hand which worsened the problem with the perfusion of blood circulation.

The Judgment was reversed and the matter was remanded.

**DISCUSSION:**

The complaint in the case alleged that the nurse performed an arterial stick on the right hand/arm of the infant son instead of an arterial stick to his heel, thereby causing "poor perfusion to his hand with resulting thrombosis of the fingertips." The nursing expert testimony offered by the mother, plaintiff, was that the arterial stick in this case was too high which could and did cause occluded blood flow to the child's right hand.

**A. The court concluded that the certified medical records and the testimony of the experts sufficiently established causation for the purpose or rebutting the nurse's motion for summary judgment.**

The court noted that the nurse herself acknowledged that an improperly performed stick

can cause occlusion or blockage of blood flow to the hand. Further the court noted that no contradictory evidence of any other plausible cause of the loss of the finger was presented by the nurse.

Chief Justice Moore and Justices Parker, Main and Wise concurred in the Per Curiam opinion.

Justice Murdock concurred in the result.

Justices Stuart, Bolin, Shaw and Bryan dissented.

**JUSTICE STUART'S DISSENT**

In her dissent Justice Stuart noted that the plaintiff did not establish adequately:

(1) the appropriate standard of care,

(2) that the defendant healthcare provider breached that standard of care, and

(3) a proximate causal connection between the healthcare provider's breach and the identified injury.

Justice Stuart wrote that although the expert opinions offered by a nurse retained by the plaintiff were provided by a similarly situated healthcare provider, that she did not agree that the expert nurse's testimony and her abilities automatically qualified her to testify about causation which would be in the purview of physician testimony.

In *Phillips v. Alamed Company*, 588 So.2d 463, 465 (Ala.1991), the Court found that a doctor had to testify as to proximate cause but did not address the rationale for not allowing a nurse to testify regarding causation. The issue was addressed by the Alabama Court of Civil Appeals in *Nelson v. Elba General Hospital and Nursing Home*, 828 So.2d 301 (Ala.Civ. App. 2000). In that case the court specifically found that a nurse could not testify as to causation.

Justice Stuart noted that her belief was that the trial court determined that expert testimony from a physician was necessary under the facts of the case and she feared that in reversing the trial court's judgment in the absence of such testimony they were acting contrary to the will of the Legislature as expressed in the Alabama Medical Liability Act.

Justices Bolin and Shaw concurred with Stuart's dissent.

**JUSTICE BRYAN'S DISSENT:**

Bryan writing separately wrote that he agreed with Justice Stuart that a physician was necessary to establish proximate cause.

**MEDICAL MALPRACTICE - SIMILARLY SITUATED HEALTHCARE PROVIDER –**

**A BOARD CERTIFIED FAMILY PRACTITIONER WAS SUED FOR MEDICAL MALPRACTICE ARISING FROM A C-SECTION DELIVERY. EXPERT TESTIMONY WAS OFFERED BY A BOARD CERTIFIED OB-GYN WHICH THE COURT DETERMINED WAS NOT A "SIMILARLY SITUATED HEALTHCARE PROVIDER."**

***Daniel Ernest Hegarty and Monroeville Medical Clinic v. Dixie Hudson*, 123 So. 3d 945 (Ala. 2013) (April 5, 2013).**

**SUMMARY:**

The trial judge allowed Dr. Banks to testify in part because in his resume, the defendant doctor stated that he did "**complete obstetrics and pediatrics and family medicine**." As a result, the trial court found that the doctor "held himself out to be more than he was and thus went outside of his specialty and I so hold [that] he held himself out as being more than a family practitioner would do in my opinion."

The defendants contended that the trial court erred in allowing the OB/GYN to testify as an expert and contended that the trial court's charge to the jury was improper, and that the judgment against the physician violated public policy.

Justice Bryan authored the opinion.

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

Justice Murdock concurred specially. Justice Murdock wrote that it was not for the jury to decide whether the OB/GYN was qualified as an expert.

**STATE AGENT IMMUNITY**

**BUS DRIVING WAS A PERFORMANCE OF OFFICIAL DUTIES AND EXERCISE OF DISCRETION IN SUPERVISING STUDENTS; THEREFORE, THE BUS DRIVER WAS ENTITLED TO STATE AGENT IMMUNITY.**

***Ex parte George Mason,* 2013 Ala. LEXIS 136 (September 27, 2013)**

**SUMMARY:**

The injured student was dropped off by the bus driver at a point that required the student to cross Highway 80 West. While doing so, the student was hit by an automobile and injured. The grandfather and next friend of the minor sued the bus driver and others alleging negligence and wantonness arising from the bus driver's alleged failure to properly supervise the student and/or his alleged failure to ensure that the student got off the bus at the appropriate school bus stopping point.

The school bus driver filed a Motion for Summary Judgment claiming that he was entitled to State Agent immunity because at the time of the incident **he was exercising judgment in transporting and supervising students on the day of the incident. He contended that he was performing his duties in a manner consistent with the rules and regulations established by the State of Alabama and the Macon County Board of Education**. The trial court denied the bus driver's Motion for Summary Judgment and the bus driver petitioned the Court for a writ of mandamus directing the trial court to enter a Summary Judgment on the basis of State Agent Immunity.

**HOLDINGS:**

1. The bus driver was entitled to State Agent immunity because the student's claims arose from his **performance of official duties and exercise of discretion** in supervising students.

2. The child's representative did not establish that the bus driver acted **beyond the scope of his authority** in supervising the students since there was no evidence that the bus driver knew or had reason to know that the student was not exiting the bus at a designated location on the same side of the highway as his house or that the bus driver suggested, forced or otherwise caused the student to exit the bus at the wrong stop. Further, there was no evidence that the bus driver saw the student in or near the flow of traffic and saw that the student was hit after the bus had continued on its route.

The Petition for Writ of Mandamus was issued.

**DISCUSSION:**

**A. Supervising students is included in "educating students."**

In *Ex parte Trottman*, 965 So.2d 780, 783 (Ala. 2007), the Court held that "educating students" "includes not only classroom teaching, but also supervising and educating students in all aspects of the educational process." Other persons who have been found to have immunity while educating students are janitors and steam fitters, school secretaries and office clerical assistants, maintenance engineers and facilities managers, and athletic trainers.

**B. There would be no immunity for injuries related to a wreck.**

The Plaintiff countered with the case of *Horton v. Briley*, 792 So.2d 432 (Ala. Civ. App. 2001), in which a bus driver was sued by a student who was injured when the bus on which the student was a passenger collided with another school bus. In that case the Court of Civil Appeals held that the bus driver was not entitled to State Agent immunity stating that "characterizing as a discretionary function conduct remote from the execution of governmental policy ... would perpetuate an erroneous construction of the Constitution. ... Thus, we conclude that the bus drivers are not entitled to State Agent Immunity." The Court distinguished *Horton* because the student in *Horton* was injured while a passenger in the bus and the claims arose from the bus driver's conduct in driving the bus.

**The Court found in this case that the claims against the bus driver instead were based on his supervising students getting off the school bus which involved the exercise of discretion in supervising students**.

**C. The Plaintiff did not demonstrate that bus driver exceeded his authority.**

The Court, therefore, found that the bus driver was entitled to State Agent Immunity. The Court also noted that the Plaintiff did not meet his burden of demonstrating that the bus driver acted beyond the scope of his authority. Plaintiff contended that the bus driver did not adhere to the following rules:

1. The driver should never change stops;

2. Students should load or unload only at their school or designated stop;

3. Students should not cross a median or divided highway;

4. Students should wait on the side of the ride in which they live;

5. Students should cross the street ten feet in front of the bus;

6. During the loading and unloading process, the driver should COUNT the students and move the bus ONLY after ALL students are safely on the side of the road in which they live

or in their seats. Be alert for students' apparel or carry on items being caught on the bus handrail, door, door handle, etc.; and

7. All students who live on the left side of the road should exit first and cross in single file.

Plaintiff contended that the bus driver had no discretion in following these rules and that he acted beyond his authority when he dropped the minor Plaintiff off at a location that was not a designated location on the side of the highway where the minor's home was located but instead dropped him off on a four-lane highway which required the student to cross the four-lane highway to get to his home. **The Court emphasized that none of the evidence established that the bus driver knew or had reason to know that the minor was not exiting the bus at a designated location on the same side of the highway as his house or that the bus driver suggested, forced or otherwise caused the minor to exit the bus at the location at which he exited**. As a result, the Court found that the Plaintiff did not satisfy his burden of establishing that the bus driver acted beyond the scope of his authority.

The Petition was granted and the Writ issued.

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

Justice Murdock concurred in the result.

Chief Justice Moore dissented.

**STATE IMMUNITY - MEDICAL MALPRACTICE**

**HEALTHCARE AUTHORITY FOR BAPTIST HEALTH WAS A FRANCHISEE OF THE STATE OF ALABAMA RATHER THAN AN ARM OF THE STATE.**

***Healthcare Authority for Baptist Health, an affiliate of UAB Health Systems d/b/a Baptist Medical Center East v. Davis,***
**2013 Ala. LEXIS 47 (May 17, 2013).**

**SUMMARY:**

This opinion was authored by Justice Murdock and is a response to a Motion for Rehearing of the Court's ruling in *Healthcare Authority for Baptist Health v. Davis*, 2011 Ala. LEXIS 17 (Jan. 14, 2011). An Executrix of a decedent's estate filed a medical malpractice suit against Defendant, Healthcare Authority for Baptist Health ("Authority") an affiliate of the University of Alabama Healthcare Authority. A jury awarded the Executrix damages.

The Defendant filed a Motion for a Remittitur of the judgment based on Alabama Code §11-93-2 Statutory Cap on Damages.

The Montgomery County Circuit Court denied the Motion and the Defendant appealed.

In this case the Court, in response to an application for rehearing withdrew the original January 14, 2011 Opinion in this case and substituted the Opinion issued on May 17, 2013.

**HOLDING:**

**(1) The statutory cap of $100,000.00 did not apply because the Defendant was neither a municipality nor a county.**

As a Healthcare Authority organized and operating under the Alabama Healthcare Authorities Act of 1982, Alabama Code §22-21-310 et seq., the Authority was neither a county nor municipality; therefore, the statutory cap on liability set forth in Alabama Code §11-93-2 did not apply to Defendant by operation of Alabama Code §22-21-318(a)(2).

**(2) The Defendant was merely a franchisee of the State - - not an arm of the State.**

The judgment of the trial court was affirmed.

**DISCUSSION:**

**A. Discussion of the January 14, 2011 opinion.**

At trial, the jury returned a $3.2 million verdict in favor of Davis. In the January 14, 2011, opinion in this case, the Court issued an opinion (1) vacating the judgment of the Montgomery Circuit Court in favor of K.E. Davis as Executrix of the Estate of Lauree Durden Ellison, deceased, and against the Healthcare Authority for Baptist Health, an affiliate of UAB Health System ("the Authority") and (2) dismissing the case and finding that the Authority was entitled to State Agent immunity under Section 14, Alabama Constitution 1901.

Baptist Hospital at one time operated certain hospitals in Montgomery, including Baptist Medical Center East. When Baptist Health encountered financial problems in conjunction with the operation of the hospitals, it sought the assistance of the University of Alabama Board of Trustees ("the Board"). In June of 2005, the Board adopted a resolution authorizing the formation of the Authority and stated in part:

> Whereas the Board of Trustees of the University of Alabama ("the Board") owns University of Alabama Hospital and related healthcare facilities located in Birmingham, Alabama ("Hospital") and whereas the Hospital is managed by the UAB Health System pursuant to an amended and restated joint operating agreement dated effective January 1, 2003 … whereas after careful consideration the UAB Health System and Baptist [Health] desire to affiliate for the purpose of improving the overall efficiency of Baptist [Health's] clinical operations and for arranging Baptist [Health] financial support of the Board's academic and research mission through contributions to the UAB Health System; and whereas by separate resolution on this same date, the Board of Trustees of the University of Alabama approved an affiliation agreement between the University of Alabama Board, UAB Health System, and Baptist [Health] and whereas the affiliation agreement provides for the establishment of a Healthcare Authority by the UA Board under the terms and conditions set forth in the affiliation agreement.

In *Cox v. Board of Trustees of University of Alabama,* 161 Ala. 639, 648, 49 So. 814, 817 (1909), the Court held that for purposes of Section 14 Ala. Constitution 1901, the **University of Alabama "is a part of the State**."

The Certificate of Incorporation of the Authority provides that it is "subject to the provisions of the affiliation agreement, the Authority shall have and may exercise all of the powers and authorities set out in the Enabling Act (the Healthcare Authority's Act of 1982, Ala. Code 1975 Section 22-21-310 et. seq.) for corporations organized there under, together with such additional powers, rights, and prerogatives as are now or may hereafter be provided by law in addition thereto, the Authority shall have the extraordinary powers set out in Section 22-21-319 of the Enabling Act (eminent domain)."

The affiliation agreement between the Board, the University of Alabama at Birmingham Health System and Baptist Health was entered into in July of 2005.

**B. Claims that Baptist had State immunity.**

The Authority is a public corporation and is an entity separate from the State and from

the persons and entities that participate in its creation. *Alabama Hospital Association v. Dillard*, 388 So.2d 903, 905 (Ala. 1980). The Authority argued for the first time on appeal that it was immune from liability pursuant to the Doctrine of State Immunity thereby depriving the Circuit Court of subject matter jurisdiction which could be raised at any time by the parties or by a Court *ex mero motu. Atkinson v. State*, 986 So.2d 408, 411 (Ala. 2007).

The seminal case on the three factors to determine whether an action against a body created by legislative enactment is an action against the State for purposes of the Doctrine of State Immunity is *Tallaseehatchie Creek, et al., v. Staudt*, 388 So.2d 991 (Ala. 1980). The three factors are:

1. **The character of power delegated to the body;**
2. **The relation of the body to the State; and**
3. **The nature of the function performed by the body.**

The Court noted that all factors must be examined in making a determination as to whether the lawsuit is against an arm of the State or merely against a Franchisee licensed for some beneficial purpose.

**C. Character of the Power Delegated to the Body – A Healthcare Authority is only an arm of the State for "Anti-Competitive" activity; therefore, the Authority was a franchisee of the State.**

As to the "character of power delegated to the body" an important consideration was the control retained by Baptist in relation to the operation of the Authority and the reservation by Baptist of an interest in the Authority's assets.

As to the relation of the Authority to the State, the Authority contended that "the legislature has determined that the Authority acts as an agent or instrumentality of its authorizing subdivision and as a political subdivision of the State. The Authority then contended that it shares the immunity of its "authorizing subdivision" the Board. **The Court noted that a healthcare authority acts an agency or instrumentality of its authorizing subdivision and as a political subdivision of the State only in connection with its engagement in ANTI-COMPETITIVE CONDUCT**.

The Court noted that "despite the potential availability to them of immunity as to certain anti-competitive conduct, however, neither counties nor municipalities nor private entities are part of the State or enjoy State Immunity," *Parker v. Jefferson County*, 796 So.2d 1071, 1072 n.2. (Ala. 2000) p. 31.

In weighing the *Staudt* factors, the Court noted that there are several key characteristics that distinguish in *Tallaseehatchie Creek* as entities separate from the State**. "Those characteristics included the ability to:**

**(1) sue and be sued;**

**(2) enter into contracts;**

**(3) sell and dispose of properties; and**

**(4) issue bonds.**

***Tallaseehatchie Creek* at 630**. The Court noted that by applying the *Staudt* factors and weighing the issues as outlined in *Tallaseehatchie Creek* that **the Authority was a Franchisee of the State rather than an arm of the State.** The Court found that the same five factors found to be dispositive in *Tallaseehatchie Creek* were present in this case - -

**(1) the power to sell and dispose of property;**

**(2) the legislature's prescription to the Authority of amenability to suit;**

**(3) the power to make contracts without being subject to the State's competitive bid laws or the contract review process;**

**(4) the power to issue debt for which the State assumes no responsibility;**

**(5) most significantly, the fact that any judgments or other losses incurred by the Authority are not payable from the State Treasury.**

The Court concluded by finding that the Authority was not entitled to State Immunity under Section 14 of Alabama Constitution.

**D. The $100,000.00 damages cap of Section 11-93-2 did not apply to the Authority or Baptist because they were not agencies or instrumentalities of a county or municipality.**

The Court found that the $100,000.00 cap did not apply because "to the extent the [Alabama Healthcare Authority's Act] was intended to extend the $100,000.00 damages cap of Section 11-93-2 to all Healthcare Authorities organized under the [Alabama Healthcare Authority's Act], i.e., not just those that constitute agencies or instrumentalities of a county or municipality, it is unconstitutional." p. 56.

**Finding that the Authority and Baptist were not entitled to State Immunity and that the $100,000.00 cap did not apply, the Court affirmed the judgment of the trial court**.

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

**Justice Bolin's Dissent:**

Justice Bolin began his dissent noting his disappointment in the delay in ruling on the application for rehearing that was filed on January 27, 2011.

Justice Bolin stated in part that "[a]lthough I am certain that the delay was not a product of judicial machinations, I must note that such a lengthy delay appears improper and that the mere appearance of impropriety reflects poorly on past and current members of this Court." Justice Bolin noted that the Authority for the first time argued State Immunity under Section 14 of the Alabama Constitution on appeal which "acts as a jurisdictional bar in this case." Justice Bolin noted that the issue is "whether a healthcare authority established by a State University operating a medical school is entitled to sovereign immunity."

**Justice Bolin noted that the Authority was a State Agency because "the legislature in allowing a State Agency to create a Healthcare Authority cannot then limit the State Agency's immunity to anti-competitive activity."** As a result, Justice Bolin contended that the Circuit Court did not have subject matter jurisdiction over the action and that thereby the judgment was void and the appeal should be dismissed citing to *Alabama Dept. Of Corrections v. Montgomery County Commission,* 11 So.3d 189 (Ala. 2008).

Justice Stuart concurred in Justice Bolin's dissent.

**The Dissent of Justice Shaw.**

Justice Shaw dissented and wrote separately.

Justice Shaw noted that Alabama Code §22-21-318(c)(2) [part of the Alabama Healthcare Authority's Act of 1982] explicitly states that the Authority **"acts as an agency or instrumentality of its authorizing subdivision ... and as a political subdivision of the State."** Justice Shaw reasoned that "This means that the Authority acts as 'a political subdivision of the State' and an 'agency or instrumentality' of the Board, its 'authorizing subdivision,' **which, under the Constitution 'shall never be made a defendant in any court of law or equity."** p. 188. Article 1 §14 of the Alabama Constitution of 1901. Justice Shaw noted that if this is true as the legislature states, he rejected the principle that the Authority is to be considered "the State" when competing in the healthcare marketplace but not considered "the State" when dispensing healthcare to patients.

Justice Stuart concurred in Justice Shaw's dissent.

**STATE IMMUNITY – SCHOOL BOARDS AND SCHOOLS**

**BOTH THE SCHOOL BOARD AND THE SCHOOL WERE IMMUNE FROM SUIT UNDER SECTION 14 OF THE ALABAMA CONSTITUTION. THEIR IMMUNITY IS ABSOLUTE.**

***Ex Parte Bessemer City Board of Education, et al,* 2013 Ala. LEXIS, 162 (November 15, 2013).**

**SUMMARY:**

The Plaintiff made claims against the school board and an individual school in an action brought by a student arising from negligence that arose from a sexual assault. The trial court denied the motions to dismiss filed by the Board and school. The Board and school then petitioned for a Writ of Mandamus.

**HOLDING:**

The Court found that **school boards are agencies of the state and are entitled to Section 14 absolute immunity.**

The Court found that **individual schools are not a separate legal entity from the Board because the Board operates the school and that schools are agencies of the state, not agents.**

**DISCUSSION:**

Justice Parker authored the opinion. In granting the petition for a writ mandamus, Justice Parker found that the claim of a minor that he was sexually abused asserted against the school board and the school was due to be dismissed based on absolute immunity. The board was entitled to immunity under the Alabama Constitution, Article 1, § 14. The school was also entitled to immunity because under Alabama Code § 16-11-1 et seq. the school was not a separate legal entity from the board so it was also protected by state immunity.

**1. *Ex parte Phenix City* controlled as to the Board.**

Justice Parker noted that this issue was decided in regard to the school board in *Ex Parte Phenix City Board of Education*, 67 So.3d 56, 58-59 (Ala. 2011) in which the court found that a city board of education that was sued by several minors who asserted tort claims was entitled to absolute immunity under Section 14.

**2. The Court found that the School also was immune from suit based on the provisions of Alabama Code Section 16-11-9 et. seq.**

As to the school, the Court found that because the school operated under the direction of the board it was too immune from suit. The Court cited to the Alabama Code as the basis for this finding:

"The legislature has vested school boards of education 'with all the powers necessary or proper for the administration and management of the public schools within such city …." Section 16-11-9, Ala. Code 1975.

The legislature has also provided that 'The general administration and supervision of the public schools and educational interests of each city [is] vested in a city's board of education ….', Section 16-11-2(b), Ala. Code 1975. Accordingly, the school is not a separate legal entity from the board and is therefore also due to be dismissed from this action. See *B.M. v. Crosby*, 581 So.2d 842 … (Alabama 1991) (recognizing that a school board and the board of education under which it operates are not separate legal entities); see also *Alabama Girls Industrial School v. Rentals,* 143 Ala. 579, 42 So. 114 (1904) (finding that a state owned and operated school was entitled to state immunity.

The plaintiff argued that the state agent immunity rules in *Cranman* should apply. The Court disagreed finding that "state agent immunity applies to a claim of immunity by an agent of the state; it does not apply to a claim of state immunity by an agency of the state itself. … "city boards of education are local agencies of the state," state agent immunity is inapplicable here."

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

**STATE AGENT IMMUNITY – PEACE OFFICE IMMUNITY**

**THE DEFENDANT POLICE OFFICER WAS ENTITLED TO PEACE OFFICER AND STATE AGENT IMMUNITY AND HIS ALLEGED IMPROPER USE OF A SIREN WAS NOT SUFFICIENT TO ESTABLISH AN EXCEPTION TO HIS STATE AGENT AND PEACE OFFICER IMMUNITY**.

***Ex parte Jerome Coleman, et al.*, 2013 Ala. LEXIS 152 (Oct. 25, 2013).**

**SUMMARY:**

A person who was injured during a traffic accident that occurred at an intersection at which the police officer had stopped traffic sued the police officer claiming that in part the accident was due to the police officer's improper use of his siren which prevented the injured party from hearing it.

**HOLDING:**

A police officer was entitled to immunity both peace officer immunity under Alabama Code § 6-5-338(a) and state agent immunity.

The officer exercised the discretion given to him under Alabama Code § 32-5A-7 in making use of the siren on the police vehicle he was driving when he stopped traffic on a highway so that a firefighter, who was making continuous use of the emergency lights and siren on the fire and rescue service engine could drive the engine through the intersection. "**Making use of an audible signal**" described in Section 32-5A-7(c) did not necessarily require continuous use and nothing in Section 32-5A-7 dictated the manner in which the siren had to be used but it required only that a siren be used.

**DISCUSSION:**

Justice Parker authored the opinion and granted the petition for writ of mandamus of the police officer defendant. Plaintiff contended that the officer did not have state agent immunity because he "yelped" the siren rather than using it continuously. The plaintiff contended that he could not hear the "yelp."

In this opinion the court discusses at length the law applicable to police officer immunity as outlined in *Ex Parte City of Montgomery*, 99 So.3d 282 (Ala. 2012). Further, the court discusses at length the analysis of state agent immunity as set out by the court in *Ex Parte Cranman*, 792 So.2d 392 (Ala. 2000).

1. **The court noted that it was undisputed that the police officer was entitled to peace officer immunity because at the time of the accident he was performing a function that entitled him to immunity, that is he was responding to an emergency call**.

Therefore the only question before the court was whether the plaintiff carried his burden of showing that one of the two categories of exceptions to state agent immunity recognized in *Cranman* was applicable.

**2. The plaintiff argued that the officer acted willfully, maliciously, fraudulently, in bad faith, or beyond his or her authority by failing to comply with Section 32-5A-7.**

Plaintiff contended that the officer was not entitled to immunity under *Cranman* because he was making improper use of an audible signal as is required by Section 32-5-213. The plaintiff contended that the officer acted outside his discretion because he failed to make continuous use of the siren so that the fireman who was making continuous use of his emergency lights and siren could drive through the intersection. The court noted that the statute was silent on the issue of whether the audible signal should be continuous and instead only applied to an "audible signal."

The plaintiff contended that whether a single "yelp" complied with Section 32-5A-7 was a question for a jury. The Court instead found that it was a question of statutory interpretation which presented only a question of law for the court.

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

Justice Murdock concurred in the result.

Chief Justice Moore and Justice Shaw dissented without writing an opinion.

**TORTS - NEGLIGENCE - BREACH OF DUTY**

**THE COURT FOUND THAT THE FACTS AT ISSUE WERE NOT IN QUESTION AND THAT THE TRIAL COURT PROPERLY DECIDED THE QUESTION OF THE EXISTENCE OF A DUTY AS A QUESTION OF LAW FOR THE COURT TO DECIDE.**

***Ex parte BASF Construction Chemicals, LLC*;**
**1101204 (Ala.)(Dec. 30, 2013)**

**SUMMARY:**

Crabtree slipped and fell on a parking deck. BASF manufactured a product applied to the surface of the parking deck floor which allegedly caused Crabtree to slip and fall.

At issue in the case was whether BASF assumed a duty to ensure that the BASF product was properly applied to the parking deck floor.

**HOLDINGS:**

**The facts at issue were not in question, therefore, the trial court properly found as a matter of law that BASF did not breach any duty owed to Crabtree**.

**DISCUSSION:**

**A. At issue was the extent of BASF's participation in the process for the application of the product and whether BASF had assumed a duty to supervise the installation of the product.**

The BASF product was applied to the surface of a parking deck floor improperly by the subcontractor and numerous problems with falls and accidents as a result of the slippery surface were reported. A property owner contracted to build a second parking deck and conditioned the hiring of a subcontractor on its having the manufacturer participate in the process of the application of the BASF product. At issue was the extent of that participation and if BASF assumed a duty to supervise the installation of the product.

**B. The key piece of evidence was a letter which the Crabtrees argued demonstrated that "BASF voluntarily assumed the role in the installation process to ensure (i.e. guarantee) that the sonoguard product was installed correctly on Deck II."**

The letter at issue was authored by a territory manager of a BASF related company, Sosa. Sosa's letter was addressed to Poole, the owner of the subcontractor that applied the BASF product. In the letter, Sosa stated that:

> Due to complications that occurred on the previous job, we have both agreed that representatives from Chemrex, Inc., would be present during various times of the project **to inspect the preparatory work, application of the products and to provide any technical assistance that may be required**. In the beginning I recommend an inspection at least once a week to ensure that all parties involved are in agreement with the manufacturer's instructions.

**C. BASF did not assume a duty to guarantee that the product was properly applied and only helped if it was requested to do so by the subcontractor.**

The Court found that BASF did not assume the duty to guarantee that the product was properly applied and instead that BASF's duty was only to give advice to the subcontractor regarding the preparatory work and product application if it was requested to do so by the subcontractor. The Court noted that there was no evidence indicating that BASF on any visit to the site observed or should have observed some condition of the site or course of action by the subcontractor that did not correspond with the advice given by a BASF representative. The Court noted too that the subcontractor testified that he rarely asked BASF for assistance.

Chief Justice Moore authored the opinion and Justices Stuart, Parker, and Shaw concurred. Justice Bolin concurred in the result.

Justices Main and Wise dissented and Justice Bryan recused himself.

In his dissent, Justice Main believed that the facts were in dispute sufficiently that the matter should be decided by the jury.

**TORTS – FRAUD**

**A MANUFACTURER ESTABLISHED THAT ITS CUSTOMER HAD A DUTY TO DISCLOSE ITS DECISION TO REPLACE THEM WITH A NEW SUPPLIER, AND A JUDGMENT AS A MATTER OF LAW WAS NOT DUE TO BEING GRANTED.**

**DAMAGES – PUNITIVE DAMAGES – *GORE* GUIDEPOSTS AND *GREEN OIL* FACTORS**

**THE AMOUNT AWARDED FOR PUNITIVE DAMAGES WAS APPROPRIATE AND DID NOT INFRINGE UPON THE CUSTOMER'S DUE PROCESS RIGHTS.**

***CNH America, LLC v. Ligon Capital, LLC, et al.*, 2013 Ala. LEXIS 157 (November 8, 2013).**

**SUMMARY:**

The breach of contract, fraudulent misrepresentation and fraudulent suppression claims asserted by Ligon against CNH were based on CNH's decision to stop using Ligon as a supplier of hydraulic cylinders.

The jury awarded a verdict in favor of the plaintiffs on their fraudulent suppression claims and awarded them $3.8 million in compensatory damages and $7.6 million in punitive damages. CNH appealed.

**HOLDING**:

(1) the judgment as a matter of law was properly denied in regard to the fraudulent suppression claims;

(2) the jury-challenged jury charge did not warrant a new trial;

(3) CNH was not entitled to a remittitur of punitive damages based on the *Gore* guideposts and the *Green Oil* factors.

**DISCUSSION:**

1. **The trial judge did not err in denying CNH's motion for a judgment as a matter of law on the plaintiffs' fraudulent suppression claims.**

"As the Court noted in *Lambert v. Mail Handlers Benefit Plan*, 682 So.2d 61, 63 (Ala. 1996), the elements of a fraudulent suppression claim under Section 6-5-102 are:

1. A duty on the part of the defendant to disclose facts;
2. Concealment or non-disclosure of material facts by the defendant;
3. Inducement of the plaintiff to act; and
4. Action by the plaintiff to his or her injury.

**a. CNH contended that it had no duty to disclose that it was terminating the relationship.**

The fraudulent suppression claim arose out of a claim that CNH decided in 2007 to replace the plaintiffs as a supplier but then fraudulently suppressed that fact from the plaintiffs for eight months which induced the plaintiffs to take actions and extend funds in an impossible attempt to foster an ongoing relationship between the plaintiffs and defendant. CNH contended that it had no duty to disclose to the plaintiffs that it was terminating its relationship before it did so in May 2008.

**b. CNH contended that questions regarding their ongoing relationship were vague and required no response.**

The general manager for plaintiffs asked representatives of CNH specific questions regarding their ongoing relationship which CNH contended were too vague and otherwise insufficient to give rise to a duty to disclose.

The Court noted that in *Freightliner, LLC v. Whatley Contract Carriers, LLC*, 932 So.2d 883, 813 (Ala. 2005), the court noted that, "A disclosing party cannot be punished for fraudulent suppression unless the questioning party articulates with reasonable clarity the particular information it desires." **The Court noted that the jury clearly believed that the questions were clear**.

The Court went on to state that even if the questions were not reasonably specific and direct that "once a party elects to speak, he or she assumes a duty not to suppress or conceal those facts that materially qualify the facts already stated." 932 So.2d at 895.

c. **The Court found that the plaintiffs established that CNH concealed or did not disclose material facts.**

While testimony was presented at trial indicating that the final decision was not made as of September 2007 based on the standard of review required in viewing the evidence in the light most favorable to the plaintiffs and to entertain such reasonable inferences as the jury would have been free to draw, **the Court found that the plaintiffs produced substantial evidence to establish the second element of their fraudulent suppression claims that CNH concealed or failed to disclose material facts -- the fact that they had already decided in September 2007 to replace the plaintiffs as the supplier**.

**d. Whether the Defendant induced the Plaintiff to act thereby causing injury to the Plaintiff was a question for the jury.**

The final two elements of a fraudulent suppression claim concern whether a plaintiff was induced to act to its injury by the defendant's suppression of material facts. Whether a party was induced to add to its injury because material facts were concealed is a question of fact for the jury. *State Farm v. Owen*, 79 So.2d 834, 841-42 (Ala. 1998). The Court found that the plaintiffs were induced to act to their injury.

**e. The challenged jury charge damaged the Plaintiff more than it damaged CNH.**

As to CNH's argument that the trial court exceeded its discretion by failing to grant the motion for a new trial filed by CNH, CNH relied in party on a jury charge that allegedly misstated the law. The court disagreed finding that if any party was damaged by the language of the jury's charge it would have been the plaintiffs not CNH.

**f. An Alabama company was damaged by CNH's actions.**

CNH contended that no punitive damages were warranted because Alabama has no interest in punishing CNH, an Illinois corporation, for harm caused to HTI, an Ohio company. However the court noted that Ligon a Birmingham-based company was damaged as well.

**g. The claims were proven by clear and convincing evidence.**

CNH next argued that even if Ligon and HTI proved their fraudulent suppression claim by substantial evidence they failed to prove their claims by clear and convincing evidence thereby precluding an award of punitive damages. The court concluded that, "Ample evidence of this 'plan of trickery and deceit,' as the trial court referred to the scheme in its post-judgment order, was adduced at trial and is contained in the record so as to constitute 'clear and convincing evidence.'" p. 42.

**h. The punitive damage award was neither arbitrary nor a windfall.**

CNH argued that the punitive damages Award should be remitted because it was arbitrary and amounts to a windfall of the plaintiffs. The court disagreed.

**i. The amount of punitive damages awarded was reasonable.**

As to the argument of CNH that no punitive damages were warranted because its conduct was not reprehensible, the court noted that, "Although the level of reprehensibility of CNH's actions may be mitigated by certain factors, the punitive damages awarded by the jury are reasonable in light of the totality of the evidence." pp. 46-74.

**j. The Court rejected CNH's contention that Alabama has no interest in discouraging confidentiality in commercial dealings.**

The Court disagreed with CNH that punitive damages should not be awarded because Alabama has no interest in discouraging confidentiality in commercial dealings. The court noted that, "The touchstone of the rule applied in *Freightliner* is that businesses need to be honest in their transactions; thus, the requirement that businesses respond truthfully to a specific request for information, as well as the additional requirement that any disclosure, whether prompted by a question or not, contain 'those facts that are material to the ones already stated so as to make them truthful.'" p. 48.

Chief Justice Moore and Justices Bolin, Parker, Main, and Wise concurred in Stuart's opinion.

**DISSENT:**

Justices Shaw and Justice Bryan dissented.

**JUSTICE SHAW'S DISSENT:**

Shaw wrote that the plaintiffs clearly understood that the relationship contemplated was not for any specific length of time into the future and a representative of the plaintiffs testified that "no statement [was made] by them that said you can, you can be guaranteed ... orders out in the future for eight months, 12 months, 16 months" was the testimony of the representative. Shaw wrote that because the plaintiffs knew from the outset that the relationship was not permanent he did not believe that a jury could reasonably have concluded that HTI was lulled by suppression of facts to believe the exact opposite.

**JUSTICE BRYAN'S DISSENT:**

In his dissent, Justice Bryan found no duty to disclose and reiterated many of the facts concluding that Ligon and HTI did not demonstrate pursuant to *Freightliner* that CNH had a duty to disclose the allegedly-suppressed facts as to its intent to go to another source for its needs.

**TORTS - WRONGFUL DEATH – CAPACITY VERSUS STANDING –**

**THE TRIAL COURT PROPERLY FOUND THAT THE DEFENDANT COULD NOT DISQUALIFY THE PLAINTIFF AS THE REPRESENTATIVE OF THE DECEDENT BECAUSE THE ISSUE WAS ONE OF CAPACITY WHICH WAS CURABLE BY AMENDMENT AND WAS NOT ONE OF STANDING WHICH COULD NOT BE CURED AND WOULD RESULT IN THE BAR OF THE STATUTE OF LIMITATIONS.**

***Ex parte Tyson Foods, Inc., et al,* 2013 Ala. LEXIS 52 (May 24, 2013).**

**SUMMARY:**

The defendants, jointly referred to as the "employer" (petitioned for a writ of mandamus directing the Trial Court to dismiss the respondent administratrix's wrongful death action against them for lack of standing. Under the Wrongful Death Act, only a personal representative of the deceased's estate can bring a wrongful death action. The Plaintiff in this case was the daughter of the deceased and the Estate's personal representative.

**Under the Worker's Compensation Act, if dependents survive, the right to sue for wrongful death lies solely with the dependents. The surviving widow was a dependent and was not the Plaintiff in the lawsuit**.

**HOLDING:**

The trial court properly added the widow as a plaintiff under Alabama Rules of Civil Procedure Rule 17(a) and acted within its discretion under Rule 15(a) of the Alabama Rules of Civil Procedure in striking the employer's late and prejudicial amendment of its answers in which they contended that the time in which the widow could be substituted as the plaintiff had expired thereby depriving the widow of standing to sue.

The petition was denied.

**DISCUSSION:**

The decedent died in a workplace accident at the Tyson Foods plant. His widow collected workers' compensation benefits from June 25, 2008 approximately two months after the death. Kirkley, the daughter of the decedent and the personal representative of his estate filed a wrongful death action. The case was removed to federal court.

Subsequent to remand in September 2011, the Tyson parties filed an amended answer and a motion to dismiss on the basis that Kirkley lacked standing to bring the wrongful death action.

The Trial Judge struck the amended answers and denied the motion to dismiss. The

Tyson petitioner's then sought a writ of mandamus.

### A. The Required Representative Under the Wrongful Death Act and Under the Workers Compensation Statute Are Different.

The Court noted that a wrongful death action was created by statute, Section 6-5-410(a), Alabama Code (1975). Under that statute only a personal representative of the deceased's estate can bring a wrongful death action.

However, the workers' compensation statute, by contrast, allows the deceased employee's personal representative to bring a third party action **only when the covered employee dies without dependents**. If dependents survive, the right to sue third parties alleging wrongful death lies solely with the dependents. Alabama Code Section 25-5-5-11, Alabama Code 1975; *Tucker v. Molden*, 761 So.2nd 996, 998 (Ala.2000).

Under the work comp statute, the decedent had only one dependent at the time of his death, his wife Mildred. His daughter Kirkley who was over the age of 19 and not incapacitated did not qualify as a dependent. Alabama Code §§ 25-5-61 (1975).

The Tyson petitioner described this as a "**quirk**" which meant that Kirkley did not qualify to prosecute the wrongful death action. In November 2011, the Tyson parties filed a motion to dismiss the wrongful death action contending that the time had expired by which the wife could be substituted as the plaintiff. Kirkley responded that the petitioners' request was barred by the doctrine of laches because they did not assert their rights until after the two year statute of limitations for a wrongful death action had expired. She also asked the Trial Court to add Mildred as a plaintiff under Rule 17(a) of the Alabama Rules of Civil Procedure and to exercise its discretion under Rule 15(a) under the Alabama Rules of Civil Procedure to strike the amended answers.

The Trial Court struck the Tyson petitioners' amended answers, denied their motion to dismiss, and granted Kirkley's motion to add the widow as a plaintiff.

The Tyson petitioners then sought a writ of mandamus in this Court arguing that Kirkley "lacked standing to prosecute the wrongful death action and that the motion to add Mildred as a plaintiff came too late."

### B. TYSON HAD A CLEAR LEGAL RIGHT TO THE ORDER SOUGHT IF STANDING WERE AT ISSUE BUT DID NOT HAVE A RIGHT TO THE ORDER IF THE ISSUE INSTEAD WAS ONE OF LACK OF CAPACITY.

In *Sexton v. Bass Comfort Control, Inc.*, 63 So.3d 656, 664 (Ala. Civ.App. 2010), the Court noted that:

> A party who wants to raise an issue as to the capacity of a party must do so by a specific negative averment. Rule 9(a), Alabama Rules of Civil Procedure. The substitution of the real party in interest has the same effect as if the action was commenced in the name of the real party in interest. Rule 17(a), Alabama Rules

of Civil Procedure.

* * *

Justice Lyons attempting to clarify the distinction between lack of capacity that is curable and lack of standing that was incurable noted that "imprecision in labeling a party's inability to proceed as a standing problem unnecessarily expands the universe of cases lacking in subject matter jurisdiction. *Hamm v. Norfolk Southern Railway*, 52 So.3d 484, 499 (Ala.2010). In *Alabama Power Company v. White*, 377 So.2d 930 (Ala.1979), "this Court expressly held that surviving dependents of the deceased employee have the capacity to bring an action in that a defendant waives the challenge to capacity by not raising it." In *Board of Water and Sewer Commissioners of the City of Mobile v. McDonald*, 56 Ala. App. 426, 322 So.2d 717 (Ala. Civ. Ap.1975), the Court found that Rule 17 allows the substitution or Joinder of plaintiffs in the same way that Rule 15 of the Alabama Rules of Civil Procedure permits the substitution of defendants to relate back to the date of the filing of the original pleading. That Court noted that "Amendments are to be allowed freely . . . when justice so requires." 56 Ala. App at 429. The *McDonald* Court held that "The amendment was properly allowed even if it were to avoid the statute of limitations.

Applying *McDonald*, the Court concluded that adding the widow as the plaintiff and the real party in interests created "no change in the claim as originally filed." Further, the Tyson petitioners were not prejudiced in preparing their defense. The Court noted that its ruling in this case was the same as was the Court's ruling in *Holyfield v. Moates*, 565 So.2d 186 (Ala.1990).

**B. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN STRIKING THE AMENDED ANSWERS.**

The first answer filed by the Tyson petitioners on July 30, 2008, did not raise the defense of capacity or lack of standing. The petitioners instead did not raise those issues until November 8, 2011 when they filed their first amended answer.

The Trial Court was within its discretion to strike the first amended answer on the grounds of undue delay and actual prejudice. The petition was denied.

Chief Justice Moore offered authored the opinion and Justices Stuart, Parker, Main and Bryan concurred.

Justices Murdock and Wise concurred specially.

Wise concurred in Murdock's special concurrence and Justice Shaw wrote a special concurrence with which Justice Bolin concurred.